

German BGH Ruling On Consent For Cookies And Third-Party Advertising

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On May 29, 2020, the German Federal Court of Justice (Bundesgerichtshof, "BGH"), Germany's highest court for civil and criminal matters, issued its [ruling](#) on case Planet49 (I ZR 7/16) regarding consent requirements for the use of cookies and telemarketing activities. In October 2017, the BGH suspended its proceedings and submitted questions to the Court of Justice of the European Union ("CJEU") for a preliminary ruling regarding the effectiveness of obtaining consent for the use of cookies through a pre-ticked checkbox. As we have [previously reported](#), the CJEU answered these questions in its judgement in Planet49 GmbH v. Verbraucherzentrale Bundesverband e.V. (C-673/17), which was issued on October 1, 2019.

Background

In 2013, Planet49 GmbH ("Planet49"), a German website, organized a promotional lottery online. To participate in the lottery, users were required to enter their postcode, which then prompted users to provide their names and addresses. Beneath this request for names and addresses, Planet49 sought two consents from users.

The first consent was sought through the use of an unticked box. It pertained to users being contacted by post, telephone or email/SMS by third-party partners for promotional offers. The relevant language included a hyperlink to 57 companies along with their addresses, commercial sector and the method of communication used for advertising (email, post or telephone). The word "unsubscribe" appeared next to each of these companies. A note preceded the list of companies to state that if the user did not unsubscribe from any or a sufficient number of these third parties, Planet49 would choose the third parties partners/sponsors for the user at its discretion with a maximum number of 30 third parties.

The second consent pertained to cookies being dropped on users' browsers in connection with participation in the online lottery. Planet49 sought consent for the use of cookies through a pre-ticked box, which included the following language: "I agree to the web analytics service Remintrex being used for me. This has the consequence that, following registration for the lottery, the lottery organizer, [Planet49], sets cookies, which enables [Planet49] to evaluate my surfing and use behavior on websites of advertising partners and thus enables advertising by Remintrex that is based on my interests. I can delete the cookies at any time. You can read more about this here." In the explanation linked to the word "here," it was pointed out that the cookies would receive a specific,

randomly generated number (“ID”), which was assigned to the registration data of the user who had entered his name and address in the web form. If the user visited the website of a registered advertising partner with the stored ID, this visit would be recorded along with information regarding which product the user was interested in.

The Ruling

Consent for Cookies: With respect to consent for cookies, the BGH ruling follows the decision of the CJEU and confirms that consent to the use of cookies is not valid if it is obtained by using a pre-ticked checkbox. In particular, the BGH affirmed that consent language in general terms and conditions in combination with a pre-ticked checkbox for the use of cookies represents an unreasonable disadvantage for the user and is therefore invalid. Under the German Telemedia Act, the creation of user profiles through the use of pseudonyms (which are interpreted to include user profiles based on identifiers collected through the use of cookies) for the purpose of advertising or market research is permitted, unless the user objects. There is currently no other relevant provision in German law to address cookie consent. Nonetheless, the generally acceptable interpretation of the Telemedia Act provision in Germany suggests that the use of cookies for advertising or market research purposes requires the user’s consent, as this provision must be interpreted in conformity with the cookie consent requirements of the ePrivacy Directive. The rationale is that a user who has not consented to the use of cookies has objected to the creation of the user profile. In applying the relevant German provision, the BGH followed the interpretation of the cookie consent requirements of the ePrivacy Directive by the CJEU, according to which there is no effective consent for the use of advertising cookies if a pre-ticked checkbox is used, and therefore active action is required. In line with the CJEU ruling, the BGH also reiterated that the question of whether the information stored on the user device is personal data does not matter in the context of the cookie consent requirements. With its judgement, the BGH overturned the appeal judgment and restored the judgement in the first instance, which had ordered Planet49 to refrain from using pre-ticked checkboxes to obtain consent for the use of cookies.

Consent for Third-Party Advertising: With respect to consent for third-party advertising activities, the BGH ruled that consent was not valid in this case, as it was not sufficiently informed and specific. As the consent process was set up, consumers were confronted with 57 third-party partners who could contact them for marketing purposes. By ticking the relevant checkbox without having unsubscribed from a significant number of partners, Planet49 was making the selection of which partners could contact the consumer. In BGH’s view, this elaborate process encouraged the consumer to refrain from selecting the advertising partners that were consequently selected by Planet49. According to the BGH, if the consumer does not know to which third party he has given consent to contact him for marketing purposes, due to a lack of knowledge of the content of the list and without exercising the right to select partners, there is no informed and specific consent.

Read the BGH’s [press release](#) (in German).

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