PRIVACY LAW/ GAMES

Federal Court of Justice rules on cookie consent – we explain the impact for games companies

"We use cookies" is the welcoming phrase used on many websites. The cookies are set, for instance, by the analysis service Google Analytics. Similar services are often found in video games (such as Google Analytics for Firebase). Although such cookies and services are widely used, the legal framework for their use was not precisely 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 Google Analytics for which the user's consent is required.

The games industry takes an ambivalent approach to dealing with these requirements. On their websites, publishers and developers usually point out the use of cookies. Also, asking for the user's consent becomes more common. In video games, in contrast, a notice on cookies or other tracking is rarely to be found. Although the privacy policy of some games mentions such technologies, yet a possibility for users to opt out or even opt in is the exception in these cases as well.

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 checkboxes or mere silence are not sufficient (see BB Privacy Ticker October 2019).

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4. IMPLICATIONS OF THE BGH RULING FOR THE GAMES INDUSTRY

The BGH tightens the previously established standards for cookies and other analysis tools. 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.

This takes precedence over the provisions of the GDPR. Publishers and developers may therefore not refer to a legal basis pursuant to the GDPR, in particular not justification based on their legitimate interest and, where applicable, a mere opt-out.

For the games industry, these requirements can have considerable consequences as they apply to any access to data on the user's device, even if no cookies are used and no personal data but pure device-related information is affected. Among other things, retrieval of the advertising ID, recording of hardware details and access to locally stored files such as detailed error reports are also subject to these rules.

Publishers and developers need to pay particular attention to these standards, especially with regard to:

- **In-game analysis** of player behaviour and game performance as well as crash reports, as these can include extensive hardware information;
- **In-game advertising**, which is often accompanied by ad verification tools to measure advertising campaigns and prevent ad fraud, which create and store a user ID;
- **Anti-cheat systems**, which evaluate either personal data and/or extensive hardware information to detect and prevent "fraudulent" behaviour;
- **DRM systems**, e.g. when they create a hash value based on the user's hardware and use it to verify the license for the game; and
- **Online shop** and **web presence**, in which conversion tracking or retargeting tools may be integrated.

In these cases, the above exceptions to the consent requirement play a central role. In this regard, the practical notes of the French data protection authority (CNIL) and of UK's data protection authority (ICO) on cookies offer 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	

In addition, the particularities of the respective video game in question should also be taken into account, which data protection authorities may not yet have assessed. For instance, when streaming games, data is stored directly on the streaming provider's servers, so that access to the user's device is not necessary and the ePrivacy Directive does not apply in this respect.

If, according to this, cookies and other technologies require the consent of the user, a consent solution must be implemented. 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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