May 2022

THE TECHNOLOGY NEWSLETTER

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INTRODUCTION

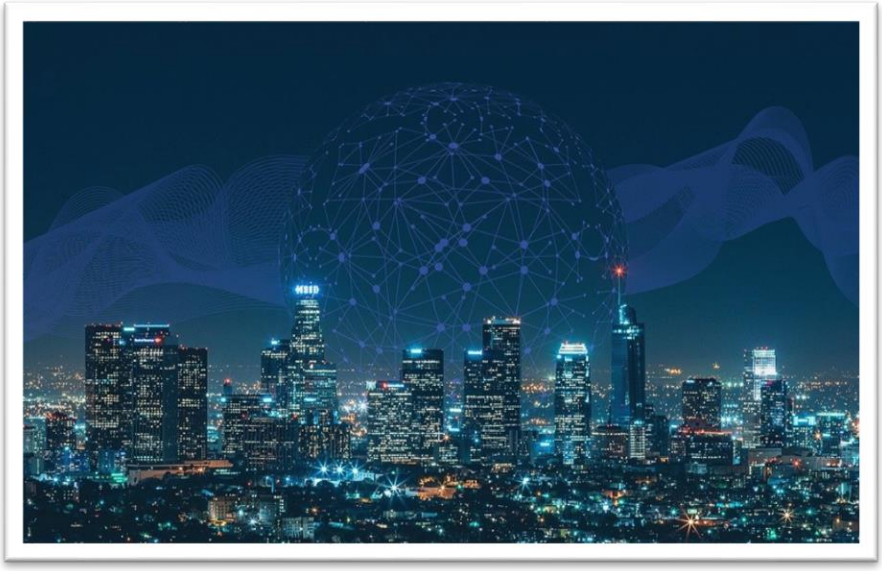
The Argus Technology Newsletter discusses recent developments in technological advances or milestones or events. As lawyers, we enjoy delving into the legal nuances and implications of technological changes and analysing their impact on our clients and their activities. It is said that law always lags behind technological advances and there could be some truth behind such statement, but there is no reason for lawyers to lag behind technological advances.

The Argus Technology Newsletter is not meant to be a substitute for your regular technology periodical. Instead, we hope and promise to offer a lawyer's insights into technological change and innovation.

Argus Partners has a developed a strong and a robust technology and data privacy practice, which spans transactional advisory, corporate and regulatory advisory as well as contentious matters and disputes. Whilst physically the attorneys are based out of our Mumbai, Delhi & Bangalore offices, the team is servicing clients across the globe on Indian legal issues in technology and data privacy.

G7 Adopts Ministerial Declaration to foster 'Data Free Flow with Trust'

Article Contributed by Aryan Mohindroo (Associate)



On May 11, 2022, the Digital Ministers of G7 adopted a Ministerial Declaration on current issues associated with digital transformation and related frameworks. The declaration pertains to policy objectives on a range of areas including digitalization and environment, data, competition in digital markets, and eSafety. The term *Digital Free Flow with Trust* ("**DFFT**") has been coined which outlines an action plan for ensuring free flow of data with trust.

The following commitments have been adopted by G7 nations through the action plan:

(i) Strengthening of evidence base of DFFT which includes working to get a better understanding of data localization, its implications and alternatives;
(ii) Building on commonalities to support interoperability and indulging in analysis to study common practices like standard contractual clauses and technology;
(iii) Ensuring constant regulatory cooperation by indulging in discussions relating to regulatory approaches to privacy enhancing technology, data intermediaries, emergent risks, sand boxes, promotion of interoperability of data protection frameworks etc;
(iv) Promoting DFFT in relation to digital trade;
(v) Dissemination of knowledge in relation to prospects of international data spaces and voluntary data sharing.

The declaration, by way of an Annexure II therein, also provides the principles for domestic legal frameworks to promote the use of electronic transferable records. These include:

(i) Legal Clarity of Regulations

The legal frameworks should be clear and unambiguous to ensure that all parties subject to the framework are in a position to understand the requirements needed to be complied with and so such parties are able to design the technical systems required to create, process and exchange electronic transferable records.

(ii) Technological Neutrality

Legal frameworks should use technologically neutral language and terms which provide flexibility to the parties subject to them. The language should be neutral to the extent that it stays applicable to technologies developed in the future.

(iii) Functional Equivalence and Non-Discrimination

Similar level of legal recognition should be allowed to electronic transferable records and their paper equivalents wherever they perform similar functions.

(iv) Interoperability

To ensure a widespread and cost-effective use of technical systems that are needed to create electronic transferable records, an element of interoperability between such technical systems should be ensured.

(v) Global Acceptance

Global acceptance of electronic transferable records should be ensured irrespective of where the same are created, processed and exchanged. This requirement of acceptance should sufficiently meet the applicable substantive requirements.

(vi) Transparency and stakeholder engagement

Drafts of legal frameworks should be opened for stakeholder comments and consultation.

French Data Protection Authority Publishes Preliminary Criteria for Validity of Cookie Walls

Article Contributed by Smriti Tripathi (Senior Associate)

The Commission Nationale Informatique & Libertés ("**CNIL**"), the French Data Protection authority has recently published preliminary criteria for the validity of cookies walls.

"Cookie walls" are used by websites that require the internet user to accept cookies or other tracking devices if he/she wants to access the content of the website. Generally, there is an alternative option in the form of a subscription fee (also referred to as "pay wall") to compensate for the loss of advertising revenue (such revenue is tied with cookie technology).

In July 2019, the CNIL had published guidelines on "cookies and other tracers". In its initial version, these guidelines prohibited cookie walls as this would violate the principle of "free consent" for cookies. However, the French Council of State ruled on 19 June 2020, that the CNIL did not have the legal power to interpret, on its own, the requirement of free consent under GDPR to ban all types of cookie walls. The assessment of the legality of cookie walls had to be more granular, on a case-by-case basis.

Preliminary Criteria: The legality of cookie walls must be assessed taking into account in particular the existence of real and satisfactory alternative(s) offered in the event of refusal by the user. The CNIL's criteria focuses on the most commonly observed practices: they must be used as part of a case-by-case analysis.

1) **Does the Internet user who refuses cookies have a fair alternative to access the content?**

   When an Internet user refuses the use of cookies on a website (for example by clicking on a "refuse all" button), the CNIL recommends:

   a) that the publisher offers a real and fair alternative allowing access to the site and which does not does not imply having to consent to the use of their data.

b) failing this, the publisher must be able to demonstrate that the same information is accessible on another publisher that provides its content without a cookie wall.

The publisher has to avoid creating an imbalance to the detriment of the internet user, and to this effect, ensure the ease of access for the user to this alternative. Imbalance could exist, for example:

a) where the publisher has exclusivity on the relevant content/service. For example, this would be the case for online public services that provide information or allow for online formalities.
b) when the internet user has few or no alternatives to the service and therefore has no real choice as to the use of cookies, for example in the case of dominant or essential service providers.

2) Access fee alternative: is the price reasonable?

Offering access for a reasonable fee is recognized as a legal alternative to acceptance of cookies. However, the fee must not be such as to deprive internet users of a real choice.

a) Determination of what constitutes a reasonable fee should made case-by-case basis by the publisher and the CNIL encourages publishers to make their analysis public.
b) The publishers should tailor the payment to the nature of the service – in some cases, rather than a subscription fee involving registration of a payment card data, micropayments on an ad hoc basis using virtual wallets will be more suitable.
c) Where the user has to set up an account with the website, the purpose of such account has to be specific and transparent. An account could for instance allow the user to benefit from its subscription on various devices. The publisher has to abide by the principles of lawfulness, fairness and transparency, data minimization and purpose limitation (in particular with respect to further processing).

3) Can the cookie wall cover "all" cookies indiscriminately?

The CNIL has instructed that users should be able accept or refuse cookies based on their purpose, (on a purpose-by-purpose basis), failing which this can affect the user's freedom of choice and therefore the validity of the consent. The publisher must demonstrate that its cookie wall is limited to the purposes that allow fair remuneration for the service offered. For example, if a publisher considers that the remuneration for its service depends on the income it could obtain from targeted advertising, the cookie wall should only be for advertising cookies and other cookie should remain optional (such as for instance personalization of editorial content, etc.). The publisher must clearly inform Internet users of purpose of the cookie wall.

4) The user chooses paid access without consenting to cookies: in what (limited) cases can cookies still be deposited?

In principle, except for cookies that are essential for a website to function correctly, no cookies should be placed where the user has opted for paid access.

The publisher may however request, on a case-by-case basis, the Internet user's consent to cookies when such cookies are required to access content hosted on a third-party site (for example, to view a video hosted by a third-party site), or a service requested by the user (for example, to provide access to sharing buttons on social networks). The user's consent could be collected, for example, within a dedicated window displayed when the Internet user wishes to activate the content, with clear information on:

a) The fact that the activation of third party content, or the use of sharing buttons, requires consenting to cookies (specifying the purpose(s) and providing a link to the privacy policy, in French, of such third party);
b) The possibility of easily withdrawing consent at any time; and
c) The consequences of refusing or withdrawing of consent, including the impossibility of accessing third party content.

In any event, the Internet user must always have the possibility of personally accessing the settings of the site, to consent to certain uses (for example, the personalization of editorial content).

It must be noted that in the last few years, EU data protection authorities such as the Dutch DPA, British DPA, Italian DPA and the Spanish DPA have ruled that cookie walls that do not offer an alternative to consent are in violation of the GDPR since they do not provide the user any real choice and the user is required to either give their consent to all cookies and trackers on a website or leave it without being able to access it. Such a 'take it or leave it' approach constitutes an invalid form of consent under the GDPR as the GDPR requires consent to be (i) freely given, (ii) specific, (iii) informed and (iv) an unambiguous indication of the user's wishes.

In May, 2020, the European Data Protection Board ("**EDPB**"), an independent supervisory body made up of representatives from all national data protection authorities in the EU, tasked with ensuring a consistent application of the GDPR and ePrivacy directive inside the EU, released guidelines that clarify the legality of cookie walls and what constitutes a valid consent. The EDPB guidelines effectively rule out cookie walls as a valid means for websites to obtain consent from their users to process their personal data. The guidelines state that "*Access to services and functionalities must not be made conditional on the consent of a user to the storing, or gaining of access to information already stored, in the terminal equipment of a user*."

In view of the above, the guidelines published by the CNIL is a move in the right direction - as they lay down the criteria to determine if a satisfactory alternative to consent is available and being provided to the user. However, some of the principles laid down by the CNIL will require additional analysis and interpretation, for instance, what would be deemed to be a fair price and which websites can be considered as dominant/essential service providers.

Singapore Court Grants an Injunction Preventing the Sale of an NFT

Article Contributed by Anurag Prasad (Associate)

This case is likely to shape the jurisprudence around the use of NFTs beyond the realm of collections. The Singapore High Court has passed an order granting an injunction preventing the sale of a non-fungible token ("**NFT**") from the popular Bored Ape Yacht Club (BAYC) series.

Brief facts of the case are as follows:

1. The plaintiff, a Singaporean NFT investor, had used an NFT from the BAYC series as collateral to borrow Ethereum (a cryptocurrency) worth around $103,000 from the defendant through NFTfi, a community platform that operates as a cryptocurrency lending marketplace which allows the use of NFTs as collateral.

2. As part of the agreement, the NFT was required to be held by the defendant until the plaintiff had repaid the loan. The agreement further provided that the defendant would not relinquish ownership of the collateral and if the loan was not repaid by the deadline, an extension would be granted.

3. However, when the plaintiff failed to repay the loan by the deadline, the defendant without any regard for the terms of the agreement, directly moved the NFT to their personal Ethereum wallet and offered it for sale on OpenSea, an NFT marketplace.

4. The plaintiff approached the court for an injunction preventing the sale of and to compel the defendant to accept repayment of the loan and to return the collateral. As mentioned above, the court granted the injunction.

In the wake of the case, cautioners from around the globe have called for regulations and standards to govern the NFT space. The injunction is the first of its kind and recognizes the

use of NFTs as legally permitted collateral for the purpose of borrowing and lending in Singapore.

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