



PRIVACY LAWS & BUSINESS

DATA PROTECTION & PRIVACY INFORMATION WORLDWIDE

Thailand – Asia’s strong new data protection law

The law which will enter into force in May 2020 includes many GDPR-informed principles, but also some omissions.

By **Graham Greenleaf** and **Arthit Suriyawongkul**.

A military coup in 2014 imposed a junta government in Thailand. In February 2019, three weeks before the first general elections since the coup, this government enacted a data privacy law to override an old and ineffective

law applying only to the public sector. A military-backed party now leads a coalition government with a Prime Minister and Cabinet members from the previous military

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CNIL’s guidance on cookies sets stricter consent requirements

Web publishers need to adapt their websites to France’s new rules. **Ariane Mole** and **Juliette Terrioux** of Bird & Bird explain.

On 4 July 2019, France’s Data Protection Authority (the “CNIL”) adopted new guidelines on cookies and similar technologies¹, which replaced the previous guidance published by the CNIL in 2013².

means to obtain a valid consent from users. The consent of users can no longer result from their browsing on the website. Web publishers will now have to comply with stricter requirements for users’ consent.

The major change concerns the

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Future PL&B Events

- *Asian data privacy laws*, 30 October, Linklaters, London
- *New Era for US privacy laws: California and more*, 14 November, Latham & Watkins, London.
- *Balancing privacy with biometric techniques used in a commercial context*, 29 January 2020, Macquarie Group, London.
- *PL&B’s 33rd Annual International Conference*, St. John’s College, Cambridge 29 June to 1 July 2020.

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PUBLISHER**Stewart H Dresner**
stewart.dresner@privacylaws.com**EDITOR****Laura Linkomies**
laura.linkomies@privacylaws.com**DEPUTY EDITOR****Tom Cooper**
tom.cooper@privacylaws.com**ASIA-PACIFIC EDITOR****Professor Graham Greenleaf**
graham@austlii.edu.au**REPORT SUBSCRIPTIONS****K'an Thomas**
kan@privacylaws.com**CONTRIBUTORS****Ariane Mole and Juliette Terrioux**

Bird & Bird, France

Guoda Šileikytė

WALLESS, Lithuania

Jay Fedorak

Office of Jersey's Information Commissioner

David Barnard-Wills

Trilateral Research, UK

Arthit Suriyawongkul

Foundation for Internet and Civic Culture, Thailand

Inês Antas de Barros and Isabel Ornelas

Vieira de Almeida, Portugal

Wenlong Li

University of Edinburgh, UK

Alvin Cheung

University of Oxford, UK

Published byPrivacy Laws & Business, 2nd Floor,
Monument House, 215 Marsh Road, Pinner,
Middlesex HA5 5NE, United Kingdom**Tel: +44 (0)20 8868 9200****Email: info@privacylaws.com****Website: www.privacylaws.com****Subscriptions:** The *Privacy Laws & Business* International Report is produced six times a year and is available on an annual subscription basis only. Subscription details are at the back of this report.

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“ comment ”**From Thailand to Jersey –
GDPR's global effect is evident**

Our Asia-Pacific Editor, Graham Greenleaf writes in this issue that the Thai data protection law is the first explicitly “GDPR-based” law yet to be enacted in Asia (p.1), and Jersey's Information Commissioner, Jay Fedorak says that Jersey's close alignment with the GDPR forms part of a general economic strategy (p.12). It is therefore clear that the GDPR is having a global effect – also in Australia where there are pressures to modernise the law (p.17).

In our series of GDPR implementation across EU Member States, we now turn to Portugal. Its law, adopted in June this year has been in force since August. Read an interview about the law with Portuguese DP lawyers on p.14. In Lithuania, a new data protection law was adopted in June 2018, and the regulator has now issued the first significant fine. There are some national specifics that are different from the GDPR such as the provisions regarding the processing of national identity numbers (p.9).

Meanwhile, organisations need to get on with training. The STAR project's ready-made, easy-to-customise training materials, developed for the busy DPO, are now available (p.20). The STAR training materials are based upon research into existing GDPR training practices and should therefore be relevant and very useful.

We also return to the issue of recent cookie guidance from France's regulator (p.1). Things are moving fast in this area – the Internet Advertising Bureau Europe has released the second version of its consent and transparency framework, and Google has said it expects to join by the end of next March.¹

We are also pleased to bring you the winning competition essays from PL&B's Student Essay Competition this summer. These two winning entries discuss consent, legitimate interest and joint controllership in AdTech (p.24), and the market and legal challenges in convincing companies that GDPR-compliance is a competitive advantage (p.28).

Laura Linkomies, Editor

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¹ [digiday.com/media/google-to-join-iabs-revamped-gdpr-framework-by-next-march/](https://www.digiday.com/media/google-to-join-iabs-revamped-gdpr-framework-by-next-march/)**Contribute to PL&B reports**

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CNIL... from p.1

These new guidelines also set other changes, the key elements of which are analysed below.

LEGAL FRAMEWORK FOR THE USE OF COOKIES

Since 2009, the use of cookies and similar technologies (i.e. functions usually performed by a cookie which can be achieved by other means: Local Shared Objects³, fingerprinting techniques, etc.) has been regulated at EU level by the e-Privacy Directive⁴. The e-Privacy Directive provides that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a user, requires the consent of the user after the user was provided with an appropriate information notice.

Such provisions were transposed into France’s Data Protection Act in 2011 and were set out in article 82⁵ of the new French Data Protection Act, which entered into force on 1 June 2019.

According to this act, setting of a

cookie or other similar technologies, or access to information stored by cookies or other similar technologies on the terminal equipment of a user requires (i) providing the user with clear and comprehensive information about the purposes of the cookies and the means to withdraw consent and (ii) the user’s prior consent.

There are only two exceptions, i.e. two categories of cookies which are exempted from the consent requirement:

- technical cookies i.e. cookies which purpose is solely to enable or facilitate electronic communications and
- cookies which are necessary in order to provide a service explicitly requested by the user (for example, cookies remembering items in a shopping basket or selected language options).

According to the Act, no other cookies can be set without the user’s prior consent.

PURPOSES AND CONTENT OF THE NEW GUIDELINES

In its previous guidelines adopted in

2013, the CNIL opted for a rather flexible approach to consent. The French Data Protection Authority prescribed a two-stage procedure:

- 1 First, a banner was required to inform the user about the setting of cookies, and give him or her the possibility to object to the use of all or some of the cookies by clicking on a link featured on the banner. *Further website browsing resulted in valid consent from the users for setting cookies on their terminal equipment.*
- 2 A dedicated webpage about cookies also needed to be provided via a link added to the banner, containing further information and giving the user the possibility to accept or to refuse cookies category per category.

Under the new guidelines, further browsing can no longer constitute valid consent. It is now necessary *that the user clearly accepts or refuses the cookies; no implied consent is possible*. This is what the CNIL emphasizes in its new guidelines for web publishers.

This change in the CNIL’s policy was triggered on one hand by the new definition of consent in the GDPR⁶, and on the other by the stricter interpretation regarding the notion of consent by the Article 29 Working Party (now replaced by the European Data Protection Board – EDPB) in its Opinion on Consent⁷.

Indeed, the GDPR requires that consent, in order to be valid, should be freely given, specific, informed and unambiguous, and expressed by a statement or by *a clear affirmative action*. This led the Article 29 Working Party to conclude that *“scrolling down or swiping through a website will not satisfy the requirement of a clear and affirmative action”*. Further browsing can therefore no longer be construed as valid consent.

The CNIL, just like the UK Data Protection Authority (ICO) on 3 July 2019, adopted the new guidelines to reflect this stricter interpretation of the conditions for the validity of consent.

WHAT IS MEANT BY VALID CONSENT TO COOKIES?

The CNIL aligned its new recommendations concerning the collection of the users’ consent on the different criteria for the validity of consent required by

FRANCE’S NEW COOKIE RULES – WHAT HAS CHANGED	
New requirements	Unchanged requirements
There is a requirement for a clear affirmative action of the user to express consent. No implied consent is possible and further browsing is no longer sufficient to constitute a valid consent	There is still an obligation to collect consent prior to the setting of cookies
The web publisher can decide to collect a “global” consent but in any case the web publisher still has to provide the user with the possibility to consent to each category of cookies	Some categories of cookies still benefit from an exemption from consent
There is an obligation to provide the user with a list of partners which have access to the information collected via cookies	Consent must not be bundled as part of the terms and conditions and pre-ticked boxes are banned
It is not enough to provide the user with the possibility to modify the settings of his or her browser to object to cookies. This is not a valid means to opt-out	There is still an obligation to inform the user about each purpose of cookies, and to accept or refuse cookies “purpose by purpose”
There are stricter rules regarding audience measurement cookies, even if they are exempted from prior consent Controversially, the new guidelines of the ICO provide no exemptions from the consent requirement for analytics cookies	The access to a website or an app must not be denied for those users who do not accept cookies (= prohibition of “cookie walls”) The ICO, however, acknowledges that partial cookie walls that restrict access to certain content that requires the use of cookies could be valid

the GDPR. Therefore, the consent of users to cookies or similar technologies must be:

- **Free**, which implies that users can exercise their choices and must not suffer major disadvantages when they refuse or opt-out to cookies
- **specific**, which implies that consent must be distinguishable per categories of cookie
- **informed**, which implies that users must be provided with clear and comprehensive information at the time when the consent is obtained
- **unambiguous**, which implies that users must take a clear and positive action to give their consent and continuing to use a website does not constitute a valid consent
- **demonstrable**, i.e. web publishers must be able to demonstrate that they have a valid consent
- **easy to withdraw** at any time.

WHAT HAS CHANGED

The table on the previous page describes, in a nutshell, what has changed and what has not changed in the new CNIL guidelines.

A TRANSITION PERIOD APPLIES

According to its press release of 28 June 2019, the CNIL allows for a transition period of 12 months, during which web publishers will have to take measures to comply with the new guidelines. The CNIL further specified, in its publication on 18 July 2019, that this transition period will end six months after the publication of its

future recommendations on the practical aspects of collecting consent, which are planned for the first quarter of 2020 (which means the transition period would last until July/September 2020).

Therefore, during this transition period, further browsing can still be accepted as valid consent. To stay on the safe side, however, several web publishers have already adapted their websites to France’s new rules.

The transition period has already been challenged before the French Council of State (the highest French administrative court) by associations *Quadrature du Net* and *Caliopen*. The Council denied the petition for preliminary suspension, but a hearing on the merits of the case is scheduled for 30 September 2019.

Starting from September 2019, the CNIL is expected to hold meetings with various stakeholders in the field in order to discuss the practical aspects of collecting consent, which should be the subject of any upcoming recommendations.

Moreover, the European legal framework relating to the use of cookies and other similar technologies should also evolve. Indeed, a new e-Privacy Regulation has been expected now for a couple of years and the Finnish government issued, at the end of July 2019, a revised proposal which was discussed in early September. Hopefully upon entry into effect of the new e-Privacy Regulation, web publishers will not have to amend again their way of using cookies and similar

technologies together with their web sites and applications. It is worth keeping an eye on this development.

AUTHORS

Ariane Mole is a Partner and Co-Head of Bird & Bird International Privacy Practice, and Juliette Terrioux an Associate at Bird & Bird Paris.
Emails: ariane.mole@twobirds.com
Juliette.Terrioux@twobirds.com

REFERENCES

- 1 CNIL Deliberation n° 2019-093 of 4 July 2019
- 2 CNIL Recommendation n° 2013-378 of 5 December 2013
- 3 Sometimes called a “flash cookie,” a data file that can be created on the computer by the sites visited.
- 4 Art. 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), modified by the Directive 2009/136/EC
- 5 Article 82 of the French Data Protection Act (*Loi Informatique et Libertés*) as amended by the Ministerial Order (*Ordonnance*) on 12 December 2018
- 6 Article 4(11) of the Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation).
- 7 WP29, Guidelines on Consent of 10 April 2018 (wp259rev.01).

Italy adopts code of conduct for consumer credit

Italy’s Data Protection Authority, the *Garante*, has approved a code of conduct for consumer credit agencies. The code, adopted on 12 September, is an amended version of the previous code and takes into account new GDPR requirements.

The Code regulates the processing of personal data of individuals located in

Italy. It should be adhered to by entities located in Italy that professionally manage credit information systems, Covington LLP reports.

“The Code provides that the legal basis for processing the personal data contained in credit information systems for credit scoring purposes is the

legitimate interest of the credit agencies, hence it is not necessary to obtain consent. Nevertheless, data subjects must receive a complete and clear information notice.”

- See www.insideprivacy.com/eu-data-protection/italian-supervisory-authority-approves-code-of-conduct-under-the-gdpr/

Cayman Islands DP law now in force

The Cayman Islands’ Data Protection Act, adopted on 27 March 2017, entered into force 30 September. The law is enforced by an Ombudsman, and

is based on eight data protection principles; Fair and Lawfulness Use, Purpose Limitation, Data Minimization, Data Accuracy, Storage Limitation, Respect

for the Individual’s rights, Security – Integrity and Confidentiality, and International Transfers.

- See ombudsman.ky/data-protection

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