

3 October 2019

ECJ Rules that Pre-Ticked Cookie Checkbox Does Not Count as Consent under GDPR

On 1 October 2019, the Court of Justice of the European Union (the **ECJ**) ruled on how cookie consent should be obtained on a website. In its judgment, the ECJ explains that only active (opt-in) consent is valid and it sets out which information must be given when obtaining consent. This decision will have important practical consequences for the use of cookies.

The ECJ judgment answers preliminary questions referred to it by the German Bundesgerichtshof in a case brought by The German Federation of Consumer Organisations against Planet49, a company registered in Germany which hosted a lottery on its website (*Case C-673/17*). The German Federation of Consumer Organisations challenged Planet49's use of a pre-ticked checkbox (the **Cookie Checkbox**) to obtain consent to store cookies on website users' equipment which traced their online activities and used such information for marketing purposes. Website users were allowed to un-tick the Cookie Checkbox at any time, without being prevented from participating in the lottery.

Even though the facts predate the entry into force of the General Data Protection Regulation (Regulation 679/2016) (the **GDPR**), the ECJ answered the questions having regard to both the GDPR and the former Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the **Data Protection Directive**). In addition, the ECJ also referred to the rules on cookies which are set out in Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the **ePrivacy Directive**).

1. COOKIE CONSENT MUST BE ACTIVE AND INFORMED

The ECJ confirmed that consent was required for cookies, irrespective of whether these cookies should be regarded as 'personal data' within the meaning of the GDPR (and the Data Protection Directive). It went on to discuss two concerns with the use of the Cookie Checkbox in terms of consent under Article 4(11) of the GDPR.

First, the ECJ confirmed that the requirement to have 'active consent' was not fulfilled because the Cookie Checkbox was pre-ticked. The opportunity for the website users

to object to the cookie storage (by un-ticking the Cookie Checkbox) was not sufficient to be regarded as 'active consent'.

Second, the ECJ noted that the requirement to click the button '*I participate*' in order to participate in the lottery (which it was argued by Planet49 constituted an active behaviour of the website users) could not be regarded as 'specific' consent allowing the cookie storage for marketing purposes.

The ECJ also ruled that in order to fulfil the transparency requirements under Articles 13 and 14 of the GDPR and to ensure informed consent, the website users had to be provided at least with information about the duration of the cookie storage and whether or not third parties may access the information collected by the cookie.

2. CAN BUNDLED CONSENT BE FREE?

Another focal point is that the website users were only allowed to participate in the lottery after having ticked another checkbox authorizing the processing of their data for marketing purposes.

In his opinion preceding the ECJ judgment, the Advocate General questioned this bundled consent in light of the requirement to have freely given consent under Article 7(4) of the GDPR. He stressed that for consent to be freely given there should in principle be separate consent for participating in the lottery and for accepting the processing of data for marketing purposes.

Unfortunately, the ECJ chose not to address this question since the question had not explicitly been referred to it by the German Bundesgerichtshof.

3. HOW TO GET COOKIE CONSENT?

While the decision of the ECJ will not come as a surprise to those who are familiar with the relevant provisions of the GDPR and the ePrivacy Directive, the clear guidance it provides will require many websites to change their behaviour. In order to comply, website operators should ensure that:

- First, the website users are properly informed about the cookie storage on their equipment (i.e., at least the duration and the third parties that may have access to the cookie, but preferably also the type of cookie – functional, statistical or marketing – and any other relevant information).
- Second, the website users are given an opportunity to accept or decline the cookie storage on their equipment. Many technical solutions are already on the market to obtain (and register) such consent. However, it is important that acceptance should require an active step (such as ticking a box or activating a virtual switch), and should not rely on pre-ticked boxes.

Finally, it is important to note that these rules apply only to those cookies for which consent is required under the ePrivacy Regulation (as amended in 2009). By contrast, consent is not required for cookies that are strictly necessary in order to provide a service explicitly requested by the website users.

The full text of the judgment can be found [here](#).

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