Decision of the European Data Protection Supervisor in complaint case 2019-0878 submitted by Mr Michael Veale against the Court of Justice of the European Union.

The EDPS,

Having regard to Article 16 TFEU, Article 8 of the Charter of Fundamental Rights of the EU, and Regulation (EU) 2018/1725,[1] in particular Articles 63(1), 57(1)(e),

Has issued the following decision:

PART I

Proceedings

On 2 October 2019, the EDPS received a complaint under Article 63(1) of Regulation (EU) 2018/1725 (the Regulation), from Mr Michael Veale against the Court of Justice of the European Union (CJEU) - Case 2019-0878.

The EDPS has handled this complaint under Article 57(1)(e) of the Regulation.

The complaint concerned the use of cookies and similar technologies in the context of the CJEU main website (curia.europa.eu). This website was included in the first wave of EDPS' remote website inspection.

On 23 October 2019, the EPDS asked the complainant to clarify the scope of his complaint, since the CJEU had changed the services embedded and the cookie consent policy after the submission of his complaint. The complainant answered on the same day. In his view, the issues regarding the use of cookies and similar technologies persisted, and he added allegations regarding the non-compliance of websites other than the CJEU main one, hosting the CJEU's videos.

On 14 February 2020, the EDPS asked the CJEU to provide comments on the complainant's new allegations and received those comments on 27 March 2020.

On 3 April 2020, the EDPS sent an email to the complainant where he was given the opportunity to comment on the controller's reply. The EDPS received no answer to this request for comments.

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[1] OJ L 295, 21.11.2018, p. 39–98.

PART II

Facts

In his complaint, the complainant alleged that when visiting the CJEU's main website (https://curia.europa.eu) '[t]he Court places cookies from Europa Analytics but only offers 'OK' and 'More Information". The complainant added that '[w]hile the site claims to obey Do Not Track signals, which is good, they do not have an option to refuse that is as easy as the option to give consent. In effect they make access to their site conditional on accepting non-necessary cookies, which have a persistent identifier which can be classified as personal data as well as information under the ePrivacy Directive.' Moreover, the complainant wanted the EDPS to audit the CJEU website to ensure that no non necessary cookies were set on visitors' devices before their consent was collected.

The scope of this initial complaint was limited to the main website of the CJEU (https://curia.europa.eu) and the cookies used on it.

On 23 May 2019, the EDPS sent the CJEU the remote website inspection report regarding its main website. This report included recommendations to improve the website's legal compliance. Some of the recommendations related to the use of cookies and similar technologies, website visitors' consent management, and the information the CJEU should provide to website visitors. In reaction to the report, the CJEU started implementing the EDPS' recommendations. In July 2019, the CJEU informed the EDPS about its progress in this regard.

On 27 March 2020, the CJEU clarified that '... the installation of European Analytics cookies without consent (...) was settled with the modifications of the Curia website in October 2019. European Analytics cookies are only installed after the user has given his explicit consent. The consent is given either through the cookie banner or on the Cookies page. Once consent has been given for the use of European Analytics cookies, it can be withdrawn at any time on the Cookie page.'

The EDPS subsequently checked the CJEU main website after receiving the complaint and noticed that the service Europa Analytics was no longer used and that the website's cookie banner was updated and included an option to allow 'Only technically necessary cookies'.

The EDPS informed the complainant on 23 October 2019 about this update. In his reply of the same day, the complainant put forward that the issue of his complaint remained unresolved since there were still '... cookies being set at points [he] browsed the website to prior to this complaint. In particular, these are not areas limited to YouTube'.

The complainant explained that 'Google Analytics cookies were set on [his] device when [he] navigated to the webcast:
http://player.companywebcast.com/televicdevelopment/201305131/en/player
which is branded with the CJEU branding and linked to from here, with no privacy policy https://curia.europa.eu/jcms/jcms/P 95693/en/'. The complainant alleged that these cookies '... were not declared on the privacy policy of the website, and no consent was provided.'

The complainant added that although the CJEU's Privacy Policy mentions a YouTube channel, it does not mention '"Companywebcast", which as [he] note[s] is branded with the CJEU banner. The CompanyWebcast site has no specific privacy policy, nor a consent box. This website sets two cookies: Google Analytics [and] "AddThis".'

The complainant also attached as evidence a document including:

- Two print screens showing cookies set when accessing the URL http://player.companywebcast.com/televicdevelopment/20130513_1/en/player.
- A print screen showing the cookies set when accessing the URL https://conference.connectedviews.com/Default.aspx?i=cdj.
- A print screen showing the YouTube cookies section of the CJEU website cookie policy.

The complainant's allegations and evidence presented on 23 October 2019, thus refer to (1) cookies set when visiting third party websites that host CJEU videos and to (2) consent management for cookies (and similar technologies) set when accessing CJEU website pages embedding YouTube videos.

Videos hosted in Connectedviews and CompanyWebcast

In its reply of 3 April 2020, the CJEU recognised that '[the] external providers, Companywebcast and Connectedviews, [were] used for the consultation of videos of two conferences held at the Court'. The CJEU said '[t]he links to these websites have now been deleted as these websites did not respect the appropriate requirements and/or the videos do not need to be publicly available anymore'. According to the CJEU, Arbor Media B.V.s is the company providing Connectedviews video hosting services. According to its privacy policy[2], Company Webcast B.V. provides the CompanyWebcast video hosting services.

The EDPS confirmed that, at least since 23 March 2020[3], the links leading to the videos were deleted from the aforementioned CJEU website pages. Nevertheless, the videos remained accessible on the Companywebcast and Connectedviews websites.

On 2 June 2020, the EDPS used its Website Evidence Collector[4] (WEC) tool to run some checks on the URLs included in the complainant's evidence. Except for loading the webpages, the WEC tool does not interact with them in any way. Therefore, it does not perform any action that could be understood as a valid consent to use cookies or similar technologies.

When checking the URL https://conference.connectedviews.com/Default.aspx?i=cdj, the WEC found evidence of Google Analytics persistent cookies being set and of data being sent through a web beacon to Google Analytics and DoubleClick, without asking for consent of the user.

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[2]https://www.companywebcast.com/wp-content/uploads/2020/04/Company-Webcast-Privacy-Cookie-Statement-.pdf

[3] https://web.archive.org/web/20200323211132/https://curia.europa.eu/jcms/jcms/P_170283/en/
https://web.archive.org/web/20200323211025/https://curia.europa.eu/jcms/jcms/P_95693/en/

[4] https://edps.europa.eu/press-publications/edps-inspection-software_en

<u>YouTube cookies and similar technologies in the CJEU website</u>

Concerning the opt-out function for YouTube cookies on the CJEU website, the controller replied that:

> '… YouTube Cookies or other trackers are only installed after the user has provided his explicit consent. This consent is given through the specific button available in front of every YouTube video embedded in the Curia website (see print screen in annex I). Once consent is given, a cookie named "cookieconsent_status_youtube" is installed from the domain curia.europa.eu. Only when this cookie is present, the embedded YouTube video can be viewed and YouTube cookies or others trackers are accepted.
>
> The consent can be withdrawn through the button provided to this effect on the Cookies page of the Curia website. This will delete the specific cookie "cookieconsent_status_youtube" and therefore block the viewing of embedded YouTube videos and the installation of YouTube cookies or others trackers.
>
> We did notice however that the option to withdraw the specific consent for the use of YouTube is also available before consent has actually been given. This might lead to the misunderstanding that an opt-out policy is applied and that YouTube cookies or trackers are installed without specific consent.
>
> This is however not the case. As explained, YouTube cookies or trackers are only installed when the specific cookie "cookieconsent_status_youtube" is present. This cookie confirms that consent has been given. As is shown in annex II, the possibility to withdraw consent is also available even though the specific cookie "cookieconsent_status_youtube" is absent.
>
> We would therefore conclude that the statement that the Curia website only has an opt-out consent policy regarding YouTube cookies is based on a misunderstanding. The Curia website does apply an explicit opt-in policy for the installation of all non-essential cookies, including YouTube cookies.
>
> However, the Court will examine whether it can improve the function to withdraw consent for the use of YouTube by making it available only when such consent has already been given.'

The CJEU added that '[o]nly videos published on YouTube are directly embedded in the CURIA website, using the function YouTubenocookies'.

On 2 June 2020, the EDPS tested the CJEU main website consent management mechanism. This mechanism is composed of two elements: a plug-in that blocks YouTube content from being accessible in the webpage until users give their consent and a control in the YouTube section of the cookie policy that allows withdrawal of consent. The EDPS manually checked and confirmed that these controls worked as expected. **No cookies associated to the YouTube services are set or accessed until the visitor consents. The button in the YouTube section of the CJEU cookie policy deletes existing cookies or local storage objects if the consent given by users is withdrawn.**

Furthermore, **on 2 June 2020, the EDPS ran the WEC on the English version of the CJEU main website**. During this check the tool browsed the default webpage, which included an embedded YouTube video, and ten randomly selected webpages of the website. **The tool did not found any data being persistently stored, be it as a cookie or as a local storage. The tool did not find the use of web beacons to transfer data**. The EDPS also conducted manual checks with identical results.

PART III

Legal analysis

1.   Admissibility of the complaint

In accordance with Article 63(1) of the Regulation, a data subject has the right to lodge a complaint with the EDPS if he considers that the processing of his personal data done by an EU institution or body infringes the Regulation.

In the present case, the complaint considers that the setting of several cookies by the CJEU infringes the Regulation. The CJEU is an EU institution in accordance with Article 9 of the Treaty of Lisbon[5], and the conditions for setting cookies are laid down in Article 37 of the Regulation.

The EDPS has no competence to assess potential violations regarding the use of cookies without the users' consent by private companies such as CompanywWebcast and Arbor Media. However, the EDPS is the competent authority to assess the compliance of the CJEU with the provisions of the Regulation, including Article 37.

The complaint is therefore admissible.

2.   Alleged violation of Article 37 of the Regulation - cookies

Article 37 of the Regulation states that 'Union institutions and bodies shall protect the information transmitted to, stored in, related to, processed by and collected from the terminal equipment of users accessing their publicly available websites and mobile applications, in accordance with Article 5(3) Directive 2002/58/EC' (the e-privacy Directive).[6]

Since this complaint concerns the processing of personal data through the use of cookies by the CJEU website, Article 37 of the Regulation is applicable.

In accordance with Article 2(f) of the e-privacy Directive, 'consent' by a user or subscriber corresponds to the data subject's consent in Directive 95/46/EC, which has been repealed by and replaced with Regulation (EU) 2016/679 (GDPR).

Article 4(11) of the GDPR states that the 'consent of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or a clear affirmative action, signifies agreement to the processing of

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[5] OJ C 306, 17/12/2007.
[6] OJ L 201, 31.7.2002, p. 37–47.

personal data relating to him or her'. In this regard, this definition of consent is identical to the one laid down in Article 3(15) of the Regulation.

It follows that a first layer of information about the cookies must be given already in the cookie banner or other consent mechanism used.[7] In addition, in order to give consent to the use of cookies, users/data subjects must be duly informed and have the freedom to refuse those cookies.

When the complainant submitted his initial complaint, the cookie banner of the CJEU website existed, but it did not provide the user with information about the cookies set by YouTube, nor the option to reject the use of cookies. Therefore, no valid consent for using cookies could be given by the user, because it was neither informed, nor freely given consent.

In light of the above, there was an infringement of Article 37 of the Regulation, which was corrected on 3 October 2019, the day after the submission of this complaint to the EDPS.

> The EDPS recognises that the CJEU has corrected the cookies banner on its website. Nonetheless, as a suggestion for improvement, the EDPS recommends that the CJEU ensure that user consent mechanisms remain effective whenever third-party components are updated or added to the CJEU website. This means that the CJEU should check the need to update the cookies banner when third-party components are updated or added to the CJEU's website.

3.   Alleged violation of Article 14 of the Regulation - transparent information

The EDPS notes that the CJEU changed their cookies policy in October 2019.

Although the CJEU has effectively removed the links to the aforementioned videos, they are still available, together with other videos[8], on Companywebcast and Connectedviews websites. According to the CJEU, these 'websites did not respect the appropriate requirements and/or the videos do not need to be publicly available anymore'. The EDPS therefore believes that the videos should have been deleted from Companywebcast and Connectedviews websites in line with the storage limitation principle (Article 4(1)(g) of the Regulation), since, according to the CJEU, these websites did not comply with the appropriate requirements and/or the videos no longer had to be publicly available.

Article 14(1) of the Regulation states that the 'controller shall take appropriate measures to provide any information referred to in Articles 15 and 16, and any communication under Articles 17 to 24 and 35 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language'.

In other words, a controller complies with the transparency requirements under Article 14 of the Regulation by providing to the data subject all necessary information under Articles 15

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[7] See EDPS Guidelines on the protection of personal data processed through web services provided by EU institutions available at: https://edps.europa.eu/data-protection/our-work/publications/guidelines/web-services_en.

[8] While the video at https://c.connectedviews.com/05/cdj has been removed, that video along with other five CJEU videos were still accessible on 2 June 2020 at http://conference.connectedviews.com/Default.aspx?i=cdj.

and 16, and any communication under Articles 17 to 24 and 37 relating to processing, in the cookie banner, cookie policy, and data protection notice. A controller is not required to inform visitors about the cookies set by the websites linked on its website.[9]

The CJEU informed the data subjects about the cookies set on its website. Therefore, there was no infringement of Article 14 of the Regulation, since Article 37 does not require the CJEU website to inform visitors about the cookies set by the websites linked on it.

> As a suggestion for improvement, the EDPS recommends that the CJEU warns visitors (for example, with a pop-up message) when they click on a link in the CJEU website to access CJEU content hosted by a third party. The warning should inform the visitors that they are abandoning the CJEU website and that the applicable privacy policy will be the one of the third party.
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> In addition, the EDPS recommends the CJEU to delete the videos still hosted on the Companywebcast and Connectedviews websites, since according to the CJEU such websites did not respect the appropriate requirements and/or the videos do not need to be publicly available anymore.

4.   Alleged violation of Article 7 of the Regulation - conditions for consent

According to Article 7(1) of the Regulation, where processing is based on consent, the controller must be able to demonstrate that the data subject has consented to the processing of their personal data.

Article 7(3) *in fine* of the Regulation states that 'it shall be as easy to withdraw as to give consent'.

When the EDPS received the initial complaint on 2 October 2019, the CJEU did not provide its website users with a way to withdraw their consent regarding the use of cookies as easily as giving it - such as a 'reject' button displayed in the same place and in the same manner as the 'accept' button. Instead, in order to reject cookies, users had to click on the button 'more information' and go almost to the bottom of the page to withdraw their consent. However, the CJEU updated its banner a few days later offering a reject button regarding the use of cookies and similar technologies.

Therefore, there was an infringement of Article 7 of the Regulation that was remedied by the CJEU shortly after the filing of the complaint.

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[9] CJEU, Judgment of the Court of 29 July 2019, Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV, Case C-40/17, ECLI:EU:C:2019:629, para.103.

PART IV

Conclusions

The EDPS concludes that, at the moment of the submission of the complaint, there was a violation of Articles 7, 14, 15, and 37 of the Regulation by the CJEU, since the data protection notice and cookies policy did not contain all the necessary information regarding the cookies used by the CJEU website at the time of the complaint to the EDPS.

However, soon after the submission of this complaint, the CJEU remedied these infringements by improving its cookie policy and adapting the content of their website to render it compliant with the provisions of the Regulation.

For this reason, the EDPS has decided not to exercise his corrective powers despite the infringements that have been established in the present decision.

However, the EDPS has made a certain number of recommendations to the CJEU to ensure a better compliance with the Regulation. In light of the accountability principle, the EDPS expects the CJEU to implement the above recommendations accordingly.

Furthermore, the EDPS already provided the CJEU with recommendations on best practices regarding processing personal data on its website and recommends the CJEU to adopt a similar approach when selecting processors for all online services.

Done at Brussels, 3 May 2021

[e-signed]

Wojciech Rafał WIEWIÓROWSKI