



PRIVACY LAW

Federal Court of Justice rules on cookie consent – it can no longer be ignored

“We use cookies” is the welcoming phrase used on many websites. Although the use of cookies is widespread, the legal framework for this was not clearly defined. It was in particular unclear to date whether consent is required for this and what form such consent has to take.

The German supervisory authorities require providers to ensure that every cookie used is justified under the GDPR. As concrete example they only comment on the analysis service Google Analytics, for which the consent of the user is necessary in any case.

Many providers ask users for their express consent to all or specific cookies. Some are content with just pointing out their use of cookies which they justify with legitimate interests, or assume the users’ tacit consent if they continue to use the website.

Today’s ruling by the Federal Court of Justice (*Bundesgerichtshof*, ‘BGH’) in the “Planet49” case (file ref. I ZR 7/16 – “Cookie Einwilligung II”) makes a significant contribution to clarification. The BGH has ruled that cookies for advertising and market research require consent of the user. This is based directly on the ePrivacy Directive, not the GDPR. To obtain such consent, providers cannot rely on an opt-out procedure, whereby consent is pre-selected so that users must actively deselect the consent to refuse it.

1. FACTS

The subject of the ruling is a complaint by a consumer organisation against a declaration of consent used in an online registration form for sweepstakes. The consent concerned a web analysis service that uses cookies to track the behaviour of participants on third-party websites and allows for “interest-based” advertising. A link provided details on data collected, recipients and the intended e-mail advertising. Participants could decide whether or not to give their consent via a checkbox. The bone of contention was that the checkbox was already “pre-selected”, i.e. the tick had to be removed in order to refuse consent (opt-out).

2. LEGAL CONTEXT

According to the GDPR, the processing of personal data, e.g. user IDs in cookies and related data, requires a lawful basis. Prior to processing, the cookie itself must be set, which is regulated by the ePrivacy Directive (Directive 2002/58/EC) that remains unaffected by the GDPR. Since 2009, the Directive generally requires for lawfully storing data on the user’s device and accessing data stored there that the user consents, i.e. opt-in instead of

opt-out (Art. 5 (3) of the ePrivacy Directive as amended by the so-called Cookie Directive 2009/136/EC).

According to the German Federal Government’s notification, these requirements are implemented in the German Telemedia Act (*Telemediengesetz*, ‘TMG’), which is still in force, according to which service providers may only process personal data of users if said users consent or a legal norm permits this (section 12 (1) TMG). At the same time, however, the TMG allows user profiles to be created for advertising purposes using pseudonyms if the user does not object (section 15 (3) TMG). For such user profiles, providers regularly set cookies containing only a pseudonymous identifier, as the exact identity of the user is usually unknown to the provider. By virtue of the wording of the TMG, the cookies could therefore be lawful via an opt-out, as in the present case. The BGH now ruled that the lack of valid consent is to be regarded as objection to the creation of user profiles within the meaning of section 15 (3) TMG.

3. COURSE OF PROCEEDINGS

The first instance court prohibited the use of the consent, as in its opinion the requirements for valid consent were not met. On the other hand, the court of appeal, based on section 15 TMG, considered the present opt-out to be permissible.

The BGH initially submitted various questions to the European Court of Justice (ECJ) regarding consent under the ePrivacy Directive. In its answer in autumn 2019 ([case C-673/17 – “Planet49”](#)), the ECJ stated that the standard of consent under the GDPR also applies to consent under the ePrivacy Directive. Hence, an active, unambiguous confirming act is required. Pre-selected check boxes or mere silence are not sufficient (see [BB Privacy Ticker October 2019](#)).

4. IMPLICATIONS OF THE BGH RULING IN PRACTICE




The BGH tightens the previously established standards. The Court clarifies that the provisions of the TMG remain in force and have to be interpreted in line with the regulations of the ePrivacy Directive. The BGH expressly extends these provisions to cookies for advertising and market research. However, the Court’s reasoning is also relevant for analysis cookies, which providers use to design their online media in accordance with their users’ needs.

The ePrivacy Directive requires that, in principle, consent must be obtained before data such as cookies are stored on the user's device or data stored there is retrieved. The only exceptions are processes:

- as far as they are strictly necessary to provide a service explicitly requested by the user, or
- if they solely serve the transmission of a communication.

Providers may therefore not refer to a legal basis pursuant to the GDPR, in particular not a justification based on their legitimate interest and, where applicable, a mere opt-out. On the contrary, no opt-out solution is necessary for cookies that are covered by the exceptions mentioned above.

It has to be checked in each case, which of the cookies used can be based on the mentioned exceptions. For this, the [practical notes of the French data protection authority \(CNIL\)](#) and [of UK's data protection authority \(ICO\)](#) on cookies offer a first orientation with the following examples:

		
Shopping basket function	possible without consent	without consent, at least insofar session cookies are used
User login and user authentication	possible without consent	possible without consent, provided only session cookies are used
Network load balancing	possible without consent	possible without consent, provided only session cookies are used
Tracking	without consent only possible under certain conditions (inter alia, neither cross-device nor cross-site)	consent always required
Online advertising	possible only with consent	
Social media plugins	possible only with consent	

These standards are not limited to cookies but apply to any technology that stores data on or reads data from the user device. It is not necessary that personal data is involved; solely device-related information is covered as well. The ePrivacy Directive also applies if, instead of cookies, data on the user's browser is read out in order to recognise users (so-called browser fingerprinting).

Common use cases and services utilized, which providers should evaluate closely with regards to the aforementioned standards, are in particular:

- **Web analysis services** such as Google Analytics, etracker or econda Analytics;
- **Conversion tracking tools** that are regularly included in the offer of advertising platforms to measure results of advertising campaigns and account accordingly, e.g. the Facebook Pixel, tracking via Google Ads or the so-called universal event tracking of Microsoft Advertising;
- Separate **remarketing tools**, for targeted personalised advertising to website visitors, such as Google Remarketing, Criteo or Facebook Custom Audiences from customer lists or from the Facebook Pixel;
- Cookies placed by **video players**, especially for videos from video platforms such as YouTube and Vimeo which are embedded in the provider's own web presence; or
- A "remember me" function.

If, according to this, cookies and other technologies require the consent of the user, providers must implement a consent solution. A possible way of implementing this are the commonly used cookie banners. The configuration and structuring of such cookie consent must also take into account the GDPR requirements for consent. Pre-selected check boxes must therefore be avoided. The details of the consent depend on the respective cookies or technologies used and their purposes. A blanket consent solution is insufficient, as consent must be specific and given for defined purposes.

If you have any questions, please address the BEITEN BURKHARDT lawyer of your choice or contact the BEITEN BURKHARDT Privacy Team directly:

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DUSSELDORF

Imprint

This publication is issued by

BEITEN BURKHARDT

Rechtsanwaltsgesellschaft mbH

Ganghoferstrasse 33 | D-80339 Munich

Registered under HR B 155350 at the Regional Court Munich/VAT Reg. No.: DE811218811

For more information see:

<https://www.beiten-burkhardt.com/en/imprint>

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