

EU Cookie Ruling Tightens Leash On Ad Tech Staple

By **Ben Kochman**

Law360 (October 9, 2019, 5:35 PM EDT) -- The online advertising industry was put on notice last week in an explicit warning from the European Court of Justice: get specific consent to track users with web cookies, or face potential enforcement action for flouting privacy rules.

Users presented with a pre-checked box authorizing cookies while they visit a website or carry out some other action, like signing up for a sweepstakes, cannot truly consent to tracking, the EU's top court found. Companies need to instead obtain "active" consent, the court wrote, meaning users need to be able to click separately on a button approving the tracking.

The decision stems from a case involving a relatively obscure German gaming company called Planet49, but its impact will be felt on the massive amount of websites that use tracking cookies — small pieces of data that websites can install on users' devices to monitor their browsing habits — to drive their business models.

Although Planet49's case predates the EU's General Data Protection Regulation, which took effect in May 2018, national regulators could easily apply the decision's logic to bring new cases under the GDPR, according to attorneys who spoke with Law360. That means companies that have dragged their feet on revamping their cookie notices now face the risk of being fined up to 4 percent of their annual revenue.

"We now have clear, unambiguous guidance about how you have to put in place a cookie banner," said Gretchen Scott, a London-based partner on Goodwin Procter LLP's cybersecurity and privacy team.

"All of the businesses that have just felt, 'Well, everyone else is doing it this way,' are going to have to rethink this," Scott added. "It will be very difficult for them to continue the way they have without taking a significant risk."

Websites use cookies for a variety of purposes, including saving a user's login information or the contents of a user's shopping basket. But the Court of Justice's decision focused on cookies that collect data in order to later connect users with the company's advertising partners.

Such cookie tracking is a staple of advertising technology. It's also come under increasing scrutiny from privacy watchdogs and regulators in recent years. Hanging over the Planet49 case was a looming question that the justices explicitly did not address: whether companies can demand that users agree to cookie tracking as a condition of using a website or service.

That practice, often referred to as a "cookie wall," is being debated by EU lawmakers in efforts to replace the bloc's current "e-privacy" directive with a more stringent regulation. The European Data Protection Board, a coalition of data privacy authorities from across the EU, has backed a ban on cookie walls, while some regulators, including the Dutch Data Protection Authority, have argued that the practice would not be GDPR-compliant.

"It's unfortunate that the court didn't address that point because it's commercially and politically a very sensitive topic, on which there is a lot of uncertainty right now, and it's a question that could have an important impact on the sector," said Kristof Van Quathem, of counsel in Covington & Burling LLP's Brussels office.

Still, last week's decision "imposes a consent requirement that is quite strict and that will require many companies to reassess the way they obtain consent today," he said.

On top of declaring pre-checked cookie tracking notices to be illegal, the EU court added that service providers also must provide users with information on how long cookies are operational and whether third parties can access them.

That portion of the decision was more surprising than the focus on pre-ticked boxes, which several EU national regulators had already cautioned companies against using, said Filip Sedefov, senior manager for privacy and data protection at the European branch of the Interactive Advertising Bureau, an ad tech industry trade group.

"The ruling itself is not surprising at all," said Sedefov. "Our transparency and consent framework already discourages the use of pre-ticked boxes, and the industry had indeed already been moving away from that sort of practice ahead of this judgment."

Regulators in the U.S. have also taken aim at websites' ability to track consumers across the web, to varying degrees. In May, Sen. Josh Hawley, R-Mo., introduced legislation that would create a national "Do Not Track" list under which consumers could opt out of having their browsing histories tracked for targeted-ad purposes.

The California Consumer Privacy Act, or CCPA, set to go on the books in January also requires platforms to notify consumers about what data they are collecting and with whom they are sharing that data, as well as allow users to opt out of that sharing.

"Guidance from individual EU member state data protection authorities have varied, and the landscape is rapidly changing in the U.S. with the pending effective date for CCPA," said Gary Kibel, a partner at Davis & Gilbert LLP who advises ad tech firms. "Compliance is therefore not one simple answer."

--Editing by Philip Shea.