

CHECKLIST · TOMORIS TOOLBOX

Cookie Banner: Checklist for Valid Consent

When consent is required, banner design, withdrawal, proof and technical checks, based on the TKG 2021, the GDPR, CJEU Planet49 and the positions of the EDPB

UPDATED

Oct 25, 2026

LENGTH

PDF, 7 pages

ONLINE

tomoris.com/en/downloads/cookie-banner-checkliste

AT A GLANCE

§ 165

Para. 3 TKG 2021:
consent for cookies

C-673/17

CJEU Planet49: no
pre-ticked box

Art. 7

GDPR: withdrawal as
easy as giving consent

0

cookies requiring consent
before the decision

WHO IT IS FOR

- Website owners and management of small and medium-sized companies
- Marketing teams that use analytics and advertising services
- Web agencies and developers who implement banners and tracking
- Those responsible for data protection

WHAT THIS COVERS

Cookie banners appear on almost every website, and European data protection authorities describe typical shortcomings: no reject option on the first layer, pre-ticked boxes, colors and contrasts that steer users toward consent. This checklist shows when consent is required under § 165 para. 3 TKG 2021 (Austrian Telecommunications Act 2021), what requirements the GDPR and the CJEU place on it, how European data protection authorities assess typical banner designs and how you can check your website yourself. At the end, it explains what the proposal for a Digital Omnibus would change.

This checklist is a TOMORIS recommendation and does not replace legal advice. § 165 TKG 2021 and the GDPR in their current versions, as well as the decision in the individual case, are decisive. The positions of the Cookie Banner Taskforce and the EDPB guidelines are interpretive aids from the data protection authorities; national requirements apply in addition.

CONTENTS

01	What applies	2
02	When consent is required	3
03	Banner design	4
04	Withdrawal and proof	4
05	Technical checks	5
06	Common mistakes	6
07	What could change	6
08	Sources	7

01 —

What applies

TKG 2021, ePrivacy Directive, GDPR and the Planet49 judgment

In Austria, § 165 para. 3 TKG 2021 transposes Art. 5(3) of the ePrivacy Directive. Providers of an information society service must provide information on which personal data they process, on what legal basis, for what purposes and for how long; collection is only permitted if the user has actively consented on the basis of clear and comprehensive information. Exempt are storage and access whose sole purpose is the transmission of a communication or that are strictly necessary for the provider to supply a service explicitly requested by the user.

Consent (Art. 4(11) GDPR)

Freely given, specific, informed and unambiguous, by a statement or by a clear affirmative action. Silence, pre-ticked boxes or inactivity do not constitute consent (Recital 32).

Conditions (Art. 7 GDPR)

The controller must be able to demonstrate consent; it can be withdrawn at any time, users must be informed of this beforehand, and withdrawal must be as easy as giving consent.

CJEU, C-673/17 Planet49

A pre-ticked checkbox that the user must deselect is not valid consent, regardless of whether personal data is involved. Users must also be informed of the duration of operation of the cookies and whether third parties have access (judgment of October 1, 2019).

Not just cookies

Art. 5(3) of the ePrivacy Directive also applies to similar technologies. In Guidelines 2/2023, the EDPB classifies, among other things, URL and pixel tracking, local processing and unique identifiers.

National law implementing the ePrivacy Directive applies to setting and reading cookies, and the GDPR applies to the subsequent processing. Setting or reading cannot be based on legitimate interest, and if consent required under § 165 para. 3 TKG 2021 is missing, the subsequent processing cannot be lawful either (EDPB, report of the Cookie Banner Taskforce, para. 24).

02

When consent is required

Strictly necessary or not: an overview of typical purposes

Typical purposes and consent under § 165 para. 3 TKG 2021

PURPOSE	CONSENT	RATIONALE
Shopping cart, login, security of the requested service	no, if strictly necessary	Exception for services explicitly requested by the user
Remembering chosen settings, such as language	usually no	The Taskforce refers to WP29: cookies that store user preferences for a service are considered necessary
Statistics and audience measurement	yes	No specific exception in § 165 para. 3; the Digital Omnibus proposes one (see Section 07)
Advertising, profiling, retargeting	yes	Not strictly necessary for the requested service
Pixels, embedded content and third-party tracking	yes, insofar as the terminal device is accessed	Similar technologies also fall under Art. 5(3) (EDPB 2/2023)

You must be able to justify classifying something as “necessary.” The Taskforce discussed that website operators should keep lists of their cookies, present them to the authorities on request and demonstrate their necessity (para. 28). The classification of statistics is a TOMORIS recommendation based on the wording of the law.

03 —

Banner design

What data protection authorities object to in banners

- ☐ Reject on the same layer as accept: the vast majority of authorities consider a banner without a reject option on the layer with the accept button to be a violation (Taskforce, type A).
- ☐ No pre-ticked boxes, not even in the second-layer settings (Planet49; Taskforce, type B).
- ☐ Reject not as an inconspicuous link in the body text or outside the banner without sufficient visual emphasis (Taskforce, type C).
- ☐ No colors or contrasts that are obviously misleading, such as a reject button with practically illegible text; assessed case by case (Taskforce, types D and E).
- ☐ Clearly recognizable what it is about, what purpose the consent serves and how to accept or reject; no impression that there is no access without consent (Taskforce, type C).
- ☐ No cookie wall: access to content must not depend on accepting cookies (EDPB 05/2020, paras. 39 to 41).
- ☐ Continuing to browse, scrolling or swiping is not consent (EDPB 05/2020, paras. 84 and 86).
- ☐ Separate choice per purpose instead of bundled consent (EDPB 05/2020, para. 42).
- ☐ Information in the banner or directly linked: data, legal basis, purposes, storage period (§ 165 para. 3 TKG 2021), duration of operation of the cookies and third-party access (Planet49).
- ☐ Setting and reading never based on legitimate interest; no second reject for "legitimate interest" on deeper layers of the banner (Taskforce, type H, paras. 22 and 24).

04 —

Withdrawal and proof

Withdraw at any time and be able to prove who consented and when

- ☐ Withdrawal possible at any time and as easy as giving consent (Art. 7(3) GDPR); anyone who consents with one click must be able to withdraw just as easily (EDPB 05/2020, para. 114).
- ☐ Withdrawal through the same interface through which consent was given, i.e. on the website itself, not through another channel such as a telephone hotline (EDPB 05/2020, para. 114 f.).

- ☐ Easily accessible way back to the settings, such as a permanently visible icon or a link in a clearly visible, customary place; no specific solution is prescribed (Taskforce, type K).
- ☐ Users informed of the right to withdraw before giving consent (Art. 7(3) GDPR).
- ☐ Consents stored in a verifiable way: time, banner version, selected purposes; however, the obligation to demonstrate consent should not lead to excessive additional data processing (Art. 7(1) GDPR, EDPB 05/2020, paras. 104 to 106).

05 —

Technical checks

How to check whether the banner really works

1

Load without deciding

Open the website in a private browser window and watch storage and network requests in the developer tools without interacting with the banner. No cookies requiring consent may be set and no requests may be sent to tracking services; by default, none of this may be set without consent (Taskforce).

2

Reject

Choose reject and switch pages: there must still be no cookies requiring consent or tracking requests.

3

Partial consent

Select only one purpose, such as statistics: only the cookies and services for that purpose may become active.

4

Withdraw

Withdraw consent via the icon or link and check that no services requiring consent load afterward.

5

Document

Keep a list of all cookies and similar technologies with purpose, provider and lifetime, and update it when the website changes (TOMORIS recommendation; the Taskforce discussed such lists and presenting them to authorities, para. 28).

The TOMORIS cookie check reads the cookies your server sets on the first visit and reports, among other things, analytics cookies without consent. Also check cookies that are only set in the browser by JavaScript, as well as third-party requests, in the browser as described above.

06 —

Common mistakes

Typical shortcomings you should avoid

- Only “Accept all” and “Settings,” but no “Reject” on the first layer.
- Tracking scripts load before a decision has been made.
- Analytics or marketing cookies classified as “necessary.”
- All purposes are preselected in the settings.
- A banner that can no longer be reached after a one-time decision, so that withdrawal is not possible.
- The subsequent processing is based on “legitimate interest,” which users must additionally reject on a second layer.

According to the EDPB, the Taskforce positions are a minimum threshold for assessing complaints and not an approval by an authority; national requirements apply in addition.

07 —

What could change

The proposal for a Digital Omnibus on terminal equipment

The Commission proposal COM(2025) 837 would move the storing and reading of personal data on the terminal equipment of natural persons into the GDPR (new Art. 88a); for other information, the ePrivacy Directive would remain decisive. It would have to be possible to reject consent requests with a single button; after a rejection, consent for the same purpose could not be requested again for at least six months. Permitted without consent would be, among other things, aggregated audience measurement exclusively for the provider’s own use and security purposes. Under a new Art. 88b, websites would have to accept and respect consent and rejection also as machine-readable signals, according to the proposal 24 months after entry into force and not for media services; web browsers would have to support such signals after 48 months.

This is a proposal, not applicable law: on October 25, 2026, procedure 2025/0360(COD) in the European Parliament was awaiting the committee decision. Until the changes apply, according to the proposal no earlier than six months after publication or entry into force, § 165 para. 3 TKG 2021 remains decisive.

NEXT STEP

Check It Yourself or Put It into Practice Together

CHECK FOR FREE

Cookie check (German)

tomoris.com/tools/cookie-check

Third-party check (German)

tomoris.com/tools/drittanbieter-check

DISCUSS IMPLEMENTATION

Get in Touch

tomoris.com/en/contact

contact@tomoris.com

08

Sources

All statements are supported by sources. Legislation applies in its current version.

- Telekommunikationsgesetz 2021 (TKG 2021), § 165, current daily version in the RIS**
§ 165 para. 3, accessed October 25, 2026
www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetze...
- Regulation (EU) 2016/679 (GDPR), German version on EUR-Lex**
Art. 4(11), Art. 7, Recital 32, accessed October 25, 2026
eur-lex.europa.eu/eli/reg/2016/679/oj/deu
- Directive 2002/58/EC (ePrivacy Directive), German version on EUR-Lex**
Art. 5(3) as amended by Directive 2009/136/EC, accessed October 25, 2026
eur-lex.europa.eu/eli/dir/2002/58/oj/deu
- CJEU, judgment of October 1, 2019, C-673/17 (Planet49)**
Operative part nos. 1 to 3, accessed October 25, 2026
eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX:62017CJ0673
- EDPB: Guidelines 05/2020 on consent, version 1.1**
Paras. 39 to 42, 84, 86, 104 to 106, 113 to 115, accessed October 25, 2026
www.edpb.europa.eu/system/files/documents/files/file1/edpb_guid...
- EDPB: Report of the work undertaken by the Cookie Banner Taskforce (January 17, 2023)**
Types A to K, paras. 22, 24 and 28, accessed October 25, 2026
www.edpb.europa.eu/system/files/documents/2023-01/edpb_20230118...
- EDPB: Guidelines 2/2023 on the technical scope of Art. 5(3) ePrivacy Directive, version 2.0**
Executive summary, use cases, accessed October 25, 2026
www.edpb.europa.eu/system/files/documents/2024-10/edpb_guidelin...
- Commission proposal for a Digital Omnibus Regulation, COM(2025) 837**
Proposed Art. 88a and 88b GDPR, Art. 5 and 11 of the proposal, accessed October 25, 2026
eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX:52025PC0837
- European Parliament, Legislative Observatory: procedure 2025/0360(COD)**
Procedural status on October 25, 2026
oeil.secure.europarl.europa.eu/oeil/en/procedure-file?reference...