

Law Drafting Competition 2023

First runner-up

TSOI Cheuk Ling

Topic 1: Private information on Internet

Proposed Bill — English text

A BILL

To

Amend the Personal Data (Privacy) Ordinance to provide for the regulation of the use and transfer of personal data collected from cookies or third-party trackers, to create a new offence for the disclosure and use of personal data obtained without consent from cookies and third-party trackers; to introduce new exemptions in respect of certain requirements under the Ordinance; to impose Cookies and Third-Party Trackers Regulation; to set out the requirements for cookie banner and cookie policy; and to provide for related matters and minor amendments.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Personal Data (Privacy) (Amendment) Ordinance 2023.

(2) This Ordinance comes into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Enactments amended

The enactments specified in Parts 2 and 3 are amended as set out in those Parts.

Part 2

Amendments to Personal Data (Privacy)

(Amendment) Ordinance (Cap. 486)

3. Section 2 amended (interpretation)

(1) Section 2(1), definition of *personal data*—

Add

“(d) referring to—

- (i) a personal identifier; and
- (ii) an online identifier.”

(2) Section 2(1)—

Add in alphabetical order

“*cookie and third-party tracker regulation* (小型文字檔案及第三方追縱器規章), means any of the cookie and third-party tracker regulations set out in Schedule 6.”

(3) Section 2(1)—

Add in alphabetical order

“*online identifier* (網上身分標識符), means an identifier—

- (a) relating to the individual’s tools, applications, or devices; and
- (b) that uniquely identifies the individual in relation to online activities.”

4. **Part 6B added**
After Part 6A—
Add

“Part 6B

Collection and Use of Personal Data from Cookies or Third-Party Trackers

Division 1—Interpretation

35N. Interpretation of Part 6B

In this Part—

cookie (小型文字檔案), in relation to online information, means a small computer file stored in a data subject’s electronic device’s web browser and used by data users.

cookie banner (小型文字檔案橫幅) means any notice regarding operating cookies and third-party trackers set out in Schedule 6.

cookie policy (小型文字檔案政策) means any cookie policy set out in Schedule 6.

install (安裝) means to download or insert online files or applications.

valid consent (有效同意), in relation to a collection or use of personal data from cookies or third-party trackers, means a voluntary, specific and informed consent by the individual.

third-party tracker (第三方追縱器) means any tracker that data users use to record or share information about the data subject’s online activities.

Division 2—Collection and Use of Personal Data from Cookies

35O. Data user to take specified action before installing cookies in the data subject's electronic device

(1) Subject to section 35P, a data user who intends to install cookies in the data subject's device must take each of the actions specified in subsection (2). (2) The data user must—

(a) inform the data subject—

(i) that the data user intends to so use the personal data; and

(ii) that the data user may not so use the data unless the data user has received the data subject's valid consent to the intended use;

(b) provide the data subject with the following information in relation to the intended use—

(i) the kinds of personal data to be collected; and

(ii) the kinds of personal data to be used; and

(iii) the types of cookie(s) to be used; and

(c) provide the data subject with a cookie banner, or a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended use; and

(d) provide the data subject with a channel to access the cookie policy.

(3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.

(4) The information provided under subsection (2)(a) to (d) must be presented in a manner that is easily accessible and understandable.

(5) Subject to section 35P, a data user who uses a data subject's personal data collected from cookies without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.

(6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

(7) In any proceedings for an offence under subsection (5), the burden of proving that this section does not apply because of section 35D lies on the data user.

35P. Circumstances under which section 35C does not apply

(1) If, before the commencement date—

(a) a data subject had been explicitly informed by a data user in an easily understandable manner that his or her personal data is intended to be collected from cookies, or to be used.

(b) the data user had so used any of the data;

(c) the data subject had not required the data user to cease to so use any of the data; and

(d) the data user had not, in relation to the use, contravened any provision of this Ordinance as in force as at the time of the use,

then section 35C does not apply in relation to the intended use or use, on or after the commencement date*, of the data subject's relevant personal data collected from cookies.

(2) If the relevant cookies are strictly necessary for the function of the website or online application

(3) In this section—

***commencement date** (本部生效日期) means the date on which this Part comes into operation.

35Q. Data user must not use personal data collected in cookies without data subject's consent

(1) A data user who has complied with section 35O must not use the data subject's personal data collected from cookies unless—

(a) the data user has received the data subject's consent to the intended use of personal data, as described in the information provided by the data user under section 35O(2)(b), either generally or selectively;

(2) A data subject may communicate to a data user the consent to a use of personal data either through a response channel or other means.

(3) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.

(4) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

35R. Data subject may require data user to cease to use personal data collected from cookies

(1) A data subject may, at any time, require a data user to cease to use the data subject's personal data collected from cookies

(2) Subsection (1) applies irrespective of whether the data subject—

(a) has received from the data user the information required to be provided in relation to the use of personal data under section 35O(2);
or

(b) has earlier given consent to the data user or a third person to the use.

(3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.

- (4) A data user who contravenes subsection (3) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (6) This section does not affect the operation of section 26.

Division 3—Processing of Personal Data in Third-party trackers

35S. Data user to take specified action before installing third-party trackers in the data subject's device

- (1) Subject to section 35T, a data user who intends to install third-party trackers in the data subject's device must take each of the actions specified in subsection
- (2) The data user must—
 - (a) inform the data subject—
 - (i) that the data user intends to so use the personal data; and
 - (ii) that the data user may not so use the data unless the data user has received the data subject's consent to the intended use;

(b) provide the data subject with the following information in relation to the intended use—

(i) the kinds of personal data to be collected; and

(ii) the kinds of personal data to be used; and

(ii) the types of third-party tracker(s) to be used; and

(c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended use.

(d) provide the data subject with a channel to access the cookie policy

(3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.

(4) The information provided under subsection (2)(a) to (d) must be presented in a manner that is easily accessible and understandable.

(5) Subject to section 35T, a data user who uses a data subject's personal data collected from cookies without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.

(6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

(7) In any proceedings for an offence under subsection (5), the burden of proving that this section does not apply because of section 35T lies on the data user.

35T. Circumstances under which section 35S does not apply

(1) If, before the commencement date—

(a) a data subject had been explicitly informed by a data user in an easily understandable manner that his or her personal data is intended to be collected from third-party trackers, or to be used.

(b) the data user had so used any of the data;

(c) the data subject had not required the data user to cease to so use any of the data; and

(d) the data user had not, in relation to the use, contravened any provision of this Ordinance as in force as at the time of the use,

then section 35T does not apply in relation to the intended use or use, on or after the commencement date*, of the data subject's relevant personal data, as updated from time to time, in third-party trackers.

(2) In this section—

*commencement date (本部生效日期) means the date on which this Part comes into operation;

35U. Data user must not use personal data collected in third-party trackers without data subject's consent

(1) A data user who has complied with section 35S must not use the data subject's personal data collected from third-party trackers unless—

(a) the data user has received the data subject's consent to the intended use of personal data, as described in the information provided by the data user under section 35S(2)(b), either generally or selectively;

(2) A data subject may communicate to a data user the consent to a use of personal data either through a response channel or other means.

(3) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.

(4) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

35V. Data subject may require data user to cease to use personal data collected from third-party trackers

(1) A data subject may, at any time, require a data user to cease to use the data subject's personal data collected from third-party trackers.

(2) Subsection (1) applies irrespective of whether the data subject—

(a) has received from the data user the information required to be provided in relation to the use of personal data under section 35S(2);
or

(b) has earlier given consent to the data user or a third person to the use.

(3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.

(4) A data user who contravenes subsection (3) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.

(5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

(6) This section does not affect the operation of section 26.”

5. **Schedule 6 amended (Forms of warrants)**

Repeal the Schedule
Substitute

“Schedule 6

Cookie and Third-party trackers regulation

1. **Cookie banner requirement**

(1) The contents of the cookie banner must cover—

(a) the option for the data subject to voluntarily accept or reject **non-essential cookies**, or any third-party trackers;

(b) all types of cookies that operated during the data subject’s **user session** (including **essential cookies**); and

(c) the purpose of using the cookies or third-party trackers.

(2) The cookie banner must be presented in a manner that is clear and legible.

(3) In this section—

essential cookies (必要的小型文字檔案) means cookies that are strictly necessary for a data user to access the website and use its functions.

non-essential cookies (非必要的小型文字檔案) means cookies that not strictly necessary for the provision of website services. This include cookies that records user preferences or online history of the data subject.

user session (用戶時段) means the session of activity that a data subject spends on a website during a specified period of time.

2. Cookie policy requirement

(1) The contents of the cookie policy must cover—

(a) information on all types of cookies and any third-party trackers that are used during the data subject's session, including

(i) the purpose of using the cookies or third-party trackers;
and

(ii) the expiration date of the cookies or third-party trackers.

(b) information on the personal data collected from cookies or third-party trackers, including—

(i) the purpose of using the personal data;

(ii) the storage of the personal data; and

(iii) whether the personal data will be transferred to or used by a third party.

(c) information on how the data subject can change the cookie preference settings or revoke the consent to accepting non-essential cookies.

(2) The cookie policy must be presented in a manner that is clear and legible.

3. Freedom of the data subject to accept or reject cookies

(1) A data user shall not, through any methods, interfere with the data user's freedom to accept or reject cookies. Such methods include—

(a) the use of pre-ticked consent boxes, by which the consent boxes to change cookie preferences are checked in advance; and

(b) the use of cookie walls, which blocks the data subject from accessing the website until the data subject accepts the use of cookies.”