

## LEGAL UPDATE

Harlay Avocats | March 2019 | Newsletter N°62

### Opportunities for tax claims following recent Administrative Court rulings

As soon as the European data protection regulations (the GDPR) came into effect, two class actions<sup>1</sup> were brought before the CNIL (the French data protection authority), against the company Google LLC ("Google"), bringing together the claims of 9 974 individuals concerning Google services offered to users of Android mobile devices.

As part of its investigation, the CNIL carried out an on-line check, which revealed breaches of information and transparency obligations, as well as a failure to validly obtain consent, notably for the processing of ads personalization operations. Given these breaches, the CNIL, on January 21 2019, decided to impose a financial penalty of 50 million Euros on Google.

- **The CNIL's jurisdiction**

Google carries out what is known as "cross-border processing"<sup>2</sup>, which allows it to take advantage of a so-called "one-stop-shop mechanism", by designating as lead supervisory authority that of its main establishment in the European Union<sup>3</sup>. The one-stop-shop mechanism allows it, with some exceptions, to report its cross-border processing activities to that lead supervisory authority only.

Google challenged the CNIL's jurisdiction on the grounds that this latter is not the supervisory authority in charge of its main European establishment, which is the company Google Ireland located in Ireland, and that only the Irish supervisory authority is in a position to bring charges pursuant to the one-stop-shop mechanism. In response the CNIL noted that Google Ireland had no decision-making powers whatsoever over the purposes and means of processing at stake at the time the charges were brought and that it could not, therefore, be deemed to be the main establishment.

The mere designation by the data controller of a main establishment on European Union territory is not enough to take advantage of the one-stop-shop mechanism. There must also be evidence that this establishment has effective decision-making powers as to the purposes and means of processing. In the absence of a lead supervisory authority, other European supervisory authorities which have received complaints against Google (and notably on the matter of geo-localization) can exercise all of the powers that they have under the terms of the GDPR against Google, without being bound by the cooperation mechanism provided for at article 60 of the GDPR.

The outcome could have been different for Google if the CNIL had received the complaints at a later date because, during the proceedings, Google indicated that it had carried out a transfer of responsibility from Google LLC to Google Ireland for the processing activities involving European citizens, effective from January 31 2019. It could then have proven the existence of a main establishment.

- **Breaches of transparency and information obligations**

The CNIL noted that the design and layout chosen by Google to deliver information on personal data processing to users did not comply with the requirements for accessibility, clarity and understanding, because this information is fragmented in several documents, requiring the user to click 5 or 6 times in order to access it. This path requires the user to cross-match and compare information in order to understand the processing carried out by Google.

Further, the CNIL considers that the information given to users is neither clear nor understandable: (i) the purposes that are described are too general to allow users to understand the scope of the processing that is carried out, (ii) the description of the personal data that are collected is vague and incomplete, (iii) the information provided does not allow the user to identify the legal basis of the processing, and (iv) information on the period for which personal data is stored, which is compulsory, is missing.

The CNIL points out that, in spite of the numerous information tools that Google makes available to its users, these tools have not enabled it to provide sufficient information.

It should be noted that the CNIL is not challenging the possibility of providing the user with information by layers. However in the case of processing on a large scale of data, information given at the time of collection must be complete and must meet the requirements of article 13 of the GDPR, which was not the case here.

- **Breach of the obligation to obtain valid consent**

Google having admitted that the legal basis for its processing was based on users' consent, the CNIL reminded it of the importance of first informing the data subject so that the consent given would be informed. However, this was not the

case here, given the breaches of transparency and information obligations previously identified.

Concerning the way in which consent was given, the CNIL found that, when a Google account is created, the user has a choice between (i) giving collective consent<sup>4</sup> for all of the services and processing carried out by Google, including those relating to ads personalization, or (ii) customizing the settings associated with his or her account by clicking on the "more options" link, which refers to a page with pre-ticked boxes by default, which can be unchecked. The CNIL concluded that these two options do not allow for valid consent.

It should be noted that, in the first case, "mutualized" consent (such as a function allowing all of the boxes to be selected with one click) is only possible on condition that the individual has been able, in advance, to become aware of the different purposes of the processing and, where applicable, to give specific consent for each of those purposes through a positive act by ticking a box and not by unchecking it. In the second case, pre-ticked boxes at the customization stage do not constitute unequivocal consent because this opt-out mechanism enables the user to express an objection to processing and not to give consent by a positive act.

- **The penalty imposed by the CNIL and its consequences**

In accordance with article 45 of the French data privacy law as amended, given the gravity of the breaches found and the scale of the processing carried out by Google, the CNIL issued a fine of 50 million Euros and decided to make its decision public. It should be noted that this fine has been imposed with no prior formal warning, the CNIL being free to decide whether to prosecute.

Google does not intend to stop there and announced on January 23 2019 that they would lodge an appeal before the French High Court (Conseil d'Etat).

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<sup>1</sup> Actions brought by the NGO None Of Your Business (NOYB) and by the association la Quadrature du Net, in application of article 80 of the GDPR, May 25 and 28 2018.

<sup>1</sup> This is notably a processing of personal data which takes place in the context of the activities of establishments of Google located in several Member States (article 4.23 of the GDPR).

<sup>3</sup> Article 56.1 of the GDPR

<sup>4</sup> By selecting the boxes "I accept Google's terms and conditions" and "I accept that my information will be used as described herein and detailed in the rules of confidentiality".



## Harlay Avocats

Le Cabinet Harlay Avocats, en qualité de responsable de traitement, traite vos données personnelles conformément à sa [charte relative à la protection des données](#), et notamment afin de vous adresser des informations utiles concernant l'activité de notre Cabinet et des actualités juridiques susceptibles de vous intéresser.

Conformément au Règlement général sur la protection des données n°2016/679 du 27 avril 2016 (RGPD), la loi Informatique et Libertés modifiée et toute autre réglementation applicable, vous disposez d'un droit d'accès, de rectification, d'opposition pour des motifs légitimes, de limitation et d'effacement (ou « droit à l'oubli ») des données personnelles qui vous concernent, d'un droit à la portabilité de vos données, ainsi que du droit de définir des directives relatives au sort de vos données après votre décès. Vous disposez par ailleurs du droit d'introduire une réclamation auprès de la CNIL.

Pour exercer ces droits, vous pouvez nous contacter à l'adresse suivante: [dpo@harlaylaw.com](mailto:dpo@harlaylaw.com).

Si vous ne souhaitez plus recevoir à l'avenir d'e-mails de la part de notre Cabinet, vous pouvez à tout moment vous y opposer en cliquant sur le [lien](#) de désinscription ci-après : se désinscrire.