

Client Update

French Parliament Adopts “Digital Republic” Bill: Greater Rights and Greater Risk

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On September 28, 2016, the French Parliament adopted the “Digital Republic” bill (the “Digital Law”) which brings wide ranging changes to digital life in France.¹ The Digital Law bolsters individuals’ rights and increases penalties twenty-fold for those who breach them.

Businesses which operate or target consumers in France will, therefore, need to be more aware than ever of their data protection obligations in the country. However, even organizations with no ties to France may find the Digital Law instructive as a possible indicator of global trends towards enhanced data privacy rights, obligations and enforcement.

THE NEW LAW

The Digital Law was adopted with the objective of:

- encouraging data and knowledge circulation, most notably by broadening the French government’s open public data policy, which lays the foundations for openness by default administrative documents and databases;
- improving protection of personal data by establishing new rights and increasing sanctions to deter breaches; and
- providing universal access to digital technology, particularly by guaranteeing continuity of connection to digital services for those in financial distress.

Several provisions of the Digital Law have already entered into force, while others will only be effective when the corresponding implementation decrees are published. Once fully implemented, the Digital Law will put France ahead of much of the EU in tackling issues posed by the ever-changing digital world.

¹ <http://www.senat.fr/petite-loi-ameli/2015-2016/744.html>.

INCREASED PRIVACY PROTECTION

The Digital Law strengthens French data protection law and gives a statutory footing to individuals' fundamental right to control how others use their personal data.² The Digital Law will also introduce a host of substantive rights which echo many of those in the EU General Data Protection Regulation ("GDPR") which is due to come into force, in France and throughout the EU, on 25 May 2018.

The new rights under the Digital Law cover the entire data supply chain, from initial collection to an individuals' death and will require businesses to revisit their internal procedures to ensure they are compliant.

Key new rights include:

- Electronic exercise of data protection rights—When a business collects individuals' data by electronic means, those individuals must be able to access and modify their personal data, or oppose its processing, electronically.
- Information on data retention—All data controllers (defined as persons, public authorities, departments or organizations who determine the purposes and means of the data processing) have to inform the data subject how long their personal data will be retained or, when the data controller is unable to do so, of the criteria used to determine how long it will be kept.
- "Digital death"—From March 2017, individuals will be able to decide in advance what they wish to do with their personal data when they die. They will also be able to designate a third party to implement their instructions.
- Right to be forgotten for minors—Data controllers are obligated to erase data on request if the data was published when a person is or was a minor. This is a precursor to the more general right of erasure under the GDPR that will apply to all individuals.
- Data recovery and portability—From May 2018, email service providers will be required to allow the migration of users' emails and contact lists when they decide to change their service provider.
- Confidentiality of electronic correspondence—The Digital Law will guarantee the confidentiality of electronic correspondence. Under the new law, by the end of 2016, emails will be treated the same as physical letters. Accordingly, email service providers will be prohibited from analyzing the

² This general principle will be added to Article 1 of the French Data Protection Act of 1978.

content of emails, which will mean that automated processing for purposes of serving advertising based upon email content, or for purposes of statistical evaluation, will be forbidden (except to detect spam messages and viruses).

In addition to the more conventional data protection rights, the Digital Law also recognizes the social and political sides of the new digital era and introduces measures to ensure continuous and nondiscriminatory access to the Internet. For example:

- Right to connection continuity—Households experiencing difficulties paying certain digital service providers may receive financial assistance from a national “solidarity fund” and their service provider has to maintain their connection while their request for assistance is considered.
- Net neutrality—The Digital Law implements “net neutrality” and prevents operators from discriminating when providing network access. Service providers must, therefore, not restrict access to websites for another’s benefit or limit consumers’ access to the Internet more generally without justification. This means that Internet service providers may not reduce the bandwidth granted to certain websites and increase the bandwidth of other websites in exchange for payment. The French authority for regulation of the electronic communications and postal sectors (the “ARCEP”) is responsible for policing this principle.

While these new rules will not impact most businesses, all organizations should recognize the sentiment behind them and remain conscious of what they could spell in other areas of the digital economy in the future.

BROADER POWERS—BIGGER PENALTIES

Inevitably, with increased rights comes increased responsibility. Therefore, under the Digital Law, the French data protection authority (the “CNIL”) boasts significantly greater powers to protect individuals’ privacy.

Most notably, the CNIL is now able to impose penalties of up to €3 million on those who breach data protection and privacy rules in France. At twenty times the previous €150,000 maximum penalty, the French government hopes that the new sanctions will give added bite to laws which in the past many perceived large organizations to be consciously flouting given the small fines they faced for doing so.

The Digital Law also paves the way for the GDPR, and from 25 May 2018, the CNIL will be able to issue fines up to the higher of €20 million or 4% of worldwide annual turnover for the most severe data protection breaches. These

increased fines mean that companies considering French (and in time EU) data protection issues will have to carry out vastly different risk assessments than they have previously, making data protection a higher priority than ever before.

Higher fines aside, businesses should also be alive to the possibility of greater cooperation between data protection authorities in the future on enforcement action. Recognizing the inherently interconnected nature of the modern digital world, the Digital Law facilitates cooperation between the CNIL and non-EU data protection authorities by allowing the CNIL to communicate information to them, provided the state in question guarantees an adequate level of protection for personal data.

A SIGN OF THINGS TO COME

With such far reaching changes, companies operating in France cannot ignore the significance of the Digital Law for their business. Even beyond France, however, the Digital Law signals changes that companies are likely to have to contend with elsewhere in the future. Most notably, any company that targets individuals in the EU will have to contend with the GDPR's onerous and unforgiving requirements come May 2018.

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Please do not hesitate to contact us with any questions.