

Bundesverband der Verbraucherzentralen und Verbraucherverbände v. Planet49: “C” Is for Cookie (and Consent)

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I. OVERVIEW

Planet49, a German company, organized a promotional lottery for Internet users in 2013.¹ In order to participate, users had to input their names and addresses into a blank field.² In addition to this information, the page contained explanatory text along with two checkboxes.³ The first checkbox, which did not contain a pre-selected tick, allowed users to agree to be contacted by different sponsors.⁴ The second checkbox, which did contain a pre-selected tick, allowed for Planet49 to place tracking cookies on the user’s device.⁵ This granted Planet49 the right to collect and store user information in order to provide the user with targeted advertising.⁶ Participation in the lottery was contingent on the user ticking only the first checkbox.⁷

The Bundesverband der Verbraucherzentralen (Federation of German Consumer Organizations, the “Bundesverband”) issued a warning notice to Planet49 regarding this practice.⁸ The notice informed Planet49 that the terms of the promotional lottery did not satisfy the consent requirements set forth in the German Civil Code.⁹ Planet49 did not comply with the warning notice, and the Bundesverband consequently instituted proceedings before a regional court in Frankfurt.¹⁰ The court

1. Case C-673/17, Bundesverband der Verbraucherzentralen und Verbraucherverbände v. Planet49, ¶ 2 (Oct. 1, 2019), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=11727E6B93FE94FA54C291E89F6EE04E?text=&docid=218462&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2651096>.

2. *Id.* ¶ 26.

3. *Id.*

4. *Id.*

5. *Id.* ¶ 27.

6. *Id.* ¶ 30.

7. *Id.* ¶ 28.

8. *Id.* ¶ 32.

9. *Id.*

10. *Id.* ¶ 33.

found merit in some of the claims and dismissed the rest.¹¹ Planet49 appealed to a higher regional court, which found that an injunction ordering Planet49 to refrain from using pre-checked boxes in their lottery was not necessary.¹² The Bundesverband subsequently appealed to the Bundesgerichtshof (Federal Court of Justice), which referred the noted case to the Court of Justice of the European Union (CJEU) in order to analyze the issues in the context of European Union data protection laws.¹³

The CJEU sought to answer whether the use of a pre-checked checkbox provides valid consent, allowing Planet49 to store or access a user's information.¹⁴ Furthermore, the court looked to what specific information service providers have to give to the user in order to provide clear and comprehensive information.¹⁵ The court also considered whether it made a difference if the information stored or accessed is personal data.¹⁶ The Court of Justice of the European Union *held* that there is no valid consent to the storage of, or access to, the user's data when a provider obtains consent by means of a pre-checked checkbox because the user must deselect in order to refuse consent. Case C-673/17, *Bundesverband der Verbraucherzentralen und Verbraucherverbände v. Planet49* (Oct. 1, 2019), <http://curia.europa.eu>.

II. BACKGROUND

EU citizens are entitled to the protection of privacy and personal data as a fundamental human right.¹⁷ In fact, the CJEU has held that data protection laws must be interpreted in light of fundamental rights guaranteed by the Charter.¹⁸ Legislation elaborating on the details and scope of this protection has evolved over the past decades, originating with

11. *Id.* ¶ 34.

12. *Id.* ¶ 35.

13. *Id.* ¶ 37.

14. *Id.*

15. *Id.*

16. *Id.*

17. Charter of Fundamental Rights of the European Union (EU Charter) arts. 7, 8, 2012 O.J. (C 326) 391, <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>, archived at <http://perma.cc/PJN3-A8MZ>.

18. Susanna Lindroos-Hovinheimo, *Who Controls Our Data? The Legal Reasoning of the European Court of Justice in Wirtschaftsakademie Schleswig-Holstein and Tietosuojavaltuutettu v. Jehovan todistajat*, 28 INFO. & COMM. TECH. L. 225, 226 (2019). Lindroos-Hovinheimo notes the following cases: *Österreichischer Rundfunk & Others* (C-465/00, C-138/01 and C-139/01, EU:C:2003:294, ¶ 68); *Case C-131/12, Google Spain v. Agencia Española de Protección de Datos*, ECLI:EU:C:2014:317, ¶ 68 (May 13, 2014); *Case C-212/13, Rynes v. Úřad Pro Ochranu Osobních Údajů*, ECLI:EU:C:2014:2428, ¶ 29 (July 10, 2014).

the Data Protection Directive of 1995 (Directive 95/46).¹⁹ In 2016, the General Data Protection Regulation (GDPR) provided an update to data privacy law.²⁰ This regulation, together with the Privacy and Electronic Communications (ePrivacy Directive),²¹ make up the bulk of the data protection legal framework today.²²

The 1995 Directive articulated the EU’s first data protection rules.²³ The main objective was to provide safeguards for the processing of personal information.²⁴ The Directive required users to give explicit consent in order for their personal data to be processed.²⁵ Personal data is defined broadly, and it includes information such as an individual’s address, credit card information, and criminal record.²⁶

Globalization and technological advancements since the 1990s facilitated the need to update the original Directive.²⁷ In January 2012, the European Commission announced plans to reform the directive with goals of strengthening online privacy rights, supporting the European digital economy, and streamlining the implementation of the rules across all EU Member States.²⁸ The GDPR was thus created with the aim of protecting citizens from privacy and data breaches in today’s data-driven world.²⁹ The GDPR effectively entered into force on May 24, 2016, and began to apply on May 6, 2018.³⁰ The regulation, as opposed to a directive, is

19. Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN>, archived at <http://perma.cc/DW3S-KL29>.

20. Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (GDPR), art. 4 (1), 2016 O.J. (L 119) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>, archived at <http://perma.cc/UWW3-KFMH>.

21. Directive 2002/58, of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications) (ePrivacy Directive), 2002 O.J. (L 201) 37, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0058&from=en>, archived at <http://perma.cc/LCQ4-LCJR>.

22. LIBRARY OF CONG., ONLINE PRIVACY LAW: EUROPEAN UNION (2018).

23. Directive 95/46, *supra* note 19, art 1.

24. *Id.* arts. 7, 10.

25. *Id.*

26. *Id.* art. 2.

27. LIBRARY OF CONG., *supra* note 22.

28. *Id.*

29. *Id.*

30. *Id.*

binding on all EU Member States.³¹ While many of the general principles remained the same, various new regulatory policies were adapted into GDPR.³² The seven key principles behind the GDPR are lawfulness, fairness and transparency; purpose limitation; data minimization; accuracy; storage limitation; integrity and confidentiality; and accountability.³³

Article 4 of the GDPR provides several definitions that are critical to understanding the scope of data protection legislation.³⁴ Notably, consent means “any freely given, specific, informed and unambiguous indication of the data subject's wishes,” and personal data means “any information relating to an identified or identifiable natural person (‘data subject’).”³⁵ In addition to the data subjects who provide the personal data, a controller is the person or body that determines the purposes and means of processing said data, and a processor processes the personal data on behalf of the controller.³⁶ Furthermore, tracking devices such as cookies should only be used when intended for a legitimate purpose.³⁷

The GDPR departs from the original directive in several key ways in order to strengthen data protection.³⁸ There is an increased territorial scope, as the GDPR applies to all companies processing the data of EU residents, whether or not the company is located within the European Union.³⁹ Previously, the jurisdiction was ambiguous, which led to conflicts in the application of the data privacy laws.⁴⁰ Additionally, there are now penalties of up to 4% of annual global turnover or €20 million for GDPR violations.⁴¹ The GDPR Commission also elaborated on the conditions for consent, requiring that consent “must be clear and distinguishable from other matters and provided in an intelligible and easily accessible form, using clear and plain language.”⁴² Lastly, the GDPR expanded data subject

31. See *Regulations, Directives and Other Acts*, EUROPA, https://europa.eu/european-union/eu-law/legal-acts_en (last visited Mar. 18, 2020).

32. LIBRARY OF CONG., *supra* note 22.

33. INFO. COMM’R’S OFFICE, GUIDE TO THE GENERAL DATA PROTECTION REGULATION (GDPR) 17 (May 22, 2019), <https://ico.org.uk/media/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr-1-0.pdf>.

34. Regulation 2016/679, *supra* note 20, art. 4.

35. *Id.*

36. *Id.*

37. Directive 2002/58, *supra* note 21, recitals 24 & 25.

38. LIBRARY OF CONG., *supra* note 22.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

rights through the enactment of a number of different regulations.⁴³ These include the “right of information and access, the right to data portability, the right to rectification, the right to erasure (right to be forgotten), the right to restriction, and several rights to object to data processing.”⁴⁴ For example, the right to access says that data subjects have the right to obtain information regarding what personal data is being processed and for what purpose.⁴⁵

While the GDPR seeks to elaborate on and streamline the existing privacy laws, much remains up for interpretation.⁴⁶ For example, the Regulation states that “companies must provide a reasonable level of protection for personal data, but does not define what constitutes reasonable.”⁴⁷ In addition to looking at the text of the legislation itself, courts can also refer to the recitals, which elaborate on the reasons behind the adaptation of the GDPR.⁴⁸ Since the GDPR’s enforcement in 2018, there have also been several significant judgments that shine light on the court’s interpretation of data protection law.⁴⁹ In general, it is apparent that the court has been developing the law in favor of ensuring the complete protection of individuals’ rights.⁵⁰

The European Court of Justice’s (ECJ) judgments in *Jehovan todistajat* and *Wirtschaftsakademie* are relevant to the future application of data protection law, even though they utilize Directive 95/46.⁵¹ Both cases deal with the interpretation of Directive definitions, and both give weight to the notion that the court supports a rigorous protection of individuals’ privacy when it comes to personal data.⁵² *Wirtschaftsakademie* concerned the processing of personal data on Facebook fan pages.⁵³

43. *Id.*

44. *Id.*

45. *Id.*

46. Michael Nadeau, *General Data Protection Regulation (GDPR): What You Need to Know to Stay Compliant*, CSO ONLINE (May 29, 2019), <https://www.csoonline.com/article/3202771/general-data-protection-regulation-gdpr-requirements-deadlines-and-facts.html>.

47. *Id.*

48. *See Recitals*, INTERSOFT CONSULTING (Apr. 27, 2016), <https://gdpr-info.eu/recitals/>.

49. *See, e.g.*, Case C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein* (June 5, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0210>; Case C-25/17, *Tietosuojavaltuutettu v Jehovan todistajat—uskonnollinen yhdyskunta* (July 10, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1557832755134&uri=CELEX:62017CJ0025>.

50. Lindroos-Hovinheimo, *supra* note 18, at 232.

51. *Id.* at 228.

52. *Id.* at 234.

53. *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein*, ECLI:EU:C:2018:388, ¶ 18 (June 5, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0210>.

Neither the company's Facebook page nor Facebook itself informed users that personal data would be processed by means of cookies.⁵⁴ The Advocate General, in his opinion, argued that both Facebook and Wirtschaftsakademie were responsible for the protection of data, and that both were classified as controllers under the Directive.⁵⁵ The Advocate General went on to clarify that favoring a broad definition of "controller" was important to ensure a thorough protection of data subjects.⁵⁶ In its judgment, the court considered a complete protection of individuals' rights and reached the same conclusions regarding Facebook and Wirtschaftsakademie's joint responsibility.⁵⁷

The Grand Chamber further discussed the scope of data protection in the 2018 case *Tietosuojavaltuutettu v. Jehovan todistajat*.⁵⁸ In that case, the national Data Protection Supervisor of Finland initiated proceedings against the Jehovah's Witness Community for collecting and storing data from individuals while preaching door-to-door.⁵⁹ The court held that the Jehovah's Witness Community could be considered a controller, and that the activity of preaching door-to-door must comply with EU law on the protection of personal data.⁶⁰ The court did not give weight to the fact that the defendant was a religious community, and ultimately this decision further reinforced broad definitions for Directive terms and a wide scope of data protection.⁶¹

III. COURT'S DECISION

In the noted case, the CJEU relied on European Union Directive 95/46 and Regulation 2016/679, as well as Directive 2002/58 as amended by Directive 2009/136 to establish the meaning of valid consent.⁶² The court largely followed the earlier opinion of the Advocate General in the

54. *Id.* ¶ 16.

55. Case C-210/16, Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein, ECLI:EU:C:2017:796, ¶ 42 (Oct. 24, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1557832820808&uri=CELEX:62016CC0210>.

56. *Id.* ¶ 45.

57. *Id.* ¶ 39.

58. Case C-25/17, *Tietosuojavaltuutettu v. Jehovan todistajat—uskonnollinen yhdyskunta*, ECLI:EU:C:2018:551 (July 10, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1557832755134&uri=CELEX:62017CJ0025>.

59. *Id.* ¶ 2.

60. *Id.* ¶ 75.

61. Lindroos-Hovinheimo, *supra* note 18, at 237.

62. Case C-673/17, Bundesverband der Verbraucherzentralen und Verbraucherverbände v. Planet49, ¶¶ 38, 42 (Oct. 1, 2019), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=11727E6B93FE94FA54C291E89F6EE04E?text=&docid=218462&pageIndex=0&doclang=en&mode=lst&diir=&occ=first&part=1&cid=2651096>.

reasoning of its decision.⁶³ First, the court found that freely given and informed consent must be active, and that demanding a user to actively object to the processing of their data violates this requirement.⁶⁴ Second, the court determined that it does not matter whether the user information stored or accessed by the provider constitutes personal data or other data.⁶⁵ Third, the court concluded that in order to provide clear and comprehensive information to the user, the provider must disclose the duration of the operation of the cookies as well as information on third-party access.⁶⁶

First, the court clarified the definition of active consent by tackling the main underlying issue of the sufficiency of the pre-checked checkbox in establishing consent.⁶⁷ The court reasoned that providing a clear definition is necessary for a uniform application of the law throughout the European Union.⁶⁸ Ultimately, a data subject must consent through “any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.”⁶⁹ The key to establishing freely given and informed consent is to remove any potential ambiguity, which can only be done through active, rather than passive, behavior.⁷⁰ Here, by presenting users with a pre-checked box, there was no way of knowing whether they actually comprehended and consented to the information being presented to them.⁷¹ As a result, it was impossible to remove ambiguity and establish freely given consent.⁷² Consequently, the court concluded that a pre-checked checkbox that must be deselected does not constitute valid consent to the storage of or access to user information.⁷³

The court then considered the nature of the information that is stored or accessed and ultimately determined that it does not matter whether the information constitutes personal data.⁷⁴ Personal data is defined under

63. See Case C-673/17, *Planet49 v. Bundesverband der Verbraucherzentralen und Verbraucherverbände* ¶ 114 (Mar. 21, 2019), <http://curia.europa.eu/juris/document/document.jsf?docid=212023&doclang=en>.

64. *Planet49*, ¶ 62 (Oct. 1, 2019).

65. *Id.* ¶ 71.

66. *Id.* ¶ 81.

67. *Id.* ¶ 44.

68. *Id.* ¶ 47.

69. Directive 95/46, *supra* note 19, art. 2(h).

70. *Planet49*, ¶ 52 (Oct. 1, 2019).

71. *Id.*

72. *Id.* ¶ 55.

73. *Id.* ¶ 65.

74. *Id.* ¶ 66.

Regulation 2016/679 as “any information relating to an identifiable natural person (‘data subject’).”⁷⁵ In the noted case, it was not disputed that the storage and accessing of data involved personal data.⁷⁶ However, the court still went on to clarify that pursuant to Directive 2002/58, all information has a privacy aspect to it, and therefore it does not matter whether the data accessed or stored is personal or not.⁷⁷ EU law aims to protect users from “interference with his or her private sphere, regardless of whether or not that interference involves personal data.”⁷⁸ Thus, Directive 95/46 and Regulation 2016/679 should not be interpreted differently when the information stored or accessed is personal data.⁷⁹

Lastly, the court addressed the scope of the requirement to provide users with clear and comprehensive information.⁸⁰ The average Internet user can be compared to the average consumer in terms of being able to make reasonably informed decisions.⁸¹ However, “the technical complexity of cookies, the asymmetrical information between provider and user and . . . the relative lack of knowledge of any internet user” support the assumption that “the average internet user cannot be expected to have a high level of knowledge of the operation of cookies.”⁸² Users should be provided with the identity of the controller and the purposes for which the data will be used.⁸³ Additionally, the court went on to state that clear and comprehensive information to users includes information on the duration of the operation of cookies as well as information on third-party access.⁸⁴ The duration of cookies is necessary in order to make an informed decision to consent or not.⁸⁵ In addition to the duration element, service providers should also inform users what types of data the cookies are processing.⁸⁶ Finally, the court stressed that in order to ensure “fair and transparent processing,” users should have been explicitly informed as to

75. Regulation 2016/679, *supra* note 20, art. 4 ¶ 1.

76. *Planet49*, ¶ 67 (Oct. 1, 2019).

77. *Id.* ¶ 71.

78. *Id.* ¶ 69.

79. *Id.* ¶ 71.

80. *Id.* ¶ 73.

81. *Id.* ¶ 74.

82. Case C-673/17, *Planet49 v. Bundesverband der Verbraucherzentralen und Verbraucherverbände*, ¶ 114 (Mar. 21, 2019), <http://curia.europa.eu>.

83. *Planet49*, ¶ 77 (Oct. 1, 2019).

84. *Id.* ¶ 75.

85. *Id.* ¶ 74.

86. *Id.*

whether third parties had access to their information, and if so, who those third parties were.⁸⁷

IV. ANALYSIS

In deciding the noted case, the CJEU continued the trend of strengthening protections for personal data under EU data protection law.⁸⁸ The judgment ultimately brought much needed clarity on the requirements for manifesting legitimate consent.⁸⁹ This decision is in line with the increased protections and specifications set forth in the GDPR.⁹⁰ In theory, this judgment implies that many websites will have to overhaul their cookie notices or risk large fines under the GDPR.⁹¹ The court’s ruling is certainly significant in light of the fact that the vast majority of websites’ cookie consent processes are either insignificant or manipulative.⁹² For example, 86% have a confirmation button that does not actually confirm anything, while only a third provide the user with information regarding why their data is being collected.⁹³ Thus, it is likely that many providers will have to change the way they do their cookie notifications in the near future.⁹⁴

The court’s conclusion regarding clear and comprehensive information will also likely have dramatic consequences for providers.⁹⁵ Currently, only around 20% of websites inform users of whom their data is being shared with.⁹⁶ In making sure that they are providing users with the correct information regarding the duration of tracking cookies, websites will also have to be careful to correctly configure their cookie

87. *Id.* ¶ 79.

88. See Case C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein* (June 5, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0210>; Case C-25/17, *Tietosuojavaltuutettu v. Jehovan todistajat—uskonnollinen yhdyskunta* (July 10, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1557832755134&uri=CELEX:62017CJ0025>.

89. Natasha Lomas, *Europe’s Top Court Says Active Consent Is Needed for Tracking Cookies*, TECHCRUNCH (Oct. 1, 2019), <https://techcrunch.com/2019/10/01/europes-top-court-says-active-consent-is-needed-for-tracking-cookies/>.

90. Regulation 2016/679, *supra* note 20, art. 4.

91. Lomas, *supra* note 89.

92. Emma Woollacott, *Pre-Checked Cookie Consent Invalid, EU Court Rules*, FORBES (Oct. 1, 2019), <https://www.forbes.com/sites/emmawoollacott/2019/10/01/pre-checked-cookie-consent-invalid-eu-court-rules/#4b0e57392049>.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

attributes.⁹⁷ This process, overall, will involve significant reform to the information that users receive.⁹⁸

That being said, the CJEU avoided answering other questions rooted in online consent.⁹⁹ While it is now confirmed that pre-checked checkboxes do not satisfy the elements of freely given and informed consent, there are still a number of ambiguous situations where it is unclear if the requirements are met.¹⁰⁰ The court concluded that it would be inappropriate for it to answer the question of whether consent can be freely given if it is needed as a prerequisite to the participation in a lottery.¹⁰¹ Similarly, the court neglected to discuss cookie walls.¹⁰² Other authorities, such as the Dutch data protection agency (DPA), have already chosen to address this topic.¹⁰³ The Dutch DPA concluded that a free choice must be offered to users; consent is not freely given if the user does not have a real choice.¹⁰⁴ As other data protection agencies continue to tackle these issues, cookie walls will remain a relevant concern.¹⁰⁵

Similarly, the court did not address the Advocate General's comments on separate consent.¹⁰⁶ In his earlier opinion, Advocate General Szpunar stated valid consent must also be separate, meaning, "The activity a user pursues on the internet (reading a webpage, participating in a lottery, watching a video, etc.) and the giving of consent cannot form part of the same act."¹⁰⁷ He relied on recital 32 of the GDPR to reach the conclusion that consent is not presumed to be freely given if it is of an ancillary nature

97. Lomas, *supra* note 89.

98. *Id.*

99. See Case C-673/17, Bundesverband der Verbraucherzentralen und Verbraucherverbände v. Planet49, ¶ 64 (Oct. 1, 2019), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=11727E6B93FE94FA54C291E89F6EE04E?text=&docid=218462&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2651096>.

100. See Nadeau, *supra* note 46.

101. Planet49, ¶ 64 (Oct. 1, 2019).

102. See Lomas, *supra* note 89. Cookie walls refer to a situation where a user must agree to provide access to their data in order to utilize the website. *Id.*

103. *Websites Must Remain Accessible When Refusing Tracking Cookies*, DUTCH DATA PROTECTION AUTHORITY (Mar. 7, 2019), <https://autoriteitpersoonsgegevens.nl/nl/nieuws/websites-moeten-toegankelijk-blijven-bij-weigeren-tracking-cookies>.

104. *Id.*

105. See, e.g., *No Consent, No Cookie! CJEU Issues Far-Reaching Decision on Cookie Consent*, MONDAQ (Oct. 14, 2019), <http://www.mondaq.com/unitedstates/x/853708/data+protection/No+Consent+No+Cookie+CJEU+Issues+FarReaching+Decision+on+Cookie+Consent>. German and French DPA guidelines consider cookie walls to be noncompliant with GDPR, while the British Information Commissioner's Office only says that consent obtained via cookie wall is unlikely to be valid. *Id.*

106. Case C-673/17, Planet49 v. Bundesverband der Verbraucherzentralen und Verbraucherverbände, ¶ 114 (Mar. 21, 2019), <http://curia.europa.eu>.

107. *Id.*

to the participation in a lottery.¹⁰⁸ The court, however, remained silent on this issue aside from a brief comment that consent “cannot be inferred from an indication of the data subject’s wishes for other purposes.”¹⁰⁹ Instead, the court focused mainly on the idea of active consent.¹¹⁰

It is likely that the court’s decision in the noted case will also have an impact on the ongoing ePrivacy reform.¹¹¹ European legislators have been trying to update the ePrivacy Directive with an ePrivacy Regulation for years.¹¹² The ePrivacy Regulation would repeal Directive 2002/58 and would be aligned with the modernized policies set forth in the GDPR.¹¹³ However, there is much debate about online tracking and consent, and many lobbying groups in the technology sector have pushed against firmer consent requirements.¹¹⁴ By providing clarity that freely given and informed consent is required to store and access cookies, the CJEU set forth a firm legal line that will be hard for legislators to ignore.¹¹⁵

V. CONCLUSION

Data privacy is a field of law that is rapidly evolving as a result of continuous advancements in technology. The CJEU’s application of the GDPR in the noted case supports an extension of personal data protection through EU law. A website that is using pre-checked boxes to obtain consent is not complying with the Regulation, and the Regulation now explicitly calls for active consent.¹¹⁶ For purposes of consent, it is not relevant whether the information being accessed or stored is personal data.¹¹⁷ Additionally, providers now have to give data subjects more information about their cookie process. Specifically, they must disclose the duration of the cookies, and whether personal information is being

108. *Id.* ¶ 66.

109. Case C-673/17, Bundesverband der Verbraucherzentralen und Verbraucherverbände v. Planet49, ¶ 58 (Oct. 1, 2019), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=11727E6B93FE94FA54C291E89F6EE04E?text=&docid=218462&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2651096>.

110. *Id.* ¶¶ 44-63.

111. Lomas, *supra* note 89.

112. *Proposal for an EPrivacy Regulation*, EUROPA (June 19, 2019), <https://ec.europa.eu/digital-single-market/en/proposal-eprivacy-regulation>.

113. *Id.*

114. Lomas, *supra* note 89.

115. *Id.*

116. Case C-673/17, Bundesverband der Verbraucherzentralen und Verbraucherverbände v. Planet49, ¶ 62 (Oct. 1, 2019), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=11727E6B93FE94FA54C291E89F6EE04E?text=&docid=218462&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2651096>.

117. *Id.* ¶ 71.

shared with third parties.¹¹⁸ It is likely that this decision will have important and consequential ramifications for a number of different data providers across the European Union who will be forced to modify their cookie process or face large fines.¹¹⁹ However, data protection remains an intricate field of law, and the interpretation of the GDPR will almost certainly keep evolving in the future.

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118. *Id.* ¶ 81.

119. Lomas, *supra* note 89.

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