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USER TRACKING, COOKIE BANNERS AND PURE SUBSCRIPTION MODELS

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Introduction

Many companies integrate user-tracking tools into their online offerings. These software applications, which are also provided primarily by (American) third party providers, allow companies to analyze the "shopping journey" and behavior of the customer, to create evaluations of the customer structure, their interests and purchasing behavior, and to present users with information, offers and advertising tailored to them, among other things. Companies often have a great interest in this tracking, as it helps them understand their customers better, and adapt and improve their offerings to the customers' interests. In contrast, users of the online offering have an interest in protecting their data and privacy. In this context, users' constitutionally enshrined right to informational self-determination has to be considered. This means that data subjects can generally decide for themselves which of their personal data may be processed by which bodies and for what purpose. Based on this, various requirements have been developed, particularly by the courts, which must be complied with when carrying out user tracking.

Legal bases

As for any data processing, the existence of a legal basis is also required for data processing procedures in connection with user tracking or the display of personalized advertising. In this respect, the data protection law principle of "prohibition with reservation of permission" anchored in Art. 6 GDPR applies. Accordingly, any data processing is only permissible if it can be founded on a legal basis

The case law of the ECJ and the BGH

In October 2019, the European Court of Justice (ECJ) ruled in a referral procedure that the variant practiced to date in Germany of waiving the user's consent under data protection law for the setting of cookies is not sufficient (ECJ, decision dated 01.10.2019 - Ref. C-673/17). According to the ECJ, active consent of the user is required for the setting of technically unnecessary cookies. Accordingly, the user's consent within the meaning of Art. 6 (1) (1) (a) GDPR must be obtained for the use of analysis and advertising cookies. In addition, the data subject must be informed about the extent to which third parties can access the cookies and how long they are stored on user end devices. In this context, the ECJ also criticized the use of cookie banners that only offer users the option of consenting to the cookies in question, but not the option of rejecting these cookies. Cookie banners designed in this way do not generally meet the requirements of the ECJ.

In May 2020, the Federal Court of Justice (BGH) then endorsed the content of the ECJ's opinion (BGH, decision dated 28.05.2020 - I ZR 7/16). In particular, it stated that it is not possible to effectively obtain consent under data protection law for the storage of cookies by means of a pre-activated checkbox. Comparable measures, which amount to the user not actively agreeing to the use of cookies, are also considered insufficient in this respect. In view of the decision of the BGH, there was no longer any room for the previously held view that, with reference to the provision in Section 15 (3) of the German Telemedia Act (TMG), only an objection solution could be implemented in the case of marketing and analysis cookies, or that only a cookie notice could be displayed.

The requirements formulated by the ECJ and the BGH in their respective cookie decisions have been taken up in Germany by the Telecommunications Telemedia Data Protection Act (TTDSG). Pursuant to Section 25 (1) (1) TTDSG, the storage of information in users' terminal equipment and access to information already stored in the terminal equipment require that the user has consented to this data processing based on clear and comprehensive information, unless one of the exceptions in Section 25 (2) TTDSG is met. With regard to the requirements to be met by the user's information and consent, Section 25 (1) (2) TTDSG then refers to the requirements of the GDPR.

Consent

At least with regard to the use of cookies for analysis and tracking purposes, it has been clarified by the decisions of the ECJ and the BGH that the consent of the user must be obtained for the data processing carried out in this context in accordance with Art. 6 (1) (1) (a) GDPR. Only when the user has consented to the setting of technically unnecessary cookies may these also be used by the respective responsible parties.

According to Art. 4 No. 11 GDPR, effective consent requires that the data subject has declared voluntarily, for the specific case, in an informed manner and unambiguously in the form of a declaration or other confirmatory act that he or she agrees to the processing of personal data relating to him or her. In order to meet these requirements, it is necessary to design the cookie banner or other consent solution and the privacy policy included in the online offer in a way that takes the various requirements into account.

Legitimate interests

The question of the extent to which the user's consent must also be obtained for the use of other technologies comparable to cookies has not been expressly addressed by the highest courts. In this respect, it could be argued – in the absence of case law to the con-

trary – that the use of such technologies can also be based on the overriding legitimate interest of the company within the meaning of Art. 6 (1) (1) (f) GDPR. However, this view is fraught with a certain risk.

In its decision, the ECJ expressly commented only on the use of cookies, but in its reasoning it refers to the e-Privacy Directive. However, the relevant provision of Art. 5 (3) of the e-Privacy Directive does not directly refer to the use of cookies, but rather to the storage of information or access to information stored in a user's terminal device. Taking this into account, as well as the sense and purpose, all technologies that access information on the user's terminal device in any way or store information there would logically have to be treated in the same way, so that the user's consent would also be required for their use. Ultimately, this view is also supported by the relevant provisions of the new TTDSG.

If, however, a tool does not fall under the technologies covered by the e-Privacy Directive and the TTDSG, it is conceivable that the associated data processing procedures can be based on the overriding legitimate interest of the company. Something else also applies if a technology is used for which it is ensured that identifiability of the user is reliably ruled out by technical and organizational measures. In this case, the evaluation of anonymized data may fall outside the scope of the GDPR. In order to minimize risks and avoid fines, a precise evaluation of the tool used and the specific mode of operation is required in each individual case.

Data processing agreement
If the tool of a third-party provider is used for user tracking and data is transmitted to and processed by the provider when the tool is used, this also generally constitutes a case of data processing, as the service provider processes the data of the responsible company on its behalf an according to its instructions – in particular, it creates evaluations. To ensure data protection, it is therefore necessary to conclude a data processing agreement with the respective provider.

Standard contractual clauses
If the tool used is the application of a provider from a third country, the third-country transfer also requires additional data protection safeguards. After the Privacy Shield agreement was declared invalid by the ECJ, the conclusion of the standard contractual clauses newly adopted in 2021 is particularly suitable for this purpose. The inclusion of these in the data protection agreements is usually also offered by the respective service providers and should definitely be carried out. It should be noted, however, that the conclusion of the standard contractual clauses does not preclude the further examination of the adequacy of the level of data protection in the third country concerned, but much rather requires it. This problem could be alleviated in the future, at least with regard to American providers, if the planned adequacy decision on data transfer to the USA is adopted by the European Commission. This could then be used to safeguard the transfer of data to the U.S. as a third country without any further review requirements.

Consent via cookie banner

In order to obtain the consent of the user required for the setting of technically unnecessary cookies, many companies use a so-called cookie banner. In principle, this must be designed in such a way that the requirements of an effective consent within the meaning of Art. 4 No. 11 GDPR are met. Various requirements result from case law in this respect.

The text of the cookie banner should initially be designed to inform the user that technically necessary cookies are used irrespective of the user's consent, but that the user can choose whether the other cookies are also activated. A pre-selection of individual questions that goes beyond the non-selectable, technically necessary cookies is to be omitted, taking into account the case law of the BGH.

Furthermore, it must be ensured that it is just as easy for the user to reject the use of marketing and analysis cookies as to agree to it. To this end, the two selection options – agree and reject – must be placed on the first page of the cookie banner. The specific design of the cookie banner must also be transparent for the user. Graphic designs are conceivable – at least to a certain extent – which are intended to encourage the user to activate the marketing and analysis cookies. However, the emphasis must not be so pronounced that the user is literally forced to make a decision. Such a design is problematic with regard to both the principle of transparency and the voluntary nature of consent and has been judged inadmissible by the courts. Taking into account the criteria of clarity and unambiguousness of consent as well as transparency aspects, the buttons that can be selected by the user should also be labeled as clearly as possible.

In order to meet the requirement of informed consent, the user must also be provided with the information essential for his or her decision within the cookie banner. With regard to further information, reference should also be made to the company's privacy policy. Extensive sub-menus with further individual information, however, are probably not mandatory according to the current status. If such information is nevertheless to be used, care must be taken to ensure that it is correct and complete.

The extent to which a specific design of the cookie banner meets the legal requirements must be evaluated on a case-by-case basis, taking into account the specific circumstances.

Pure subscription models

In addition to classic cookie banners and extended consent management tools, companies have recently also increasingly used so-called "tracking walls" or, more specifically, "pure subscription models". In this respect, there are, for example, designs in which the rejection of marketing and analysis cookies is made dependent on registration or the conclusion of a paid subscription. If the user wants to use the site free of charge in the latter case, he must agree to the use of cookies. The permissibility of such a design has been discussed in the past, particularly with regard to the aspect of the voluntary nature of consent.

The German Data Protection Conference (DSK), the association of the data protection supervisory authorities of the German federal and state governments, has now stated that it is generally permissible to make a visit to a website dependent on consent to tracking, provided that a tracking-free model is offered as an alternative, even if this is subject to payment (DSK decision dated 22.03.2023). However, the service that the user receives in the paid model must be equivalent to the service that he obtains through his consent, in accordance with the explanations of the DSK. In addition, the consent must meet all the effectiveness requirements of the GDPR. If the user opts for the tracking-free offer, only those data processing procedures may be carried out that meet the requirements of the GDPR and the TTDSG. In particular, the existence of a legal basis is required for any data processing.

The Austrian data protection authority has also come out in favor of the permissibility of pure subscription models (decision of the Austrian data protection authority dated 29.03.2023). It states that a paid subscription could in principle be a viable alternative to consent. However, the associated data processing must be limited to what is absolutely necessary. It goes on to discuss the effectiveness of the consent requirements, which must be met in total. In

particular, the data protection authority addresses granularity as an aspect of the voluntary nature of consent, which must be complied with in all cases. Accordingly, separate consents must be obtained for different processing purposes. If this requirement is not met, consent must be assumed to be involuntary and therefore ineffective.

Technical implementation and further information requirements

In addition to the design of the cookie banner, attention must also be paid to technically correct implementation. In particular, technically unnecessary cookies may not be set and data may not be transferred until the user gives his consent. Since not all providers can easily ensure that a connection to the tool provider's servers – and therefore also a data transfer – is only established when the user has consented to the data processing, the so-called "two-click solution" should also be implemented in these cases. In this case, the user must first activate the third-party content by means of a first click and can then interact with the content by means of a second click. This ensures that no user data is transmitted to the provider without explicit consent, but only if the user consciously establishes the connection to the respective servers by clicking on them.

With many tools, it is also possible to choose between different setting options with reference to data protection. If such options are available, care should always be taken to select the most privacy-friendly variant.

In order for data subjects to exercise their right to informational self-determination and to assert the data subject rights provided for by the GDPR, it is necessary for data subjects to be comprehensively informed about the extent to which their personal data is collected, disclosed or otherwise processed when using an online service. Since the user is usually only provided with the particularly relevant core information within the cookie banner, comprehensive information on the respective data processing procedures must be provided within the privacy policy linked to in the cookie banner. This also applies in particular in consideration of the information obligations applicable to data controllers pursuant to Art. 13 GDPR.

Future alternative: Personal Information Management Systems

The statutory provision in Section 26 TTDSG is the first regulation at national level for consent management services, including personal information management systems (PIMS). The case law of the ECJ and the BGH on the use of cookies has sometimes led to users having to deal with consent requests and associated data protection information on the vast majority of websites if they wish to use the online offering. Contrary to the guidelines developed by case law, cookie banners are often still designed in such a way that the user is guided in his decision, or that buttons for rejecting technically unnecessary cookies either do not lead to the desired result at all, or only in a roundabout way. Insofar as this ultimately leads to users clicking away from the banners and notices as quickly as possible because they perceive them merely as an annoying obstacle, the actual idea – to enable the user to have self-determination over his or her data – is directly undermined. The introduction of PIMS is intended to counteract this problem by giving users the opportunity to call up all the relevant information within a single user interface and to make the appropriate settings, instead of being confronted with a separate query on every website.

So far, the new model has not been able to establish itself in practice. However, it is now to be implemented at national level by means of the Consent Management Ordiance (EinwVO). The Federal Ministry of Digital Affairs and Transport presented a corresponding draft regulation dealing with the specific design of consent management services at the end of 2022. It remains to be seen to what extent this will contribute to the spread of such services, although the problem remains that Germany is the sole advocate so far.

Conclusion

If companies want to carry out user tracking as part of their online services, they must comply with the requirements arising from the various legal sources and from case law. As for any other data processing, the existence of a sound legal basis is required in particular. In addition, users must be provided with comprehensive data protection information so that they can make informed decisions about the processing of their personal data and exercise their rights. For the use of cookies, it has now been clarified that active user consent must always be obtained. If other technologies are used, it must be checked in each individual case to what extent the user's consent to the respective data processing is also required, or if the process is based on a different legal basis. In addition to ensuring that the cookie banner is designed in accordance with the legal requirements, care must also be taken to ensure that the user's decision is also implemented correctly from a technical point of view.

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