

DATA PROTECTION-COMPLIANT DESIGN OF A COOKIE BANNER

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Introduction

The majority of online offerings employ user tracking tools and other third-party services, for example for the integration of maps or videos. To protect privacy, case law has formulated various requirements based on the right to informational self-determination that must be complied with when using such services. The requirements must be observed above all when cookies that are not technically necessary are used. In these cases, the ECJ ([ECJ, decision dated 01.10.2019, ref. C-673/17](#)) and the BGH ([BGH, decision dated 28.05.2020, ref. I ZR 7/16](#)) consider it necessary to obtain the user's consent to the data processing carried out in this context. The supreme court has not yet expressly ruled on the use of technologies comparable to cookies. However, taking into account the e-Privacy Directive and the Telecommunications and Telemedia Data Protection Act (TTDSG), appropriate requirements must be made in this respect. A so-called cookie banner is typically used to request consent. Since website operators generally have a great interest in analyzing the behavior and interests of users in order to be able to present them with offers and advertising tailored to them, among other things, they often try to use a cookie banner design that is as optimized as possible for the operator in order to achieve the highest possible consent rate. Such arrangements are also permissible within certain limits; however, the basic requirements of the General Data Protection Regulation (GDPR), the case law on this topic and the Telecommunications Telemedia Data Protection Act (TTDSG), which came into force at the end of 2021, must be observed.

Obtaining effective consent and user information

In response to the case law of the ECJ and BGH, the German legislator has explicitly provided for a consent requirement in Section 25 (1) (1) TTDSG. The storage of information in users' terminal equipment and access to information already stored in the terminal equipment is only permitted if the user has consented to the data processing on the basis of clear and comprehensive information, provided that none of the exceptions in Section 25 (2) TTDSG are met. With regard to the requirements for informing the user and obtaining their consent, Section 25 (1) (2) TTDSG refers to the provisions of the GDPR.

The requirements that must be met for consent to be valid are set out in particular in Art. 4 No. 11 GDPR. According to this, consent is any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

The requirements for the transparent information of the user result in principle from Article 13 and 14 GDPR. The obligation to provide information includes, in particular, the contact details of the controller and the data protection officer, the categories of data processed, the purposes of data processing and the relevant legal basis, the recipients of the data, the duration of storage and the rights of the data subjects. In its decision, the ECJ also states that users must be informed in particular about the scope of cookie use, access options and storage duration in the course of the consent request.

In order to meet the applicable requirements in this respect, it is necessary to design the cookie banner and the privacy policy integrated into the online offering in a way that takes into account the various requirements. Attention must also be paid to correct technical implementation. In particular, the technologies requiring consent may only be used if the user has actually actively consented to the data processing in question. Previous data transfers to the third-party provider may have to be prevented by implementing the so-called „two-click solution“.

Design of the cookie banner

Various aspects must be taken into account when designing the cookie banner in compliance with data protection regulations.

Active consent

According to the ECJ and the BGH, the setting of technically unnecessary cookies and, in accordance with the structure of Section 25 TTDSG, the use of comparable technologies generally requires the active consent of the user. In this respect, it should first be noted that a preselection of individual checkboxes going beyond the technically necessary cookies that cannot be deselected is generally inadmissible. Other measures that also require no participatory action of the user are ruled out in view of the requirement for a declaration or other unambiguous confirmatory action.

Consent text

The text of the cookie banner should be designed in such a way that the user is informed that technically necessary cookies are used regardless of the user's consent, but that the user can choose whether other cookies or other technologies are also activated. A clear formulation of the declaration of consent is particularly necessary in view of the criteria „unambiguous“ and „for the specific case“.

Positioning and design of the selection options

Taking into account the „voluntary“ requirement, care must also be

taken to ensure that it is just as easy for the user to refuse the use of marketing and analysis technologies that are not required as it is to agree to them. To ensure this, the two required options - accept and reject - must always be placed on the first page of the cookie banner. Whether the user is only provided with a general consent button or has the option of making a separate selection with regard to individual categories of tools is at the discretion of the company. In contrast, the general rejection of the use of unnecessary tools must not be made more difficult by requiring multiple clicks. Non-specific configuration options are not permitted in this respect. Instead, a reject button must be implemented that can be selected by the user with a single click.

The further design of the cookie banner must be transparent for the user. The extent to which graphic designs intended to persuade the user to consent are permissible is highly controversial in this respect. Emphasis that is so pronounced that the user is literally urged to make a decision is inadmissible with regard to the principle of transparency and the criterion of voluntariness, taking into account that the user must be given a real choice. The case law ([LG Munich I, decision dated 29.11.2022, ref. 33 O 14776/19](#) and [LG Köln, decision dated 23.03.2023, ref. 33 O 376/22](#)) even partly takes the view that a rejection option that is hidden within the continuous text or placed in pale lettering at the edge of the window and thus outside the user's immediate field of vision cannot be regarded as an equivalent alternative to a conspicuously designed consent option.

In order to meet the criteria of certainty and unambiguity of consent as well as the principle of transparency, the selectable buttons should also be labeled as clearly as possible.

In contrast, so-called tracking walls or pure subscription models, in which the rejection of marketing and analysis tools is made dependent on registration or the conclusion of a paid subscription, are predominantly [considered permissible](#), although the user must in fact agree to the use of the services if he wants to use the offer free of charge. Since in this case the registration or subscription is the equivalent of the option to refuse, this must also be offered to the user in a suitable manner on the first page of the cookie banner.

Further information

In order to also meet the requirements for informed consent, the user must be provided with the essential information for their decision within the cookie banner. With regard to further information, reference should also be made to the company's comprehensive privacy policy, in which the mandatory information to be provided to the user is to be prepared. In this respect, the cookie banner should contain a link to the privacy policy. In contrast, detailed submenus with more detailed information on the individual tools within the cookie banner are not necessary. If a corresponding design is nevertheless chosen, care must be taken to ensure that the information provided is correct and complete in every case.

Outlook

In future, personal information management systems (PIMS) could be used to request consent instead of cookie banners. This would give users the opportunity to store their preferences in a central location rather than separately in each individual online offering. Section 26 TTDSG also expressly provides for such a solution, although this is still an individual national solution. In this respect, it still needs to be clarified whether and how PIMS can meet the requirements of the GDPR for effective consent. Further developments in this respect remain to be seen, but this approach can help to curb cookie banners, which are regularly considered annoying.

Conclusion

In order to use marketing and analysis tools in compliance with data protection regulations, it is necessary to implement the requirements arising from the various legal sources and case law. As with any other data processing, the existence of a reliable legal basis is particularly necessary. In this respect, taking into account the case law and the legal innovations, the consent of the user is decisive. Effective consent requires, among other things, that the data subjects affected by the data processing are provided with the necessary data protection information. In order to fulfill the other requirements, it is particularly important to ensure that the cookie banner is designed in accordance with the requirements. In addition, it is also relevant that the user decision is implemented in a technically correct manner.

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