



Laga Newsflash

Valid consent for use of Cookies becomes more stringent

In a recent judgment (C-673/17) of 1 October 2019, the Court of Justice of the European Union (CJEU) ruled that consent for the use of cookies obtained through a **checkbox ticked by default** (which the user must deselect to withhold consent) **is not valid**.

As a reminder, storing or accessing information on a user's terminal equipment (typical functionality of cookies) in principle requires the user's **prior informed consent**. However, consent is not required when such access or storage is strictly necessary to (i) convey communications over networks or (ii) in order to provide a service requested by the user. This derives from the e-Privacy Directive (2002/58 of 12 July 2002), implemented into the Belgian Electronic Communications Act of 13 June 2005.

Discussions have taken place over the years regarding the best method for collecting such consent (pop-ups, cookie banners, explicit or implied consent, etc.).

Through its 1 October 2019 judgment, the CJEU shed (some) light on the matter. According to the CJEU, valid consent within the e-Privacy Directive's meaning requires the user's **active behaviour**. A checkbox ticked by default does not fulfil that requirement as it does not make it possible to objectively ascertain whether a user has actually given consent or not. The user may indeed not have read the information accompanying the pre-ticked checkbox, or may even have neglected that checkbox, before continuing to browse on the website.

The CJEU also gives a broad interpretation to the consent requirement. The Court confirms that consent is required with respect to:

- **any information** stored or accessed on a website user's terminal equipment (and not only information that qualifies as personal data according to GDPR); and
- **any kind of cookie** for which consent is required (and not only for cookies used for marketing or behavioural advertising purposes).

The CJEU's interpretation seems **more stringent than the Belgian Data Protection Authority's guidelines**, which have so far served as a basis for the interpretation of applicable rules under Belgian law with respect to cookies.

Hence, it is highly recommended for companies to review their current cookie policies, especially if consent is linked to continued browsing on the website or on checkboxes ticked by default.

Laga's Data Protection team is readily available to draft or review companies' cookie policies to ensure compliance with these new developments in the field of e-privacy.

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