

EUI **Poseidon's** core-business is to develop closer relations with EU citizens. The Unit entitled "Strengthening relations with EU citizens" intends to organise an on-line promotional quiz, in which participants may win a three-day trip in the EU Member State of their choice.

Internet users wishing to take part in the quiz are required to visit the website www.your-EUtrip.eu, and enter their name and address.

Beneath the input fields for the address are two sets of checkboxes.

Participation in the quiz - confirmed by clicking the 'participation' button at the bottom of the page - is possible only if at least the first checkbox is ticked.

Scenario A:

The **first checkbox** is **NOT** pre-ticked and it reads:



"I agree to certain [sponsors and cooperation partners](#) providing me with information by post, telephone or e-mail/SMS about offers from their respective commercial sectors. I can choose three sponsors and cooperation partners myself here; otherwise, the selection is made by the organiser. Further information about this can be found [here](#).

I can revoke this consent at any time."

When clicking on "[sponsors and cooperation partners](#)" and "[here](#)":



Participants are taken to a separate webpage containing a list of more than 60 sponsors and partners, their addresses, their commercial sector and the method of communication used for the advertising (e-mail, post or telephone).

There is a statement preceding the list of companies:

*By clicking on the “**Unsubscribe**” link, I decide that no advertising consent is to be granted to the partner/sponsor in question. If I have not unsubscribed from any or a sufficient number of partners/sponsors, **Poseidon** will choose partners/sponsors for me at its discretion”.*

The hyperlink “**Unsubscribe**” is available after the name of each company.

The **second checkbox is pre-ticked** and it reads:



*“I agree to the web analytics service **The Greathack** being used for me. This has the consequence that, following registration for the quiz, the quiz organiser, **Poseidon**, sets cookies, which enables **Poseidon** to evaluate my surfing and use behaviour on websites of advertising partners and thus enables advertising by **The Greathack** that is based on my interests. I can delete the cookies at any time. You can read more about this [here](#)”.*

When clicking on “[here](#)”, the following information is displayed:

'Cookies are small pieces of data that a website stores on the visitor's computer or mobile device. The cookies named quiz_trip_eu_ms_xccc are small files which are stored in an assigned manner on your hard disk by the browser you use and by means of which certain information is supplied which enables more user-friendly and effective advertising. The cookies contain a specific randomly generated number (ID), which is at the same time assigned to your registration data.

That ID will be shared with **The Greathack**. If you then visit the website of an advertising partner which is registered for **The Greathack** (to find out whether a registration exists, please consult the advertising partner's data protection declaration), **The Greathack** will use the ID to automatically build a profile based on the partner websites you visit, which products you have shown interest in, and whether a transaction was entered into.

Subsequently, Poseidon can arrange, based on the advertising consent given during registration for the quiz, for advertising emails to be sent to you which take account of your interests demonstrated on the advertising partner's website. After revoking the advertising consent, you will of course not receive any more email advertising.

The information communicated by these cookies is collected, stored and used separately for each advertising partner. User profiles involving multiple advertising partners will not be created under any circumstances. The individual advertising partners do not receive any personal data.

If you have no further interest in using the cookies you can delete via your browser at any time. You can find a guide to this effect in your browser's "help" function.

You of course have the option of revoking this consent at any time. You can do so in writing to Poseidon, Rue de la Mer 67, 13000 Marseille, France. However, an email to revocation@poseidon.europa.eu will also be sufficient.

Be aware that disabling cookies will affect the functionality of this website and many others that you visit. Disabling cookies will usually result in also disabling certain functionalities and features of this website. Therefore, it is recommended that you do not disable cookies.'

Scenario B:

Beneath the input fields for the address, there is a **checkbox** which is **NOT pre-ticked** with the following text:



“I agree to Poseidon processing my personal data necessary for organising the quiz and to certain sponsors and cooperation partners providing me with information by post, telephone or e-mail/SMS about offers from their respective commercial sectors.”

Once the participant is registered, the webpage leads them to the quiz, where the following information appears in a banner:

“This website uses first and third party cookies to enhance your experience. By **continue browsing** this website you consent to our use of cookies.”

You are the DPO of **Poseidon** and the Unit in charge of the project has some doubts about consent and cookies. They ask you the following questions:

- 1) In scenario A, does the consent obtained by **Poseidon** from quiz participants of the website www.your-EUtrip.eu through the second pre-ticked checkbox, constitute a valid consent?
- 2) In scenario B, does the consent obtained by **Poseidon** to use cookies and similar technologies constitute a valid consent?
- 3) Does it make a difference whether the information stored or accessed through the cookies constitutes personal data or not?
- 4) Does the service provider **The Greathack** have to inform the users when obtaining consent?
- 5) May third parties have access to those cookies? Should **The Greathack** inform the users about the access of third parties?

Poseidon - Your EU Trip - Win a Trip and Discover the EU

To strengthen the relations with the EU citizens, *Your EU Trip* invites you to participate in a quizz! Win a three-day trip in any one of the EU Member States of your choice.

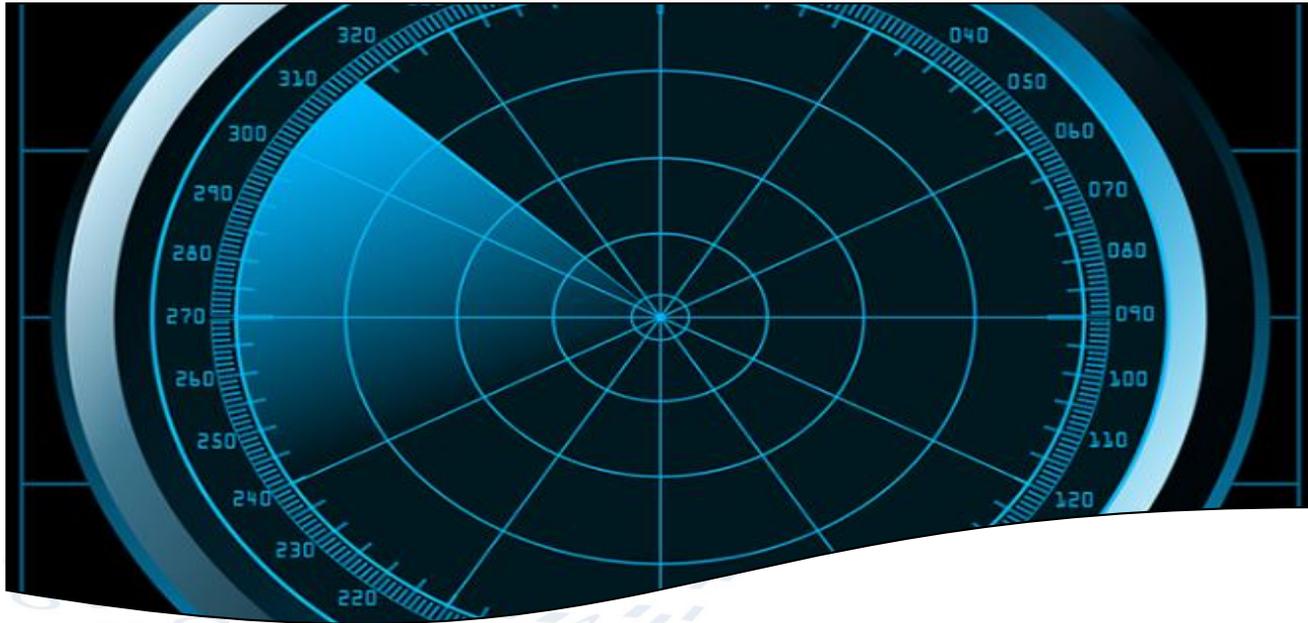
Your Name:

Your E-Mail:

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Find here further information.

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**EDPS- DPO Meeting, 7 November 2019
Planet49 analysis**

**Xanthi Kapsosideri & Petra Candellier
EDPS Supervision & Enforcement Unit**



Definition of consent

Art.2(h) Directive 95/46:

« the data subject's consent shall mean 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 »

Art.2(f) Directive 2002/58 (e-Privacy):

« consent by a user or subscriber corresponds to the data subject's consent in Directive 95/46 »

Art.4(11) Regulation 2016/679 (GDPR):

« consent should be given a **clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement** ...by a statement or by a clear affirmative action »

Recital 32 GDPR:

Consent should be given a **clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement** to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement...

Recital 43 GDPR:

In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a **clear imbalance** between the data subject and the controller, in particular where the **controller is a public authority and it is therefore unlikely that consent was freely given** in all the circumstances of that specific situation. **Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations ...**

Art.7(4) GDPR:

When assessing whether consent is **freely given**, **utmost account shall be taken** of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract

Q1: Do pre-ticked boxes amount to valid consent?

action is required, not passive behaviour (para 49,52,54)

consent may no longer be presumed (para 56)

e-Privacy Directive does not indicate the form of consent (para 49)

Informed indication of the users' wishes

recital 32 GDPR precludes « silence, pre-ticked boxes or inactivity » from constituting consent (para 62)

user may not have read the info or noticed that checkbox (para 55)

pre-selected checkbox does not imply active behaviour (para 52)



Do pre-ticked boxes amount to valid consent?

Adv. Gen. Szpunar:

i) Active consent

the user may or may not have read and digested the text

the user may have omitted to do so out of negligence

ii) Separate consent

the activity a user pursues on the internet and the giving of consent cannot form part of the same act

Both actions, must optically in particular, be presented on an equal footing

iii) Obligation to fully inform

a user must be in a position to assess to what extent they are prepared to give their data

no room for any ambiguity whatsoever



Do pre-ticked boxes amount to valid consent? (*Adv. Gen. Szpunar*)

Active consent: Recital 32 GDPR stricter than Art.2(h) Dir 95/46

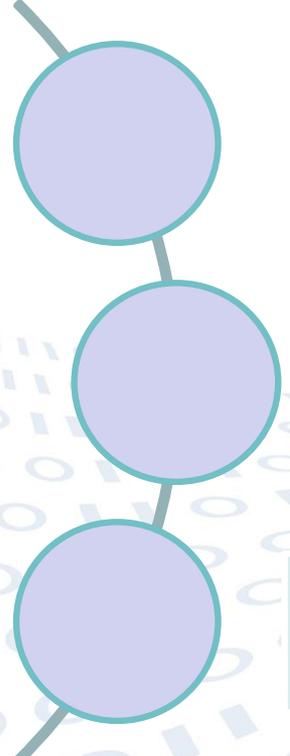
« **unambiguous indication and clear affirmative act** » (para 70)

Separate consent:

the need for separate consent is explicitly stressed in Recital 43
GDPR

(para 75)

The second, pre-ticked, checkbox (*Adv. Gen. Szpunar*)



Only addresses the requirement of **active**, not that of **separate consent**

Untick a box, becomes **active** if not **consenting to cookies**, but **not freely given** and **informed decision**

Two expressions of intention (quiz and cookies) cannot be both subject to the same participation button: must form a **separate act**

The first, unticked, checkbox (*Adv. Gen. Szpunar*)

Does not deal with cookies, only with the processing of personal data of **users**: they **agree** to be contacted **merely by a list of sponsors**

Not pre-ticked = active consent, BUT not enough for separate consent

Prohibition on consent bundling (Art.7(4) GDPR, but with exceptions:

- purpose of the quiz: sell personal data to sponsors
- Users provide personal data in order to participate to the quiz
 - The processing of this personal data is necessary for the participation in the quiz

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Poseidon - Your EU Trip - Win a Trip and Discover the EU Participate in the Quiz

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Do cookie data constitute personal data?

Cookies placed on the device of a user participating in the quiz organised by Poseidon, contain a number which is assigned to the registration data of that user, who must enter their name and address in the registration form for the quiz (para 45)

By linking that number with that data, a connection between a person to the data stored by the cookies amounts to a processing of personal data (para 45 & 67)



Do cookie data constitute personal data?

e-Privacy Directive (5(3)) refers to
« the **storing of information** » and
« gaining of **access to information already stored** »,
without specifying that it must be personal data (para 68)

not a prerequisite that this « information » is personal data (para 108, Adv. Gen.)

recitals 24 & 25 of e-Privacy Directive

Article 29 Working Party Opinion 2/2010 online behavioural advertising

Article 29 Working Party Opinion 2/2010 on apps on smart devices: « consent requirement of Art.5(3) applies to **any information without regard to the nature of the data being stored or accessed**. The scope is not limited to personal data; information can be any type of data stored on the device »

Aim of Article 5(3) of e-Privacy

protect the user from interference with their **private sphere** (para 69)

this **private sphere** includes any information stored on a users' device **regardless of** whether that interference involves **personal data or not** (para 107 Adv. Gen.)

protect users from the risk that hidden identifiers and other similar devices enter those users' terminal equipment without their knowledge (recital 24 of e-Privacy Directive) (para 70)



Does the Greathack have to inform the users?

Art.5(3) e-Privacy:
requires that the user has given their consent after having been provided with **clear and comprehensible information, inter alia about the purposes of the processing** (para 73)



Does the Greathack have to inform users?

(para 113, 114 Adv Gen)

conceptual proximity of an internet user (and provider) to that of a consumer (and trader)

assymetrical information between provider and user



Does the Greathack have to inform users?

(para 115 Adv Gen)

information **clearly
comprehensible
without ambiguity or
interpretation**



user should be able to easily **determine
the consequences** of any consent they
give on cookies



assess the **effects** of their actions

information **sufficiently
detailed**



enable user to
comprehend the **functioning** of
cookies actually resorted to

Does the Greathack have to inform users?

(para 78)

A long or even unlimited duration of a cookie means:

collection of a large amount of information on **users' surfing behaviour**

how often users **visit the websites** of Poseidon's advertising partners



Does the Greathack have to inform the users?

Information on the **duration of the operation of cookies** must be regarded as a requirement of **fair and transparent processing** (para 78 & 79)

The Greathack must consider the **lifespan of the cookie** and whether this lifespan is appropriate in light of the **cookie's purpose** (para 117 Adv.Gen)

The **duration** of the operation of cookies relates to the explicit informed consent requirements regarding the **quality and accessibility of information to users** (para 118 Adv.Gen)



May third parties have access to the cookies?

Information to be provided to users as part of recipients or categories of recipients of the data (para 80)

If third parties gain access to a cookie, users must be informed (para 119 Adv Gen)

A user should be explicitly informed whether third parties have access to cookies set or not

The fact that other third parties have no access, does not have to be pointed out separately if third parties have access, their identity should be disclosed



Key conclusions

- Pre-ticked checkboxes authorising the use of cookies and similar technologies do NOT constitute valid consent under the e-Privacy Directive
- Where consent is required for cookies under the e-Privacy Directive, recital 32 of GDPR standard of consent applies
- It does not matter whether the cookies constitute personal data or not – Art.5(3) of the e-Privacy Directive (the cookies consent rule) applies to any information installed or accessed from an individual's device
- Website operators must provide website users with information on the duration of the cookies, and whether third parties will have access to the cookies.

Conclusion

- ✓ ECJ's findings unsurprising, but a reminder that implied consent is dead
- ✓ Judgment to influence the ongoing reform of e-Privacy rules
- ✓ ECJ did not tackle the issue of « freely given », but pending « Orange Romania » case is expected to clarify this
- ✓ Adv Gen analysis and examples worth-reading



thank you!



Q? A!

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