

**Deliberation of the Restricted Committee No SAN-2024-004 of 4 April 2024
concerning [REDACTED]**

The *Commission nationale de l'informatique et des libertés* (French Data Protection Authority), meeting in its Restricted Committee composed of [REDACTED]

[REDACTED] members;

Having regard to the end of the term of office of Mr Alexandre LINDEN on 1st February 2024;

Having regard to deliberation no. 2024-015 of 7 March 2024 electing Mr Philippe-Pierre CABOURDIN as Chairman of the Restricted Committee of the *Commission nationale de l'informatique et des libertés*;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of personal data and on the free movement of such data;

Having regard to the French Postal and Electronic Communications Code;

Having regard to the French Data Protection Act no. 78-17 of 6 January 1978, and in particular Articles 20 et seq.;

Having regard to Decree No 2019-536 of 29 May 2019 implementing Law No 78-17 of 6 January 1978 on data processing, data files and individual liberties;

Having regard to deliberation no. 2013-175 of 4 July 2013 adopting the internal regulations of the CNIL (French Data Protection Authority);

Having regard to decision No 2021-191C of 29 June 2021 of the President of the CNIL (French Data Protection Authority) to instruct the Secretary General to carry out or have carried out a verification mission of the processing operations implemented by the [REDACTED] by its subsidiaries or on its behalf, in any place likely to be concerned by their implementation;

Having regard to the decision of the President of the CNIL (French Data Protection Authority) appointing a rapporteur before the Restricted Committee, dated 4 April 2022;

Having regard to the report of Ms Valérie Peugeot, Commissioner-Rapporteur, notified to [REDACTED] on 23 August 2023;

Having regard to the written observations submitted by [REDACTED] on 29 September 2023;

Having regard to the Rapporteur's reply to these observations, notified to the company on 20 October 2023;

Having regard to the closure of the investigation, notified to the company on 22 November 2023;

Having regard to the oral observations made at the meeting of the Restricted Committee on 7 December 2023;

Having regard to the preliminary deliberation of the Restricted Committee No SAN-2023-019 of 14 December 2023;

Having regard to the written observations submitted by the Rapporteur on 21 December 2023;

Having regard to the written observations submitted by the company on 28 December 2023;

Having regard to the oral observations made at the meeting of the Restricted Committee on 18 January 2024;

Having regard to the memo to the restricted committee submitted by the company on 29 January 2024;

Having regard to the other documents in the case file;

The following were present at the Restricted Committee meeting:

- Valérie Peugeot, Commissioner, heard in her report;

As representatives of [REDACTED]

- [REDACTED]

- [REDACTED];

[REDACTED] having spoken last;

The Restricted Committee adopted the following decision:

I. Facts and proceedings

1. [REDACTED] (hereinafter referred to as "the Company"), whose registered office is situated at [REDACTED] is a subsidiary of the [REDACTED]. It manages the [REDACTED] stores, which specialise in the retail sale of telecommunications equipment. At 31 May 2023, the company had [REDACTED] employees and [REDACTED] stores, spread across [REDACTED] [REDACTED] and [REDACTED]. Its revenue for 2021 was around [REDACTED] million, with net income of [REDACTED] million.
2. To promote the catalogue of products sold in stores, the company carries out canvassing campaigns by telephone and SMS using prospect files purchased from two main partners, [REDACTED] and [REDACTED]. It said it had sent around 1.4 million text messages between September 2020 and September 2021, and more than 220,000 between May 2022 and May 2023. With regard to telephone prospecting, the company said it made around 3.2 million calls between May 2022 and May 2023, to around 1.3 million prospective customers.
3. On 23 September 2021, a delegation of the Commission nationale de l'informatique et des libertés (hereinafter "the CNIL" or "the Commission") carried out an inspection on the company's premises, in order to verify compliance with the provisions of law No 78-17 of 6 January 1978 as amended on information technology, files and freedoms (hereinafter "the French Data Protection

Act” or “law of 6 January 1978 as amended”) and 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 (hereinafter the “Regulation” or “GDPR”).

4. Official report No 2021-191/1, drawn up on the day of the inspection, was sent to the company on 30 September 2021.
5. The company provided additional documents on 5 October and 22 November 2021.
6. On 4 April 2022, the President of the Commission appointed Ms Valérie Peugeot as Rapporteur on the basis of Article 22 of the amended Act of 6 January 1978.
7. In accordance with Article 56 GDPR, on 9 June 2023, the CNIL informed all the European supervisory authorities of its competence to act as lead supervisory authority for cross-border processing carried out by the company, as a result of the fact that the company's principal place of business was in France. Following exchanges between the CNIL and the European data protection authorities as part of the one-stop shop mechanism, Italy, Spain, Portugal and Belgium declared themselves concerned.
8. On 8 June and 13 July 2023, the Rapporteur sent two additional requests to which the company replied on 23 June and 3 August 2023.
9. On 23 August 2023, at the end of her investigation, the Rapporteur sent the company a report detailing the breaches of Articles 6, 14 and 32 GDPR and Article L34-5 of the French Postal and Electronic Communications Code (hereinafter "the CPCE") which it considered constituted in the case in point. This report proposed that the Restricted Committee impose an administrative fine on the company. It also proposed that the decision be made public.
10. On 29 September 2023, the company submitted observations in response to the sanction report.
11. On 20 October 2023, the rapporteur responded to the company's observations.
12. On 22 November 2023, the Rapporteur informed the company and the Chairman of the Restricted Committee that the investigation was closed, pursuant to Article 40 III of Decree No 2019-536 of 29 May 2019 implementing the Data Protection Act.
13. On the same day, the company was informed that the matter had been placed on the agenda of the Restricted Committee meeting of 7 December 2023.
14. The Restricted Committee held a meeting on 7 December 2023.
15. By preliminary decision No SAN-2023-019 of 14 December 2023, sent by email to the company on the same day and notified by post on 21 December 2023, the Restricted Committee asked [REDACTED] and the Rapporteur to produce an additional document, which the company raised at the meeting of 7 December 2023.
16. On 21 December 2023, the Rapporteur provided the Restricted Committee with an exhibit entitled [REDACTED]

17. On 28 December 2023, the company communicated to the Restricted Committee an exhibit also entitled [REDACTED]
18. Pursuant to Article 41 of Decree No 2019-536 of 29 May 2019, [REDACTED] was on 18 January 2024 notified of a meeting of the Restricted Committee on 21 December 2023;
19. The Rapporteur and the company made verbal observations at the Restricted Committee session.

II. Reasons for the decision

A. On the appointment of the Rapporteur

20. Pursuant to Article 39 of Decree No. 2019-536 of 29 May 2019, "*when a measure provided for in Article 20(III) of the Law of 6 January 1978 [...] is likely to be pronounced, the chairman of the authority shall appoint a rapporteur who does not belong to the restricted committee, and shall inform the controller or processor in question*".
21. The Restricted Committee notes that, pursuant to these provisions, by decision of 7 April 2022, the President of the CNIL appointed Ms Valérie Peugeot, Commissioner, to draw up the report enabling the Restricted Committee to adopt its decision in the context of file "CTX n°2022-019 [REDACTED]
22. At the meeting of 7 December 2023, and then in its observations of 28 December 2023, [REDACTED] argued that the appointment was null and void, insofar as it had been made on the basis of a referral that did not concern [REDACTED]
23. The Restricted Committee noted that on 1 July 2020, the CNIL had received a complaint No [REDACTED] against several companies in the [REDACTED]
24. By decision No 2021-191 of 29 June 2021, the President of the CNIL instructed the Secretary General to carry out, or have carried out, a verification mission of the processing operations carried out by the [REDACTED] or its subsidiaries.
25. The inspection report dated 23 September 2021 stated that "*the purpose of the inspection is to carry out an on-site verification of the compliance of personal data processing operations implemented by the [REDACTED] or its subsidiaries, in particular [REDACTED] and [REDACTED] [...]*". It stated that "*in particular, this involved carrying out verifications after the closure on 4 May 2021 of formal notices MED No 2020-041 dated 24 November 2020 against [REDACTED] and MED No 2020-042 dated 24 November 2020 against [REDACTED] it also involved following up on referral No [REDACTED] relating to the exercise of a complainant's right of access*".
26. The Restricted Committee took the view that, insofar as referral No [REDACTED] had given rise to verifications carried out during the on-site inspection on 23 September 2021, which targeted the [REDACTED] and all its subsidiaries, including [REDACTED] the fact that this referral was mentioned in the President's decision to appoint Ms Valérie Peugeot as Rapporteur had no bearing

on the validity of this appointment, even though said referral had not specifically been aimed at [REDACTED]

B. With regard to the European cooperation procedure

27. Under Article 4(23)(b) GDPR, "cross-border processing" means *"processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State"*.
28. The Rapporteur noted that the company had stores [REDACTED]. She noted that, although the company had indicated that its commercial canvassing operations had been conducted exclusively from France, targeting French nationals, it had nevertheless transmitted recordings of canvassing calls to Belgian nationals, with the aim of promoting its stores located in Belgium. In addition, the Rapporteur noted that the company had also indicated that its customer database contained all the customer data for [REDACTED] stores in Europe. She took the view that the company was therefore processing cross-border personal data.
29. In its defence, with regard to commercial canvassing by telephone, the company stated that it only canvassed individuals domiciled in France, in order to generate traffic in its points of sale located in France. With regard to the recordings of calls to Belgian nationals sent to the delegation, it stated that *"[REDACTED] Belgium, the head entity carrying out [REDACTED] activities in Belgium, does not have staff dedicated to running a customer service department. Also, for telephone or SMS canvassing operations carried out with a view to generating traffic in points of sale located on Belgian territory, [REDACTED] Belgium was able to subcontract this canvassing activity to [REDACTED] by using the services of this company's sales platforms in France. As a result, the teams responsible for canvassing were given access to a Belgian canvassing file acquired from [REDACTED] Belgium"*.
30. **Firstly**, with regard to the commercial canvassing by telephone covered by the breach of Article 6 GDPR, the Restricted Committee noted that the breach had been based on the design of forms implemented by data brokers who only provided [REDACTED] with the data of French nationals. In these circumstances, despite the fact that the company had canvassed Belgian nationals by telephone, the Restricted Committee took the view that the processing concerned by the breach of Article 6 GDPR did not constitute cross-border processing.
31. **Secondly**, with regard to the recordings of telephone canvassing calls covered by the breach of Article 14 GDPR, the Restricted Committee noted that these targeted French nationals as well as Belgian nationals, in order to promote stores located in Belgium. Thus, the cross-border nature of the processing was clear.
32. **Thirdly and finally**, the company stated that its customer database, which was the subject of the breach of Article 32 GDPR, had contained customer data from all [REDACTED] points of

sale in Europe. The Restricted Committee therefore took the view that the management of this database constituted cross-border processing within the meaning of Article 4(23) GDPR.

33. Pursuant to Article 60(3) GDPR, the draft decision adopted by the Restricted Committee was forwarded to the other competent European supervisory authorities, with a view to enabling them to make relevant and reasoned objections to the processing operations and breaches which concern them, on 20 February 2024. The Restricted Committee noted that the following supervisory authorities were concerned by this procedure: Belgium, Italy, Spain, Portugal.
34. As of 20 March 2024, none of the supervisory authorities concerned had raised a relevant, reasoned objection to this draft decision, so that, pursuant to Article 60(6) of the GDPR, they are deemed to have approved it.

C. On the breach of the obligation to obtain the consent of the data subjects for the implementation of commercial prospecting by electronic means

35. Under the terms of Article L34-5CPCE, "*direct canvassing by means of an automated electronic communications system [...], a fax machine or electronic mail using the contact details of a natural person [...] who has not previously expressed his/her consent to receive direct canvassing by this means is prohibited. For the purposes of this article, consent means any free, specific and informed expression of will by which a person accepts that personal data concerning him/her may be used for the purposes of direct marketing. [...]*".
36. Under Article 4(11) GDPR, "*consent*" of the data subject means "*any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her*".
37. Pursuant to the combined provisions of Articles L34-5 CPCE and 4(11) GDPR, the organisation that carries out commercial canvassing by electronic means must have the unambiguous, specific, free and informed consent of the data subjects.
38. **The Rapporteur** noted that the company had indicated that it carried out commercial canvassing by SMS using prospect files purchased from data brokers. She noted that the delegation's findings had established that these brokers were collecting data from data subjects via online competition entry forms.
39. In proposing that the Restricted Committee take the view that the company had breached its obligations under Article L34-5 CPCE, as clarified by the provisions of Article 4(11) GDPR, the Rapporteur based her opinion on the fact that the design of these forms did not enable users to express their consent in a clear and unambiguous positive act, and strongly encouraged them to agree to the transmission of their data to the company's partners for canvassing purposes.
40. **In defence**, the company relied on the terms of the contract linking it to one of its suppliers, ██████████ taking the view that it could not be held responsible for the non-compliant actions of its service provider. With regard to the other supplier, ██████████ it stated that it had no

contractual relationship with it before November 2021 and that the majority of the files received came from [REDACTED] supplemented by contributions from [REDACTED] which itself used a network of subcontractors including [REDACTED]

41. **In the case in point**, it was clear from the investigation that [REDACTED] carried out commercial canvassing by SMS using prospect files purchased from data suppliers, who were responsible for obtaining the consent of the data subjects at the time the data was collected. Between September 2020 and September 2021, [REDACTED] prospecting SMS messages were sent. The number of messages sent between May 2022 and May 2023 was [REDACTED].
42. **Firstly**, with regard to [REDACTED] the Restricted Committee noted that during the inspection on 23 September 2021, the company had indicated that "canvassing SMS messages relating to the [REDACTED] catalogue are sent to prospects supplied by [REDACTED] because [REDACTED] is able to target prospects close to the stores". This involved extracting 5,000 prospect files supplied by [REDACTED]. The company also provided the delegation with two purchase orders from [REDACTED] dated 3 August 2021, for the sale of several tens of thousands of files to [REDACTED]
43. On the basis of these factors, the Restricted Committee took the view that [REDACTED] had indeed been using the prospect files supplied by [REDACTED] on the date of the inspection.
44. **Secondly**, the Restricted Committee pointed out that when the data of prospective customers had not been collected directly from them by the prospecting organisation, consent may have been obtained at the time of the initial collection of the data by the initial collector, on behalf of the organisation that was to carry out the subsequent prospecting operations. Otherwise, it is up to the prospecting organisation to obtain such consent before carrying out any prospecting (CNIL, FR, 24 November 2022, Sanction, No SAN-2022-021, published).
45. As a result, in its capacity as controller, [REDACTED] is obliged to check that the conditions allowing it to carry out commercial prospecting operations have been met. In this respect, the Restricted Committee held an organisation liable on the basis that a simple contractual undertaking by its data broker to comply with GDPR and the rules applicable to commercial canvassing did not constitute a sufficient measure (CNIL, FR, 24 November 2022, Sanction, No SAN-2022-021, published).
46. Thus, with regard to the contractual commitments of [REDACTED] which [REDACTED] relies on, the Restricted Committee took the view that the contractual obligations that may be imposed on suppliers could not exonerate [REDACTED] from its liability as controller, despite the possible existence of liability on the part of suppliers.
47. **Thirdly**, the Restricted Committee pointed out that the specific consent required by the provisions of Article L34-5 CPCE could only result from the express consent of the user, given in full knowledge of the facts after adequate information on the use to be made of his/her personal data. It is therefore important to ensure that the data subjects have given their unambiguous, specific, free and informed consent when their personal data is collected via the forms used to take part in competitions.

48. In this respect, the Restricted Committee noted that the work carried out on cookie practices with regard to consent gathering banners could be used to assess more generally the conditions for gathering free, unambiguous, specific and informed consent, and serve as a reference for commercial prospecting when it was based on gathering consent.
49. Furthermore, on the same conditions of consent, the Court of Justice of the European Union (hereinafter “CJEU”) specified, in its Planet49 GmbH decision: “*Article 7(a) of Directive 95 provides that the consent of the data subject may make such processing lawful provided that such consent is “undoubtedly’ given by the data subject. However, only active behaviour on the part of this person with a view to expressing his consent is likely to meet this requirement.*” (CJEU, Grand Chamber, 1 October 2019, Planet49 GmbH, C-673/17, ECLI:EU:C:2019:801, §54) If consent was not unambiguously given, it had to be considered to be lacking, which rendered the processing unlawful for lack of a legal basis. More specifically on the methods of collection, the CJEU states that “the expression of will referred to in Article 2(h) of Directive 95/46 must, in particular, be ‘specific’, in the sense that it must relate precisely to the data processing concerned and cannot be inferred from an expression of will having a distinct purpose. *In this case, contrary to Planet49’s argument, the fact that a user activates the button to take part in the promotional game organised by that company cannot therefore be sufficient to consider that the user had validly given his consent to the placement of cookies*” (*Idem*, §§ 58-59).
50. In addition, the Conseil d’Etat held that “*free, specific, informed and unambiguous consent can only be express consent from the user, given in full knowledge of the facts and after adequate information on the use to be made of his personal data.*” (CE, 10th and 9th joint chambers, 19 June 2020, Google LLC, No 430810, pt. 21).
51. The Restricted Committee also noted, by way of example, that the 5/2020 guidelines on consent, adopted on 4 May 2020 by the Article 29 Working Party (now the European Data Protection Committee, hereinafter “EDPB”), specified that the free nature of consent “implies real choice and control for the data subjects”. *As a general rule, GDPR states that if the data subject is not genuinely able to exercise a choice, feels compelled to consent or will suffer significant adverse consequences if he or she does not consent, the consent is invalid [...]. In general terms, any inappropriate pressure or influence exerted on the data subject (which may manifest itself in various ways) preventing him or her from exercising his or her will will render the consent invalid.*”
52. By way of illustration and comparison, in its Deliberation No 2020-092 of 17 September 2020 adopting a recommendation proposing practical arrangements for compliance in the event of recourse to “cookies and other tracers”, the Commission recommended that the organisations concerned ensured “that users are fully aware of the options available to them, in particular through the design chosen and the information provided (§ 10) [...] In order not to mislead users, the Commission recommended that controllers ensure that choice gathering interfaces do not incorporate potentially misleading design practices that lead users to believe that their consent is compulsory or that visually emphasise one choice rather than another. *It is recommended that buttons and fonts be of the same size, easy to read and highlighted in the same way.*” (§ 34). (§ 34)

It adds that “*care should be taken to ensure that the information accompanying each actionable element enabling consent or refusal to be expressed is easily understandable and does not require efforts of concentration or interpretation on the part of the user. In particular, it is advisable to ensure that it is not worded in such a way that a quick or inattentive reading could lead users to believe that the option selected produces the opposite of what they thought they were choosing.*” (§ 23) Otherwise, the unambiguous nature of the consent would not be characterised.

53. The Restricted Committee also points out that studies carried out on the practices of digital interfaces, in particular with regard to cookies, have shown that the appearance of banners requesting consent has a considerable impact on user choice, as it may encourage users to make choices that do not reflect their preferences on data sharing.
54. In the case in point, it is clear from the documents in the file that [REDACTED] and [REDACTED] suppliers of prospect data to [REDACTED] collect the data of the data subjects (last name, first name, title, email address, mobile phone number, date of birth and postal address) via entry forms for online competitions, in order to enable their partners to use them in their commercial prospecting.
55. With regard to the findings made by the delegation during the inspection, the Restricted Committee noted that the forms accessible from the websites [REDACTED] [REDACTED] were similar. Beneath the fields enabling the data subjects to enter their contact details (which were requested by the formulas "fill in your contact details below in the event of winning" or "fill in your contact details below to apply") was a "VALIDATE", "I VALIDATE" or "I ANSWER QUESTIONS TO APPLY" button. Above or below this button, a text specified that by clicking on it, the user declared that he had read the company's data protection policy and accepted that the data collected would be used to send them offers from the company's partners. Hyperlinks provided access to the data protection policy and the list of partners concerned. The end of the text stated that if users wished to continue without receiving offers from the company's partners, they could click on a link in the text ("click here").
56. Thus, users confronted with this form can either click on a button to validate their participation in the game and accept that their data will be used to send them offers from the company's partners, or click on the "click here" link to continue without receiving these offers.
57. The Restricted Committee took the view that, as designed, the proposed forms did not allow data subjects to express a valid choice reflecting their preferences regarding the transmission of data for commercial prospecting purposes. The overall view of the interfaces highlighted in particular the "VALIDATE", "I VALIDATE" or "I ANSWER QUESTIONS TO APPLY" button, whose size and colour made it stand out from the other information provided. Similarly, its title was more suggestive of the conclusion of the user journey rather than the transmission of data to partners. Finally, its location gave the impression that it had to be clicked to complete the registration and take part in the competition. On the other hand, the hypertext link making it possible to take part in the game without agreeing to the transmission of one's data to the partners was presented in the body of the text, in characters of a much smaller size than those used for the buttons and without any particular emphasis, so that it did not appear intuitive that it was possible to take part without

clicking on one of the aforementioned buttons and therefore without transmitting one's data to third parties for canvassing purposes. The consent obtained was therefore not unequivocal and free.

58. The Restricted Committee also noted that, as part of its written observations relating to the failure to comply with Article 6 GDPR, the company produced two other forms, which were presented as compliant. However, the Restricted Committee noted that their design did not allow the data subjects to express their consent by a clear and unambiguous positive act.
59. On the one hand, the Restricted Committee noted that the presentation of these forms, like those consulted by the delegation during the on-site inspection, particularly emphasised the "VALIDATE MY COORDINATES" and "CONTINUE" buttons, to validate participation in the game and transmit data to the partners. On the other hand, the "click here" hypertext link making it possible to take part in the game without accepting this transmission was presented in the body of the text, in characters much smaller than those of the button and without any particular emphasis. In addition, the overall design of the form accessible from the [REDACTED] website, which contained three green boxes ("I CONFIRM MY ENTRY", "I CONFIRM MY CONTACT DATA FOR DELIVERY IF I WIN" and "I CONFIRM MY CONTACT DATA") suggested that there was a logical sequence between these three actions and that the "CONFIRM MY CONTACT DATA" button was the last button to be activated to enter the game and win. However, this button was not compulsory, as the user could use the "click here" link, which was not intuitive given the general appearance of the form.
60. In addition, with regard to the form used by [REDACTED] on the [REDACTED] website, the Restricted Committee noted the existence of two boxes to be ticked, one concerning the reading and acceptance of the rules of the game, the other concerning the reading of the privacy policy and the acceptance of the transmission of one's data. The similar appearance of these boxes, presented as legal notices that had to be read, and whose accompanying text began with "I have read", encouraged users to tick them indiscriminately, then click on "CONTINUE" when transmitting their data. The option to enter the prize draw without receiving any promotional offers was available by clicking on the "here" link, but it was written in a smaller font and was not highlighted in comparison with the "CONTINUE" button, which was particularly visible due to its size, colour and font, and which also appeared to conclude the user journey due to its location at the bottom of the form. Thus, the optional nature of the "CONTINUE" button could not be clearly deduced from the overall design of the form.
61. On the other hand, the Restricted Committee noted that an online check carried out on 17 October 2023 had revealed that, given its configuration, the form referred to in the previous paragraph did not materially allow the user to take part in the game without accepting the transmission of his data to the company's partners, and therefore without being the recipient of commercial canvassing, contrary to what was indicated on the form.
62. The Restricted Committee therefore took the view that the aforementioned forms did not sufficiently inform data subjects that they were consenting to the transmission of their data for the purposes of commercial canvassing, in a context where the very purpose of these websites was to

offer the prospect of gains that could not suggest the objective of collecting this data on a permanent basis for such purposes. These people were not in a position to express their consent in a clear and unambiguous positive act.

63. Under these conditions, the Restricted Committee took the view that [REDACTED] did not have valid consent within the meaning of Articles L34-5 CPCE and 4 GDPR to carry out its commercial prospecting operations by electronic means.
64. A breach of Article L34-5 of the CPCE is thus established.

D. On the breach of the obligation to process data lawfully

65. Pursuant to Article 6 GDPR, *“1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”*
66. The Restricted Committee pointed out that commercial canvassing by telephone could be carried out on the legal basis of the company's legitimate interest (f) or on the basis of consent (a).
67. In the case in point, the company stated that it had carried out commercial canvassing by telephone, using prospect files purchased from several data suppliers.
68. The Restricted Committee noted that the company had been unable, either in its written observations or in its oral observations at the meeting, to indicate precisely what legal basis it had had for carrying out such processing. In these circumstances, the two legal bases likely to be applicable in this case will be examined in turn.

1) On legitimate interest

69. **The Rapporteur** maintained that the company could not rely on the legal basis of legitimate interest referred to in Article 6(1)(f) GDPR as a basis for its commercial canvassing by telephone. Thus, with regard to the online competition entry forms through which ██████████ collected the data of prospective customers that it sold to ██████████ it pointed out that ██████████ was not systematically mentioned in the list of partners likely to approach the data subjects, and that the latter could not legitimately expect to receive commercial offers from this company.
70. **In defence, the company** relied on ██████████ contractual commitments, which stipulated that ██████████ had to be mentioned among the recipients of the data collected. It took the view that it could not be held liable for the failings of its service provider, and produced an example of a form used by ██████████ containing a URL link to a list of partners, including ██████████ (a link to ██████████ privacy policy giving access to the full list of companies belonging to the same group as ██████████ including ██████████ Finally, the company stated that it carried out regular checks on the conformity of the files delivered.
71. **The Restricted Committee** reiterated that, while commercial canvassing by non-electronic means might be carried out on the basis of the company's legitimate interest, the latter had to ensure that the processing did not adversely affect the rights and interests of the persons whose data was processed, taking into account their reasonable expectations.
72. In this respect, recital 47 GDPR provides that: “[...] *the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing [...].*”
73. In the case in point, the Restricted Committee noted that some of the competition forms used by ██████████ to collect data from prospective customers, which it then transmitted to ██████████ did not allow the data subjects to reasonably expect to receive commercial prospecting offers from this company.
74. Thus, with regard to the form accessible from the ██████████, website, the Restricted Committee noted that it contained a hypertext link to a list of partners by name and not to categories of partners. Thus, data subjects might therefore legitimately expect this list of partners to be exhaustive. However, said list did not mention ██████████
75. Concerning the forms on the websites ██████████ (this form refers to the website ██████████ and ██████████, the Restricted Committee noted that they did not mention the list of partners or categories of partners to whom the data might be transmitted, and that they also did not contain any link allowing access to such a list.

76. Moreover, with regard to the checks that the company claimed to carry out on the forms from which the data was collected, the Restricted Committee noted that it had not produced any evidence to support this, as the contractual commitments of its suppliers did not constitute a control measure as such.
77. The Restricted Committee took the view that, in these circumstances, the protection of the interests, freedoms and fundamental rights of the data subjects took precedence over the legitimate interests of the company, and that the latter could not therefore rely on the legal basis mentioned in Article 6(1)(f) to justify its telephone canvassing operations.

2) On consent

78. The Rapporteur took the view that the company could not rely on the legal basis of consent referred to in Article 6(1)(a) GDPR as a basis for its commercial canvassing by telephone. She relied on the same arguments as those developed for the breach of Article L34-5 GDPR, with regard to the collection forms used by data providers.
79. **In defence, the company** relied on the terms of the contract with [REDACTED]. She took note of the observations made, but pointed out that, while there were shortcomings, they were not indicative of a desire to disregard its obligations, or of widespread practices. She provided two examples of collection forms used by its suppliers, which she considered to be compliant. Lastly, she reported on the inspections carried out on the files after they had been made available by the service provider and insisted on the impossibility, given the volume of these files, of carrying out a unitary inspection.
80. **Firstly**, the Restricted Committee pointed out that, while the intentional nature of the breach had to be taken into account when deciding whether a fine should be imposed and the amount of the fine, it had no bearing on the nature of the breach, which might be the result of negligence. The same applies to the generalised nature or otherwise of said breach.
81. **Secondly**, with regard to the methods used to obtain consent for telephone canvassing, the Restricted Committee took the view that the forms used by the suppliers of [REDACTED] did not allow valid consent to be obtained within the meaning of Article 6(1)(a) GDPR, as explained in points 47 to 63 of these deliberations with regard to electronic canvassing.
82. **Thirdly and finally**, with regard to the inspections that the company claimed to have carried out on the files delivered, the Restricted Committee noted that the company had not produced any evidence of this.
83. Firstly, in its written observations of 29 September 2023, and then in its oral observations at the meeting of 7 December 2023, the company referred to a document entitled [REDACTED], collected during the on-site inspection and which, according to the company, referred to "checks on prospecting files carried out after they had been made available by the service provider". In deliberation No SAN-2023-019 of 14 December 2023, the Restricted Committee asked the Rapporteur and the company to produce this document.

84. The Restricted Committee noted that the file produced by the Rapporteur, whose digital footprint attested that it was indeed the file from which the findings had been made by the delegation during the inspection, did not contain any evidence likely to attest to the verifications invoked by the company. As mentioned in the inspection report, this is a leads file delivered by ██████████ to the ██████████ on 23 September 2021, containing the data of approximately 15,000 leads. Although each of these leads contained a URL link to the source of the data, the Restricted Committee noted that there was no mention of any checks that might have been carried out by ██████████ or the ██████████. At the meeting on 18 January 2024, the company indicated that it did not question the integrity of this document.
85. With regard to the file produced by the company, the Restricted Committee noted that it did not correspond to the one collected during the inspection, insofar as its digital footprint and size differed. It also noted that this difference was confirmed by its content since, contrary to the findings in the minutes of 23 September 2021, it contained no prospect data but only URL links accompanied by comments ("ok", "only one box to tick", "contentious").
86. Finally, the Restricted Committee noted that the content of the file produced did not appear to be consistent with the stated purpose insofar as the summary and undated comments appearing therein were not linked to any lead sheet and that it had not been demonstrated that the non-conformities identified would have been reported to ██████████. The Restricted Committee therefore took the view that, in any event, such a file did not make it possible to demonstrate the existence of checks carried out on the files delivered.
87. On the other hand, with regard to the other documents in the file, the Restricted Committee noted that they attested exclusively to requirements imposed by ██████████ on ██████████ before the resumption of their contractual relations, without constituting controls by ██████████ on the subsequent practices of its service provider.
88. Lastly, the Restricted Committee noted that the proportion of non-compliant files among those randomly examined by the delegation (i.e. four non-compliant files out of the seven examined) demonstrated the inadequacy of the measures taken by the company to ensure the validity of the consent of the data subjects.
89. Thus, the Restricted Committee took the view that the forms referred to in the present deliberation did not enable ██████████ to obtain valid consent from the data subjects. It pointed out that, in light of the forms produced by the company in its observations of 29 September 2023, the breach identified was persistent.
90. Consequently, in the absence of a legal basis allowing ██████████ to base its commercial canvassing operations by telephone, the Restricted Committee took the view that there had been a breach of Article 6 GDPR.

E. On the breach of the obligation of transparency and to provide information to individuals

91. Article 14(1) GDPR lists the information to be communicated by the controller to data subjects where their personal data has not been collected from them, including the purposes of the processing as well as its legal basis.
92. Paragraph 2 of the same Article provides that in “[I]n addition to the information referred to in paragraph 1, the controller shall provide the data subject” with certain information “necessary to ensure fair and transparent processing in respect of the data subject”, in particular the rights available to the data subject, the retention period of the data, the source from which it originates or the right to lodge a complaint with a supervisory authority.
93. **The Rapporteur** noted that people who were the subject of commercial canvassing by telephone on the part of ██████████ (i.e. approximately 1.3 million prospective customers in France and Belgium between May 2022 and May 2023) were not informed of all the compulsory information provided for in the aforementioned Article 14. It observed that, while prospective customers were informed that the call would be recorded and that they might object to this recording and register with Bloctel, they were not given all the other information, nor were the data subjects given the opportunity to obtain more complete information.
94. **The company** has not submitted any defence observations on this point.
95. **The Restricted Committee** pointed out that, insofar as the company had indicated that it carried out commercial canvassing by telephone on the basis of files transmitted by its partners, this was a case of indirect collection, for which the provision of information to individuals had to be ensured under the conditions defined in Article 14 GDPR.
96. It noted, by way of clarification, that the EDPB stated, in his guidelines on transparency within the meaning of Regulation (EU) 2016/679, that while multi-level information was possible for greater clarity, it *"recommends that the first level (in other words, the main way of communicating for the first time with a data subject) should communicate the most important information in general [...] For example, when the first contact with a data subject is made by telephone, this information could be provided during the telephone call while the other information required under Articles 13 and 14 could be provided at a later stage and by other means, in particular by sending a copy of the privacy policy by email and/or by sending the data subject a link to the controller's online privacy notice/statement at different levels"*. With regard to the obligation to provide information in a telephone environment, it is suggested that *"oral explanations provided by a natural person allowing interaction, [questions requiring an answer, or] automated or pre-recorded information offering the option of hearing other more detailed information"* should be implemented.
97. The Restricted Committee noted that it was clear from the telephone recordings provided by the company that people who were the subject of telephone canvassing were only informed that the call had been recorded and that they could register with Bloctel, without being given any other information about the processing of their personal data.
98. The Restricted Committee also noted that these people were not offered any possibility of obtaining more complete information, for example by pressing a button on their telephone keypad.

99. In these circumstances, the Restricted Committee took the view that there had been a breach of Article 14 GDPR.

F. On the breach of the obligation to ensure data security

100. Pursuant to Article 32(1) GDPR, *“taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk [...]”* and in particular *“the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services”* and *“a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing”*.
101. **The Rapporteur** noted that the company had indicated that it would retain the data of customers of its sales outlets in Europe, i.e. 104,391 people in November 2021, for a period of five years from the date of closure of the contract, in accordance with the legal limitation periods, specifying that this data was kept in an active database, without any intermediate archiving mechanism being implemented. The Rapporteur took the view that these retention arrangements did not make it possible to limit access to data to users who needed to know it, insofar as persons with an interest in having access to this data during the term of the contract continued to have unrestricted access to it for a period of five years, even after the end of the contract, even though their duties no longer necessarily required them to know it.
102. **In defence, the company** pointed out that each ██████████ had its own customer database, and that vendors could therefore only access customer information for the store to which they were attached. With regard to support services, it confirmed that they had access to all ██████████ network customer data. Furthermore, it did not dispute that at the end of the contractual relationship, there was no restriction on access, and specified that certain services, in particular after-sales service, were managed by the vendors themselves. Lastly, in its oral observations at the meeting on 7 December 2023, it pointed out that ██████████ although created in 2017, began rolling out its stores in 2021, and that no data had therefore been kept for five years.
103. **The Restricted Committee** pointed out that it followed from the provisions of Article 32 GDPR that the controller had to implement appropriate measures to ensure the confidentiality of data and prevent it from being processed unlawfully by persons who had no need to know (CNIL, FR, 29 October 2021, Sanction, No SAN-2021-019, published).
104. This need to know was likely to change depending on the life cycle of the data and the purposes for which it was stored. Thus, during the phase of their current use, which corresponded to the time required to achieve the specified purpose, the data was kept in an "active base" and was accessible to all departments responsible for implementing the processing. At the end of this phase, when the data was no longer used to achieve the objective set but was still of administrative interest

to the organisation (e.g. for the management of any dispute) or had to be retained to meet a legal obligation, it had to be possible to consult it only on a one-off basis and for a reason, by specifically authorised persons involved in the objective that justified its retention, and it had to be subject to intermediate archiving. This intermediate archiving required separation from the active database, which might be physical (by transferring the data to a dedicated archive) or logical (by putting in place technical and organisational measures to ensure that only people with an interest in processing the data by virtue of their duties could access it).

105. The Restricted Committee noted that the company did not dispute that it retained its customers' data at the end of the contractual relationship, without taking any intermediate archiving measures. The Restricted Committee reiterated that the termination of contractual relations had to result in access to data being restricted to certain employees by virtue of their duties. However, the Restricted Committee took the view that, as things stood, the information in the file did not make it possible to establish that persons would have had access to said data without having a need to know.
106. It followed from the foregoing that there was no breach of Article 32 GDPR.

III. On the pronouncement of corrective measures and publicity

107. Pursuant to Article 20(III) of the Act of 78-17 January 6 (1978) as amended: *"Where the controller or its processor fails to comply with the obligations resulting from Regulation (EU) 2016/679 of 27 April 2016 or from this Act, the Chairman of the CNIL may [...] refer the matter to the Restricted Committee of the Commission with a view to pronouncing, after adversarial proceedings, one or more of the following measures: [...] 7° With the exception of cases where the processing is implemented by the State, an administrative fine not exceeding €10 million or, in the case of a company, 2% of the total annual worldwide revenue for the previous accounting period, whichever is greater. In the cases referred to in Article 83(5) and (6) of Regulation (EU) 2016/679 of 27 April 2016, these ceilings are increased to €20 million and 4% of said revenue respectively. In determining the amount of the fine, the Restricted Committee will take into account the criteria specified in Article 83."*
108. Article 83 GDPR provides that: *"Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive"*, before specifying the elements to be taken into account in deciding whether an administrative fine should be imposed and in deciding the amount of this fine.
109. **Firstly**, the Restricted Committee pointed out that, when imposing an administrative fine, it had to take into account the criteria set out in Article 83 GDPR, such as the nature, seriousness and duration of the breach, whether or not the breach had been deliberate, the measures taken by the controller to mitigate the damage suffered by data subjects, the degree of cooperation with the supervisory authority and the categories of personal data affected by the breach.

110. The Restricted Committee emphasised that the company's breaches concerned obligations relating to the fundamental principles of personal data protection.
111. Thus, **with regard to obtaining consent for prospecting purposes by electronic means**, the Restricted Committee insisted on the fact that the ecosystem of the resale of data from partners to partners required particularly strong guarantees as to the quality and validity of the consent obtained by the primary data collector and used by the partners for canvassing purposes. It stressed that in this respect, an organisation that relied on such consent to carry out commercial canvassing assumed an essential responsibility requiring it, as the controller, to ensure that the conditions enabling it to carry out said operations were met, independently of the possible responsibility of the data suppliers, the primary data collectors. In addition, it took the view that the requirements had to be particularly stringent with regard to the procedures for obtaining the consent of users of websites whose purpose was to offer the prospect of gain, as these people were not necessarily aware of the scope of their agreement when they registered. It also notes that the company made extensive use of electronic canvassing, having sent more than 1.3 million text messages between September 2020 and September 2021, and more than 220,000 between May 2022 and May 2023, and that such practices were likely to be perceived as particularly intrusive.
112. **With regard to the breach of the obligation to have a legal basis for processing the data of prospects in the context of telephone marketing**, the Restricted Committee reiterated the importance, in the absence of valid consent, of enabling data subjects to assess the extent of the processing to which their data was likely to be subjected. Thus the fact that, at the time the data was collected, a detailed list of partners likely to carry out commercial prospecting operations was made available to the data subjects, without ██████████ being included, and without this list being supplemented by a statement specifying the categories of partners to which ██████████ could belong, deprived the data subjects of the minimum basis of information enabling their interests, freedoms and fundamental rights to be safeguarded.
113. **With regard to the breach of the obligation to inform individuals**, the Restricted Committee noted that the company had used data obtained on a massive scale from data brokers, without in particular allowing the data subjects to ascertain the source of the data collected. It pointed out that informing people was a fundamental measure enabling them to exercise the rights they enjoyed, and that such a failure was therefore particularly serious. Lastly, it pointed out that this failure appeared to be structural, insofar as none of the dozens of call recordings provided by the company met the information requirements set out in Article 14 GDPR.
114. Finally, the Restricted Committee emphasised that ██████████ as a subsidiary of ██████████ had sufficient human, financial and technical resources to ensure compliance with the rules on the protection of personal data.
115. In view of all these factors, the Restricted Committee took the view that an administrative fine should be imposed for the breaches of Articles L34-5 CPCE and Articles 6 and 14 GDPR.
116. **Secondly**, with regard to the amount of the fine, the Restricted Committee pointed out that the breaches identified in the case in point concerned breaches of principles that might be subject,

under Article 83 GDPR, to an administrative fine of up to €20 million or up to 4% of the worldwide annual revenue for the previous accounting period, whichever was higher.

117. It took the view that the company's business and financial situation should be taken into account. In this respect, it noted that [REDACTED] had achieved revenue of more than [REDACTED] for 2021, with a profit of more than [REDACTED]. In addition, the Restricted Committee noted that the number of [REDACTED] stores had risen from [REDACTED] in September 2021 to [REDACTED] in May 2023, up 56%.
118. Consequently, in view of the company's liability, its financial capacity and the relevant criteria of Article 83(2) GDPR referred to above, the Restricted Committee took the view that a fine of five hundred and twenty-five thousand euros (€525,000) appeared justified.
119. **Thirdly**, with regard to the publication of the sanction, the Restricted Committee took the view that this was justified in view of the seriousness of some of the breaches in question, the company's position on the market, the scope of the processing and the number of data subjects.
120. It also pointed out that the purpose of this measure was to inform the data subjects by the company's canvassing operations. This provision of information would enable them to assert their rights if necessary.
121. Lastly, it took the view that this measure was proportionate given that the decision would no longer identify the company by name two years after publication.

CONSEQUENTLY

The Restricted Committee of the CNIL, after deliberation, decided to:

- **order [REDACTED] to pay an administrative fine of five hundred and twenty-five thousand euros (€525,000) for breaches of Article L34-5 of the French Post and Electronic Communications Code and Articles 6 and 14 GDPR, which breaks down as follows:**
 - **two hundred thousand euros (€200,000) for breach of Article L34-5 of the French Postal and Electronic Communications Code;**
 - **three hundred and twenty-five thousand euros (€325,000) for breaches of Articles 6 and 14 GDPR;**
- **make public, on the CNIL website and on the Légifrance website, its deliberation, which would no longer allow the company to be identified by name at the end of a period of two years from its publication.**

The Chairman

Philippe-Pierre CABOURDIN

This decision may be appealed before the Council of State within two months of its notification.
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