

# Expert comment

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expressed are his own**

**A**s readers will perhaps be aware, on 21st January 2019, the French Data Protection Authority (the CNIL) imposed a financial penalty of €50m against Google LLC for GDPR failures arising from a “lack of transparency, inadequate information and lack of valid consent regarding the ads personalization”. The fact that this is the first large fine under the GDPR made the front pages globally. However, for privacy professionals, it is worth taking a careful note of some of the more nuanced details in the decision.

## Timing is everything

The decision was issued just over a week prior to the departure of the CNIL’s President, Isabelle Falque-Pierrotin. Ms Falque-Pierrotin is a former Chair of the Article 29 Working Party, and a leading voice on the need for US companies in particular to adhere to GDPR standards. It is unsurprising, therefore, that her name will be forever associated with the first major GDPR fine.

## Implications for One Stop Shop

Much of the media reported that Google responded to the CNIL decision by changing its headquarters for GDPR One Stop Shop purposes to Ireland. In fact, Google had announced its decision to transfer the role of service provider for most of its consumer services from Google LLC to Google Ireland Limited prior to the decision. Associated changes to Google’s general Terms of Service and Privacy Policy had been flagged by Google on 12th December 2018 (albeit while the CNIL’s investigation was at an advanced stage).

In this regard, Google was unusual among the major tech companies in that it had not formed a ‘main establishment’ prior to GDPR commencement on 25th May 2018, meaning it did not qualify for the benefits of the consistency and cooperation mechanisms embedded in the One Stop Shop process. This fact was already in the public domain, evident not least from the decision of the Irish Data Protection Commission’s Head of Communications’ decision to write a letter to the *Irish Times* clarifying that the DPC was not Google’s Lead Supervisory Authority. The letter which was published by the *Irish Times* on 27th August 2018,

noted that “Google LLC, an American company, is the controller, and so Google cannot avail of the [One Stop Shop] mechanism at all. At the point that Google meets the objective criteria of ‘main establishment’ that will change.” Notably this letter is referred to in the CNIL’s decision.

## Cooperation between the CNIL and the DPC

When the CNIL received the underlying complaints from the privacy interest groups None of Your Business (NOYB) and La Quadrature du Net, it consulted with the DPC on jurisdiction. The CNIL decision notes that Google’s Irish establishment “did not have a decision-making power on the processing operations carried out in the context of the operating system Android and the services provided by GOOGLE LLC, in relation to the creation of an account during the configuration of a mobile phone”. The CNIL did not accept that the fact that Google had 3,600 employees in Ireland who are involved in the context of financial and accounting activities, sale of advertising space, contracting, etc automatically corresponded to a ‘main establishment’ of the controller in the EU. Instead, the CNIL determined that Google had no right to avail of the One Stop Shop and it was competent to determine the complaints.

The lesson for multinationals is clear. If you wish to avail of the benefits of the GDPR One Stop Shop system, you will be expected to be able to demonstrate that your lead EU operation meets the substantive establishment and decision making requirements of Article 4(16) of the GDPR. Few multinationals would be surprised by this aspect of the decision.

## Implications for Privacy Notices

Of starker import for EU controllers operating online are the findings on Google’s shortcomings on transparency. Anyone who has used Google’s suite of products in the past 12 months could hardly have failed to notice a very determined campaign by Google to put its users on notice of its new privacy policy and suite of data protection tools. If anything, the approach was seen as a bit of a nuisance, as in some cases, users had to reconfirm consents and preferences across multiple phone, tablet and PC

devices. However, clearly this approach was not sufficient to satisfy the CNIL.

In the CNIL's view, Google's approach to transparency was "excessively disseminated across several documents, with buttons and links on which it is required to click to access complementary information." It gave the examples of five actions being necessary for a user to access information on ads personalisation and six actions for geolocation.

The CNIL also found shortcomings in the vagueness of Google's explanation of the categories of data processed for various purposes across its approximately 20 services. Users were not able to have a proper perception of the nature and volume of data collected, notwithstanding that the collection of these data sets was likely to reveal, with a high degree of precision, many of the most intimate aspects of people's lives, including their lifestyle, their tastes, their contacts, their opinions or their trips. The result of the combination of these data between them greatly reinforced the 'massive and intrusive' nature of the infringements.

The CNIL also found a lack of clarity around what processing was grounded on consent as opposed to legitimate interests, and a failure by Google to identify the retention period for the data which it deemed to be hidden behind a link entitled 'Exporting and Deleting Your Information'. The CNIL rejected Google's argument that it provided first level information in accordance with the European Data Protection Board's Guidelines on Transparency (WP260) or that the Google Dashboard tool and pop-up windows provided sufficient access to information and choices. Users were not able, particularly at the first level of information presented in the Privacy Policy and Terms of Use, to measure the scope of the main impacts on their private life, particularly at the point of sign-up when their data were first sought.

This aspect of the decision places companies who offer a suite of services online in a conundrum. On the one hand, the GDPR requires them to provide concise, intelligible and easily accessible explanations, even where

their privacy policies purport to apply across a range of different products. On the other hand, if the explanations are deemed to be vague or if there are too many clicks required to access the details, the test is failed.

So, how much detail is enough and how many clicks are too much? Unfortunately the decision doesn't shed any real light on this, other than placing the emphasis on the controller to identify the more intrusive uses of data and to highlight them above other uses.

### Implications for consent

On the issue of consent, the CNIL found examples of pre-checked consent boxes to personalised ads when users sought to access certain options before creating their account. It was relatively easy therefore to conclude that this was not a valid consent given the requirements of Articles 4(11) and 7 of the GDPR.

The CNIL accepted that user journeys may include a feature allowing the user to consent to the processing of data for different purposes, but the different purposes must be presented in a distinct way beforehand and the user must give a specific consent for each purpose, by a clear positive act, the boxes not being pre-checked.

Given that internet users around the world are fed up of the EU's cookie banners, one wonders what the tolerance there will be for multiple clicked privacy consents at every new online service.

### Precedent value of the €50m fine

Finally, the CNIL felt that the correct fine in this case was €50m given that, among other factors, the violations related to the fundamental issues of transparency and legal bases, the fact that the infringements are ongoing, and the company was deriving commercial benefits from the advertising. Google's high profile was also noted as a factor in driving awareness of the protection of EU citizens' data protection rights.

### Conclusion

So we now have our first major GDPR fining decision with several others expected in the short term. Google has decided to appeal the decision, and it will be interesting to see how that progresses. It will also be interesting to see whether other Supervisory Authorities will broadly follow suit and/or whether this decision will drive a radical change in approach to the presentation of privacy policies and privacy choices across the EU.

Stand by for further developments!

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