



# Privacy Law: A Global Legal Perspective on Data Protection Relating to Advertising and Marketing



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## FOREWORD

Advertising has changed dramatically over the past decade. Rapid developments in technology, the proliferation of social media, and increased access to consumer data have allowed publishers, brands, agencies, and other players in the advertising ecosystem to better understand consumers and deliver more relevant content. Consumer data is incredibly valuable and can be used for purposes such as research and analysis, calculating attribution for campaigns, email and text marketing, delivering personalized advertising, and finding prospective customers in ways not previously possible. For example, a brand can upload its customer list to a social media platform, and serve advertising on the platform to both customers on that list as well as segments of customers identified by the platform as similar to the brand's customers and likely to purchase the brand's products.

The increased reliance on consumer data has led to inevitable questions about the need for regulation over consumer privacy. While privacy is not a new concept, privacy exploded on a global scale in 2018 due to a combination of factors. Most significantly, the European Union began enforcing its robust data protection law, the General Data Protection Regulation (GDPR), which gave regulators the ability to issue dramatic penalties against companies for improperly processing data about individuals located in Europe. Concerned about the ease of data flows across borders and the growing importance of international markets, companies around the world took measures to address the obligations of the GDPR. At the same time, the world learned about the Facebook-Cambridge Analytica incident, which created heightened awareness of the power of data and the potential for misuse.

Privacy compliance has shifted from a business best practice to a business necessity. Since 2018, numerous jurisdictions have updated their privacy laws to bring them closer to GDPR standards. For instance, California and Brazil both passed GDPR-like privacy laws, effective in 2020. While many of the new laws share similarities to the GDPR, they differ in key aspects and require independent analysis. Companies must now understand the

nuances between privacy obligations in their home jurisdictions and those elsewhere, and implement procedures and systems to harmonize compliance.

This book, developed by the Global Advertising Alliance (GALA), in cooperation with the International Advertising Association (IAA), is the first, to our knowledge, designed specifically to address global privacy laws in the context of the advertising ecosystem. GALA members across 70 countries with expertise in privacy in their respective jurisdictions helped develop the content for the book. Each chapter covers a specific country, giving a background on the privacy framework for that country, detailing key issues in relation to advertising, and concluding with opinions from the author of that chapter as to the state of privacy in that country. To improve readability of the book, GALA divided the book into two parts. Part one focuses on countries outside the European Union, while part two starts with an overview of the GDPR and then focuses on countries within the European Union that are subject to the GDPR. The digital version of the book includes both parts.

While there are great differences in the ways that privacy is addressed around the world, there are certainly some key trends across jurisdictions:

- Countries are more focused than ever before on privacy, and many are developing robust laws with harsh penalties. However, compliance can be difficult because laws often are not technologically agnostic and struggle to fit advancements in technology.
- The types of consumer data considered to be personally identifiable have broadened substantially. Information previously treated by the advertising ecosystem as “de-identified” or “anonymous,” such as IP addresses and Ad IDs, could fall within scope of privacy laws.
- Transparency and choice are becoming universal concepts. Privacy laws around the world accept the notion that consumers have the right to know what information is being collected from them and the purposes for which it is being collected. They also frequently give consumers the right to limit use of their information for marketing purposes. Depending on the jurisdiction and other factors, choice may require opt-in or opt-out consent.

- Practices that are not specifically prohibited by law could still violate the law or create public relations issues if those practices do not meet the reasonable expectations of consumers. Providing better notice to consumers and avoiding “creepy” practices can help address potential issues.
- In response to globalization, some countries have instituted strict data localization requirements. Cross-border data flows require additional consideration.
- Global data security and breach response obligations have dramatically evolved over the past decade, playing catch up to those already found under U.S. law. Violations often carry harsh penalties.
- Privacy regulation comes not just from lawmakers, but also from the platforms and browsers from which data is collected. Changes to their policies and technology have a fundamental impact on the advertising ecosystem and privacy compliance efforts.
- Profiling and automated decision-making carry increased scrutiny. Many jurisdictions impose specific obligations, such as internal assessments, around related data processing.
- Jurisdictions do not always align on balancing privacy, surveillance, and freedom of speech. Companies should aim to understand local belief systems and practices when processing data about consumers related to that jurisdiction.

It is important to note that this book reflects a snapshot in time and was developed prior to the COVID-19 pandemic of 2020. As such, the content does not address the impact of COVID-19 on privacy law. Countries around the world have taken measures to combat COVID-19, including through development of apps designed to trace the spread of COVID-19 that rely on the processing of vast amounts of consumer data. These measures may have a short term impact on privacy rights and expectations, and could ultimately result in long term increased privacy regulation as consumers become more concerned

about how their data is used. We reserve discussion of the impact of COVID-19 for the next edition of this book.

A big thank you to all of the GALA members who contributed to this book, and, in particular, to Soren Pietzcker (who also led the writing of the GDPR chapter) and to Lyric Kaplan (who helped develop the questions for the book), as well as to the IAA for its collaboration efforts. This book would not be possible without all their hard work. Special thank you to Stacy Bess (Executive Director of GALA), Jeff Greenbaum (Chairman of GALA), Srinivasan Swamy (Chairman & World President of IAA), Carla Michelotti (Global VP of Government Affairs of IAA), and Dagmara Szulce (Managing Director of IAA).

On behalf of GALA, we appreciate you choosing to read our book, and hope you find it to be a valuable resource.

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FRANCE



# 1 PRIVACY LAW

## 1.1 How is privacy regulated in France?

Privacy is regulated by statutory law and European Law. These Laws are interpreted and enforced by the supervisory authority (“CNIL”), which is a governmental authority, but also by French courts. The CNIL acts in the following four main fields of activity:

- (a) to inform individuals of their rights and data controllers/processors of their obligations (and accompany them in their compliance process);
- (b) to issue its own guidelines interpreting the law;
- (c) to sanction the violation of its guidelines (investigatory powers, warnings, cease and desist letters and sanctions, including monetary sanctions); and
- (d) to issue public communications (opinions at the request of the legislator, or public communications pertaining to innovation/prospective).

The CNIL’s guidelines and opinions are not binding the courts but are usually taken into account by the judges.

Privacy has been regulated in France since the law dated January 6, 1978 (“Data Protection Law”). It was amended on June 20, 2018 to introduce the necessary changes (ie, opening clauses) required by the European General Data Protection Regulation (“GDPR”).

As the most important aspects of data privacy are regulated by the GDPR, France has only very limited regulatory power. The rules which are not subject to national regulation, or for which France has not made use of an opening clause, will only be mentioned below by a short reference on the European Union.

## 1.2 What are the key laws regulating privacy? Please point out national laws, local or state-specific laws, sector-specific laws, and self-regulatory frameworks, with special focus on advertising aspects.

The primary source for data protection in the European Union, and thus in France, is the GDPR, which is directly applicable in all European Member States and does not need to be implemented by the individual European Union Member States. The GDPR covers the majority of privacy regulation.

The Data Protection Law aims at implementing the opening clauses; the main rules aiming at completing the GDPR are the following :

- (a) the implementation of the accountability principle led to the withdrawal, from French law, of the obligation to file a data processing activity with the CNIL (which was compulsory before the GDPR entered into force), except for specific data processing, in particular for the collection/processing of French citizen’s social security identification number (ie, this still requires the authorization of the CNIL);
- (b) sensitive data cannot be processed except in limited instances provided by law (eg, when the processing relates to data which have been anonymized, or when the processing concerns public information mentioned in court decisions, provided that the purpose and the consequences of the processing do not lead to the re-identification of the individual concerned);

- (c) the processing of health data must be authorized by the CNIL in certain instances, in particular, processing for research purposes when the processing does not meet the guidelines issued by the CNIL;
- (d) a child must be at least 15 years old to give a valid consent for the processing of his/her personal data (the GDPR sets the age at 16 years, but EU Members States are allowed to provide for a lower age);
- (e) when the processing is based on the consent of the data subject, the controller must be able to demonstrate that the contracts which relate to devices or services leading to the processing of personal data do not prevent consent of the end user. Consent may be deemed prevented when the end user is faced with restrictions, without legitimate technical or security reasons, in particular during the initial configuration of the device; and
- (f) the notification of a data breach to a data subject can be restricted when such a notification could raise an issue relating to national security, defence or public security.

### **1.3 How is privacy law enforced? Please address both regulators and self-regulatory bodies.**

France does not have any self-regulatory body which can enforce privacy law.

The GDPR and the Data Protection Law is enforced by the CNIL, the French supervisory authority which has the following powers :

- (a) to handle claims filed by individuals;
- (b) to carry out investigations (as a supervisory authority) and to issue corrective measures in the event of a violation of privacy law (eg, warnings, cease and desist letters, withdrawal of an authorization issued by the CNIL, prohibition to carry out the processing, imposition of fines etc); and
- (c) to inform the prosecutor of any violation of the privacy law and to submit observations during a criminal procedure.

The French courts also have jurisdiction in the event that a lawsuit is brought by a data subject claiming that his/her rights have been violated and claiming a civil or criminal liability (depending on the violation) from the data controller or processor.

## **2 SCOPE**

### **2.1 Which companies are subject to privacy law in France?**

See the European Union chapter.

In addition to the scope of the GDPR, French data protection law applies to any processing carried out in connection with the activity of the establishment of a data controller (or its data processor) where this establishment is located in France (irrespective of the place where the processing is located, whether in France or abroad).

**2.2 Does privacy law in France apply to companies outside the country? If yes, are there specific obligations for companies outside the country (eg, requiring a company representative in the country)?**

Yes, privacy law applies outside the country:

- (a) As far as the GDPR is applicable, it applies to data controller located outside France.
- (b) The rules in the Data Protection Law enacted to implement the opening clauses of the GDPR apply if the data subject resides in France (irrespective of whether or not the data controller is established in France); there is, however, an exception for processing carried out for journalistic, academic, artistic or literary purposes, whereby the Data Protection Law applies to the data controller when it is established in the EU.

The Data Protection Law no longer imposes the requirement that the data controller, which is not established in France (or in another EU Member State), must appoint a representative located in France.

**3 PERSONAL INFORMATION**

**3.1 How is personal information/personal data defined in France?**

The Data Protection Law makes a reference to the GDPR for the definition of personal information/personal data. See the European Union chapter.

**3.2 What categories of personal information/personal data are considered sensitive (eg, children, biometric, health, video, geo-location, financial)? Are there specific obligations around sensitive information?**

See the European Union chapter.

In addition to specific obligation contained in the GDPR, the Data Protection Law sets forth exceptions to the prohibition of the processing of sensitive data, eg, if:

- (a) the processing concerns statistics and is carried out by the French national authority in charge of statistics and economic studies, or by a service of a Ministry in charge of statistics (This exception is more restrictive than the corresponding exception set forth by the GDPR); or
- (b) processing concerns public information mentioned in court decisions, provided that the purpose and the consequences of the processing does not lead to the re-identification of the individual concerned (see question 1.2(b)).

The controller or processor must take appropriate and specific measures to safeguard the interests of the data subject.

**3.3 What are the key privacy principles that companies need to follow regarding their processing of personal information/personal data (eg, transparency, choice, purpose limitation)?**

See the European Union chapter.

## 4 ROLES

- 4.1 Does privacy law assign different roles to companies based on how they process personal information/personal data (eg, controller versus processor)? If so, how do these roles affect obligations and contractual requirements?**

See the European Union chapter.

## 5 OBLIGATIONS

- 5.1 Please summarize the key obligations required by privacy law, with special focus on advertising (eg, posting a privacy policy, keeping records of processing operations, appointing a privacy officer, registering with a privacy authority, conducting risk impact assessments).**

See the European Union chapter.

## 6 DATA SECURITY AND BREACH

- 6.1 How is data security regulated in France? Is there a minimum standard for securing data? If so, are there any resources to help companies address this standard?**

See the European Union chapter.

- 6.2 How are data breaches regulated in France? What are the requirements for responding to data breaches?**

See the European Union chapter.

## 7 INDIVIDUAL RIGHTS

- 7.1 What privacy rights do individuals have with respect to their personal information/personal data?**

See the European Union chapter and question 1.3 above.

## 8 MARKETING AND ONLINE ADVERTISING

- 8.1 How are marketing communications (eg, emails, texts, push notifications) regulated from a privacy perspective?**

See the European Union chapter for privacy law obligations.

In addition, certain direct marketing activities, such as marketing by email, telefaxes, SMS and automatic calling, are subject (as a general rule for B2C communications) to the prior informed consent of the recipient (ie, opt-in; no pre-ticking of the boxes) under the Electronic Communication and Postal Service Code. There are exceptions to the opt-in rule when the recipient is already a customer and the purpose of the marketing communications relates to products or services similar to those previously purchased by the customer (in such a case, the opt-out principle applies: the recipient can refuse any further communication when he/she receives the marketing communications).

The CNIL confirmed, in a public release, that the GDPR does not affect the above rules (so that a specific consent must be obtained for the sending of such communications).

**8.2 How is the use of tracking technologies (eg, cookies, pixels, SDKs) regulated from a privacy perspective?**

See the European Union chapter.

On July 4, 2019, the CNIL issued guidelines pertaining to the use of tracking technologies such as cookies. The former version of these Guidelines was no longer compliant with the GDPR (under the former guidelines, the fact that an internet user continues browsing was deemed a valid consent). The current version of the CNIL's Guidelines is now in line with the GDPR concerning the need for the explicit consent of the internet user, as set forth by the GDPR.

These Guidelines will be supplemented at the beginning of 2020 by a Recommendation in order to enlighten operators on practical methods to obtain the internet user's consent (see question 8.3).

**8.3 How is targeted advertising and behavioral advertising regulated from a privacy perspective?**

See the European Union chapter.

On January 14, 2020, the CNIL launched a public consultation, open (to companies acting in this field of activity, and to the public) until February 25, 2020, as part of its draft Recommendation (see question 8.2 above) on targeted advertising.

According to the CNIL, the purpose of this Recommendation (soft law) is to guide the professionals concerned in their process of compliance. Thus, it will describe possible practical methods to obtain consent in accordance with the applicable rules, and contain concrete examples of user interface, and describe good practices allowing companies to go above and beyond legal requirements.

**8.4 What type of notice and consent do advertisers need to share data with third parties for customer matching (eg, Facebook Custom Audiences or via LiveRamp)?**

See the European Union chapter.

**8.5 Are there specific privacy rules governing data brokers?**

See the European Union chapter.

**8.6 How is social media regulated from a privacy perspective?**

See the European Union chapter.

On April 27, 2017, the CNIL sanctioned Facebook Inc and Facebook Ireland for the violation of the Data Protection Law and ordered them to pay a fine of 150,000 Euros. During its investigations, the CNIL noted, in particular, that cookies were stored on the devices of users who were not registered with Facebook (the cookies allowed Facebook to track the browsing of a user and to collect such user's browsing data if the user visited a third party's website containing a social media tool, such as a "like" button).

According to the CNIL, the data were not collected and processed in a fair way, due to the absence of sufficiently clear and precise information on the collection of data carried out, and because the cookie made it possible to carry out a detailed monitoring of the browsing of all internet users (whether or not registered on Facebook's social network).

**8.7 How are loyalty programs and promotions regulated from a privacy perspective?**

See the European Union chapter.

**9 DATA TRANSFER**

**9.1 Are there any requirements or restrictions concerning data transfer (eg, restrictions on transferring data outside the country or between group companies)?**

See the European Union chapter.

**9.2 Are there any other issues companies need to consider when transferring data (eg, privilege issues when transferring data between group companies)?**

See the European Union chapter.

**10 VIOLATIONS**

**10.1 What are the potential penalties or sanctions for violations of privacy or data security law?**

- (a) Administrative sanctions: See the European Union chapter.
- (b) Criminal penalties: The French Criminal Code sets forth criminal penalties, eg, the processing (in particular for marketing purposes) of personal data of an individual despite his/her opposition (or when this opposition is based on legitimate interests) is sanctioned by a prison term of up to 5 years and by a fine of up to 300,000 Euros (when the infringer is an individual) or 1.5 million Euros (when the infringer is a legal entity).

**10.2 Do individuals have a private right of action? What are the potential remedies?**

See the European Union chapter and question 10.1 above.

**11 MISCELLANEOUS**

**11.1 Are there any rules that are particular to the culture of France which affect privacy?**

Section 9 of the Civil Code provides for a right of privacy, as it states that "Everyone has the right to respect for his private life. Without prejudice to the indemnification for injury suffered, judges may prescribe any measures, such as escrow, seizure and others, suited to the prevention or the ending of an infringement of the intimate character of private life; in case of emergency those measures may be provided for by summary proceedings".

The scope of Section 9 has been extended/used, by French courts, for the protection of the right of publicity (image, likeness etc) and is also used as a ground of action destined to control the commercial use of someone's persona.

**11.2 Are there any hot topics or laws on the horizon that companies need to know?**

The hottest topic is the draft ePrivacy Regulation. See the European Union chapter.

**11.3 Is there any other information not covered in this chapter that companies need to know, including general advice or cautions around processing personal information/personal data in France?**

On January 21, 2019, the CNIL, in application of the GDPR, imposed a penalty of 50 million Euros on Google LLC, for lack of transparency, unsatisfactory information, and lack of valid consent for the personalization of advertisement.

According to the CNIL, the users' consent was not sufficiently informed. The information on these treatments, diluted between several documents, did not allow the user to become aware of their scope. For example, in the section dedicated to "Personalization of ads", it was not possible to take note of the plurality of services, sites, applications involved in these treatments (Google search, You tube, Google home, Google maps, Playstore, Google photo etc) and, therefore, the volume of data processed and combined.

In addition, the CNIL found that the consent obtained was not "specific" and "unequivocal".

**12 OPINION QUESTIONS**

**12.1 What changes in the privacy landscape have you observed over the past few years? In your opinion, what propelled/triggered these changes?**

See the European Union chapter.

**12.2 What do you envision the privacy landscape will look like in 5 years?**

See the European Union chapter.

**12.3 What are some of the challenges companies face due to the changing privacy landscape?**

See the European Union chapter.

The hottest topic is the draft ePrivacy Regulation and the interpretation and implementation of the CNIL's Guidelines pertaining to the use of cookies, in particular for advertising purposes (see questions 8.2 and 8.3 above).



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