The ECJ weighs in on the requirements for using cookies

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In its judgment in the Planet49 case, the ECJ created a little more clarity in fundamental questions of data protection law. This ruling was issued in a case in which the Planet49 company organized a lottery on a website for which visitors were asked to submit a consent form containing a pre-checked box stating that the company may place a cookie on the lottery participant's terminal device in order to evaluate the participant's surfing and use behavior for advertising purposes. The dispute involved this very question, i.e. whether the box in question may be checked in advance.

The ECJ found (unsurprisingly) that this practice does not constitute valid consent in terms of the e-Privacy Directive (Directive 2002/58/EC) but that the website operator is not required to obtain consent for cookies which are necessary for technical reasons in order to provide the service. It can be stated with a high degree of confidence that this category includes cookies which save the contents of the website visitor’s cart for future visits. Which other cookies are necessary for technical reasons is a question which has yet to be clarified by courts at the highest level so that which reasons must be cited in each individual case.

The question as to whether consent for data processing for advertising purposes may be made contingent upon participation in the lottery is also left unanswered by the court. After all, consent generally has to be “freely given” in accordance with Article 4 No. 11 of the GDPR, and Article 7(4) of the GDPR imposes the “coupling prohibition,” which essentially prohibits making a contractual performance contingent upon consent for data processing. Whether or not participation in a lottery may be made contingent upon data processing for advertising purposes is still an open question, and one which has to be clarified by the courts sooner or later.

Since Article 5(3) of the e-Privacy Directive relates only to "access" and "storing information" (!), the ECJ also ruled that it is immaterial whether or not the processed information consists of personal data. In other words, consent must be obtained in accordance with the Directive regardless of whether the data in question is personal data, unless the processing of the data is necessary for technical reasons so that the service can be provided. Since evaluation of the user’s surfing behavior for advertising purposes is not necessary for technical reasons, the user's active express consent will be required for such purposes in the future.
Finally, the ECJ ruled that Article 5(3) of the e-Privacy Directive must be interpreted to mean that website visitors must be informed about the length of time for which cookies will be stored and whether the data processed by the cookies will be accessed by third parties. Whether this information must be provided in the course of obtaining the visitor’s consent, i.e. when the website is first accessed, or whether it is enough to place this information in the website’s data privacy policy remains an open question. There are good arguments to support the view that this information may also be included in the data privacy policy, provided that clear reference is made to this policy before the visitor issues consent, so that consent can be issued based on this information.

So, what needs to be done under this Judgment by the ECJ?

- If a cookie is placed for a website visitor, the visitor’s consent must be obtained in the future unless the cookie is necessary for technical reasons.
- The visitor also has to be informed about the length of storage and (at least) the categories of recipients of the data processed by the cookie.