

**TECHNOLOGY AND PRIVACY**

Cookies – European Court decision provides useful guidance

Cookies are a topic that creates a major headache for companies, because there has been no clear guidance on the requirements applicable to the consent that must be given by users.

In Portugal, the CNPD (Portuguese National Data Protection Commission) has never issued guidelines on this subject. In other EU Member States, there are several sets of guidelines in force, and they often contradict each other. For this reason, we have been expecting specific guidelines from the courts on this issue.

This guidance has now been given in the Planet 49 judgment in Case no. C 673/17, published on 1 October 2019. In this case, the European Court of Justice (ECJ) ruled that the consent the user of an Internet site must provide for cookies to be placed on their equipment cannot be validly given through a pre-checked checkbox that the user has to deselect to refuse consent.

The case was brought by the federation of German consumer organisations against the German company Planet49. On 24 September 2013, the German company hosted an online promotional lottery on its website, which is central to understanding fully the opinion of the ECJ on cookies and consent.

In its judgment, the ECJ held that the service provider must explicitly provide the user with information on the duration of the operation of cookies and on whether or not third parties can access them. The ECJ found that it was not relevant whether the information provided is personal data or not within the meaning of Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

The judgment of the ECJ makes it clear that the consent must be specific and must be given actively, in other words, it cannot be given through a pre-checked box.

In conclusion, the judgment holds that the service provider must provide:

- Information on the duration of the operation of cookies;
- Information on whether or not it is possible for third parties to access these cookies;
- An active option for the user to validate their consent.

Following this judgment, companies that use cookies on their websites must rethink the way they collect the consent and check the mechanisms they have already implemented.