

ECJ Ruling: No Cookies Without Consent!

Important site adjustments required / avoid warnings and fines.



According to the recent judgment of the European Court of Justice (ECJ) in the matter “Planet49” there is no way to get around the use of “Consent Tools” on any website in the EU. Many websites, therefore, need to make adjustments to be in compliance with the ruling.

The ECJ has now clarified that an explicit consent agreement is now required for almost all cookies and other tracking mechanisms on websites in the EU. Pre-checked fields (“opt-out”

procedures) or mere “further surfing” abilities and commands are not allowed. For website operators, this means that websites now must have a “Consent Tool” or a “Consent Manager” (see Figure 1). Website operators are now required to ask all site users for their consent for use of all cookies launched when the user first arrives at the site. “Cookie Banners,” which commonly appear at the top or bottom of websites (see Figure 2), are no longer sufficient. ■

This website uses cookies

We use cookies to personalise content and ads, to provide social media features and to analyse our traffic. We also share information about your use of our site with our social media, advertising and analytics partners who may combine it with other information that you've provided to them or that they've collected from your use of their services

☒ Necessary ☐ Preferences ☐ Statistics ☐ Marketing Show details ▼

OK

Figure 1: Consent Manager

We use cookies to improve your experience. Please read our [cookie policy](#) for more information about how we use cookies.



Figure 2: Insufficient Cookie Banner

During spring of 2019, the data protection supervisory authorities classified the use of Cookie Banners as an unacceptable solution. The use of a Consent Tool has been recommended by privacy experts for the last several months, and in accordance with the current decision of the European Court of Justice, it appears that website operators must now adopt such tools. Warnings in regards to

this topic have surfaced over recent weeks. Evidence suggests that more written warnings will most likely be issued. In addition, those who do not comply with this new ruling may be subject to fines and other consequences.

Are you in compliance? This whitepaper summarizes the background of the current decision.

What was the judgment of the ECJ about?

The judgment of the ECJ (Ref.C-673/17) concerning Planet49 GmbH ./ Bundesverband der Verbraucherverbände sets forth (in simple terms) which cookies and other tracking mechanisms require consent-and how this consent must be obtained.

In this case, the ECJ interpreted a provision of the European ePrivacy Directive (also known as the Cookie Directive), but the decision has

important implications for the interpretation of the General Data Protection Regulation (GDPR). For legal laymen, the interaction of these regulations is hardly comprehensible. Therefore, in this paper, we do not want to deal with academic issues or interpretations of legalese, but rather summarize what we (at Finch) see as the crucial, practical implications of the verdict.

The ECJ made the following key statements in the decision:

- Cookies and other tracking mechanisms may only be used with prior consent of the website user.
- Regardless of whether you collect personal, indirectly personal (e.g. pseudonymized), or statistical data, you must obtain prior consent.
- Exceptions apply only to cookies which are absolutely necessary for the operation of the website or the service (e.g. session or shopping cart cookies).
- User consent must be given by an active opt-in. Opt-out solutions such as pre-marked fields or mere "surfing" are no longer enough. Thus, the days of the previously common "Cookie Banner" are about to end.
- Website users must be provided with certain mandatory information before submitting consent. This information includes the duration of the cookie.

Our Recommendation

Most websites use cookies and other tracking mechanisms. These include services such as Matomo (Piwik), Google Tag Manager, Google DoubleClick, Google Dynamic Remarketing, as well as Google Analytics or Facebook Custom

Audiences. If your website uses any of these resources, it is essential that you implement a Consent Tool. The most important requirements for a Consent Tool are summarized in our checklist, below.



Checklist for Implementation of Consent Tools

- ✓ The Consent Tool is set up in such a way that the cookies are not saved on the user's device until a user gives consent.
- ✓ The Consent Tool provides the user with the following information (at a minimum) before the user submits consent:
 - ✓ A clear, direct heading that is not intentionally misleading in any way (e.g. "By consenting, you acknowledge will may pass on your user data to third parties").
 - ✓ The subject of the consent being given; for example:
 - ✓ Which sets of personal data are affected
 - ✓ What happens to the data after collection
 - ✓ Who has access to the data
 - ✓ Whether the user's personal data will be linked to other data
 - ✓ The purpose the data collection serves
 - ✓ The duration of the cookies
 - ✓ A statement that consent is voluntary and/or can be revoked at any time.
 - ✓ An explanation of the cancellation policy.
- ✓ The consent is not pre-set. The user must give active consent ("opt-in"). However, there is still uncertainty about the details of "active consent." For example, although it is clear that merely clicking away a consent window does not sufficiently indicate consent, it remains undetermined the extent to which one can design their web-based consent process to encourage (or "nudge") the user to give active consent.



Which tools can I use?

The following is provided for information purposes only. **FINCH** is not affiliated with these providers and does not endorse or vouch for their products and services.

Currently, you can work with a provider who offers the use of Consent Tools. The following three providers offer services and tools that they claim you can use to become legally compliant.

- [Borlabs](#) - (*paid service*) – Borlabs is configurable and offers “nudging”. It may be the right tool for online stores and websites that rely on strong tracking capabilities. Borlabs claims that its service can reduce the risk of warnings and can be configured to be tracking-friendly.
- [Usercentrix](#) - (*paid service*) – This offering appears very similar to Borlabs. Usercentrix may be easier to set up and use.
- [Cookiebot](#) - (*free basic version*) – Very configurable and can be set up quickly because it recognizes cookies. Compared to the other two tools, it’s not particularly tracking-friendly. Depending on the configuration, Cookiebot may be a good tool for private websites or legal and/or medical websites (or other similar sites) that do not rely on tracking. This tool offers low costs and a simple set up.

Conclusion

There is no doubt that the GDPR (in general) and the recent ECJ ruling on Cookie Banners and consent requirements can affect conversions on a website. Expect bounce rates to increase and conversion rates to decrease. Website operators must face with the question of how to reconcile the legal requirements of data protection with the business requirements of a functional, successful website.



Of course, you do not want to run the risk of receiving warnings, paying fines, or worse. Website operators are, therefore, caught between concerns of user confidence, risk minimization, and conversion optimization--which has to be recaptured in accordance with the current state of the legislation.

Because this is a new and developing topic, we advise you to discuss this topic with an attorney to obtain competent legal advice.

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