

ECJ ruling confirms that cookies need active consent

Vincent Manancourt



The European Court of Justice has ruled that the use of tracking cookies requires active consent, affirming recent guidance by top data watchdogs advising against relying on implied consent.

The ECJ today said pre-ticked boxes cannot be used to obtain consent to place cookies, which website providers store on users' computers.

The ruling today follows a referral by Germany's Federal Court of Justice regarding litigation between the Federation of German Consumer Organisations NGO and online lottery provider Planet49.

Planet49's website had presented visitors with two checkboxes which had to be ticked or unticked before they could take part in the lottery. The first unticked checkbox forced users to consent to being contacted for

marketing purposes by third-party companies; the second checkbox, which was pre-ticked, sought consent for installing cookies on users' browsers.

In November 2017 the German court asked the ECJ to clarify standards for free and informed consent under EU data protection legislation, as well as questions relating to the ePrivacy Directive, which applies to privacy in electronic communications.

The court, confirming a March opinion by ECJ Advocate General Maciej Szpunar, today said its decision is unaffected by whether or not the information stored or accessed on the user's equipment is personal data. "EU law aims to protect the user from any interference with his or her private life, in particular, from the risk that hidden identifiers and other similar devices enter those users' terminal equipment without their knowledge."

In a departure from AG Szpunar's opinion, however, the ruling did not touch on so-called consent bundling, where providers force users to consent in return for access to content. Szpunar had said GDPR bans consent bundling in most circumstances.

"They haven't said whether that's allowed or not ... it's a huge point," said Fieldfisher partner Phil Lee, who pointed to the prevalence of consent walls to access website content.

Reactions

Lee said that in many ways, the ruling is a "statement of the bleeding obvious".

"This lays to rest any ongoing suggestions that a pre-ticked box is implied consent," he said.

He added, however, that many cookie notices fail the requirement laid down by the ruling to notify users how long cookies are set for. "A lot of companies will have to revisit their notices," he said.

Alex van der Wolk, a partner at Morrison Foerster in Brussels, said the ruling reiterates the advocate-general's opinion as well as guidance from regulators.

"The bottom line is that all signs are pointing towards more explicit forms of cookie consent," he said, pointing to recent guidance by the French and UK data watchdogs that implied consent cannot be used – "and this is now essentially affirmed by the ECJ."

He added that websites should be wary of relying on any form of implied consent. “Essentially, websites should be asking themselves: ‘Is there a clear enough act by which consent is signified?’ Ambiguity is recommended to be avoided.”

In July, CNIL said browsing a website can no longer be taken as consent, while the same month the ICO said that explicit consent is needed for non-essential cookies.

The German NGO that brought the original claim did not respond to a request for comment. Planet49 could not be reached for comment.