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Cookie decision of the ECJ: what to do?

The definition of cookies

Cookies are small text files that are stored locally on the user's terminal device when a website is visited. Cookies can be used to store user settings and other information via the web browser. If the user visits a website again, the website can retrieve this information and send it to the server. Cookies can make it easier to navigate between pages and improve the user experience, but they can also help to tailor information offers and advertisements to the interests of users or to record user behaviour on the website.

Summary of the ECJ ruling (Case C-673/17)

On Tuesday, 01.10.2019, the ECJ positioned itself on the issue of data protection consent for the use of cookies, while practitioners assumed that this issue would now be finally regulated by the forthcoming ePrivacy Regulation. The judgement was based on a legal dispute between the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband e.V.; vzbv) and Planet 49 GmbH. (vzbv) and Planet 49 GmbH. The court decided that the use of cookies would require the active consent of the user and that preset checkboxes would not satisfy this requirement. The relevant provisions should not be interpreted differently depending on whether the information stored in the user's terminal on a website is personal

data or not. Information on the duration of the cookies and whether third parties can access the cookies were among the information to be made available by the service provider to the user of a website.

Effects of the judgment on practice

In the opinion of the ECJ, website operators must ensure that they obtain a "genuine" consent of the website user for the use of third-party cookies, which satisfies the data protection requirements. So far, the use of third-party cookies has often been based on a legitimate interest of the website operator pursuant to Art. 6 para. 1 lit. f GDPR, in the hope that this would exploit a legal grey area. Often there was an information banner for this without any consent mechanisms. According to the decision of the ECJ, this is at least no longer possible. Nevertheless, it should be emphasised that the ECJ did not explicitly exclude other legal bases from the GDPR. The president of the Bavarian supervisory authority BayLDA, Thomas Kranig, announced at the IAPP conference in Germany that several companies would be fined for not using tracking mechanisms in compliance with data protection regulations.

Outlook and need for action

The decision of the ECJ refers only to the consent, but leaves other legal bases from the GDPR unaffected. Accordingly, data protection-compliant consent mechanisms and other legal bases would have to be examined more closely. In fact, the German Federal Court of Justice (BGH) now has to transfer the ECJ's answers to German law. This will probably result in the BGH declaring Sec. 15 TMG inapplicable and using Art. 6 para. 1 lit. a GDPR as the applicable legal basis. However, this remains to be seen. Although no clear statements on the legal situation can currently be made due to the legal uncertainty, the following steps should nevertheless be carried out and the following aspects taken into account:

- All cookies used on the website would have to be checked again. It would have to be determined which cookies are technically necessary and which are not.
- Accordingly, cookies that are not absolutely necessary should not be used.
- For cookies that can be based on a legitimate interest, extensive considerations of interests should be made.
- No new tracking or advertising cookies should be used until there is legal clarity.

We consult you in all data protection questions and provide an external data protection officer for you. Feel free to contact us!

Kind regards, the NOTOS Xperts Team!