

Tough Cookies – be aware of regulatory practices of data protection authorities regarding the use of cookies (substantial fines can be imposed in case of non-compliance)

In a recently published decision, the National Authority for Data Protection and Freedom of Information (NAIH) imposed a fine of HUF 10 million (ca. EUR 27,000) on TV2 due to the improper use of internet cookies.

Based on the facts underlying the case, TV2's website had multiple categories of cookies, including necessary, statistical, and marketing cookies, where neither the legal basis for data processing nor the purpose of data processing were properly indicated. The related websites followed different consent practices for data processing, as they were operated by various providers with whom TV2 did not enter into the data processing agreements required by the General Data Protection Regulation (GDPR).

The reasoning behind the NAIH's decision reveals that the customers were not adequately informed and the legal basis for data processing was not appropriate during the use of cookies. Experience shows that practices similar to TV2's are not rare, making it essential for everyone to review cookie usage practices. It is necessary to provide appropriate, tailor made, easily accessible and comprehensive information to the data subjects visiting the website in a concise, clear, understandable, and consistent form. The data controller's identity should be clearly stated, as well as the scope of the processed personal data and the types of cookies used.

The important lesson of this case is that the obligation to properly inform data subjects cannot be delegated, and there cannot be multiple templates used simultaneously to obtain consent from data subjects. Additionally, it is crucial to enter into a data processing agreement with data processors in accordance with the GDPR rules. When involving service providers outside the EEA, the so-called third countries (for example Facebook, YouTube, and other marketing service providers), the risks associated with this must be brought to the attention of the data subjects visiting the website.

The data controller is required to obtain separate consent for each data processing purpose, such as for the use of marketing cookies and statistical cookies, while also providing the possibility to withdraw consent. Proper identification of the legal basis is also crucial. The indication of the customer's consent as a legal basis is not appropriate for cookies that are necessary for the functioning of the website. Instead, the legitimate interest should be identified as the legal basis, which requires the availability of an appropriate balancing test.