



# The EU's GDPR in context

CIRCULATION VERSION

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**“Understanding Data Privacy & Data Protection in a ‘4.0’ World”**

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## GDPR: What is it?

- **Replaces Data Protection Directive**
  - GDPR is nothing new, merely modernisation
- **Regulation, not Directive**
  - Provides a higher degree of harmonisation (but not complete!)
- **In force 25 May 2018**
  - Need to act now
- **99 Articles (plus Recitals) totalling 88 pages!**
  - Poor, unnecessarily complex, drafting style is barrier to compliance
- **Key clause: “Personal data shall be [...] processed lawfully, fairly and in a transparent manner in relation to the data subject” (Art. 5(1)(a))**



## GDPR: “Innovations”

- ‘Right to be forgotten’
- ‘Representant localisation’
- High fines
- Data protection officer
- ‘Data portability’
- Data protection by design, and by default
- Data breach notification



## *GDPR: Why it matters in Thailand*

- High fines
- Affects data transfers
- Impact what is available online (worldwide?)
- Leads the way
  - is being imitated
  - sets standards
- Extended extraterritorial operation

# *GDPR, Art 3: where GDPR applies*

1. This Regulation applies to the processing of personal data in the context of the activities of an **establishment of a controller or a processor in the Union**, regardless of whether the processing takes place in the Union or not.
2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:
  - (a) the **offering of goods or services**, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
  - (b) the **monitoring of their behaviour** as far as their behaviour takes place within the Union.
3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies **by virtue of public international law**.



## GDPR Article 3 / PDPA Section 5:

Key objectives of a provision dealing with the geographical reach of a data privacy law is to fulfil two distinct functions. Using the Thai *Personal Data Protection Act* as an example:

- 1) It should ensure that the Personal Data Protection Act provides adequate protection in the Kingdom of Thailand in relation to actors and activities overseas impacting the data privacy of the Thai people; and
- 2) It should ensure that the Personal Data Protection Act does not apply more broadly than is necessary.

As currently drafted, Section 5 is useful for the first of these purposes but less so for the latter. The same is true about GDPR Article 3.





## GDPR Article 3 / PDPA Section 5:

- **Overly broad claims of jurisdiction have several downsides. Looking at PDPA for example:**
  - 1) It encourages discretionary enforcement;
  - 2) It undermines the international legitimacy of the Personal Data Protection Act;
  - 3) It puts the Personal Data Protection Act at odds with aspects of international law (such as the doctrine of comity);
  - 4) It puts unnecessary pressure to pursue the enforcement of the Personal Data Protection Act where not necessary for the protection of the Thai people; and
  - 5) It adds to the risk of other States seeking to impose their laws in an overly broad manner thereby impacting Thai interests.

# A 'layered approach' to extraterritoriality in data privacy frameworks:

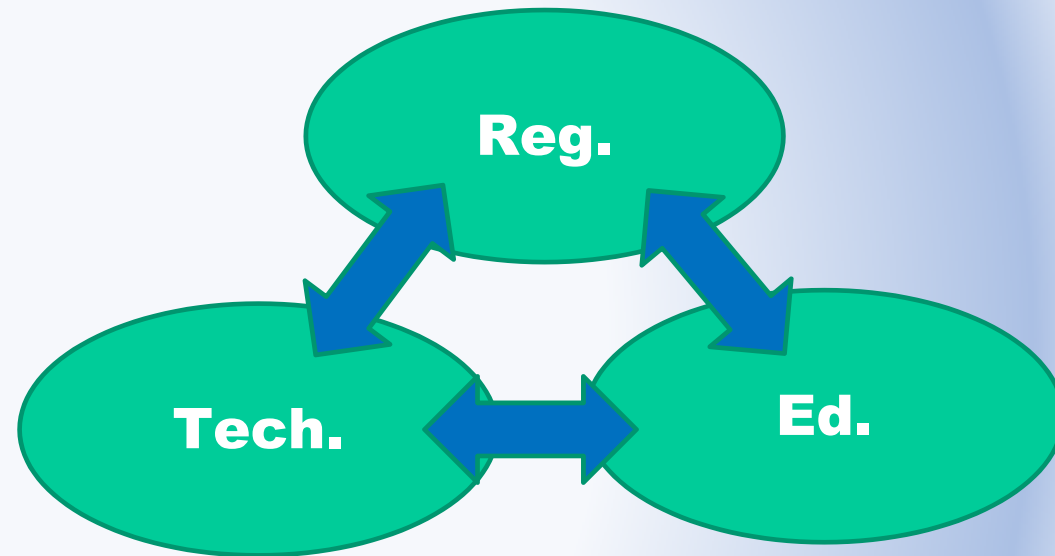
- **Current approach:** Under which circumstances will the Regulation/Act apply extraterritorially? Once caught, caught by whole Regulation/Act.
- **HOWEVER**, traditional bi-polarity is a too blunt tool for a diverse Regulation.
- ***We need a layered approach!***
- **Proposal:**
  - The abuse prevention layer (eg Art 5 = any contact?)
  - The rights layer (eg Art 15 = US 'minimum contact' test?)
  - The administrative layer (eg Art 37 = US test for 'general jurisdiction'?)

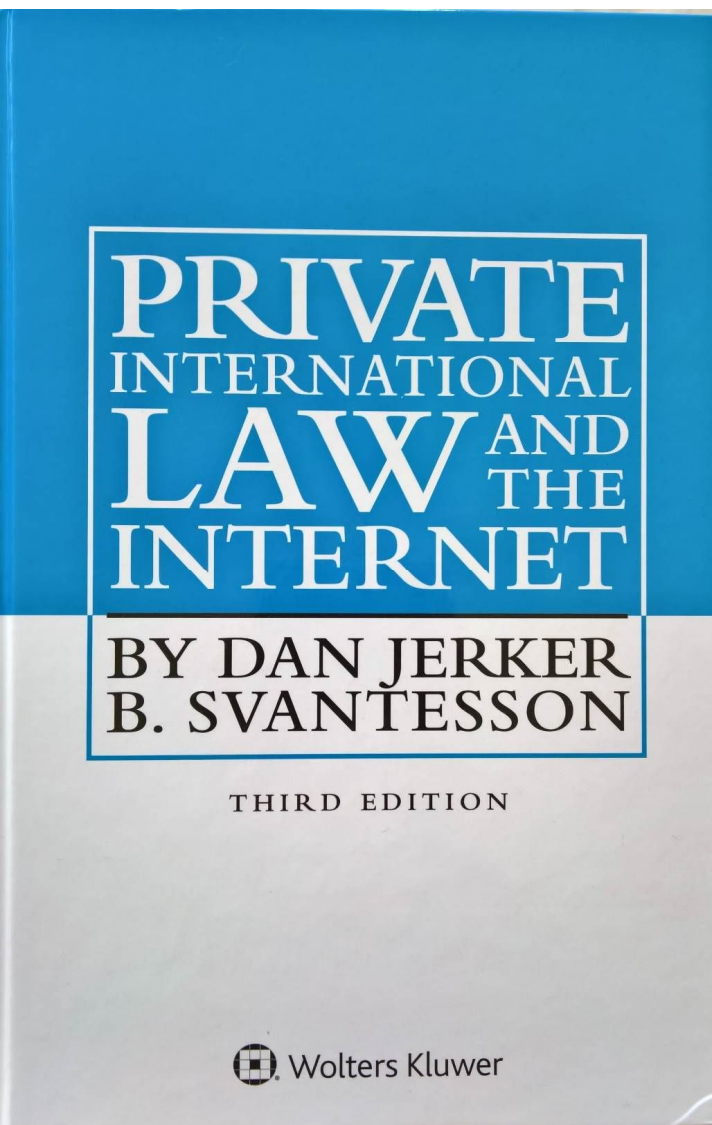




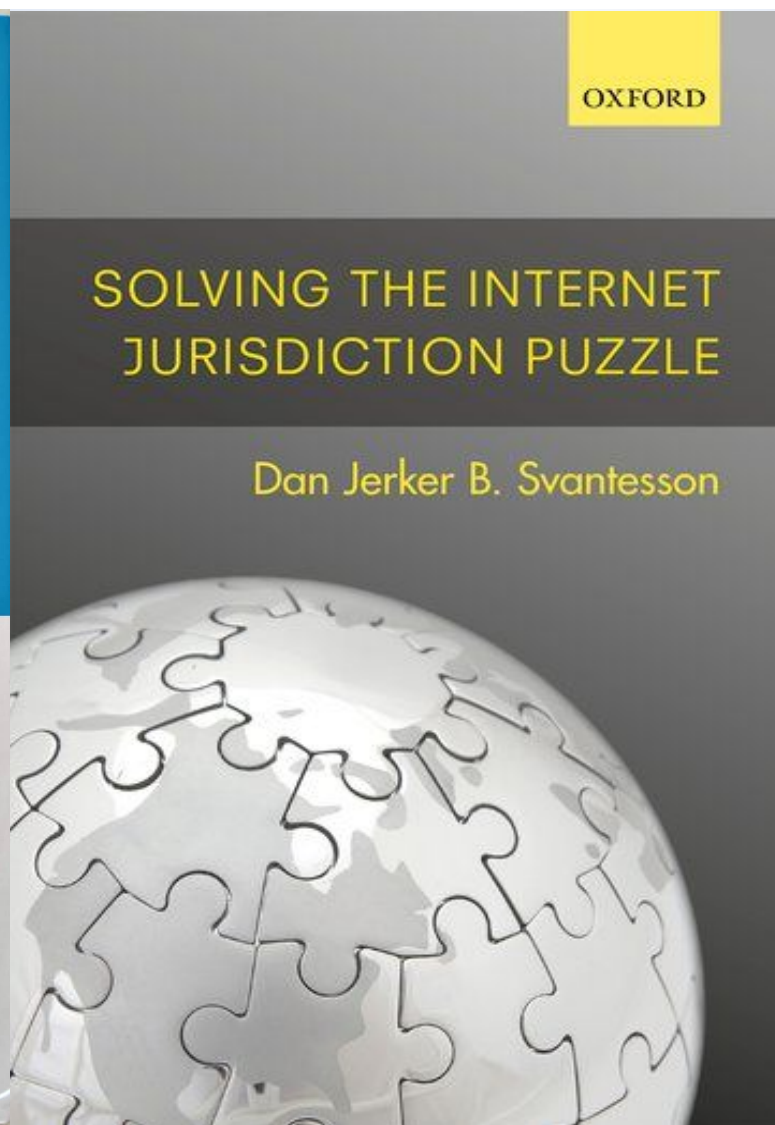
## GDPR: The value

- Put data privacy on the agenda
- Data - lifeblood of AI, machine learning, Internet of Things, Big Data, Industry 4.0 etc
- Value of well managed data regimes = competitive advantage

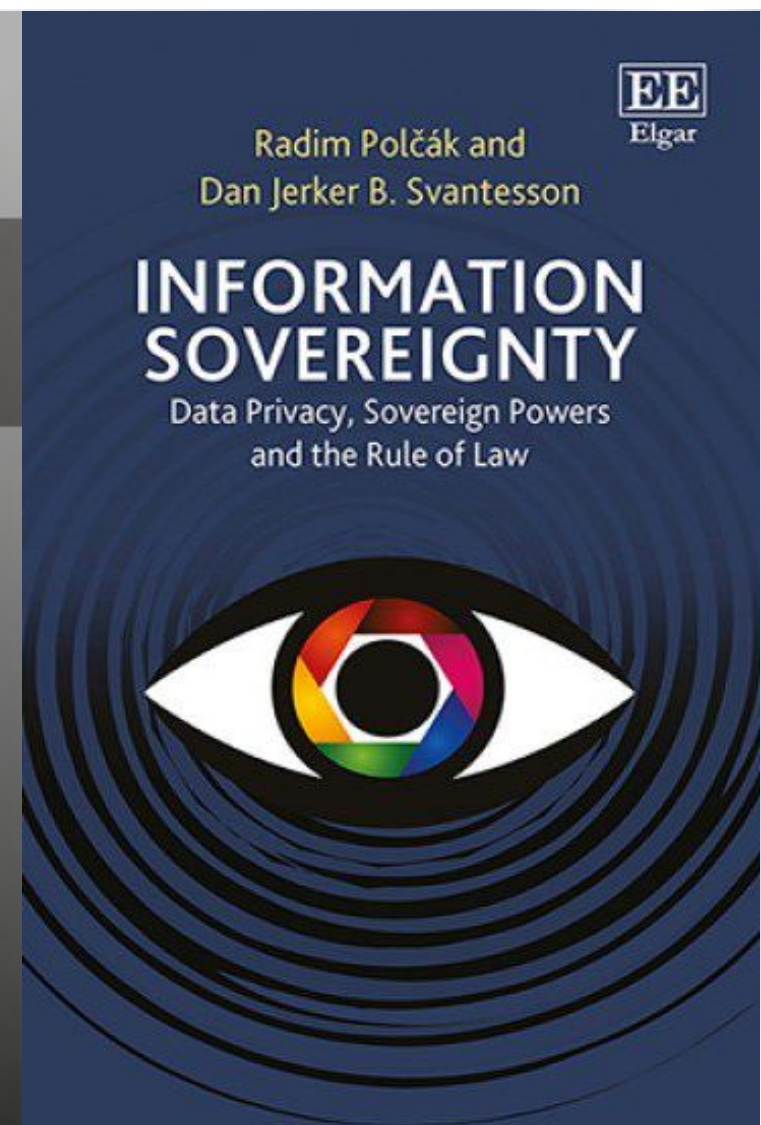




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Thank you.  
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see  
Seminar BOOKLET  
'Backgrounder' for  
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