

## Information note - CJEU and AEPD issue new guidelines on the use of cookies

Madrid, October 14<sup>th</sup>, 2019

Over the last few weeks, a judgment of the Court of Justice of the European Union ("CJEU" or "Court") has been published, as well as several resolutions of the Spanish Data Protection Agency ("AEPD") interpreting current legislation on cookies and establishing some common criteria.



### **Considerations of the CJEU**

On 1 October, the CJEU delivered [a judgement in case C-673/17<sup>1</sup>](#) in response to a request for a preliminary ruling from the Bundesgerichtshof of Germany (Supreme Court for Civil and Criminal Matters). The judgment analyses (i) the validity of the consent given to participate in a promotional game for the processing of participants' personal data, including the installation of cookies on their devices, and (ii) the information to be provided to the user in such situations.

The Court states that it is not possible to objectively determine whether the user has effectively given consent by not removing a mark from a box. That is to say, **the user's behaviour must be**

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<sup>1</sup> CJEU case:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=C9DBCDF021B29489166B86367C5D43CC?text=&docid=218462&pageIndex=0&doclang=es&mode=req&dir=&occ=first&part=1&cid=1458896>



**"active and not passive" and cannot be presumed, but must derive from the user's active behaviour.** In addition, consent must be given separately and specifically, so that ticking a box by which the user agrees to participate in a game is not sufficient to consider that the user has consented to the installation of cookies.

In this sense, the CJEU understands the full applicability of the General Data Protection Regulation and, therefore, the **invalidity of the consent given through pre-checked boxes** is even more evident as it does not imply a positive action.

In addition, the Court finds that the need to obtain the user's consent for the installation of cookies is necessary regardless of whether or not it is personal data, in accordance with the provisions of Directive 2002/58.

On the other hand, with regard to the information to be provided to the user, it must be clear and complete. For this reason, the CJEU understands that, amongst the rest of mandatory requirements, **information must be provided on the duration of the operation of the cookies, as well as the possibility for third parties to access the information.**

#### **Criteria established by the AEPD**

For its part, the AEPD has published several resolutions<sup>2</sup> that define certain criteria on how prior and informed consent should be obtained for the installation of cookies. The following is a summary of the most relevant common aspects of the different scenarios:

##### **a. Information to be provided in the first layer:**

- Identification of the responsible editor.
- Indication on whether the website uses first- or third-party cookies.
- Cookies' purposes.
- The way in which the user can give consent or reject the installation of cookies and configure their use, advising, where appropriate, that if a certain action is taken, it will be understood that the user accepts their use.
- Existence of the right to revoke consent.

##### **b. Granularity of consent.** The user should be informed on how to configure cookies (i.e., enable or disable them). In this sense, a mechanism must be included to (i) disable all cookies, (ii) enable all cookies, and (iii) enable or reject them by type.

Likewise, it is considered insufficient to only inform on the cookie settings provided by web browsers.

##### **c. Consent prior to installation.** Cookies may not be installed before the necessary information has been provided to the user, as well as consent.

##### **d. Retention period.** The retention period for the purposes for which the cookies will be used shall be indicated.

##### **e. Third-party cookies.** If it is not possible to reject the installation of third-party cookies through the offered configuration system, the user must be informed of this circumstance and of the way in which it can be set up from the web browser or the third party's page.

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<sup>2</sup> AEPD resolutions: [https://www.aepd.es/resoluciones/A-00010-2019\\_ORI.pdf](https://www.aepd.es/resoluciones/A-00010-2019_ORI.pdf); [https://www.aepd.es/resoluciones/A-00014-2019\\_ORI.pdf](https://www.aepd.es/resoluciones/A-00014-2019_ORI.pdf); [https://www.aepd.es/resoluciones/A-00022-2019\\_ORI.pdf](https://www.aepd.es/resoluciones/A-00022-2019_ORI.pdf); [https://www.aepd.es/resoluciones/A-00023-2019\\_ORI.pdf](https://www.aepd.es/resoluciones/A-00023-2019_ORI.pdf); [https://www.aepd.es/resoluciones/A-00019-2019\\_ORI.pdf](https://www.aepd.es/resoluciones/A-00019-2019_ORI.pdf)



- f. **Ease of rejecting cookies.** The mechanism for rejecting cookies should allow the user to reject them as easily as they may be accepted. For example, the "Accept and continue browsing" button is invalid, as it includes two actions that are incompatible with each other and does not allow the installation of cookies to be rejected.

We remain at your disposal for any additional queries.

Kind regards.

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