



Trinity College Dublin

Coláiste na Tríonóide, Baile Átha Cliath

The University of Dublin

Cookies and RTB: what does the law say?

What is the Internet doing to me? TEU00311

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2024/2025

Contents

- **Intro to the legal framework**
- **Electronic confidentiality**
- **Case law**

THE GDPR + the E-PRIVACY DIRECTIVE (2002/58/EC) (EPD)

Irish Transposition:

Data Protection Act 2018

S.I. No. 336 of 2011 EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES) (PRIVACY AND ELECTRONIC COMMUNICATIONS) REGULATIONS 2011, 5th July, 2011.

<https://www.irishstatutebook.ie/eli/2011/si/336/>

Relationship between the GDPR and the EPD

Everyone has the right to *respect for* his or her private and family life, his home and communications
Art 7 EU Charter of Fundamental Rights (CFR)



EPD: 'Special provisions that particularise and complement GDPR (Art. 1.2) in the Telecom field'

- (4) Dir. 2002/58 repeals Dir. 97/66/EC, to face developments in the markets and technologies for e-communications services

Everyone has the right to the protection of personal data concerning him or her.
Art 8 EU Charter of Fundamental Rights (CFR)



GDPR: safeguards the right to the protection of personal data + rules on the processing of personal data



EPD: reconciling providers' interests with users' rights

LAST CALL Ireland hangs up on Eir phone book as the annual book of numbers will no longer be available due to dwindling demand

Sean McCarthy
3 May 2020, 20:12



A PHONE book won't be printed in Ireland anymore.

Regulators have decided Eir will no longer be required to produce the annual book of numbers due to dwindling demand.



Fewer than 2,400 copies of the phone book were ordered last year

Credit: Alamy Stock Photo



https://en.wikipedia.org/wiki/Landline#/media/File:Siemens_Furolset_805.jpg



Planet49
(C-673/17)

WWW & cookies (tracking)

Proximus
(C-129/21)

1997:
Directive
97/66/EC

2002: Directive
2002/58/EC
(repeals 97/66)

2009: amended
by 2009/136/EC

New
Regulation?
(Negotiations
suspended)

Real Time Bidding

Data Breaches

Google Ads

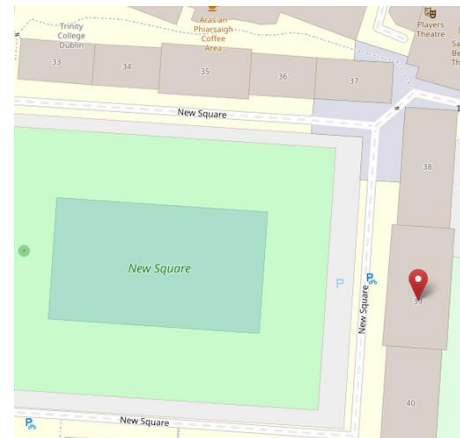
Online advertising platform owned by
Google



Some vocabulary (Articles 2 EPD, 2(1) Reg 2003)

Data/information

- **Communication:** any information exchanged or conveyed between a finite number of parties
 - Except broadcasting
 - N.B.: Personal data + other information
- **Location data:** the geographic position of **the terminal equipment** of a user of a publicly available e-communications service (Rec 14, art 9);
- **Traffic data:** data processed for conveyance of a communication on an e-communications network or for billing thereof (Rec 15, Art 6)



**Called +353 1 896 1000
at 4 PM for 5'20''**

More complex for TCP/IP

Who does the EPD deal with? (Articles 2-3 EPD)

Apply to «processing of personal data in connection with the provision of publicly available e-communications services in public communications networks» **in IE and where relevant EU**

Includes public communications networks supporting data collection and identification devices (EPD)

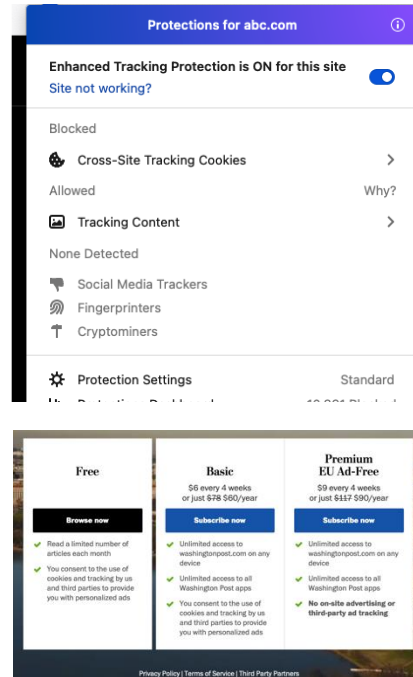
Information generated by user, who could be subscriber (undefined)

- **User:** any natural person using a publicly available e-communications service, for private or business purposes, without necessarily having subscribed to this service

Used by providers of publicly available e-communications networks & services

- Providers can collect / use location & traffic data

The principle of confidentiality and its exceptions



Customize your choice

On this page you can find more information about purposes of data processing and the vendors that we use on our websites.

Purpose

Technically essential On

Purpose: Technically essential

These cookies are essential to make it possible for you to navigate our websites and use their functions.

Function Off

Analysis Off

Marketing Off

Vendor

Cloudflare.com On

Facebook Off

Google Analytics Off

Google Maps Off

Google Recaptcha Off

Google TagManager On

YouTube Off

Examples of consent management platforms (CMPs)

Confidentiality: Article 5 (1) EPD

Recitals 21-24 EPD

Principle

- confidentiality of communications and related traffic data...through national law.
- **Reg 2011:** « the listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, is prohibited.»

Rec 24 EPD: «Terminal equipment ...part of the private sphere of the users So-called spyware, web bugs, hidden identifiers ...can enter the user's terminal without their knowledge in order to gain access to information...and **may seriously intrude upon the privacy of these users. The use ...should be allowed only** for legitimate purposes, **with the knowledge of the users concerned..**»



Source:
https://en.wikipedia.org/wiki/File:Cis_forcookie.jpg & licensing therein

Confidentiality: ...but Arts 5 (1)-(2) EPD...and

Recitals 21-26 EPD

Exception (EPD)

«when legally authorised to do so in accordance with Article 15(1)» *(not relevant here)*

Exception (EPD)

«authorised recording of communications ...in the course of lawful business practice for ... providing evidence of a commercial transaction» [Recs 21-3] *(not relevant here)*

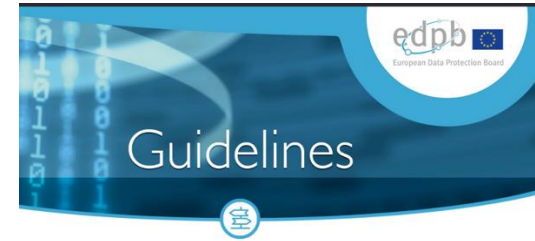


Source: <https://www.malte-spitz.de/your-phone-company-is-watching/>

...Article 5 (3) EPD (very relevant here)

Member States shall ensure that the **storing** of information, or the **gaining of access** to information already stored, in the **terminal equipment** of a **subscriber or user** is **only allowed** on condition that the subscriber or user concerned has given his or her **consent**, having been provided with clear and **comprehensive information**, in accordance with Directive 95/46/EC, inter alia, about the purposes of the processing.

This shall **not prevent** any **technical storage** [Rec 26 EPD] or **access** for the sole purpose of **carrying out the transmission** of a communication over an electronic communications network, **or as strictly necessary** in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service [Rec 25 EPD].



Guidelines 2/2023 on Technical Scope of Art. 5(3)
of ePrivacy Directive

Adopted on 14 November 2023

https://www.edpb.europa.eu/system/files/2023/11/edpb_guidelines_202302_technical_scope_t_53_eprivacydirective_en.pdf

Consent is defined in the GDPR (Articles 4 & 7)

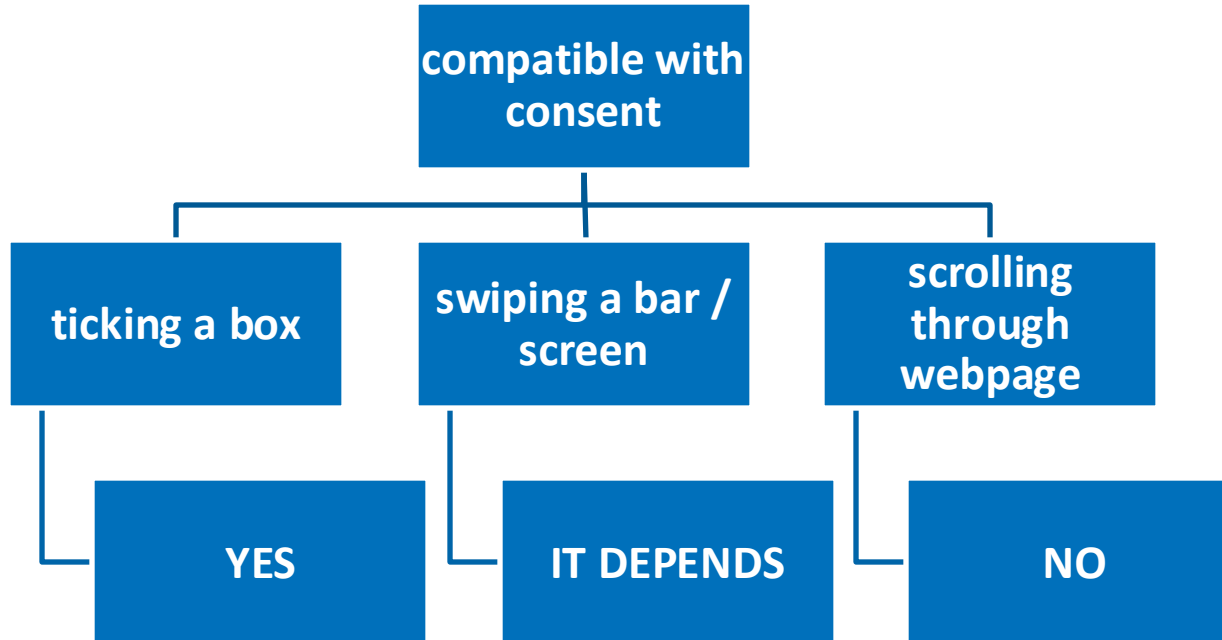
Consent: *freely given, specific, informed and unambiguous* (Art. 4.11). EDPB 05/2020

Art 7:

- (2) request for consent shall be clearly distinguishable from other matters
- (3) right to withdraw his or her consent at any time.
- (4) if...the performance of a contract... is conditional on consent to the processing of personal data that is not necessary for the performance of that contract, **then consent is not freely given**
- **Recital 32:** ticking a box when visiting a website, choosing technical settings for service: **OK**. Silence, pre-ticked boxes, opt-out or inactivity: **NOT OK**.

EDPB 05/20: §75-89, especially §79, §80, §81, §168 clarifies consent

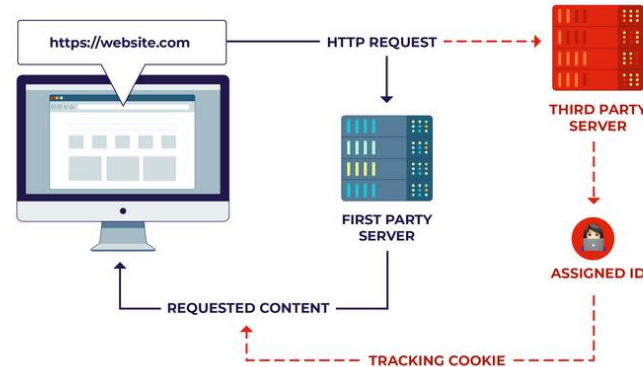
Art .7 GDPR: provisions on consent (Opinion 5/20)



Available at: https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-052020-consent-under-regulation-2016679_en

What do we make of this?

Some judgments on cookies, targeted advertising and litigation on RTB



Guidance Note:
Cookies and other tracking technologies
April 2020



Sources: <https://www.dataprotection.ie/sites/default/files/uploads/2020-04/Guidance%20note%20on%20cookies%20and%20other%20tracking%20technologies.pdf> ;
<https://www.eff.org/wp/behind-the-one-way-mirror>

Case C-673/17 (Planet49): facts

Court of Justice of the European Union (interpretation of EU law)

Dispute between German Federation of Consumer Organisations & Planet49 GmbH, an online gaming company

→ consent of participants in promotional lottery organised by Planet49 in 2013

- Checkbox 1 (unselected): transfer of personal data to company's sponsors and partners
- Checkbox 2 (pre-selected): storage of info + access to info stored in terminal equipment of users (§26-31) - COOKIES
- Points of law: Recitals 17 and 24; Articles 1, 2 & 5(3) EPD

Customize your choice

On this page you can find more information about purposes of data processing and the vendors that we use on our websites.

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Technically essential ☐

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These cookies are essential to make it possible for you to navigate our websites and use their functions.

Function ☐

Analysis ☐

Marketing ☐

Vendor

Cloudflare ☐

Facebook ☐

Google Analytics ☐

Google Maps ☐

Google Recaptcha ☐

Google TagManager ☐

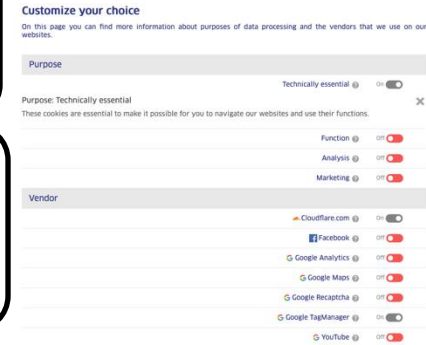
YouTube ☐

Case C-673/17 (Planet49) (3/4): CJEU decision

Consent referred to in Article 2(f) and of Article 5(3) of Directive 2002/58/EC is **not validly constituted if, in the form of cookies, the storage of information or access to information** already stored in a website user's terminal equipment is **permitted by way of a pre-checked checkbox which the user must deselect to refuse his or her consent.**

The interpretation of Article 2(f) and Article 5(3) of Directive 2002/58 does not depend on **whether or not the information stored or accessed on a website user's terminal equipment is personal data**

Article 5(3) of Directive 2002/58 → **the information** that the service provider must give to a website user **includes the duration of the operation of cookies and whether or not third parties may have access to those cookies.**



Case C-446/21: some background facts

Court of Justice of the European Union (interpretation of EU law)

23 Mr Schrems received advertising concerning an Austrian politician, which was based on the analysis done by Meta Platforms Ireland indicating that he had points in common with other users who had 'liked' that politician. Mr Schrems also regularly received advertising targeting homosexual persons and invitations to related events (...). That advertising and those invitations were not based directly on the sexual orientation of the applicant in the main proceedings and his 'friends', but rather on an analysis of their interests, in this case on the fact that friends of Mr Schrems 'liked' a product.

24 Mr Schrems commissioned an analysis concerning the inferences which could be drawn from his friends list, which showed that he did civilian service with the Red Cross in Salzburg and that he is homosexual. Moreover, the list of his activities outside Facebook, held by Meta Platforms Ireland, includes, inter alia, dating apps and dating websites for homosexuals, as well as the website of an Austrian political party. The stored data of the applicant in the main proceedings also includes an email address which was not provided on his Facebook profile, but which he had used to send requests to Meta Platforms Ireland.

25 (...) Mr Schrems discloses the fact that he is homosexual to the public. He has never indicated his sexual orientation on his Facebook profile, however.

26 Before the Regional Court for Civil Matters (Vienna, Austria), Mr Schrems argued that the processing of his personal data by Meta Platforms Ireland infringed a number of provisions of the GDPR. (...) his consent to the terms of use of the digital platform (...) did not comply with Article 6(1) and Article 7 of that regulation. Furthermore, Meta Platforms Ireland processes the sensitive data of the applicant in the main proceedings within the meaning of Article 9 of that regulation when it does not have his consent for that purpose under Article 7 thereof. Nor was there any valid consent for the processing of Mr Schrems' personal data received by Meta Platforms Ireland from third parties. In that context, Mr Schrems requested, inter alia, that the defendant be ordered to cease processing his personal data for the purpose of personalised advertising and using those data derived from visits to third-party websites obtained by third parties.

<https://curia.europa.eu/juris/document/document.jsf?jsessionid=7BC1E93DA9E5CAAD497162AC23AD2464?text=&docid=290674&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=847283>

Case C-446/21: decision

Article 5(1)(c) GDPR must be interpreted as meaning that **the principle of data minimisation** provided for therein **precludes any personal data obtained by a controller, such as the operator of an online social network platform, from the data subject or third parties** and collected either on or outside that platform, **from being aggregated, analysed and processed for the purposes of targeted advertising without restriction** as to time and without distinction as to type of data.

2. Article 9(2)(e) GDPR must be interpreted as meaning that **the fact that a person has made a statement about his or her sexual orientation on the occasion of a panel discussion open to the public does not authorise the operator of an online social network platform to process other data relating to that person's sexual orientation**, obtained, as the case may be, outside that platform using partner third-party websites and apps, **with a view to aggregating and analysing those data, in order to offer that person personalised advertising.**

EU top court sides with Schrems in privacy dispute with Meta

Updated / Friday, 4 Oct 2024 11:26

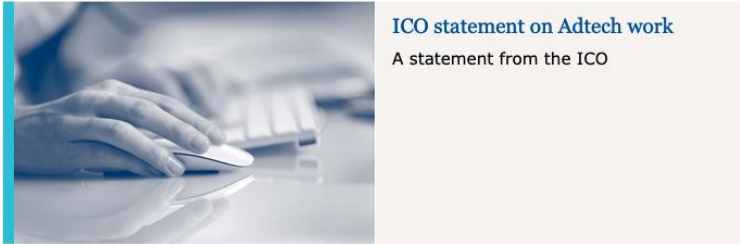


Austrian privacy activist Max Schrems

Source: <https://www.rte.ie/news/business/2024/1004/1473586-schrems-privacy-dispute-with-meta/>

Real-time bidding (RTB): view of national data protection authorities

Information Commissioner's Office (UK)



In February 2019 the ICO launched a review of Real-Time Bidding (RTB) due to its complexity and scale, the risks posed to the rights and freedoms of individuals and the concerns the ICO has received.

It is an area that has evolved and grown rapidly in recent years and is underpinned by advertising technology (adtech), allowing advertisers to compete for available digital advertising space in milliseconds, placing billions of online adverts on webpages and apps in the UK every day by automated means.

This page will be updated as and when developments arise as part of the review.

- [Adtech blogs](#)
- [Reports](#)
- [Fact Finding Forum 2, 19 November 2019 - slide presentations](#)
- [Fact Finding Forum 1, 6 March 2019 - summary report](#)
- [Technology opportunities](#)

<https://ico.org.uk/about-the-ico/what-we-do/our-work-on-adtech/>

Transparency and consent:

- Grounds for processing unclear
- Privacy notices insufficient
- Intrusive profiles
- Ignorance of ethical implications by advertisers

Data supply chain: inappropriate reliance on contractual agreements to protect how bid request data is shared,

RTB: Belgian Data protection authority

Timeline of the IAB EUROPE case

2022

- On 2 February 2022, the Litigation Chamber of the Belgian DPA published its decision 21/2022 concerning IAB Europe, in which the Litigation Chamber imposes several sanctions including an action plan for compliance
- IAB EUROPE appeals the decision
- On 7 September 2022, the Market Court refers several questions to the CJEU for preliminary ruling

2023

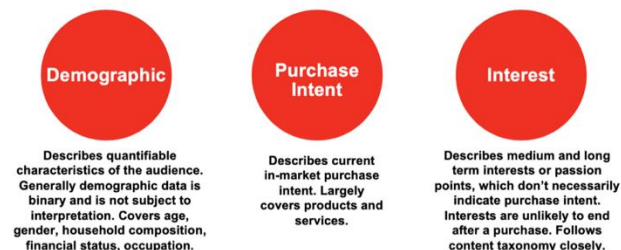
- On 11 January 2023, the Litigation Chamber approves IAB EUROPE's action plan
- IAB EUROPE and the complainants in the IAB EUROPE case appeal the decision of the Litigation Chamber to approve IAB EUROPE's action plan
- On 21 September 2023, the hearing before the CJEU takes place

7 March 2024

- The CJEU rules on the case in its judgment [C-604/22](#) 

Belgian DPA: <https://www.dataprotectionauthority.be/citizen/iab-europe-case-the-cjeu-answers-the-questions-referred-for-a-preliminary-ruling>

3 core pillars for audience segments



Sources: <https://iabtechlab.com/standards/audience-taxonomy/>
IAB = a standards body for the digital advertising industry based in New York

RTB: challenge by Irish Council for Civil Liberties (ICCL)

- ICCL complained with Irish Data Protection Commission (DPC) in 2019
- No reaction by DPC
- ICCL has taken IAB Tech Labs to court in Germany, (Landgerichte, Hamburg)
 - where IAB «has representation (a consultancy it hired)»
- Grounds = violation of DP security principle

<https://www.iccl.ie/rtb-june-2021/>

<https://techcrunch.com/2020/09/21/irelands-data-watchdog-slammed-for-letting-adtech-carry-on-biggest-breach-of-all-time/>



Sources: <https://www.iccl.ie/rtb-june-2021/>

Conclusions

- **Legal framework is dated**
- **Concept of confidentiality based on cookies, not contemporary trackers**
 - **Only guidance**
- **Case law is moving legislation forward**
- **What do you think?**



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Thank you!

