

ПРОБЛЕМЫ И ПЕРСПЕКТИВЫ ПРАВОВОГО РЕГУЛИРОВАНИЯ ЦИФРОВОГО ПРОФИЛИРОВАНИЯ

Alain Dufлот,

почетный консул Гватемалы,
практик международного класса в области права,
основатель адвокатского бюро «Дюфло и Партнеры»,
Университет Леон III имени Жана Мулена

DIGITAL IDENTITY AND ITS PROTECTION IN FRANCE

Abstract. Digital technologies have opened up new perspectives, freeing a person from the limitations of reality, allowing him to create an identity for his personal development. Thus, technological advances have increased a person's ability to change his personality in the virtual space, form a digital profile, digital personality, etc. The article discusses the legal aspects of a digital person and a digital personality. At the same time, special attention is paid to the issues of digital identity, considered as a part (continuation) of individual identity, the problem of digital identification and the means of its legal protection and protection, which are constantly evolving.

Keywords: Digital identification (identity), Digital identity, Digital person, Law, Legal protection, Legal protection.

ЦИФРОВАЯ ИДЕНТИФИКАЦИЯ И ЕЕ ЗАЩИТА ВО ФРАНЦИИ

Аннотация: Цифровые технологии открыли новые перспективы, освободив человека от ограничений реальности, позволив ему создать идентичность в целях своего личного развития. Тем самым, технологические достижения увеличили возможности человека по изменению своей личности в виртуальном пространстве, формированию цифрового профиля, цифровой личности и др. В статье рассматриваются юридические аспекты цифрового человека и цифровой личности. При этом особое внимание уделяется вопросам цифровой идентичности, рассматриваемой как часть (продолжение) индивидуальной идентичности, проблеме цифровой идентификации и средствам ее юридической охраны и защиты, которые постоянно развиваются.

Ключевые слова: цифровая идентификация (идентичность), цифровая личность, цифровой человек, право, юридическая охрана, юридическая защита.

Digital identity is and remains an elusive and above all constantly evolving concept for the law. There is currently no satisfactory legal definition of digital identity to understand the richness of the concept, indeed, the few legislative or regulatory texts that refer to digital identity ultimately deal only with the notion of «personal data», and only with this notion. For example, the French law called «Law for a Digital Republic» of 7 October 2016 is limited in its final version to linking this concept to that of the «digital safe», without

providing the precise contours of this identity. The evolution of digital techniques and their integration into positive law goes beyond the sole question of digital identity or more precisely digital identity leads to the recognition of a true digital personality. (I) Given the challenges of the digital revolution, the need to guarantee the protection of digital identity conditions the trust of the economic and social relations that are developing in the digital sphere. Among these guarantees of protection, three bodies of law stand out. First of all, there is the protection of personal data, then banking secrecy which is an interesting and recognized element of the protection of the identity of customers and third parties and finally criminal law with the crime of digital identity theft. Given the limited time allotted to me today and which I am desperately trying to respect, but also and above all the general theme of banking law of our conference, I will limit myself to mentioning in a second part the role of the banking system in the protection of identity and digital personality thanks in particular to banking secrecy (II).

First of all about identity and digital personality Digital identity and personality Legal identity, defined as the set of elements that the legislator takes into account to individualize a person, is mainly suffered by the subject; however, some aspects are under his control. Since the digital person is part of the concept of a legal person, digital identity cannot be radically different from legal identity.

1. The digital identity suffered by the individual Legal identity has traditionally been designed in relation to the civilian police function assigned to it. Each person is identified and individualized on the basis of biological and social characteristics, the list of which varies from country to country.

According to French law, the composition of the status of persons is mainly a matter of civil and family status transcribed within the acts of civil status. As such, we will mention, the first name, surname, sex, date and place of birth, domicile. Although some of the above elements are in fact subject to change, the stability of identity is a necessity in that it conditions the certification of the legal existence of a person in the social group, thus making it possible to control individuals and secure legal trade. Based on these brief observations, what about digital identity? If we refer to positive law, digital identity is implicitly enshrined in the protection conferred on it by special laws such as Article 4, 1 of the GDPR GENERAL DATA PROTECTION REGULATION (EU) (from which it is inferred that a natural person is digitally identified from an «identifier, such as a name, an identification number, location data, an online identifier, or one or more elements specific to its physical, physiological, genetic, mental, economic, cultural or social identity» Is this enough to deduce that the state of people exists in a numerical form?

First, in comparison with the function of identifying the status of persons, it should be noted that there are electronic identification procedures based on elements of identity traditionally included in the state of persons. First of all, it is important to mention the Regulation of the European Parliament of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market (EIDAS). Designed to secure electronic transactions, this regulation established an electronic identification regime «consisting in the use of personal identification data in an electronic form unequivocally representing a natural or legal person». Second, from the perspective of a control of individuals that the digital state of people is being consecrated. In positive law, on the

one hand, the control can be carried out on the basis of identity documents incorporating digitized data. This is the case for the passport since biometric elements are integrated into it, a real «electronic passport». In the near future, this will be the case when Regulation 2019/1157 of the European Parliament and of the Council of 20 June 2019 is transposed into national law, in particular, by adding biometric personal identification data to identity cards'. For both the passport and the digital identity card, the control of the identity from a digital title corroborates the idea of a certification specific to the state of the persons. Beyond the state of people, digital identity encourages reflection on the identification elements freely determined by the subject and no longer suffered.

Digital identity mastered. The emergence of a right to personal development as a component of the right to privacy has resulted in a progressive mastery of the subject over certain elements of one's identity. One thinks, for example, of surnames and first names, which, although conceived as fundamental elements of the state of persons, are liable to be modified by the person himself. In the same sense, the terms relating to sex can be changed according to a simplified procedure since the French law of 18 November 2016. This margin of intervention left to individuals in the construction of their individual identity also manifests itself with digital identity. Technological developments have increased the possibility for the individual to modify his identity by the use of a pseudonym, its use is widespread in virtual spaces. In the same logic, the subject modifies his image by the media of digital filters, shapes his profile on social networks according to the target audience and, when this trend reaches its climax, creates an identity from scratch by using an avatar, in other words a character virtually representing the subject. In short, digital technology has opened up new perspectives by detaching the person from the constraints of reality, to enable him to build an identity at the service of his personal development. This reunion between the digital identity suffered by the individual and the controlled digital identity must make it possible to recognize the existence of a true digital personality that will be an extension or manifestation of the traditional legal personality.

Digital personality. Legal personality essentially consists of the ability of the subject to have rights and to be bound by legal obligations. The digital personality should follow the same destiny as the legal personality of which it is the digital expression. The existence of the digital personality.

The existence of legal personality presupposes demonstrated both the ability to have rights and the ability to be bound by obligations. As regards, first, the ability to have rights, it is possible to confirm what is initially only a hypothesis by studying the multiplication of subjective rights governing digital uses. The personal data regime is the best-known illustration of this. Without taking over the entirety of the positive law, the data are protected and their use is conditioned, in particular because of the need for consent that can be withdrawn at any time. The person thus has a right of access to personal data, «rectification», «erasure», «limitation of processing», «data portability», opposition to data processing. With regard, secondly, to the ability to be bound by obligations, it should be recalled that the French Civil Code (Articles 1369-1 to 1369-3) contains a whole chapter dealing with contracts concluded in electronic form. In other words, the digital person implements a fundamental ability of the personality: The ability to contract. In addition, if the digital person contracts, he should also be able to answer for his fact

as soon as the responsibility expresses the aptitude for the obligation. In this respect, there is nothing in theory to preclude the application of the general regime of civil liability for damage caused in the digital sphere. Nevertheless, digital damage remains a damage and nothing in the texts reduces the fault to an action from the material world. We can therefore see the existence of a digital personality. When then are the means to protect this digital identity and consequently this digital personality? Today I will discuss the contribution of the banking system in this protection, leaving aside data protection and criminal law (digital identity theft):

PROTECTION BY BANKS AND BANKING SECRECY

The role played by banking and credit institutions in protecting digital identity is essential through several tools.

INFORMATION

Banks have long been the reference for identity and financial information. To open an account, obtain a loan or approve a mortgage application, banks must have accurate information about the person's creditworthiness and employment. For many customers, banks hold valuable insights into revenues and consumption patterns over decades.

The PSD DIRECTIVE 2

The second European Payment Services Directive (PSD 2), in force in the European Union since 13 January 2018, includes a set of regulatory provisions aimed at regulating the provision of payment services and strengthening the security of payments at European level. In particular, Strong Authentication for electronic payment Banks are legitimate to be guardians and identity providers. However, to support this role and ensure authentication, these institutions will need to continue to improve their identity and authentication infrastructure. Like what:

- Fingerprinting: Identify a user's authentication device using the time zone of the IP address, operating system, browser, browser fonts and screen dimensions. This collected information will help to confirm the user's Identity and also check if the device used has not been the subject of previous hacking attempts.

Behavioral analytics: Leveraging data on customers' past transactions to determine the risk of fraud for each new transaction.

- Behavioral biometrics: monitor keyboard key presses, mouse dynamics, and user typing when browsing banking in order to establish a behavioral biometric profile and thus detect profile changes.

Finally with banking secrecy.

BANKING SECRECY

Banking secrecy has always been a remarkable lever for protecting the identity of account holders. Professionals in the banking field are required to ensure the protection of the information they receive from their customers and third parties about their customers of which they are custodians. In a digital world in which the reliability of electronic identification is an essential link in the chain of economic and commercial relations, the trusted third party that constitutes the banking institution is undeniably at the heart of digital identity, if only by the measures put in place as part of the obligations on the knowledge of customers (KYC Know Your Customer process) The banker is responsible for verifying the identity and contact details of the account holder, as part of his duty

of care. This burden is so great that the bank incurs its liability to third parties in the event of breaches, even in the event of simple negligence. Banking secrecy in France was introduced by the Law of 24 January 1984 and falls into the category of professional secrets. It is imposed on all the staff of banking institutions as well as subcontractors. It is subject to derogations only in the cases expressly provided for by law. The violation of banking secrecy is punishable by criminal law (1 year in prison and € 15,000). Banking secrecy is a means of ensuring the protection of personal data and therefore of digital identity; at the same time, the protection of such data is the basis of banking secrecy.

Some are already talking about a real digital identity market that would even constitute the «oil of the twenty-first century» and as such banks have a central role in the protection of digital identity just like the state and the individual himself.

В. В. Игумнов,

аспирант кафедры информационного права и цифровых технологий,
Московский государственный юридический университет
имени О. Е. Кутафина

ПРАВОВЫЕ ПРОБЛЕМЫ ПОЛУЧЕНИЯ ДОСТУПА К СВЕДЕНИЯМ О СУБЪЕКТАХ ЦИФРОВОГО ПРОФИЛИРОВАНИЯ

Аннотация. В статье представлен анализ средств инфраструктуры цифрового профиля, используемых для организации доступа публичных органов власти, иных органов и организаций к необходимым сведениям о субъектах цифрового профилирования. Целью исследования является определение проблем получения доступа к сведениям о субъектах цифрового профилирования и выявление основных путей их решения. В исследовании особенностей данной темы особое внимание уделяется объему хранящихся в системе данных, субъектам профилирования, объему предоставляемых данных, а также обязательности использования инфраструктуры цифрового профилирования при получении доступа к данным субъектов цифрового профилирования. Отдельное место отводится проблеме актуальности использования системы цифрового профиля при получении доступа к необходимым сведениям о физическом лице при наличии действующего механизма получения согласия на обработку персональных данных вне взаимодействия с государственными и муниципальными информационными системами.

Ключевые слова: цифровые технологии, информационные системы, цифровой профиль, персональные данные, субъекты цифрового профилирования, реестр согласий, инфраструктура цифрового профиля, система цифрового профилирования

LEGAL PROBLEMS OF OBTAINING ACCESS TO INFORMATION ABOUT DIGITAL PROFILING SUBJECTS

Abstract. The article offers an analysis of digital profiling infrastructure instruments used to provide access of public authorities, other bodies and organizations to the necessary information about the subjects of digital profiling. The purpose of the study is to identify