

## French Authority Fines Google for Data Privacy Violations in a Groundbreaking Decision

On January 21, 2019, the French data protection authority *Commission Nationale de l'Informatique et des Libertés* (“CNIL”) fined Google €50 million<sup>1</sup> in one of the first major enforcement actions brought under the General Data Protection Regulation (“GDPR”),<sup>2</sup> the European Union’s data protection regulatory scheme. Google was found to have violated the GDPR by failing to provide its users with sufficient information regarding their data and by not obtaining its users’ consent in an appropriate manner. This fine, as well as CNIL’s assertion of authority in this case, should serve as a wake-up call to data processors that may have relied on Google’s policies as a benchmark.

On May 25 and 28, 2018, data protection associations None of Your Business and La Quadrature du Net filed complaints against Google with CNIL mere hours after the GDPR came into effect. The complaints charged Google with a failure to obtain appropriate consent for processing its users’ data.

### France’s Authority to Enforce the GDPR

France was an unexpected venue for enforcement of the GDPR against Google. The GDPR makes each data protection authority competent to regulate entities acting within the borders of the Member State in which the authority resides.<sup>3</sup> However, in order to avoid inconsistent or duplicative regulation, the GDPR gives priority over enforcement actions to a lead data protection authority, which is the Member State where the entity’s main establishment resides.<sup>4</sup> This component of the regime has colloquially been referred to as a “one-stop shop mechanism.”

Though Google has a French subsidiary, Google France SARL, its European operations are managed from Ireland through Google Ireland Ltd. Google therefore argued under Article 56 of the GDPR that Ireland’s data protection authority, and not CNIL, had priority to regulate Google and enforce the GDPR against Google.<sup>5</sup> CNIL rejected the argument, noting that the operative inquiry in identifying the main establishment was

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<sup>1</sup> Deliberation SAN-2019-001 of 21 January 2019, *Commission Nationale de l'Informatique et des Libertés* (the “CNIL Decision”).

<sup>2</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. L 119/1.

<sup>3</sup> GDPR, art. 55.

<sup>4</sup> GDPR, art. 56.

<sup>5</sup> CNIL Decision at 3.

where Google made decisions with respect to data processing.<sup>6</sup> Despite evidence that Google managed a myriad of operations in Ireland, including taxation, accounting, audit, and advertising, CNIL determined that Google's data processing decisions came from the company's U.S. headquarters.<sup>7</sup> Accordingly, CNIL found that Google had no main establishment anywhere in the EU, and therefore Google was not protected by GDPR Article 56's one-stop shop mechanism.<sup>8</sup> In the absence of a lead authority, Google was subject to regulation by CNIL, or any other EU data protection authority.<sup>9</sup>

### Google's Violations of the GDPR

After its investigation, which focused on the process of creating a Google account for use with Android phones, CNIL found that Google had violated the GDPR in two major respects: (i) it failed to satisfy its obligations of transparency and information, and (ii) it failed to obtain satisfactory consent for its data processing.<sup>10</sup>

With respect to transparency and information, CNIL found that the information provided by Google was not easily accessible to users.<sup>11</sup> The GDPR requires a controller to provide information regarding the rights of the user and the intended processing purposes at the time the data is obtained.<sup>12</sup> Such disclosures must include the identity and contact details of the controller and its data protection officer and the expected recipients of the data.<sup>13</sup> Disclosures must also inform the user about how long their data will be held, their right to request deletion of their data, their right to lodge a complaint with a supervisory authority, and their ability to revoke consent at any time, among other things.<sup>14</sup> This information must be provided in a concise, transparent, intelligible, and easily accessible way.<sup>15</sup>

CNIL found that Google had adopted a fragmented, difficult-to-follow framework for disseminating information to users about the company's data processing purposes, data storage periods, and categories of personal data processed.<sup>16</sup> This information was spread across several documents and accessible to the user only after several steps,

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<sup>6</sup> *Id.*; GDPR, art. 4(16).

<sup>7</sup> CNIL Decision at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 6, 9.

<sup>11</sup> *Id.* at 6.

<sup>12</sup> GDPR, art. 12, 13, 14.

<sup>13</sup> GDPR, art. 13.

<sup>14</sup> GDPR, art. 13.

<sup>15</sup> GDPR, art. 12.

<sup>16</sup> CNIL Decision at 7.

demanding up to six clicks for users to find information about data collected in connection with, for example, ad personalization or geo-tracking services.<sup>17</sup>

CNIL also observed that the information provided by Google was unclear or incomplete in some cases.<sup>18</sup> Specifically, users could not easily learn the scope of Google's processing operations because, to the extent that Google described its processing, it had done so in a generic and vague manner.<sup>19</sup> CNIL highlighted users' need for this information in light of Google's particularly massive and intrusive processing operations, conducted across nearly two dozen services offered by the company.<sup>20</sup>

With respect to Google's procedures for obtaining users' consent — one of its bases for processing data — CNIL found significant inadequacies existed.<sup>21</sup> Under the GDPR, data may be processed only if there is a legal basis for doing so.<sup>22</sup> Consent of the user is one such basis, but that consent must be freely given, specific, informed, unambiguous, and recorded by a clear statement or affirmative act of the data subject.<sup>23</sup>

CNIL concluded that the users' consent to processing was not adequately informed because the information was spread across several sources and was otherwise diluted as described above.<sup>24</sup> CNIL also noted that the consent of Google's users was neither "specific" nor "unambiguous."<sup>25</sup> A user could only modify some data processing options by clicking on a button for "more options."<sup>26</sup> Requiring the user to click that button hindered the goal of informed consent. CNIL was particularly perturbed to find that several options were pre-ticked to give the user's consent.<sup>27</sup> Google's setup interface also included an overriding general consent option near the end of the account-creation process. CNIL found that this overriding consent violated the principle that consent should be specific as to each category of processing and therefore ran afoul of the GDPR.<sup>28</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 10.

<sup>22</sup> GDPR, art. 6.

<sup>23</sup> GDPR, art. 4(11).

<sup>24</sup> CNIL Decision at 11.

<sup>25</sup> *Id.* at 11-12.

<sup>26</sup> *Id.* at 12.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

### Takeaways for Data Processors

With the Google decision, CNIL has shown a willingness to impose a significant fine in the face of what it deemed particularly egregious violations of the GDPR. It remains to be seen whether other European authorities will follow suit, but similar complaints currently pending against Facebook, WhatsApp, and Instagram should give shape to the future of European data privacy law. In the meantime, data processors should consider taking steps to avoid facing a similar fate under the GDPR:

Organizations with multiple EU establishments should shift data processing decisions to their desired forum (and in any event to a European forum) to avoid seemingly arbitrary intrusion from unexpected regulators. CNIL's action against Google suggests that regulators will look toward objective factors to determine where data-related headquarters are located and unwary controllers and processors could find themselves facing regulation in unanticipated fora.

If consent is the legal basis for your processing, ensure that you are obtaining that consent at an early stage, in specific and descriptive terms. Do not use pre-ticked boxes to obtain consent. Data processing consent solicitation should be as straightforward as possible.

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The authors thank Daniel Banaszynski and Mustafa Moiz for their assistance preparing this article.