

EU Data Privacy Working Party Clarifies Cookie Requirements



Jan Dhont

Partner
Lorenz
Brussels, Belgium
j.dhont@lorenz-law.com



Valérie Vandenweghe

Associate
Lorenz
Brussels, Belgium
v.vandenweghe@lorenz-law.com

In the European Union, the default regime for placing cookies on individuals' end user equipment, such as hard-drives or smartphones, is to provide clear notice and obtain the prior consent of individuals (Directive 2002/58/EC, Article 5.3). An exception exists for cookies which are (i) strictly necessary to provide an information society service explicitly requested by the user (i.e. user-input cookies, authentication cookies, user centric security cookies, multimedia player session cookies, language preference cookies and result display preference cookies) and (ii) necessary to carry out communication over the network (i.e. load balancing session cookies).

The implementation of the consent requirement varied to a substantial degree throughout the European Union. In addition, websites and platform providers use different types of consent mechanisms, varying from tacit consent to more implicit systems. Therefore, the Article 29 Working Party (hereinafter: "Working Party") recently issued practical guidance to harmonize the regimes.

According to the guidance, the following elements must be taken into account when acquiring consent for cookies: (i) specific information, (ii) prior consent, (iii) active behavior and (iv) freely given. We have summarized the requirements as set forth in the Working Party's guidance below.

Specific Notice

At the moment the consent is sought (in practice, on the entry page of a browsing session), a clear and visible notice on the use of cookies must be provided, including a link where the user can find more information about the following:

- categories and purpose of the cookies (including information on third party cookies or third party access to data collected by cookies);
- retention period of the cookies;
- information on how to accept all cookies, some cookies or no cookies; and
- information on how to change cookie preferences in the future.

In practice, this information can easily be provided by providing a link to a dedicated cookie policy in the notice on the entry page of the browsing session.

Timing

Before cookies are set or read, opt-in consent must be sought. Thus, the consent mechanism itself may not set cookies before the user has signified its wishes regarding cookies (except for the aforementioned cookies that are exempted from the consent requirement).

Active Behavior May Constitute Consent

The Working Party leaves the methodology to obtain consent open to providers. Different ways are possible, such as pop-up screens, banners, splash screens and, in very limited circumstances, a website browser - on the condition that the website operator knows that the user has been fully informed and actively configured its browser.

The user's consent can be based on: (i) a positive action, such as clicking on a button or ticking a box close to the location where information is presented or (ii) other active behavior which clearly indicates that consent has been given. The action must be based on a traceable user-client request vis-à-vis the website. This means that the website operator must be able to prove that the user opted-in to cookies (e.g. logs registering that the user clicked on a link).

Explicit consent, although preferred, is not required according to the Working Party; consent can also be deduced from other actions that signify consent. In our view, such actions can be, for instance, clicking on website links or leaving personal details on a site. In such case, it is required that the user has been fully informed of the fact that these actions represent consent. On the contrary, clicking on a link "*more information on cookies?*" does, according to the Working Party, not constitute sufficient opt-in consent as the user only requested for more information.

It is still grey zone whether scrolling down website page(s) can be considered active behavior. According to the Working Party, absence of any behavior cannot be regarded as valid consent; however, in our view, if it is possible to prove that the user has scrolled down, this could also be considered active behavior. As cookies may not be installed before such actions have taken place (except for the aforementioned exempted cookies) the traceable user-client request may present technical challenges.

Freely Given Consent

The user must be able to freely choose to accept all or some cookies or to decline all or some cookies (except for cookies that are exempted from obtaining consent such as functional cookies). Therefore, we recommend grouping the cookies into main categories which the user can accept or decline (e.g. analytical cookies and social media cookies). The user must also be able to change its cookie settings at any time in the future. In practice, every webpage should contain a link to the cookie policy (similar to the link to the terms and conditions or a separate privacy policy) with, amongst others, more information on how to change the cookie settings.

According to the Working Party, general access to the website may not be conditional on acceptance of all cookies. It is however legitimate to limit access to specific website functionalities if the user does not consent to cookies, however, these functionalities may not be the main purpose of the website. For example, access to a web-shop on an e-commerce website cannot be refused on the basis of not having accepted any cookies.

The full text of the Working Document is available at ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp208_en.pdf.