

CNIL fines Monsanto Company, July 26th 2021

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Abstract

On the 26th of July 2021 the French Data Protection Agency CNIL fined the Monsanto Company 400,000 Euro for failing to disclose data storage and processing to data subjects and for failing to establish a proper contract between them as the data controller and a data processor they employed.

The case not only makes clear that GDPR obligations apply to data that was processed **before** its introduction, if the obtained data is retained past the enactment of GDPR, it is also a landmark decision with respect to the question who is to be considered data controller and who is data processor. Lastly it reiterates that many GDPR provisions apply to personal data **even if** this data is public and easily obtained.

This decision and future ones in its spirit are likely to have a significant impact on the type of knowledge-gathering companies that were employed in this case while markedly empowering individuals targeted by lobbying campaigns, particularly in the political sphere.

1 Setting the Scene

Between 2016 and 2017 the chemicals company Monsanto ordered the public relations company Fleishman-Hillard (herein referred to as *FH*) to compile a list of influential public figures that could shape the debate surrounding a license renewal for the controversial pesticide glyphosate. This list included 201 people that reside in France and another news outlet claims that lawyers of the company Bayer, which bought Monsanto in 2018, had found such lists at Monsanto containing close to 1,500 people residing in the EU [6].

Monsantos directive to *FH* was to identify individuals of interest, procure public contact information and assign scores on “influence, credibility and support for MONSANTO society on six subjects, namely agriculture, pesticides, genetically modified organisms, the environment, food and health.” [2]. Presumably this information was used to target Monsanto’s lobbying efforts. Afterwards there was ongoing communication between *FH* and Monsanto about this list, in partic-

ular “MONSANTO was closely associated with the identification and listing of stakeholders involved in the debate on glyphosate” [2]. Monsanto’s active involvement will become an important aspect in the decision on who should be considered data controller in this case.

In May 2019 the existence of the list was made public by the French media. The newspaper “Le Monde” [5] and the TV channel “France 2” revealed the existence of the list containing over 200 European public figures pertaining to the glyphosate debate. Over the subsequent months seven separate complaints were raised with CNIL, which began investigating immediately.

The investigation lasted until February 2021, at which point a report was issued to Monsanto. This was followed by a response and hearings that concluded on July 26th 2021 with the aforementioned fine being imposed on the company. There is to this date no press release from Bayer, the current owner or Monsanto, regarding the decision, or any information as to whether the fine has been paid.

2 GDPR Violations

Before considering particular violations it is first necessary to establish whether GDPR [4] applies in this case. In the hearing Monsanto argues that the creation of the list and the data gathering and processing took place prior to the enactment of the GDPR. They show file metadata that indicates no modification after 2017. The GDPR does not apply retroactively, however as the public prosecutor points out, Monsanto retained the list past the enactment of GDPR. Since the provisions apply not only to data processing but *storage*, Monsanto would still have had to follow the regulation. The justification being that the list could still be easily *accessed* without that being reflected in the metadata.

CNIL found Monsanto’s actions to be in violation of two articles of the GDPR [2, 3]. Article 14, which governs the rights of data subjects where the data has not been provided to the controller by the subject and Article 28, which is part of a suite of articles that define the relationship between data con-

troller and processor. In particular Monsanto was found to be the data controller and that it had not set out an adequate contract with the processor *FH* with respect to Article 14-3 GDPR.

Article 14 sets out the rights of data subjects that have not themselves provided the data to the controller, but where the data is part of the public record. Most notably for this case the data controller needs to inform the data subject that their data is being processed, the purpose and duration of processing and the identity of the data controller. This provision is essential to the GDPR as knowledge about stored data, processing and the identity of the controller is necessary so that the data subject is able to use their rights to object to processing (Article 21), right to erasure (Article 17), right to access (Article 15) etc.

Neither Monsanto nor *FH* informed the persons on the list that their data was being collected and likely used to inform a campaign to sway opinions in favor of glyphosate prior to the existence of the list being unveiled by the French media.

Article 28 defines the relationship between data controller and processor. Monsanto was found to have failed to properly establish their relationship as a data controller in a contract with *FH*. This point was contended as Monsanto sees not themselves but *FH* to be the data controller. According to the company *FH* was given a directive to improving Monsanto's public relations with regards to glyphosate, not specifically to compile the data in question. This is undermined by the fact that there appears to have been multiple communications Monsanto seems to have specifically requested information on public 'stakeholders' in the debate on glyphosate and there also were multiple communications between Monsanto and *FH* regarding the file in question in particular. Monsanto actively monitored and guided the creation of the list, therefore depriving *FH* of the independence in the choice of processing means and purpose enjoyed by a data controller.

As a result Monsanto is liable for the data subjects not being informed about the processing and storage of their data and additionally they would have been required to contractually define their relationship as controller with *FH* as the processor.

3 Discussion

There are two important aspects to this case which further clarify the provisions in, and applicability of the GDPR. In this case both those aspects award power and control to the data subjects. In the first aspect it could otherwise have resolved into a kind of backdoor around the GDPR and in the second aspect may have given controlling parties the ability to shift responsibility.

GDPR applies to storage of previously processed data.

This is perhaps surprising as the GDPR deal to a large degree with *processing*. It also signifies that legacy data, the processing of which happened before the GDPR was enacted, is not exempt from its provisions if the data is retained. Companies who's business is dealing in public and derived data and judgments on public persons must now inform those people of this processing and its purpose both for ongoing and also past activity if results are still used. I believe this could mark an important step in empowering individuals to be aware of and react to targeted campaigns to influence their opinions.

Exerting control designates the controller. This is an important aspect of this ruling as it establishes that the designation of data controller, processor or third party client is not a choice that can simply be persisted contractually, but a property arising from the relationship between the parties. Or, conversely, once contractually enshrined designated roles as controller and processor imposes restrictions on the relationships and interactions between those parties. This prevents controlling entities from shifting responsibilities for violating GDPR provisions to contracted third parties. In finding Monsanto to be a data controller this case makes an important clarification about when a party must be considered to be the data controller, therefore carrying liability and the responsibilities laid out by GDPR.

While the fine of this particular case is comparatively small, I believe its impact must not be underestimated. It demonstrates how broad a scope the GDPR actually has and also clarifies what it means to be a data controller.

Both in the court transcripts documents and the media reporting [1-3, 6] there is little to no mention of any technical aspects of this case. This is unsurprising in so far as this case neither involved automated processing or technical failure or leaks. However it raises important questions about how companies must treat public data. In particular companies that center around the processing of public data for *multiple* purposes will have to find solutions that ensure data subjects are adequately informed as well as providing the other rights set out by GDPR, such as erasure and access. Given the importance of public relations companies with similar practices as *FH* a technical solution that automates this process would certainly be of interest. One such solution could be databases with awareness of public personal data as well as processing purposes that informs persons automatically as their data is touched.

A second aspect highlighted by this case is the necessity to delete such data after its purpose is done. This again could be aided by a purpose-aware data-store that deletes relevant data automatically when the purpose expires. It is likely that at this point technical solutions in this space are underutilized and simultaneously that there is a significant amount of public or public-derived personal data stored in companies like *FH* and

clients like Monsanto, for which the purpose has expired.

4 Acknowledgments

This document is chiefly informed by the released court documents from CNIL [2]. Since these documents are only available in French I used google translate to translate the page to English. Similarly for this [3] article.

References

- [1] CNIL refuses to let Monsanto off the hook | BDK Advokati.
- [2] Délibération SAN-2021-012 du 26 juillet 2021.
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- [4] EU General Data Protection Regulation (GDPR), April 2016.
- [5] « Fichier Monsanto » : des dizaines de personnalités classées illégalement selon leur position sur le glyphosate. *Le Monde.fr*, May 2019.
- [6] France data protection agency slaps Monsanto with €400k fine for running 'watch lists'. <https://www.rfi.fr/en/france/20210728-france-data-protection-agency-slaps-monsanto-with-%E2%82%AC400k-fine-for-running-watch-lists>, July 2021.