



LEGAL UPDATE

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The CNIL has its back to the wall

The French Conseil d'État censors the guidelines of the French data protection authority on the prohibition of “cookie walls”

Last Fall, nine professional associations in the digital media, communication and marketing sectors (SRI, GESTE, MMA France, IAB France, UDECAM, AACC, SNCD, FEVAD and the Union des Marques) brought proceedings for ultra vires before the French supreme administrative jurisdiction (Conseil d'État) against the [deliberation by the French data protection authority \(CNIL\) n° 2019-093 of July 4 2019 adopting guidelines on cookies and other tracers](#).

The plaintiffs challenged, in particular, the prohibition on the use of a “cookie wall”, which consists for website editors to block access to the content of their websites if users do not consent to cookies being placed or read.

In a [decision rendered on June 19 2020](#), the Conseil d'État considered that the CNIL had overstepped its powers in enacting such an overall and absolute prohibition through the use of a soft law instrument like guidelines adopted in application of the law of January 6 1978.

The CNIL reacted immediately in a [press release](#), confirming that it would review its text “**to the extent that is strictly necessary in order to draw conclusions from the ruling of the Conseil d'État**”.

In practice, and as things stand, this means that a website editor can provide users with a free version of its website that is financed by advertising, subject to the user accepting advertising cookies and tracers, provided that the user has an alternative way of accessing the content without accepting advertising cookies and tracers (for example by offering a pay version or a version requiring the user to be logged in).

The plaintiffs had also criticised other parts of the guidelines, such as: specific consent for distinct purposes, the right to withdraw or refuse consent as easily as giving it, or the recommended retention period for cookies. The Conseil d'État dismissed their opinions and upheld the validity of the CNIL's guidelines.

The Conseil d'État also pointed out that it does not have to take a position on the specific ways of obtaining consent, which are not the subject of these guidelines but which will be

set out in future recommendation by the CNIL.

The CNIL's timeline remains to be defined, but it has indicated that new guidelines and recommendation will be published after September 2020.

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For further information or if you have any questions, feel free to contact Fabrice Perbost, Partner, at fperbost@harlaylaw.com or Sabine Lipovetsky, Partner, at slipovetsky@harlaylaw.com.



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