

Pre-ticked 'cookie' consent boxes prohibited

Abstract

EU Court of Justice has ruled that pre-checked consent boxes for dropping cookies are not legally valid. Based on current legislation, cookies are activated by default on most websites and visitors can object to or “opt-out” of cookies. According to the latest EU Court of Justice ruling¹, this interpretation will be subject to change. Under the new interpretation, certain tools, trackers, and cookies may only be used if visitors actively agree to them or “opt-in.” EU law aims to protect the user from any interference with his or her private life from the risk that hidden identifiers and other similar devices enter those users’ terminal equipment without their knowledge.

Key words: cookies, trackers, consent

Consent must be obtained prior to storing or accessing non-essential cookies e.g. tracking cookies for targeted advertising, therefore consent cannot be implied or assumed. This means that consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject’s agreement to the processing of personal data, such as by a written statement².

It should be noted that, consent which a website user must give for the storage of and access to cookies on his or her equipment is not valid by way of a prechecked checkbox, irrespective if the information stored or accessed on the user’s equipment is personal data. Web designers and service providers must select the lowest level of risk for the data subject, this would mean the ‘No’ option being pre-populated. Therefore, it could be concluded that the user gave a valid consent to the storage of cookies.

Web designers and service providers must also identify the duration of the operation of cookies as an element of the requirement for informed consent, meaning that service providers should ‘always keep data subject’s informed of the types of data they are processing and the purposes and duration for which it is done. This also extends to third party access to these tracers, meaning that service providers must identify which third

parties are being used as well as retention period of such third-party cookies. e.g. Statistics cookies (which can only be collected for visitors who agree to the use of such cookies).

The decision by the EU Court of Justice is in line with the European General Regulation on Data Protection (GDPR) of 25 May 2018, which provides for enhanced rights for Internet users and requires any company, whether on the Internet or not, to request "explicit consent" and positive "to use personal data collected or processed in the EU.

The decision is also likely to influence the ongoing reform of ePrivacy rules — which govern online tracking.

1. Judgement of the Court of Justice Case C-673/19 https://curia.europa.eu/jcms/jcms/p1_2423854/en/
2. Recital 32 of Regulation 2016/679