

Olivier Proust - 'French Senate's proposed Bill to amend Data Protection Act'

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French Senate's proposed Bill to amend Data Protection Act

The French Senate drafted a proposed Bill in November 2009 that would amend the Data Protection Act, introducing a requirement for data controllers to obtain the prior consent of data subjects before installing cookies on their computers, and a security breach notification obligation. The proposed Bill would also empower the French data protection authority to impose stronger fines. Olivier Proust, from Hunton & Williams, a legal expert consulted by the French Senate while drafting the proposal, examines the main changes proposed by the Senate.

Introduction

The French Senate has recently published a report entitled 'The Right to Privacy in the Age of Digital Memories'. The core message of this report is that, in recent years, the right to privacy has been confronted with the development of 'new digital memories' resulting from a rapid evolution of new technologies that enable the tracking and tracing of individuals in time and space (e.g. through biometrics, nanotechnologies, GPS, RFID, Bluetooth, etc.). Following the report, the French Senate published, on 6 November 2009, a draft proposal for a Law to Better Guarantee the Right to Privacy in the Digital Age (hereinafter 'the Bill'), which aims to amend the French Data Protection Act and reinforce the protection of privacy. If adopted, the Bill would introduce new provisions in the existing Data Protection Act, which would impact both the rights of individuals and the obligations of data controllers. The Bill would also grant the French data protection authority (CNIL)

stronger enforcement powers.

Additional rights for data subjects

A clear and easily accessible privacy notice

Under the current law, data controllers must inform data subjects about the collection and processing of their personal data. The new Bill aims to enforce this provision by imposing on data controllers an obligation to provide prior notice in a 'clear, specific and easily accessible manner'.

A simplified right of access

The Bill also aims to simplify the data subjects' right of access by modernising the means by which they may access their personal data. Under the current law, data subjects may only access their personal data in person or by mail, which overlooks the fact that most personal data are now collected via the internet. The Bill would require data controllers who collect data through a website to inform and enable data subjects to access their data electronically, having identified themselves. This would mean, for example, that internet users who have registered on a website would have the right to access, rectify or delete any information stored on their personal space after entering a login and password.

A simplified right to object

With a view to clarifying the current wording of the French Data Protection Act, the Bill proposes to distinguish two stages during which an individual may exercise his right to object. Prior to any processing or disclosure of data, data subjects may object, free of charge, to the use of their personal data for commercial purposes. After the data has been processed, data subjects may request the deletion of their

personal data, based on a legitimate purpose. This clarification is expected to grant individuals more control over the use of their personal data.

New obligations for data controllers

Obligation to obtain prior consent for the use of cookies

Under the current law, a data controller must receive individuals' consent in order to process their personal data, or must satisfy one of the legal conditions stated in the law. The new Bill specifies that such consent must be obtained before processing the data and after informing the data subject about the data processing activity. In particular, the Bill requires that data controllers obtain consent in order to 'store, or have access to, information on a user's terminal equipment'. In other words, companies must obtain the prior consent of internet users in order to store cookies on their computers. The purpose of this measure would be to implement the new requirements on the use of cookies recently adopted by the European Parliament and Council in the context of the revised ePrivacy Directive.

Obligation to appoint a data protection officer in large organisations

Currently, organisations in France are not obliged to appoint a data protection officer (DPO) - this function is optional. The new Bill would oblige large organisations in which more than 50 employees have access to, or process personal data, to appoint a DPO. The Bill states that DPOs are in charge of 'ensuring independently compliance with the provisions of the law and of informing all the people working for the organisation of the necessity to protect personal data'. According to

the Senate, this function is crucial since DPOs help to develop a 'privacy culture' and to raise awareness about privacy and data protection issues within the organisations by which they are appointed. The obligatory appointment of a DPO in large organisations would further strengthen the strategic role played by DPOs in the data processing decision-making.

Obligation to notify the data protection authority in case of a security breach

The Bill proposes to specify the security measures imposed on data controllers and states that 'data controllers must implement adequate measures, with regard to the nature of the data and the risks of the data processing, to preserve the security of the data, in particular to protect the data processed against any breach accidentally or unlawfully causing the destruction, loss, alteration, disclosure, communication, storage, processing or unauthorised access to personal data, particularly when the processing contains transmissions of data over a network, as well as any other unlawful form of processing'. This new wording would replace the insufficient wording of the French Data Protection Act, which simply requires data controllers to take 'useful precautions, with regard to the nature of the data and the risks of the processing, to preserve the security of the data'.

In addition, the Bill would introduce a new data security breach notification requirement. In case of a data security breach, data controllers would have to notify the CNIL of this breach 'without delay'. If the breach is likely to impact the personal data of one or more individuals, the CNIL may require the data controller to notify

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these individuals as well. The content, form and conditions of this notification would be further explained in an implementing decree adopted by the State Council (*Conseil d'Etat*) following an opinion rendered by the CNIL. This new measure anticipates the implementation of the provisions on data security breach notifications recently added to the revised ePrivacy Directive. However, the Bill would go beyond the ePrivacy Directive, which only covers breach notifications for telecommunications companies and internet service providers.

Stronger powers for the French data protection authority

Power to impose heavier fines

Since 2005, the total amount of fines imposed by the CNIL has reached €520,400. This number is significantly lower than the total amount of fines imposed by the Spanish data protection authority: €22.6 million in 2008 only. This is due to the fact that, under the current law, the maximum fine that the CNIL may impose is €150,000 for a violation of the French Data Protection Act, or €300,000 in case of a second violation within five years of the first sanction. The Bill proposes to double these thresholds by bringing them to €300,000 and €600,000 respectively.

Broader publication of the CNIL's decisions

The current wording of the French Data Protection Act states that the CNIL may publish the fines it pronounces only 'in case of bad faith' of the data controller. Since this limits the scope of the CNIL's decisions, the Bill proposes to delete these words, thus enabling the CNIL to publish its decisions and penalties whenever it deems so appropriate.

A spontaneous right of intervention in court proceedings

Under the current law, the CNIL must respond to a request from public authorities and courts for an opinion. It must also immediately inform the public prosecutor of offences of which it has knowledge and may present its remarks in criminal proceedings. In particular, the judges in charge of an investigation or of rendering a case may request the chairman of the CNIL or his representative to submit his comments or to present them orally before the court. The proposed Bill would supplement these provisions, granting the CNIL the additional right to produce written observations or to be heard spontaneously in any civil, administrative and criminal court hearing. These written observations would be admissible in court, whatever the applicable procedure.

Conclusion

The Senate's proposed Bill shows that the French legislator is taking data protection seriously, and has grasped the challenges of new technologies on the protection of privacy. In the upcoming months, the Bill is due to be reviewed by an internal Committee of the French Senate before being put to the vote in the full assembly of Senators. If adopted by the Senate, the Bill will be forwarded to the French National Assembly, where it will be reviewed and put to vote a second time. If this Bill is enacted, it will undoubtedly impose on data controllers additional obligations and may require them to make some structural changes and to reassess the manner in which they process personal data.

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