

**COMPLAINANT**

See appendix

**CONTROLLER**

Aktiebolaget trav och galopp

**Swedish ref.:**  
IMY-2023-16453

**Austrian ref:**  
D130.865

**IMI case register:**  
372595

**Date:**  
2024-12-19

# Final decision under the General Data Protection Regulation – Aktiebolaget Trav och Galopp

## Decision of the Swedish Authority for Privacy Protection

The Swedish Authority for Privacy Protection (IMY) finds that Aktiebolaget Trav och Galopp (ATG, 556180-4161) has processed the complainant's personal data in breach of Article 6 and 7(3) of the General Data Protection Regulation (GDPR)<sup>1</sup> by not making it as easy to withdraw as to give consent, and making it more difficult for the complainant to give an informed and freely given consent, by using a misleading design of its cookie banner.

IMY issues a reprimand to ATG pursuant to Article 58(2)(b) of the GDPR for the infringements.

## Presentation of the supervisory case

IMY has initiated supervision regarding ATG due to a complaint. The complaint is one of several complaints filed with the European Data Protection Authorities regarding cookies and cookie banners. The complaints mainly concern the design of cookie banners, the placement of cookies and the subsequent processing of personal data after the cookies have been placed on the complainant's browser or device. To facilitate cooperation on these complaints, a 'Cookie Banner Taskforce' was created within the European Data Protection Board.

In view of the cross-border nature of the processing, IMY has made use of the cooperation and consistency mechanisms provided for in Chapter VII of the GDPR. The supervisory authority concerned has been the Austrian Data Protection Authority.

The complainant has essentially stated the following.

On 21 May 2021, ATG processed the complainant's personal data in breach of the GDPR because there was no valid consent. Nor has it been possible to refuse cookies in the first layer and the company has thus made it more difficult to refuse the

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<sup>1</sup> 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 (General Data Protection Regulation).

processing of personal data. The design of the cookie banner has through colour selection, contrast and links also been misleading, which means that it has not been possible to give an informed and freely given consent in accordance with the GDPR. This is also contrary to the principle of transparency and information. In addition, it has not been as easy to withdraw consent as it has been to give consent.

ATG's information that cookies are used on the website (in a so-called cookie banner) has been attached to the complaint.

ATG has essentially stated the following. On 21 May 2021, ATG had consent as the legal basis for the processing. It was possible to refuse cookies and this could be done in the second layer. It was also possible to withdraw the consent. Information about the right to withdraw consent was provided in the second layer. The consent was withdrawn via ATG's cookie policy under the heading "How do I manage the acceptance/rejection of cookies?".

There were some shortcomings in the consent on 21 May 2021, therefore the following were addressed in October 2021. ATG introduced a clear button to refuse cookies instead of a link. Furthermore, the colour and contrast of the buttons were changed. No cookies other than necessary cookies were placed in the visitor's browser before the visitor made an active consent to cookies. ATG has attached pictures of the changes to the cookie banner.

The complainant has been given the opportunity to comment on ATG's statement and has withdrawn the parts concerning the possibility to refuse cookies in the first layer and misleading link design.

ATG has been given the opportunity to comment on the draft decision.

## **The scope of the case**

The Swedish Post and Telecom Authority is the sole competent supervisory authority over the Electronic Communications Act (2022:482), which contains specific requirements for the storage of cookies in terminal equipment or the collection of data from such equipment. However, the personal data processing that takes place after collection, such as analysis or profiling, is subject to the provisions of the GDPR, where IMY is the competent supervisory authority. Against that background, IMY's investigation has been limited to the processing of personal data that took place after the data was collected and the deficiencies stated in the complaint relating to that subsequent processing.

During the handling of the case, the complainant has stated that the parts regarding no possibility to refuse cookies and that ATG makes it difficult for the complainant to withdraw or refuse consent through the use of a misleading link, have now been remedied. IMY also notes that ATG has changed its cookie banner and that there is now a way to refuse cookies in the first layer and that a button is used instead of a link to refuse cookies. IMY therefore finds no reason to investigate this further.

## Motivation for the decision

### Applicable provisions, etc.

Processing of personal data is only lawful if one of the conditions set out in Article 6 of the GDPR is met. The legal basis in question in the case is consent pursuant to Article 6(1)(a).

Consent is defined in Article 4(11) of the GDPR as any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her. For consent to be valid, all of these requirements must be met.

### Freely given and informed consent

The transparency of the processing of personal data towards the data subject follows from the principle of transparency set out in Article 5(1) of the Regulation. It is in the light of that principle the requirement that consent must be informed should be read.

Recital 42 of the GDPR states that consent should not be regarded as freely given where the data subject has no genuine or free choice or cannot easily refuse or withdraw his or her consent.

The European Data Protection Board (EDPB) guidelines on consent state that there should be a genuine choice and control for data subjects. As a general rule, the GDPR provides that if the data subject has no real choice, feels compelled to consent or will suffer adverse consequences if they do not consent, the consent will not be valid. The guidelines also state that data controllers must design consent solutions that are clear to data subjects.<sup>2</sup>

The EDPB further considers that the use of a small font size or a colour that does not contrast sufficiently to provide sufficient readability (e.g. slightly grey text colour on a white background) may have a negative impact on users, as the text becomes less visible and users either overlook it or have difficulty reading it.<sup>3</sup>

### Withdraw consent

Article 7(3) of the GDPR provides that, in order for consent to be valid, the data subject must have the right to withdraw his or her consent at any time. Before consent is given, the data subject shall be informed thereof. It should be as easy to withdraw as it is to give consent.

The EDPB Guidelines on consent state that consent does not have to be given and withdrawn in the exact same action, but should be as simple. In practice, when consent is given electronically by a single mouse click, swipe or keystroke, data subjects must be able to withdraw consent just as easily. Where consent is obtained through a service-specific user interface (e.g. via a website or an app), the data subject must undoubtedly be able to withdraw consent via the same electronic interface, as switching to another interface for the sole purpose of withdrawing consent would require an unjustified effort. In addition, the data subject should be able to

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<sup>2</sup> EDPB Guidelines 05/2020 on consent under Regulation (EU) 2016/679, version 1.1, adopted on 4 May 2020, paragraphs 13 and 84.

<sup>3</sup> EDPB Guidelines 03/2022 on misleading design patterns in social media platform interfaces: how to recognise and avoid them, Version 2.0, adopted on 14 February 2023 May, paragraphs 51 and 84.

withdraw the consent without difficulty. This means, among other things, that a controller must ensure that it does not cost anything to withdraw consent or that the service is impaired.<sup>4</sup>

The question in the case is whether there was a valid consent to process the complainant's personal data via cookies.

## Assessment

ATG provides information that cookies are used on the website in a so-called cookie banner. The banner is displayed, inter alia, when the user first enters the website. In the first layer of the cookie banner, as it appeared on 21 May 2021, there were two options to choose from for the data subject, 'Select your cookies' and 'Accept all cookies'. The following assessment is based on this cookie banner on the company's website.

### Comparison of consent and withdrawal procedures

The complainant highlights the option of having a permanently hovering icon visible on all pages of the website to withdraw consent. IMY considers that a permanent hovering icon is an option that can meet the condition that it should be as easy to withdraw as to give consent. On the other hand, IMY does not consider that the GDPR requires a specific technical solution that all controllers must use in order to comply with the requirement of Article 7(3). The assessment of whether it is as easy to withdraw as it is to give consent needs to be made in the individual case on the basis of the procedure in question used to give consent. This assessment is in line with the Cookie Banner taskforce report and the EDPB opinion on valid consent.<sup>5</sup>

During the relevant period, when a user visited ATG's website for the first time, the cookie banner appeared immediately. The title of ATG's cookie banner was 'Accept cookies'. There, the user could, at the click of a button, consent to the use of all (non-essential) cookies. Once a user had given their consent in the cookie banner, the cookie banner disappeared and the website could be used. In order to withdraw consent, the data subject had to go to the company's cookie policy, which was located in the footer under the heading 'Personal data'. There you had to click on the "Cookies" button and then on the "How do I manage the acceptance/rejection of cookies?" button. Information about accepting/denying cookies came up and at the bottom was the option 'click here to open the cookie-settings'. There, the data subject had to click again and then enter a settings center where he or she had to uncheck the categories of cookies to which he or she had previously consented and then press 'save settings'. Thus, when comparing the way consent was obtained on the website, much fewer keystrokes were needed to give consent than to withdraw consent. IMY further considers that it was difficult for a data subject to find where to withdraw consent at all.

Since 21 May 2021, ATG has implemented changes to its cookie banner. Among other things, ATG has added clarification headings on withdrawal under the button 'how do I manage the acceptance/rejection of cookies?' in the cookie policy. However, the data subject still needs to go through all the steps described above in order to withdraw.

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<sup>4</sup> EDPB Guidelines 05/2020 on consent under Regulation (EU) 2016/679, version 1.1, adopted on 4 May 2020, paragraphs 113-114.

<sup>5</sup> Report on the work of the EDPB Working Group, 'Cookie Banner Taskforce', adopted on 17 January 2023, para. 35 and Opinion 08/2024 on valid consents for "Consent or Pay Models" implemented by large online platforms, adopted on 17 April 2024, paragraph 169 (IMY translation).

IMY's assessment is therefore that the changes made have not led to a data subject being able to withdraw his or her consent as easily as giving consent.

### **Misleading design**

IMY does not consider it possible to introduce a general standard regarding the colours and contrasts that a data controller should use in its cookie banner. An assessment of a cookie banner and whether it complies with the GDPR needs to be made on a case-by-case basis. The assessment shall consider whether contrast and colour are clearly misleading for the data subject and do not result in unintentional and therefore invalid consent. This assessment is in line with the Cookie Banner taskforce report.<sup>6</sup>

IMY does not consider that the option to refuse and to accept cookies needs to look exactly the same in order to comply with the GDPR's provisions on consent. However, they must be equivalent in order for the data subject not to be misled in their choice.

During the period in question, ATG used two different colours for the 'Select your cookies' and 'Accept all cookies' options. For the option not to accept cookies a link was used and for accepting cookies a button was used. The link consisted of grey/black text and the button to approve was green with white text. The background of the banner was white. The option of not accepting cookies, i.e. the link, is therefore not perceived as prominent as a green button on a white background. Furthermore, it is not clear that the link constitutes a possible choice for a user. It seems more like information because the text "Choose your cookies" is designed in the same way as the general information about cookies in the banner. IMY therefore considers that the design of the cookie banner reinforced the perception that the user should click to accept cookies. This must also be seen in the light of the fact that the cookie banner had the heading 'Accept cookies'. IMY considers that ATG's design of the cookie banner and the choice of colours and contrasts were designed to encourage the data subject to accept cookies. ATG has stated that the company needs to comply with regulations to improve accessibility. IMY does not consider that this justifies the need for the company to highlight the option of accepting cookies.

IMY's assessment is that the complainant's consent cannot have been an expression of its unambiguous wish, since the design made it appear that there were no other options than to consent. The complainant cannot therefore have been considered to have had the opportunity to give an informed and freely given consent.

ATG has changed the design of its cookie banner after the complaint. IMY considers that these changes brought some improvements for the data subject to provide freely given and informed consent. However, IMY believes that despite the changes, the design makes the option to accept all cookies more prominent than refusing. This is because the option to accept cookies still has a stronger contrast to the background than the option to refuse cookies. Against that background, IMY considers that ATG used misleading design in its choice of colour and contrast in its cookie banner, which affects the complainant's ability to give an informed and freely given consent.

### **Summary**

ATG has not made it as easy to withdraw consent as to give it. In addition, the company has used misleading designs in its choice of colour and contrast in the cookie banner, which affected the complainant's ability to give an informed and freely

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<sup>6</sup> Report on the work of the Cookie Banner Taskforce, adopted on 17 January 2023, para. 17.

given consent. There was therefore no valid consent and consequently no legal basis for processing the complainant's personal data. ATG therefore processed the complainant's personal data in breach of Article 6 and Article 7(3) of the GDPR.

### **Choice of corrective measure**

Pursuant to Article 58(2)(i) and Article 83(2) of the GDPR, IMY has the power to impose administrative fines in accordance with Article 83. Depending on the circumstances of the case, administrative fines shall be imposed in addition to or instead of the other measures referred to in Article 58(2), such as injunctions and prohibitions. Furthermore, Article 83(2) determines the factors to be considered when imposing administrative fines and when determining the amount of the fine. In the case of a minor infringement, IMY may, as stated in recital 148, instead of imposing a fine, issue a reprimand pursuant to Article 58(2)(b). Aggravating and mitigating circumstances of the case need to be taken into consideration. These could include the nature, gravity and duration of the infringement as well as past infringements of relevance.

IMY notes the following relevant facts. IMY has assessed that the company has not had a legal basis to process the complainants' personal data. Although ATG is not considered to have made the withdrawal as easy as the giving of consent, there has been an opportunity to withdraw consent and the company has made some improvements after the complaint to make it easier for the data subject. ATG has also made some improvements to the design of the cookie banner, although these have been considered insufficient. The company has not previously been found to have infringed the GDPR.

Against this background, IMY considers these minor infringements within the meaning of recital 148 and that ATG is to be given a reprimand pursuant to Article 58(2)(b) of the GDPR.

### **How to appeal**

If you wish to appeal the decision, you should write to the Swedish Authority for Privacy Protection (IMY). Indicate in the letter which decision you wish to appeal and the change you are requesting. The appeal must have been received by IMY no later than three weeks from the day you received the decision. If the appeal has been received in time, IMY will then forward it to the Administrative Court in Stockholm for review.

You can e-mail the appeal to IMY if it does not contain any privacy-sensitive personal data or information that may be covered by confidentiality. IMY's contact information is shown in the first page of the decision.