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Bratislava, 17.05.2022

## **Legal memorandum on the new legal regulation of the use of cookies and similar technologies in the Czech Republic and Slovakia**

BAA/65000.03

Dear Michal,

On behalf of **Luigi's Box, s.r.o.** ("Client"), you contacted us with the request to carry out an assessment of the new legislation on the use of cookies and similar technologies used to store or retrieve information stored on users' end devices (collectively, "cookies" or "cookie technologies"), in connection with the services provided by Client to its customers.

The opinion is structured into the following sections:

- a) a brief summary of the new legislation on the use of cookies in the Czech Republic and Slovak Republic;  
and
- b) assessing the Client's services in the context of the new legislation on the use of cookies.

We have based our conclusions in this legal memorandum on the applicable legislation in the area of electronic communications, privacy and data protection (including the European General Data Protection Regulation, the "GDPR"). In addition, we have also taken into account the interpretative opinions of the European authorities (European Data Protection Board, WP29, EDPS) and the opinions of supervisory authorities from various European countries (e.g. the ICO from the UK). Given that there is insufficient application practice on the use of cookies in the Slovak Republic, we cannot exclude that in the event of an inspection, the competent supervisory authority will have an opinion that differs from the conclusions of our legal memorandum. However, the legal views presented in the present memorandum are based on the current practice of the European supervisory authorities and therefore we consider that their possible questioning by the Slovak authorities is unlikely. A similar conclusion applies to the legislation of the Czech Republic.

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Below we present our assessment of the above points and are, of course, happy to be of service if you have any further questions.

## **1. LEGAL STATUS OF THE USE OF COOKIES IN THE SLOVAK AND CZECH REPUBLICS**

On 1 January 2022, an amendment to the Czech Act No. 127/2005 Coll. on Electronic Communications entered into force. Similarly, in the case of the Slovak Republic, the new Act No. 452/2021 Coll. on Electronic Communications entered into force on 1 February 2022. This legislation regulates the scope of the protection of the private sphere of users of end devices when using cookie technologies (as opposed to, for example, regulations in the area of personal data protection, which protect the data itself associated with a particular individual).

Both amendments introduce an essentially similar legal regime for the use of cookie technologies in both the Slovak Republic and the Czech Republic. The common feature of both legal amendments is the fact that they make the use of cookies conditional on obtaining prior demonstrable consent. The obtaining and quality of this consent must meet the standards required for consent under the GDPR. This means that the consent must be freely given (with the possibility of its refusal and revocation), it must be specific, informed and unambiguous that it is an active expression of the data subject's will.

In simplified terms, it can therefore be stated that consent is not be considered valid, for example: (i.) if the user does not have a genuine choice (for example, the use of a cookie wall that only allows access to the website after consent has been clicked), (ii.) if consent is conditional on the use of the website or application, (iii.) if the quality of the provided service is impaired without consent, (iv.) or in case of the "default" technical settings of the web browser (under the previous Slovak legislation, such a setting was considered to be a valid consent).

In the context of cookie technologies, it can also be noted that consent must be prior, i.e. it must be obtained before the cookies are placed on the end device or before the information is accessed, and it must be informed, i.e. the user must have access to information pursuant to Article 13 of the GDPR (e.g. about the purpose of the cookie, the controller, the cookie's expiry date, the recipients of the cookie data, etc. - this is the information provided by default in the so-called Cookie Policy) before consent is given.

Requiring prior consent for the use of cookies is currently standard in many EU Member States (e.g. Germany, France, Italy, but also the UK), and a uniform European regulation on mandatory consent should be introduced in the future by the so-called ePrivacy Regulation, applicable to all EU Member States.

In any case, the aforementioned legislation requires consent for the use of most cookies, such as marketing cookies, most analytics cookies, various social plug-in tracking technologies, cross-device tracking technologies using cookies or device fingerprinting, etc.

On the other hand, the legislation contains two exceptions that allow the use of cookie technology without obtaining consent, namely in the case of technical storage or access to data:

- (i.) for the purpose of carrying out the transmission or facilitating the transmission of a message over an electronic communications network, or
- (ii.) if it is absolutely (strictly) necessary for the provider of the information society services (website, application, etc.) to provide such services that were expressly requested by the user.

These exceptions are based on the provisions of Article 5 (3) of the Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

A correct understanding of the latter exception is important for the Client's services. The Slovak authorities' application practice in this respect does not provide any specific conclusions or recommendations, therefore we rely on the analysis of this exception that results from the practice of other supervisory authorities (e.g. ICO, EDPS). For the sake of the practical applicability of this memorandum, we present only relevant opinions that can be used in the appropriate setup of the Client's services.

In general, only those cookies that are strictly necessary for the functionality of the service requested by the user are considered to be absolutely necessary (i.e. if there is a technical solution that allows the user to use the requested service without the cookie, the "strictly necessary" exception should not apply). Similarly, this exception cannot be used for analytics cookies, as analytics are not explicitly required by the user and the service should be equally usable by the user without analytics.

Traditionally, the interpretative practice of the authorities of European authorities has included under this exception, for example, cookies used in the provision of a website/application and necessary for the purpose of: compliance with legal obligations (security, AML regulations, authentication, etc.), the functioning of the shopping cart in the e-shop, network management (load balancing), video playback or streaming, and, to a limited extent, cookies that remember basic user preferences if they are not associated with a persistent identifier.

It therefore follows quite clearly that most analytical tools and other cookies that collect data about the user, for example for the purposes of personalising offers and marketing, cannot be used without the user's consent.

On the other hand, various technical and functional cookies that are strictly necessary for the functioning of the service in which the user of is interested can be used without consent.

## **2. CLIENT SERVICES IN THE CONTEXT OF THE NEW LEGISLATION**

In the light of the new legislation, it is necessary to consider two types of services that the Client provides to its customers:

- (i.) services that use analytics tools without personalising the services or content of the website/application for a specific user - analytics use a session cookie that records how the site is used (e.g. what terms are entered into a search, what search results are displayed, which items are clicked by the user, what typos users most often make when searching, etc.) under an anonymous identifier. The information collected in this way is then stored in aggregated form and used to provide the non-personalised Search, Autocomplete and Recommender services (features) that are implemented on a particular website/application ("Non-Personalised Services").
- (ii.) services that use analytics tools to provide personalised website/app content ("Personalised Services").

Both of the above-mentioned groups of services use cookie technologies, which fall within the scope of the new legislation on electronic communications. The latter group of Personalised Services can be subsumed under the regime of cookies, which necessarily require the active prior consent of the user in order to function, even without further detailed analysis. If consent is not given, Personalised Services should not be activated against a specific user.

The situation is not so clear for Non-Personalised Services. Non-Personalised Services require cookies to be stored on the end device in order to function. The purpose of the cookie is to ensure that anonymous information about the use of the website/application is obtained. This data will be stored in aggregate form and in this form will enable qualitative changes to the functionalities of the website/application. Non-Personalised Services include, for example, the display of relevant content search results for all users of the site (i.e. without personalised content). Thus, there is no personalisation of content during search and neither search results nor other services (functions) are customised according to the preferences of a particular user (i.e. the same search result is displayed to all users when they enter the same term). The cookie used therefore ensures that the website/application contains the functionality to display the relevant content, in particular when using the search tool after entering a certain password (term). This is a so-called session cookie, which is automatically deleted from the user's device when the session is

closed. When the page is reopened, a new cookie is stored on the device, without any connection to the previous session. For the sake of completeness, we must mention that the cookie provides the operator and the Client with information about what goods and under what terms are searched for by users on the website, without linking this information to a specific user - only aggregated processing of information provided by individual users takes place, a functionality that is essential for the proper functioning of the Non-Personalised Services.

Non-Personalised Services, such as the search service, therefore, operate on a similar principle as a shopping cart service in an e-shop, allowing the user to view relevant content on the page - i.e. the contents of the shopping cart with items that the user has consciously placed there, or the content with search results according to the terms that the user has consciously entered into a search engine. In both cases, the invasion of users' privacy is minimal and based only on providing the specific functionality of the website/application at the required level.

An example of a feature associated with the Non-Personalised Services is the Search service, which has significant qualitative and technical differences compared to a regular website search. Regular internet search does not allow the user to obtain search results of the same quality and to the same extent as the search service provided by the Client. This means that the result of a regular search service will be different and less relevant to the user than would be the case if the Search service were used. The Search service should therefore be considered a relatively separate feature of the site (similarly for the other Non-Personalised Services).

Given the above circumstances of the Non-Personalised Services, we believe that the use of cookies for this type of service is necessary (strictly necessary). The cookie used obtains information from the user's device only if the user uses certain tools of the site - for example, if the user uses the search function, the cookie obtains information about the search method and, at the same time, the requested function offers the user content that is relevant to the search term. If the cookie were not stored on the device, there would not be a sufficient database of aggregated data on the use of the website, which is necessary for the operation of the Non-Personalised Services in question. Therefore, in our opinion, the Non-Personalised Services set up in this way do not require the prior consent of the user, but their use can be based on the above-mentioned exception from obtaining consent pursuant to Section 109(8) of the Slovak Electronic Communications Act or Section 89(3) of the Czech Act or pursuant to Art. 5 (3) of the EU Directive on privacy and electronic communications (i.e. they are technically necessary cookies for the provision of the Non-Personalised Services in question)

From a data protection perspective, it is questionable whether the use of Non-Personalised Services involves the processing of information that has the quality of personal data at all (we assume that to some extent it does). If such processing does take place, it may be

based on a legal basis other than the data subject's consent (e.g. the performance of a contract or the legitimate interest of the website operator under Article 6 (1) (b) or (f) of the GDPR). However, a detailed analysis of the service in question from the point of view of GDPR regulation is not the subject of this legal memorandum.

In conclusion, requiring consent to enable the functionality of the Non-Personalised Services could be considered explicitly inappropriate. This is because for a valid consent, it is important that the potential refusal of granting a consent does not have negative consequences for the services provided (i.e. that the user does not receive a worse service if the consent is not granted compared to the situation if he/she had given consent). The use of the cookie associated with the Non-Personalised Services is a condition for the use of these services, as this cookie provides the user with search options at a qualitatively and functionally higher level than is the level of search without the functionality provided by the Client. Thus, if the Non-Personalised Services are implemented on a specific website, conditioning the use of these services on the user's consent would not be in accordance with the condition of the voluntary consent (as this could lead to an unacceptable conditionality of the provision of the service).

Sincerely

**TaylorWessing e/n/w/c advokáti s. r. o.**  
JUDr. Ján Lazur, LL.M.  
(73NZ)