



Legal Alert

23 September 2021

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Amendment to the Electronic Communications Act introduces an obligation of prior consent for the use of cookies from 1 January, 2022!

Amendment to the Electronic Communications Act

On 15 September, 2021, the Chamber of Deputies approved a [government bill](#) amending Act No. 127/2005 Coll., on electronic communications and on amendments to certain related acts (the Electronic Communications Act), as amended, and certain other acts (the "Amendment").

The Amendment introduces, among other things, the **possibility of using cookies only with the active consent of the user** (with certain exceptions). The consent granted will have to comply with the requirements of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (the "**GDPR**").

The stricter rules that **change the possibility of the existing regime interpreted as opt-out to opt-in**, will apply from January, 2022 and at the same time the Amendment implements Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing a [European Electronic Communications Code](#) into Czech law. The Amendment is now waiting for the

President's signature.

What are cookies?

Cookies are small data files used when browsing the internet, and that a website exchanges with the user's browser. In addition to its **technical** functions, such as facilitating the functioning of the website for the user, it can also fulfil a **marketing, analytical or statistical functions**. Cookies are considered personal data under the GDPR. Both the current wording of the Electronic Communications Act and the Amendment do not apply just on the regulation of cookies but there are other similar technologies capable of communicating with the user's device (e.g. *device fingerprinting* used to uniquely identify the end user's device) and these are subject of the same regime as cookies.

Current legislation on cookies

Due to the imperfect transposition of the [ePrivacy Directive](#) (Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, the ePrivacy Directive), the current legal regulation of the Electronic Communications Act is unclear, which has led to a variety of interpretations and approaches, resulting in inconsistencies in the approach to cookies processing across websites or applications. The ambiguity stems from the current wording of the act, which provides that the operator of a website or mobile application is obliged to inform *subscribers or users in advance of the scope and purpose of the processing of cookies in a demonstrable manner and is obliged to offer them the possibility to refuse such processing*.



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This wording of the Electronic Communications Act therefore implied, contrary to the EU intention, an opt-out regime, i.e. that it is possible (subject to the information obligation) to process all types of cookies until the user withdraws his consent. In practice, this means that the vast majority of Czech websites or applications do contain a cookies bar with consent, but this is often in complete contradiction with the EU regulations based on the opt-in principle, where the website or application provider needs prior consent from users to use cookies (with some exceptions for so-called essential or technical cookies). Therefore, despite the critical opinion of the European Data Protection Board on the practices of processing and storing cookies, websites with so called *cookies wall* denying the user full access to content or certain functions without providing prior consent to process all types of cookies or so-called *scrolling consent*, where the website indicates that by further browsing the user agrees to the storage of cookies, are not exceptions.

The Amendment affecting the regulation of cookies

The proposed legislation of the Amendment will clarify the situation and align Czech cookies legislation with the text of the ePrivacy Directive, by clearly defining the regime under which an entity that intends to use or uses electronic communications networks to store or access data stored on subscribers' or users' end devices will be required to **obtain demonstrable prior consent to the scope and purpose of processing cookies**. Consent must also comply with the requirements for consent under the GDPR.

Freely given, specific and informed consent, which is also

an active consent of the user, as an unambiguous expression of the user's will, is required. It will therefore no longer be possible to block a user's access to the site or otherwise make it difficult for them to view it in order to coerce their consent. At the same time, it is important to remember that the information obligation under the GDPR is closely linked to the consent provided. The information should indicate who is the controller of the personal data (cookies) that is asking the user for consent to their processing, for what purposes the data will be processed (if there are multiple purposes, distinguish them consistently), what personal data will be processed, the existence of the right to withdraw consent at any time and other information required under Articles 13 and 14 of the GDPR. In order to provide all the information, it is advisable to use the principle of layering or granularity, i.e. to provide the most important information in the first layer of information - who, what, why - and to link to the detailed information on the processing of personal data for further information. Please note that even after the Amendment, there will be an exception for the aforementioned technical or necessary cookies, which are not subject to the need for prior consent.

What to do now?

Even though a longer period between approval by Parliament and entering into force was set and the Amendment enters into force on 1 January, 2022, it is advisable to start working now on revising the current procedures of operators of websites, applications or other tools monitoring the use of the website or personalisation of advertising, etc.

We recommend you to identify which cookies are pro-



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cessed and whether they are used only for technical storage, to ensure the transmission of messages or to provide services requested by the user. If this is the case, a consent to its processing will probably no longer be required. However, this does not affect the obligation to properly inform the user about their processing pursuant to Articles 13 and 14 GDPR. With regard to other types of cookies, in accordance with the Amendment, the web interface or application should be set up in such a way that the user is provided with a first layer of information and enabled to express their consent to the processing of cookies by actively ticking a box or clicking on the relevant consent button. Furthermore, the privacy policy will also need to be revised to meet the requirements of the Amendment and the GDPR.

Please also note that if you are in a situation where you are involved in the transfer of personal data to third countries, i.e. outside EU/EEA countries, in connection with the storage and processing of cookies, we recommend that you also address tools for such transfers.

If necessary, please do not hesitate to contact us. Our dedicated team will be happy to provide you with the necessary support regarding cookies and other similar tools.

The information contained in this bulletin is presented to the best of our knowledge and belief at the time of going to press. However, specific information related to the topics covered in this bulletin should be consulted before any decision is made. The information contained in this bulletin should not be construed as an exhaustive description of the relevant issues and any possible consequences, and should not be fully relied on in any decision-making processes or treated as a substitute for specific legal advice, which would be relevant to particular circumstances. Neither Weinhold Legal, v.o.s. advokátní kancelář nor any individual lawyer listed as an author of the information accepts any responsibility for any detriment which may arise from reliance on information published here. Furthermore, it should be noted that there may be various legal opinions on some of the issues raised in this bulletin due to the ambiguity of the relevant provisions and an interpretation other than the one we give us may prevail in the future.

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