

## In Defense Of The One-Stop Shop: CNIL Stands Corrected

By **Alex van der Wolk, Lokke Moerel and Ronan Tigner**

(July 8, 2020, 3:57 PM EDT)

On June 19, the Council of State, France's highest administrative court, confirmed French data protection authority CNIL's decision fining Google 50 million euros.[1] However, the Council of State also corrected CNIL on a key element of General Data Protection Regulation enforcement: how to rightfully apply the "one-stop-shop mechanism," or OSS.

### The Decision's Merit

The French Council of State corrects CNIL where it required that, for the EU headquarters of Google in Ireland to qualify as the "main establishment" under the OSS provided in the GDPR, it also has to determine "the purposes and means" of the relevant cross-border processing (and therefore also has to qualify as the controller for the relevant processing).

If that were correct, the OSS mechanism would de facto not be available for non-EU-based companies (such as Google), as their EU administrative headquarters will rarely independently decide on the purposes and means of its cross-border processing activities in the EU. (These activities are often part of global service offerings in respect of which decisions are mostly made at the global level). This would entail that these companies be exposed to a potential accumulation of fines for their cross-border processing activities in the EU, as each and every national data protection authority, or DPA, would be able to fine the company up to the maximum allowed under GDPR.

The Council of State now confirms that the place of central administration in the EU may qualify as the main establishment, even if that place does not itself have decision-making power over "the purposes and means" of the processing, as we've advocated.[3] We provide further details below.

### What is the One-Stop-Shop?

The OSS mechanism of the GDPR aims to simplify enforcement for cross-border processing activities by organizations with multiple establishments across the EU. Prior to the GDPR, companies engaging in



Alex van der Wolk



Lokke Moerel



Ronan Tigner

cross-border processing operations had to deal with all relevant DPAs, each being responsible for enforcement in its own jurisdiction. This fragmented system created high administrative costs and legal uncertainty for companies with cross-border processing operations in the EU.

The OSS was designed to change this by concentrating enforcement activities under a single "lead" DPA in specific situations. Where an organization is established in more than one member state and with respect to cross-border processing activities, the DPA of the company's "main establishment" in the EU is able to bring an enforcement action on behalf of other DPAs that are also entitled to supervise the processing. This DPA then becomes the "lead DPA," responsible for spearheading the enforcement action.

The definition in Article 4(16) of the GDPR provides that the "main establishment" means the place of an organization's central administration in the EU, unless the decisions on purposes and means of the processing are made by another establishment in the EU, and such other establishment has the power to have such decisions implemented.

The question then arises of whether the central place of administration must also make decisions about the purposes and means of the processing. This could be implied by the use of the term "unless," which could be taken to mean that if decisions on purposes and means of processing will be made by another establishment instead of by the central administration, such other establishment will qualify as the main establishment.

### **CNIL's Take on OSS**

In its decision, France's DPA, CNIL, considered that Google<sup>[4]</sup> does have EU headquarters in Ireland, but that this Irish entity "did not have a decision-making power" over the relevant cross-border data processing activities to which the complaints related. For that reason, CNIL decided that the OSS mechanism did not apply and that CNIL was therefore competent to make a decision.

According to CNIL, this means that for non-EU companies having administrative headquarters in the EU only, no main establishment can be identified and no lead DPA under the OSS mechanism can be established.

### **Main Establishment Revisited**

The Council of State has now corrected CNIL on its take on the OSS. It follows from the decision that a main establishment exists where the organization has a "central administration in the EU" or where there is "an establishment with decision-making power as to its purposes and means in the EU and such other establishment has the power to have decisions applied in the entire EU."

It is therefore very possible that a place of central administration may qualify as main establishment, even if it does not itself have decision-making power over "the purposes and means of the processing." The Council of State therefore confirmed an important nuance in the GDPR that will have significant effects on the breadth and scope of situations in which the OSS is applicable.

For Google, however, the nuance does not make a difference. The Council of State found that, at the time of the fine, Google's EU headquarters in Ireland did not exercise direction or control over other EU establishments and therefore did not qualify as the central administration in the EU.

The Council also found that the Google entity in the United States (Google LLC) alone determined the purposes and means of the processing activities in question, and that Google's EU headquarters therefore also did not meet the second prong. The Council of State therefore upheld that CNIL was indeed entitled to handle the complaints in relation to French individuals for its own jurisdiction because Google LLC did not at the time have a "main establishment" in the EU.

With only limited cases in which the application of the OSS has been motivated<sup>[5]</sup>, the Council of State's decision brings much-needed nuance to the definition of the "main establishment," which may well lead to more successful applications of the OSS in the near future.

---

*Alex van der Wolk is a partner at Morrison & Foerster LLP and co-chair of the firm's global privacy and data security practice.*

*Lokke Moerel is senior of counsel at the firm.*

*Ronan Tigner is an associate at the firm.*

*Former firm associate Karine e Silva also contributed to this article.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] <https://www.mofo.com/resources/insights/190122-french-dpa-google-gdpr-fine.html>

[2] <https://www.conseil-etat.fr/actualites/actualites/rgpd-le-conseil-d-etat-rejette-le-recours-dirige-contre-la-sanction-de-50-millions-d-euros-infligee-a-google-par-la-cnil>

[3] <https://www.mofo.com/resources/insights/190221-one-stop-shop.html>

[4] <https://www.cnil.fr/sites/default/files/atoms/files/san-2019-001.pdf> (see points 28–40)

[5] <https://iapp.org/news/a/tell-a-friend-but-only-with-your-friends-consent/>