Deliberation of the Restricted Committee No SAN-2024-014 of 26 September 2024

concerning [redacted]

The Commission nationale de l'informatique et des libertés (French Data Protection Authority), meeting in its Restricted Committee composed of Mr Philippe-Pierre Cabourdin, President, Mr Vincent Lesclous, Vice-President, Ms Laurence Franceschini, Ms Isabelle Latournarie-Willems and Mr Alain Dru, members;.

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 (hereinafter "GDPR");

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 2021-270C of 4 October 2021 of the President of the CNIL to instruct the Secretary General to carry out or have carried out a verification mission of the processing operations implemented by [redacted] and [redacted] or on their behalf, in any place likely to be concerned by their implementation;

Having regard to the decision of the President of the CNIL of 16 November 2023 appointing a Rapporteur to the Restricted Committee;

Having regard to the report of Ms Sophie Lambremon, Commissioner-Rapporte, served on [redacted] on 1 March 2024;

Having regard to the written observations submitted by [redacted] on 2 April 2024;

Having regard to Decision No 2024-093C of 22 April 2024 of the President of the CNIL to instruct the Secretary General to carry out or have carried out a mission to verify any processing accessible from the domain "[redacted]" or relating to personal data collected from the latter;

Having regard to the Rapporteur's reply to these observations, notified to the company on 30 April 2024;

Having regard to the written observations submitted by Cosmospace on 30 May 2024;

Having regard to the closure of the investigation, notified to the company on 10 June 2024;

Having regard to the letters sent by the company to the registry of the sanctions and litigation department and to the President of the Restricted Committee on 24 June 2024;

Having regard to the oral observations made at the Restricted Committee session on 4 July 2024;

Having regard to the other documents in the case file;

The following were present at the Restricted Committee meeting:

- Ms Sophie Lambremon, auditor, whose report was read out;

As representatives of [redacted]:

- Maître [redacted], lawyer at the Paris bar;
- Maître [redacted], lawyer at the Paris bar;

[redacted] having had the floor last;

The Restricted Committee implemented the following decision:

I. FACTS AND PROCEEDINGS

1. [redacted] (hereinafter "the company"), whose registered office is located at [redacted], is a simplified joint stock company offering remote divinatory art services (tarot, horoscope, fortune telling), free or paid. As at 30 November 2021, it had 154 employees.

2. Between March 2021 and March 2022, it generated revenue of around €[redacted] and net income of €[redacted]. The following year, revenue came to approximately €[redacted], with a net loss of €[redacted].

3. The company offers, primarily, personalised telephone consultation services provided by salaried or independent remote advisors, some of whom are located outside France (in Spain but also in countries outside the European Union, such as Bali, Tunisia or the United States). While the majority of calls received come from users established in France, the information provided by the company shows that approximately 5% come from other EU countries or third countries.

4. In addition, the company publishes several websites, including the website [redacted], as well as several mobile apps. These websites and apps offer, in addition to voice services by telephone, voice services by instant conversation (chat) or by text message, provided by its partner [redacted]. The latter is also in charge of the development, supply and maintenance of the IT and digital services of [redacted], which is its main client. Relations between the two companies are governed, on the one hand, by a processing contract and, on the other, by a joint responsibility agreement concerning the processing of a certain amount of personal data.

5. In order to promote its offers, [redacted] carries out commercial prospecting campaigns by email and text message, both with its customers and with prospective customers whose contact details

have been obtained either directly by [redacted] (mainly via its websites), or by [redacted] (which also manages its own websites, which offer fortune telling services by telephone provided by [redacted]).

6. To this end, [redacted] has its own database ("[redacted]" database, which included, as of 7 December 2021, a little more than 673,000 unique contacts with the status of customers and a little more than 278,000 with the status of prospects), but also a database common with [redacted] ("[redacted] database), containing the data of all the customers and prospects of the two companies, which represented, as of 6 October 2022, more than 7 million contact records for more than 1.5 million unique individuals.

7. In the first three quarters of 2022, [redacted] said it had sent nearly 6.3 million text messages and more than 75.6 million marketing emails.

8. On 15 November 2021, a delegation of the Commission nationale de l'informatique et des libertés (hereinafter "the CNIL" or "the Commission") carried out an online inspection from five websites published by [redacted] and [redacted]. Its purpose was to verify compliance with the provisions of French Data Protection Act No 78-17 of 6 January 1978 (hereinafter the "French Data Protection Act" or "amended Act of 6 January 1978") and the other provisions relating to the protection of personal data set forth by legislative and regulatory texts, European Union law and France's international commitments. The report drawn up at the end was notified to [redacted] on 22 November 2021.

9. An on-site inspection was also carried out on 7 and 8 December 2021 at the premises of the aforementioned companies. The related reports were notified to [redacted] on 10 December 2021.

10. The company provided the delegation with additional information on 20 December 2021, 26 January, 25 February, 30 May, 5 August and 12 October 2022.

11. On 16 November 2023, the President of the Commission appointed Sophie Lambremon as Rapporteur on the basis of Article 22 of the amended Act of 6 January 1978.

12. In accordance with Article 56 of 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 (hereinafter "GDPR") and in view of the elements of the file, the CNIL, on 27 April 2023, informed all the European supervisory authorities of its competence to act as lead supervisory authority concerning cross-border processing implemented by the company, resulting from the fact that the company's main establishment was located in France. After exchanges between the CNIL and the European data protection authorities within the framework of the one-stop-shop mechanism, it appeared that the German, Austrian, Belgian, Croatian, Danish, Spanish, Greek, Italian, Luxembourg, Maltese, Dutch, Polish, Portuguese, Romanian, Slovenian and Swedish authorities were concerned by the processing carried out, with persons residing in these member states having used the fortune telling services offered by the company by telephone.

13. On 1 March 2024, at the end of her investigation, the Rapporteur sent the company a report detailing the breaches of Articles 5(1)(c), 5(1)(e) and 9(2) GDPR and Article L34-5 of the French Post and Electronic Communications Code (hereinafter "CPCE") that she considered to have occurred in the case in point. This report proposed that the Restricted Committee impose an administrative fine on the company. It also proposed that this decision be made public but that it would no longer be possible to identify the company by name at the end of a period of two years from its publication.

14. On 2 April 2024, the company submitted its observations in response to the sanction report.

15. On 23 April 2024, at the request of the Rapporteur and pursuant to Article 39 of the Decree of 29 May 2019, a delegation from the CNIL carried out a new on-line inspection from the [redacted] website.The report drawn up at the end was notified to [redacted] on 30 April 2024.

16. On the same day, the Rapporteur responded to the company's observations of 2 April.

17. On 30 May 2024, the company submitted further observations in response.

18. On 10 June 2024, pursuant to Article 40-III of Decree No 2019-536 of 29 May 2019 implementing the Data Protection Act (hereinafter "the Decree of 29 May 2019"), the Rapporteur informed the company and the President of the Restricted Committee that the investigation had been closed.

19. On the same day, the company was informed that the file had been placed on the agenda of the Restricted Committee session of 4 July 2024.

20. The Rapporteur and the company made verbal observations at the Restricted Committee session.

II. REASONS FOR THE DECISION

A. With regard to the European cooperation procedure

21. Under Article 4(23)(b) GDPR, "cross-border processing" means, in particular, "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".

22. **The Rapporteur** considers that the company implements cross-border processing of personal data insofar as some of its customers access the services offered from other EU countries. She thus notes that the company sent the delegation a document stating the number of telephone consultations issued each month, with a breakdown of customers by country, which attests to the cross-border nature of the processing.

23. **In its defence, the company** considers that the CNIL wrongly informed its European counterparts of the procedure followed against it and that the application of the cooperation mechanism was not appropriate. It indicates first of all that the company's services are exclusively provided in French and that the content of its website is only accessible in this language. Then, while it admits that it may happen, "exceptionally and marginally", that certain French customers access the company's services from abroad, it considers that they are not themselves foreign, based on the place of birth of the data subjects. It considers that, given these elements, only the Belgian authority could possibly be concerned.

24. **The Restricted Committee** notes that it emerges from the elements in the file that, in the context of the consultation consultations delivered by telephone, the company received each month, over 2022, between 350 and 400 calls from different EU countries. This circumstance is sufficient to establish the existence of cross-border processing, insofar as it affects or is likely to significantly affect data subjects in several member states, within the meaning of Article 4(23)(b) GDPR, notwithstanding the language in which these individuals express themselves, their nationality or even their place of birth.

25. 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 22 August 2024.

26. As of 19 September 2024, none of the supervisory authorities concerned had raised any relevant, reasoned objection to this draft decision so that, pursuant to Article 60(6) of the GDPR, they are deemed to have approved it.

B. On the procedure followed before the Restricted Committee

1) On the objection based on the lack of knowledge of the right to a fair trial

27. **The company** first argues that, in the context of the proceedings before the CNIL, the adversarial principle was not respected. It states that it only became aware of the document entitled "IMI REPORT – Number: [redacted] – Article 56 – Identification of the LSA and CSA", in which the CNIL informs the supervisory authorities concerned that a sanction procedure has been initiated, when it consulted the file at the CNIL's offices on 10 June 2024. It considers that, as the closure of the investigation was notified to it on the same day, it was not able to present its observations on this point.

28. It also considers, more generally, that the elements of the file have not been discussed and that no debate could take place insofar as, since the inspection, it has not been given formal notice to change its practices.

29. Lastly, the company criticises the Rapporteur for having investigated this case exclusively on the basis of the charges brought against it.

30. **The Restricted Committee** recalls, firstly, that the adversarial principle implies the right of the parties to be notified of and to be able to discuss any exhibits or observations submitted to the judge with a view to influencing his decision (ECHR, Grand Chamber, 20 February 1996, Vermeulen v.Belgium, No 19075/91).

31. The Restricted Committee recalls, on the one hand, that pursuant to Article 40-III of Decree No 2019-536 of 29 May 2019, the decision to close the procedure belongs to the Rapporteur, when she considers the case as is. In the case in point, it should be noted that the Rapporteur took this decision on 10 June 2024, considering that the debate was exhausted after several exchanges of submissions with the company, the latter having made its observations last. These exchanges include the documents on which the Rapporteur has based her characterisation of the breaches that she is proposing to the Restricted Committee.

32. The Restricted Committee also notes that the document entitled "IMI REPORT – Number: [redacted] – Article 56 – Identification of the LSA and the CSA", which is merely an informative document in the context of the procedure for cooperation between supervisory authorities, is one of the documents in the procedural file. It notes that the company was informed of the possibility of reading and copying all the documents of said file when the sanction report was served on 1 March 2024. However, the Restricted Committee notes that it was only on 30 May 2024, after sending its second observations in defence, that the company asked to be able to exercise this right, with the consultation having been organised on 10 June 2024.

33. In any event, the Restricted Committee notes that the company was able to present its oral observations on the aforementioned document at the meeting of 4 July 2024, which, moreover, led the Restricted Committee to suspend the session and deliberate on this point before continuing the discussions. The Restricted Committee also recalls that the entire file of the procedure was also

made available to it before the session. It follows from all the foregoing that the members of the Restricted Committee were able to have all the elements enabling them to make their decision.

34. Under these conditions, the Restricted Committee considers that the adversarial principle has not been disregarded. With regard more generally to the conduct of the proceedings, the Restricted Committee notes that it was conducted on a regular basis, the company having been able to present its observations, first in writing within the framework of the investigation, then orally during the Restricted Committee session of 4 July 2024, in accordance with the procedural rules set out in Articles 22 of the French Data Protection Act, 39 to 45 of the Decree of 29 May 2019 and 61 to 70-1 of the CNIL internal regulations.

35. Secondly, the provisions of Article 20-IV of the French Data Protection Act provide that the decision to refer the matter to the Restricted Committee falls within the powers of the President of the CNIL, without such a decision being conditional on the issuance of a prior formal notice (EC, 10th, 26 April 2022, Optical Center, No 449284, unpublished).

36. Thirdly and finally, the Restricted Committee notes that, in preparing her report, the Rapporteur relied on the information gathered during inspections, carried out in compliance with the provisions of the French Data Protection Act, and that she examined the facts observed in light of the applicable rules on the protection of personal data. The Restricted Committee thus considers that no element is likely to reveal an unfavourable bias of the Rapporteur towards the company.

37. Consequently, in view of all the foregoing, the company is not entitled to argue that the proceedings against it disregarded its right to a fair trial

2) On the online inspection of 23 April 2024

38. **The company** considers that the documents relating to the online inspection carried out on 23 April 2024 from the [redacted] website must be excluded from the proceedings, insofar as this website does not belong to [redacted].

39. The **Restricted Committee** notes that, by decision No 2021-270C of 4 October 2021, the President of the CNIL instructed the Secretary General to carry out or have carried out a verification mission of the processing operations implemented by [redacted] and [redacted].

40. Pursuant to this decision, a CNIL delegation carried out, on 15 November 2021, an online inspection from several websites published by these two bodies. The findings made revealed that [redacted] implemented, on its [redacted] website, a form enabling it to collect user data for commercial prospecting purposes.

41. In the context of its exchanges with the supervisory delegation, [redacted] indicated that it had set up, with its partner [redacted], a common database enabling them to send prospecting emails and text messages indifferently to the customers and prospects of either of the companies.

42. In her report, notified to [redacted] on 1 March 2024, the Rapporteur argued that the latter could not, in order to carry out its prospecting operations, avail itself of the consent obtained by

[redacted] via the form implemented on this company's website [redacted], on the grounds that no list of partners (mentioning [redacted]) was easily accessible. She considered that this constituted a breach of Article L34-5 CPCE.

43. In its observations in response of 2 April 2024, [redacted] responded on this point and indicated in particular that, since the online inspection of 15 November 2021, the form on the [redacted] website had been modified. In this regard, it provided a screenshot of this new form.

44. Within the framework of the powers granted to her by Article 39(4) of the Decree of 29 May 2019, the Rapporteur requested the carrying out of a new inspection, with the aim of verifying the compliance of the form mentioned by [redacted] in its observations in response.

45. By decision No 2024-093C of 22 April 2024, the President of the CNIL instructed the Secretary General to carry out or have carried out a mission to verify any processing accessible from the domain "[redacted]" or relating to personal data collected from it.

46. It was under these conditions that a CNIL delegation carried out a new online inspection of this site, on 23 April 2024.

47. The Restricted Committee notes that, insofar as [redacted] processes data collected from the [redacted] website, the inspection referred to appears perfectly justified. It further notes that [redacted] was notified of the inspection report on 30 April 2024. Moreover, it observes that the inspection decision of 22 April 2024 does not concern [redacted] or [redacted], but rather the domain [redacted].

48. Under these conditions, there is no need to dismiss the exhibits relating to the online inspection of 23 April 2024.

C. On the breaches noted

1) *On the breach of the obligation to ensure the adequacy, relevance and non-excessive nature of the data pursuant to Article 5(1)(c) GDPR*

49. Article 5(1)(c) GDPR provides that personal data must be "adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation')".

50. The **Rapporteur** considers that the full and systematic recording of telephone conversations between fortune tellers and customers, between switchboard operators and fortune tellers and between switchboard operators and customers or prospective customers is excessive in relation to the purposes of training, evaluation and quality control, and that it should be limited to a sample of conversations between the aforementioned individuals, with the exception of conversations between switchboard operators and customers or prospective customers, for which the recording should relate only to the part clearly concerning the conclusion of a contract.

51. **In its defence, the company** considers, firstly, that although the recordings in question do contain personal data, they are not subsequently processed in any way.

52. Secondly, the company believes that it already carries out minimisation operations, on the one hand by deleting each evening, at the end of the service, 50% of the recordings of conversations between fortune tellers and customers and between fortune tellers and switchboard operators and, on the other hand, by not recording any information relating to its customers' bank details.

53. Thirdly, it discusses each of the purposes that, in its view, govern the recording of telephone conversations. First of all, it considers that the complete and systematic recording of conversations is necessary for quality control and training purposes, given the nature of its activity and the diversity of consultations delivered. Secondly, it considers that in the event of a legal challenge to its services, it has no other means to demonstrate the subscription and proper performance of the contract. The company further argues that it regularly receives judicial requisitions requesting it to communicate the recordings made and that it is therefore obliged to respond to them, under penalty of criminal sanction. Finally, it considers that these recordings are necessary for the purpose of safeguarding human life, arguing that they would enable it to assess the situations in which the emergency services should be contacted.

54. **The Restricted Committee** notes that it emerges from the elements of the file that [redacted] records in an integral and systematic manner, on the one hand, conversations between the fortune tellers providing the consultation and the customers, as well as conversations between the switchboard operators and the fortune tellers (in the context of the transfer of calls from a customer to a fortune teller, or when the fortune tellers sends the customer to the switchboard at the end of the consultation). Every evening, at the end of the service, 50% of these recordings are automatically deleted. The others are retained for a period of six months (except in the event of litigation).

55. And on the other hand, the company records all conversations between the switchboard operators and the customers or prospects (with the exception of the part relating to the collection of the customer's bank details), which it keeps for 13 months.

56. **First of all,** Article 4(2) GDPR defines processing as "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".

57. Pursuant to these provisions, the recording of telephone conversations constitutes, in itself, the processing of personal data. The Restricted Committee has also sanctioned, on several occasions and for several years, organisations carrying out such recordings under conditions that do not comply with GDPR (CNIL, FR, Sanction, 21 November 2019, SAN-019-010, published; CNIL, FR, Sanction, 28 July 2020, SAN-2020-003, published; CNIL, FR, Sanction, 8 June 2023, SAN-2023-008, published). In addition, the CNIL provides the public with a wide range of content on this issue on its website. The Restricted Committee notes that this was already the case before GDPR came into force, with the adoption in 2014 of simplified standard No 57 relating to the listening to and recording of telephone conversations in the workplace.

58. The Restricted Committee notes that in the case in point, by recording the aforementioned conversations, the company collects the data of the data subjects – both that of its prospects or customers and its employees –, retains such data (for a more or less long period, ranging from a few hours to several months) and, for some, consults and uses such data for various purposes that it details (training and quality control of the service, judicial requisitions, disputes, etc.). Thus the company carries out various processing operations as detailed in Article 4(2) GDPR.

59. While it appears established that the company carries out, each evening, the random and automatic deletion of 50% of some of the recordings made, the Restricted Committee emphasises that this circumstance has no impact on the qualification of these processing operations, with this deletion taking place, by definition, after the collection and processing of the data.

60. **Secondly**, the Restricted Committee considers that it is necessary to analyse each of the purposes invoked by the company to carry out the full and systematic recording of the conversations referred to in paragraph 50 of this deliberation, in order to determine whether the data collected appears to be adequate, relevant and limited to what is necessary for these purposes.

61. With regard to the full and systematic recording of telephone calls for the purposes of quality control and training, the Restricted Committee notes first of all that the company does not provide any evidence to justify the need to record all the aforementioned conversations for this purpose. The Restricted Committee then considers that the purpose of controlling the quality of the service provided by the switchboard operators and fortune tellers can be achieved by a less intrusive means such as a one-off and random recording.

62. Therefore, the Restricted Committee considers that the introduction of a system for the systematic recording of telephone calls made, on the one hand, between fortune tellers and customers and, on the other hand, between switchboard operators and customers is excessive with regard to the purpose pursued.

63. The Restricted Committee recalls that it has already considered, with regard to a company recording telephone calls made or received by customer service employees for training purposes, that "the company does not justify the need to record all telephone conversations made by customer service, with regard to the purpose of the processing, namely employee training. (…). The Restricted Committee therefore considers, in view of these elements, that a breach of Article 5(1)(c) GDPR is constituted" (CNIL, FR, 28 July 2020, Sanction, SAN-2020-003, published). This

position has recently been recalled with regard to a company offering, as in this case, consultation by telephone (CNIL, FR, 8 June 2023, Sanction, SAN-2023-008, published).

64. Under these conditions, the full and systematic recording of calls does not appear necessary either for service quality control or for training purposes.

65. With regard to the full and systematic recording of telephone calls as evidence of the conclusion of a contract, the Restricted Committee reiterated that such recording is possible, provided it is necessary and in the absence of any other means of proof, such as written confirmation. In this case, however, the recording must not be complete, with the professional having to provide mechanisms in order to record the conversation only when its purpose clearly relates to the conclusion of a contract.

66. The Restricted Committee noted that, in the case in point, the sale of packages or services may take place during calls between customers and switchboard operators. Insofar as it is the customers who contact the company and, therefore, this sale does not follow a telephone solicitation, the contract is concluded orally, without any written confirmation being sent to the customer. Under these conditions, and in the absence of any other method of proof of subscription of the contract, the recording of the part of the call relating to the conclusion of the contract appears to be justified. The Restricted Committee notes, however, that the company is not limited to recording only this phase of the call, but carries out its full recording, regardless of the different categories of calls cited above.

67. In its defence, the company argues firstly that the full and systematic recording of conversations between customers and switchboard operators and between customers and fortune tellers is necessary for the purpose of proving that the contract has been taken out, insofar as it is all these exchanges that would make it possible to reach an agreement.

68. The Restricted Committee recalls that pursuant to Article 1121 of the French Civil Code, the contract is concluded as soon as acceptance of the offer reaches the offeror, i.e., in the case in point, when the customer agrees, having received the appropriate information (price of the service, duration, terms, etc.), to use the services of the company.

69. Under these conditions, for calls between switchboard operators and customers, the full and systematic recording of the call does not appear necessary for the purpose of proving that a contract has been taken out, as a recording limited to the conclusion phase of the contract is sufficient. For the recordings of calls made between fortune tellers and customers, and between fortune tellers and switchboard operators, no contract being concluded during these calls, they are not necessary for the achievement of this purpose.

70. Secondly, the company argues that, insofar as the entire service takes place orally, the full and systematic recording of the aforementioned conversations is necessary for the defence of its legal rights in order to prove the proper performance of the contract, particularly when it is faced with claims for reimbursement.

71. The Restricted Committee wishes to recall that, while the retention of certain data collected for specific and legitimate purposes may be justified for litigation or pre-litigation purposes, such an objective cannot justify as such the recording of all telephone calls, in their entirety.

72. The Restricted Committee further notes that, in the case in point, the company is likely to have other elements enabling it to ensure its defence (such as, for example, text messages confirming appointments and invoicing). In any event, it notes that the justification provided by the company does not appear consistent since, as it stands, 50% of the recordings being deleted each evening, it does not appear able to provide these recordings systematically in the context of the legal proceedings that may be initiated against it.

73. With regard to the full and systematic recording of telephone calls with a view to judicial requisitions, the Restricted Committee recalls that, while it is necessary for controllers to grant the judicial requisitions they receive concerning the data they process for their own purposes, they do not, however, have to organise, in advance, the collection of personal data with a view to responding to a potential judicial requisition (CNIL, FR, 8 June 2023, Sanction, SAN-2023-008, published). Thus the company cannot validly argue that it would be exposed to any criminal sanction in the event that it was unable to respond to the requisitions received, due to the fact that it did not have this data.

74. With regard to the full and systematic recording of telephone calls for the purpose of safeguarding human life, the Restricted Committee noted that, in the case in point, the fortune tellers or switchboard operators may have to contact the emergency services in response to violent or suicidal comments made by customers.

75. The Restricted Committee considers that it cannot be validly argued that such cases would justify the full and systematic recording of conversations, particularly in view of the low proportion of these calls compared to the number of consultations carried out (89 calls in 2021 for approximately 360,000 consultations), on the understanding that assistance to persons in danger does not fall within the scope of the declared and daily activities of the company. It also emphasises that, on the one hand, it is the reaction of the participants (fortune tellers or switchboard operators) to the messages of certain customers, and not the existence of the recordings in question, that enables the emergency services to intervene and, on the other hand, that a mechanism enabling the company's employees to manually trigger the recording when they are confronted with worrying messages could perfectly well be put in place (a manual interruption mechanism already existing with regard to the recording of customers' bank details).

76. Therefore, the company cannot argue that the full and systematic recording of calls would be necessary for the purposes of safeguarding human life.

77. **In view of all these elements, the Restricted Committee considers that a breach of Article 5(1)(c) GDPR is constituted.**

2) <u>On the failure to comply with the obligation to define and respect a retention period proportionate to the purpose of the processing pursuant to Article 5(1)(e) GDPR</u>

78. Pursuant to Article 5(1)(e) GDPR, personal data must be "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed (…)".

79. In accordance with these provisions, it is the responsibility of the controller to define a retention period that is consistent with the purpose of the processing. Once this purpose has been fulfilled, the data must be deleted or rendered anonymous, or be archived for a specific period of time when its retention is necessary, e.g. to comply with legal obligations or for pre-litigation or litigation purposes.

80. By way of illustration, Deliberation No 2021-131 of 23 September 2021 adopting a reference framework relating to processing implemented for the purposes of managing commercial activities states that customer data may be retained at the end of the commercial relationship under certain conditions, and points out that the retention periods must be set according to each purpose. While said reference framework proposes retention periods, it provides that an organisation may choose to deviate from it in view of the specific conditions relating to its situation and to retain the data for a longer period, provided this period does not exceed that necessary for the purposes for which it is processed and provided it is able to justify it.

81. With regard to the retention of customer data for the purposes of commercial prospecting, the aforementioned guidelines recommend a maximum period of three years from the end of the commercial relationship.

82. The **Rapporteur** considers that the six-year period set by the company for storing its customers' data from the end of the last service carried out on their behalf, for the purposes of commercial canvassing, appears excessive. It emphasises that it emerges from the information provided by the company, and in particular from its own internal guidelines on retention periods (which mentions the legally prescribed periods as well as those recommended by the CNIL), that it was fully aware of the recommended periods and that it chose to deviate from them. It also notes that the information accessible from the [redacted] website states that the data is kept for the duration of the business relationship and for a maximum of five years after the last contact with the company, which does not correspond to the practice observed during the inspection. Furthermore, the Rapporteur considers that this six-year period must be put into perspective with the very high number of canvassing messages sent by the company, as well as with the number of requests to exercise the right to object or the right to erasure received by the company, which testifies to the discomfort that can result from such practices.

83. **In its defence,** the company stresses that the retention periods recommended by the CNIL are not mandatory and that an organisation may choose to deviate from them.

84. It argues that the six-year period is adapted to the specifics of the market, and produces a study carried out by it revealing that some of its inactive customers would once again consume a service with the company while their last consumption was more than three years old. It estimates the revenue generated by these customers at more than €1.1m for 2022. It points out that, given the nature of the consultations provided, it seems reassuring for customers that their data is kept, in order to allow them personalised access. The company also puts into perspective the number of requests to exercise the right to object or the right to erasure that it receives in relation to the total number of contacts with its customers and prospects. In addition, it notes that the retention period implemented appears to be totally in line with the civil (five years) and criminal (six years) limitation periods. In any event, it considers that it has not committed any breach, insofar as it has put in place a clear policy of data retention periods, which it applies and with which it complies.

85. The **Restricted Committee** noted that, in the case in point, the company kept its customers' data for a period of six years from the end of the last service carried out on their behalf, in particular for the purposes of commercial canvassing.

86. Firstly, the Restricted Committee notes that the breach alleged against the company relates exclusively to the period of retention of its customers' data for commercial prospecting purposes, and not to the period implemented for other purposes. It recalls in particular that, where personal data is no longer used to achieve the objective that justified the collection of the data (e.g. when the business relationship has ended) but still presents an administrative interest for the organisation (e.g. for the management of any litigation) or has to be retained to meet a legal obligation, such data may be retained by intermediate archiving, enabling it to be consulted by specifically authorised persons (CNIL, FR, 28 May 2019, Sanction, SAN-2019-005, published; CNIL, FR, 29 October 2021, Sanction, SAN-2021-019, published; CNIL, FR, 7 July 2022, Sanction, SAN-2022-015, published; CNIL, FR, 29 December 2023, Sanction, SAN-2023-023, published).

87. Secondly, the Restricted Committee considers that the six-year period implemented by the company does not appear proportionate with regard to the purpose relating to commercial prospecting. The Restricted Committee notes that the information produced by the company does not justify the duration used, which leads to keeping the data twice as long as the duration recommended by the CNIL in its management of commercial activities guidelines.

88. With regard to the study produced by the company, the Restricted Committee notes first of all that it reveals that the majority of customers covered by this study returned to consult after a period of inactivity of three years or less (63%). It then observes that the study in question only targets customers who returned to consult after a period of inactivity of between one year and six years, but does not include those who did not return to consult, nor those who returned to consult after a period of inactivity of less than one year. Thus, as the Rapporteur pointed out, the 37% mentioned does not correspond to 37% of the company's customers, as the latter asserts, or even to the total of inactive customers (whether or not they returned to consult), the proportion of the number of customers who returned to consult after a period of inactivity of between three and six years, compared to the total number of customers of the company, being necessarily lower.

89. The Restricted Committee also wishes to point out that the periods recommended by the CNIL in its guidelines are defined, in particular, with regard to the inconvenience likely to be caused by the repeated sending of commercial prospecting messages. In this respect, the Restricted Committee sanctioned an organisation that kept the data of its inactive customers for a period of four years for commercial prospecting purposes, pointing out that the recommended period of three years was already substantial (CNIL, FR, 18 November 2020, Sanction, SAN-2020-008, published). In the case in point, the Restricted Committee considers that the mass sending of commercial prospecting messages by the company – which has indicated having sent on average nearly one emails per day to its inactive customers over the first three quarters of 2021 (i.e. nearly 30 million emails to approximately 112,000 people) – justifies limiting the data retention period to three years, this period and the regularity of the requests from the company very largely leaving the opportunity for the data subjects to come forward if they wished to use the services of the company again.

90. **Consequently, the Restricted Committee notes that the fact that the company retains its customers' data for a period of six years for commercial prospecting purposes constitutes a breach of the provisions of Article 5(1)(e) GDPR.**

3) On the failure to comply with the obligation to obtain the prior consent of data subjects to the collection of particular categories of data pursuant to Article 9 GDPR

91. Under Article 9(1) GDPR, "[p]rocessing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited", unless such processing falls within one of the conditions set out in paragraphs 2(a) to (j) of the same article.

92. Among these conditions, it is provided in particular that the processing may take place "the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject" (Article 9(2)(a)).

93. **The Rapporteur** observes that the company does not obtain the prior and explicit consent of its customers or prospects for the collection of sensitive data. She refers, on the one hand, to data relating to the sexual orientation of users of the [redacted], collected through a form intended to provide a prediction of their love compatibility and, on the other hand, to sensitive data collected by the fortune tellers during telephone consultations (sex life, health, religious beliefs, etc.).

94. **In its defence,** with regard to the data collected through the form on the [redacted] website, the company considers that the data in question cannot be categorised as sensitive data and that processing both the civil status and the date of birth of a person is common practice in many areas.

95. With regard to data collected as part of telephone consultations, the company states that it does not process sensitive data, and in particular does not voluntarily collect such data. In particular, it argues that fortune tellers do not raise any questions relating to this type of data, and states that it has put in place procedures so that such data that could be spontaneously provided by customers is not mentioned in any computer or paper file. It further points out that its general conditions prohibit the disclosure of sensitive information and that customers who disclose such data would be in breach of these conditions. It adds that it makes no use of this data and does not provide any service on this basis.

96. Finally, the company considers that in any event, in the event that it is considered that special categories of data are processed by the company, the exception based on Article 9(2)(e) GDPR should then apply, with regard to information manifestly made public by data subjects.

97. **Firstly**, the Restricted Committee notes that the company does indeed process special categories of data (termed sensitive data), within the meaning of Article 9 GDPR.

98. On the one hand, it notes that it emerges from the online inspection carried out on 15 November 2021 from the [redacted] website that after creating a user account (requiring entering, *at least*, an email address, first name, last name, sex and date of birth), the delegation was able to access a form intended to provide users of the website with a free prediction of their love compatibility with a person of their choosing. The user's first name, date of birth and sex must ~~thus~~ be entered on the form, as well as the first name, date of birth and sex of his/her partner.

99. The Restricted Committee notes first of all that this information, in that it relates to an identified or identifiable natural person – in particular thanks to the provision of the full identity of the user and his/her email address when registering on the website, it being recalled that the findings were made while the delegation was connected to his/her user account – constitutes "personal data" within the meaning of Article 4(1) GDPR.

100. The Restricted Committee then recalls that, in a judgment of 1 August 2022, the Court of Justice of the European Union (hereinafter "the CJEU") considered that, even if the data in question did not constitute, by nature, sensitive data, it had to be considered as such when it was likely to indirectly disclose the sexual orientation of the data subject (CJEU, Grand Chamber, 1 August 2022, Vyriausioji tarnybinės etikos komisija, No C184-20).

101. In the case in point, the fact that the company collects both the sex of the data subject and that of his/her partner, in a context of love compatibility, makes it possible to infer the sexual orientation of this person. Therefore, the data collected must be classified as sensitive data, within the meaning of Article 9 GDPR.

102. On the other hand, the Restricted Committee notes that it emerges from the recordings sent to the inspection delegation that, during telephone consultations, customers may communicate to the fortune tellers certain sensitive data, such as data revealing their religious beliefs, data concerning their health or even their sex life or sexual orientation. Even if the company indicates that it does not use this data for a specific purpose, it appears that it is indeed processed, insofar as it is collected (via the recording of telephone conversations), retained (for a more or less long period,

with half of the recordings being deleted at the end of the day, the other half being kept for six months), liable to be consulted (e.g. in the event of a dispute) and *ultimately* deleted. Various processing operations referred to in Article 4(2) GDPR are thus carried out in connection with this data.

103. **Secondly**, the Restricted Committee considers that the processing of sensitive data collected during fortune telling consultations can only take place on the basis of the explicit consent of the data subjects to the processing of their personal data for one or more specific purposes, pursuant to Article 9(2)(a) GDPR, since none of the other conditions set forth under Article 9(2)(b) to (j) GDPR can be mobilised in the case in point (CNIL, FR, Sanction, 8 June 2023, SAN-2023-008, published).

104. Indeed, contrary to what the defendant company indicates, the Restricted Committee notes that it cannot argue that the processing carried out would relate to "personal data which are manifestly made public by the data subject" (Article 9(2)(e) GDPR). With regard to this exception, the guidelines 8/2020 on the targeting of social media users adopted on 13 April 2021 by the European Data Protection Board (hereinafter "the EDPB") recall that it implies that "controllers can demonstrate that the data subject has clearly expressed his/her intention to make [such data] public", which is not the case for a private conversation between a fortune teller and a customer.

105. With regard to the consent required pursuant to Article 9(2)(a) GDPR, the Restricted Committee recalls that the explicit nature of the consent is analysed on a case-by-case basis and depends on the context of the processing of sensitive data. When the service requested by the user necessarily involves the processing of sensitive data, it is, however, necessary for the user to be fully aware that his/her sensitive data will be processed and sometimes stored by the controller, which in principle implies explicit information on this point when obtaining consent.

106. The Restricted Committee points out that, according to Article 4(11) GDPR, the concept of consent is understood to mean any freely given, specific, informed and unequivocal expression of will by which the data subject signifies his/her agreement, by a declaration or by a clear positive act, to personal data concerning him/her being processed.

107. On the one hand, the Restricted Committee considers that the explicit nature of the consent set forth in Article 9(2)(a) GDPR presupposes that the data subject is able to demonstrate, through a positive action, his/her assent to the processing of sensitive data, attesting to the materiality of hi/hers consent.

108. By way of clarification, the Restricted Committee recalls that in its guidelines on consent within the meaning of Regulation 2016/679 of 10 April 2018, the EDPB states that "GDPR stipulates that a 'clear positive statement or act' is a sine qua non of a 'standard' consent. *Since the requirements for 'standard' consent in GDPR are already raised to a higher level than those of Directive 95/46/EC, it should be specified what additional efforts a controller should undertake in order to obtain the explicit consent of a data subject in accordance with GDPR. The explicit term refers to how consent is expressed by the data subject. It implies that the data subject must make a declaration of express consent. An obvious way to ensure that consent is explicit would be to*

expressly confirm consent in a written statement. Where appropriate, the controller could ensure that the written statement is signed by the data subject in order to prevent potential doubt and potential absence of evidence in the future. However, such a signed statement is not the only way to obtain explicit consent [...]" (Guidelines 2016/679 WP259 rev.01 of 10 April 2018, page 21).

109. The Restricted Committee stresses that on several occasions it has adopted corrective measures against controllers who do not obtain the explicit consent of individuals to collect and process their "sensitive" data, in particular in its Deliberations No 2016-405 of 15 December 2016 and No 2016-406 of 15 December 2016, as well as in its Deliberation No SAN-2017-006 of 27 April 2017, in which it considered that "the spontaneous provision of such data does not relieve the company of the obligation to obtain the express consent of individuals, who must be able to demonstrate by positive action their assent to the processing of sensitive data, thus attesting that the consent is given with full knowledge of the facts".

110. The Restricted Committee therefore noted, as it had already done recently with regard to another organisation providing fortune telling services, that the mere willingness to receive this type of service and the fact of spontaneously providing sensitive information did not constitute explicit consent by the data subjects to the processing of their data, and that the controller had to provide the individuals from whom it collected special categories of data with a means of ensuring that they gave their explicit consent in a clear positive act (CNIL, FR, 8 June 2023, Sanction, SAN-2023-008, published).

111. On the other hand, the Restricted Committee points out that the consent obtained under Article 9(2)(a) GDPR had to be read in light of the definition set out in Article 4(11) GDPR, which implied that, in order to give valid consent, the data subject had first to be fully informed of the specific nature of the data he/she was communicating, particularly in that it might reveal his/her state of health and sexual orientation, and of the use that would be made of this data.

112. In the case in point, the Restricted Committee notes that the company does not provide any specific information to the data subjects regarding the collection and processing of data collected from the form on the [redacted] website and does not obtain their explicit consent for the processing of this data.

113. Similarly, in the context of telephone consultations, neither the switchboard operators nor the fortune tellers provide information relating to the processing of such data, nor do they obtain consent.

114. Therefore, the Restricted Committee considers that the company does not provide data subjects with specific information and does not obtain their explicit consent, so that it cannot avail itself of the exception to the prohibition on collecting and processing special categories of data set forth in Article 9(2)(a) GDPR.

115. **Consequently, the Restricted Committee considers that in the absence of prior and explicit consent from customers to the collection of their sensitive data, and of specific information on this subject, there has been a breach of Article 9 GDPR.**

4) On the breach of the obligation to obtain the consent of the data subjects for the implementation of commercial prospecting by electronic means pursuant to Article L34-5 CPCE – NOT SUBJECT TO COOPERATION

116. Under the terms of Article L34-5 CPCE, "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 shall mean 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 […]."

117. 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".

118. 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 free, specific, informed and unambiguous consent of the data subjects.

119. The **Rapporteur** notes that the company indicated that it carried out commercial prospecting operations by electronic means for prospects whose data had been collected by its partner, [redacted]. She considers that [redacted] does not have the informed consent of the data subjects to carry out these operations. It considers that, when [redacted] collects this data through a form on its [redacted] website, no list of partners to whom the data may be transmitted is easily accessible and, therefore, the data subjects cannot expect to receive marketing messages from [redacted] since they have not validly consented to it.

120. **In its defence,** the company considers, firstly, that the joint liability agreement signed with [redacted] enables the two companies to send emails and text messages indifferently to the customers and prospects of both companies.

121. Secondly, the company argues that a list of partners was indeed accessible from the form in question, and that no breach could therefore be upheld.

122. Thirdly, the company indicates that, since the inspections carried out, the form in question has changed and that the list of partners likely to send prospecting emails to the data subjects is now presented in accordance with the recommendations of the Rapporteur.

123. Fourthly and finally, the company considers that in any event, it appears "almost impossible" to present users with a list of partners, let alone an up-to-date list. According to the company, the fact of showing such a list clearly constitutes an infringement of business secrecy and is in contradiction with the contractual clauses (particularly confidentiality clauses) binding it to its partners.

124. The **Restricted Committee** points out that when the data of prospective customers has not been collected directly from them by the organisation canvassing, 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 will carry out the subsequent canvassing operations. Otherwise, it is up to the prospecting organisation to obtain such consent before carrying out any prospecting (CNIL, FR, 24 November 2022, Sanction, SAN-2022-021, published; CNIL, FR, 4 April 2024, Sanction, SAN-2024-004, published).

125. In addition, for consent to be informed, individuals must in particular be clearly informed of the identity of the prospector on whose behalf the consent is being collected and the purposes for which the data is to be used. To this end, an exhaustive and updated list of partners must be made available to individuals at the time their consent is obtained, e.g. directly on the collection medium or, if the list is too long, via a hypertext link to said updated list and the privacy policies of service providers and suppliers (CNIL, FR, 24 November 2022, Sanction, SAN-2022-021, published; CNIL, FR, 12 October 2023, Sanction, SAN-2023-015, published).

126. **In the case in point,** the investigation showed that [redacted] and [redacted] set up a joint database ("[redacted]") containing all the personal data of their customers and prospects, representing, as at 6 October 2022, more than 7 million contact records for more than 1.5 million unique individuals (the same customer or prospect may have several records, depending on how he/she is contacted). These two companies both confirmed that they process this data, in particular for commercial prospecting purposes, independently of the company that collected the data. During the first three quarters of 2022, [redacted] stated that it had sent 85,452 text messages and 7,364,453 emails to just under 54,000 individuals (i.e. one email every two days) whose contact details had been collected by [redacted] as part of its fortune telling services or on its websites.

127. The Restricted Committee also notes that, for the sending of emails and text messages to the individuals whose data was collected by [redacted], [redacted] indicated that it did not obtain the prior consent of the data subjects, considering that this collection had already been carried out on its behalf when the data was collected by [redacted].

128. **Firstly**, with regard to the joint liability agreement existing between [redacted] and [redacted], and which the company invokes in this context, the Restricted Committee recalls that, despite the status of joint managers contractually defined by the two companies for the management of their common database containing the data of their customers and prospects, each company is responsible for the operations carried out on its own behalf from this database, in particular commercial prospecting operations (CNIL, FR, 28 December 2021, Sanction, SAN-2021-021, published).

129. Therefore, the existence of such an agreement does not exempt the signatory companies from the need to have the free, specific, informed and unambiguous consent of the data subjects for the use of their data for the purposes of commercial prospecting by electronic means, when such data has not been collected directly by the prospecting body.

130. **Secondly**, with regard to the validity of the consent obtained by [redacted], which [redacted] relies on to base its commercial prospecting operations electronically, the Restricted Committee observes that it emerges from the findings made during the online inspection of 15 November 2021 that the form used by [redacted] from the website [redacted] included a tick box authorising without distinction prospecting by [redacted], on its own behalf, and prospecting likely to be carried out by its partners, without identifying them.

131. Indeed, the Restricted Committee first notes that the text accompanying this box *("*"by ticking this box, you agree to receive from [redacted] and its Partners, by email, telephone and text message, offers related to fortune telling") did not mention [redacted] and that it did not contain any URL link enabling access to the list of partners to whom the data was likely to be transmitted. The Restricted Committee then observes that, although a link entitled "find out more" makes it possible to obtain additional information relating to the existence of partners, this information is not easily accessible. Indeed, this "find out more" link is located further on the registration form, at the end of a notice informing the data subjects of their ability to unsubscribe to no longer receive emails or text messages. By using the "find out more" link, it is possible to access a page "find out more about the processing of your personal data and your rights", which mentions that "the processing of personal data collected by [redacted] is managed by [redacted] and its partner, [redacted]". This link, which, by the colour of its font and its positioning, merges with the email address of the data protection officer preceding it, and which is located far from the checkbox, does not enable users to be clearly informed of the identity of the prospector to whom the data may be transmitted. In addition, while the information on the page "find out more about the processing of your personal data and your rights" did indeed mention the existence of [redacted], in its capacity as a partner of [redacted], the terms used in no way referred to the concept of commercial prospecting, so that users could not, even on reading this text, expect to be approached by [redacted].

132. It emerges from all these elements that [redacted] could not avail itself, to carry out its commercial prospecting operations, of the consent obtained by [redacted] on its behalf through the form implemented on the [redacted] website, at the time of the online inspection of 15 November 2021, which did not enable the expression of informed consent within the meaning of Article 4(11) GDPR.

133. The Restricted Committee notes that, in its written observations of 2 April 2024, the company indicated that the form appearing on the [redacted] website had been modified since the inspection operations, and before the sanction procedure was initiated, presenting its new version as complying with the consent requirements necessary to be able to carry out the canvassing operations referred to in Article L34-5 CPCE.

134. However, the Restricted Committee notes that said form did not enable data subjects to express their consent in an informed manner.

135. An online inspection carried out on 23 April 2024 found that the checkbox used to obtain consent was accompanied by the text "I give my express consent(3) to receive fortune telling offers by telephone, email, text message or WhatsApp". Firstly, the Restricted Committee noted that although the list of partners now appeared on the same page as the form, only a figure next to the word "express", mentioned in the form of a superscript, in very small and illegible characters, referred to a footnote, located at a distance from the form (and on a part of the page that was not visible when the form was displayed), in which said list appeared. The Restricted Committee considers that, given these elements, the user could easily not see this figure, not pay attention to it or not dwell on it and, therefore, not refer to the content of the note.

136. On the other hand, the Restricted Committee notes that, in this second wording accompanying the box to be ticked, no further reference to the concept of "partners", the mere mention *"I give my express consent to receive fortune telling offers by telephone, email, text message or WhatsApp"* suggesting to the user that these offers come exclusively from [redacted].

137. It therefore appears that, for these two forms, the consent obtained by [redacted] did not appear sufficiently informed to enable [redacted] to avail itself of such consent in the context of its commercial prospecting operations by electronic means.

138. **Under these conditions, the Restricted Committee considers that, in the absence of informed consent from the individuals whose data was collected by [redacted], [redacted] is in breach of Article L34-5 CPCE.**

139. The Restricted Committee nevertheless notes that, since the last inspections carried out, it appears that [redacted] has again modified the form in question. It emerges from the latest information provided that the text accompanying the checkbox enabling users' consent to the use of their data for commercial prospecting purposes now explicitly targets [redacted] *(*"I give my express consent to receive fortune telling offers by telephone, email, text message or WhatsApp by [redacted] and its partners [redacted], [redacted], [redacted] and [redacted]"). While the Restricted Committee takes note of this compliance, the breach nevertheless appears to be constituted for the past.

III. ON THE PRONOUNCEMENT OF CORRECTIVE MEASURES AND THEIR PUBLICITY

140. Under the terms of Article 20 of Act No 78-17 of 6 January 1978 as amended, "where the controller or its processor fails to comply with the obligations arising from Regulation (EU) 2016/679 of 27 April 2016 or from this Act, the President of the CNIL may [...] refer the matter to the Commission's Restricted Committee with a view to ordering, after an adversarial procedure, 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 €10m or, in the case of a company, 2% of the total annual worldwide revenue for the previous 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."

141. Article 83 GDPR further states that "[e]ach 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.

142. First of all, the company maintains that it was in no way negligent, as the shortcomings identified resulted, in its view, from a different application and interpretation of the texts. It considers that, in any event, the proposed sanction is disproportionate with regard to other decisions handed down by the Restricted Committee. It thus considers that certain criteria should be taken into account such as its economic situation, its level of compliance, the length of the procedure, the absence of prior formal notice and its total cooperation. Lastly, it considers that the proposed publicity measure is unjustified, insofar as no serious breach has been identified, no complaint has been lodged and, if it is a question of setting a precedent in the fortune telling sector, the CNIL had already handed down a decision on 8 June 2023.

143. **Firstly,** the Restricted Committee recalls that, while the imposition of an administrative fine is conditional on the establishment of a wrongful breach by the prosecuted body, this fault may result from deliberate behaviour but also from negligence, pursuant to Article 83(2)(b) GDPR (CJEU, Grand Chamber, 5 December 2023, Deutsche Wohnen SE et al., C-807/21; CJEU, Grand Chamber, 5 December 2023, Nacionalinis visuomenės sveikatos centras prie Sveikatos apsaugos ministerijos et al., C-683/21).

144. The Restricted Committee considers that, in the case in point, the breaches committed by the company reveal a certain negligence on its part. Indeed, the Restricted Committee emphasises, on the one hand, that the rules recalled in this deliberation are subject to constant interpretation by the CNIL. For example, while the guidelines relating to the processing of personal data implemented for the purposes of managing commercial activities were published shortly after the inspection operations, the recommendations it contains do not appear new, since the CNIL has already adopted, since 2005, simplified standard NS-048 (containing in particular recommendations on the retention period of customer data for prospecting purposes) and, since 2014, simplified standard NS-057 (concerning recordings of telephone conversations). On the other hand, the Restricted Committee notes that the multiplicity of breaches noted shows negligence in the implementation of the processing carried out by the company.

145. **Secondly,** the Restricted Committee considers that the criterion set forth in Article 83(2)(a) GDPR relating to the nature, severity and duration of the breach should be applied, taking into account the nature and scope of the processing and the number of data subjects.

146. The Restricted Committee notes first of all that the breaches of Articles 5(1)(c), 5(1)(e) and 9 GDPR concern the fundamental principles of data protection and are thus likely to be subject to a fine of up to €20m or 4% of the company's annual revenue of the previous period – i.e. the maximum amount set forth by the texts –, pursuant to Article 83(5) GDPR. In this respect, the guidelines on the calculation of administrative fines adopted by the European Data Protection Board recall that "through this distinction, the legislator gave an initial indication of the seriousness of the breach, in an abstract manner. The more serious the breach, the higher the fine is likely to be" (point 50).

147. The Restricted Committee then notes that the breaches identified are likely to concern a large number of people, with the database common to [redacted] and [redacted] comprising more than 1.5 million unique contacts having the status of prospect or customer. In particular, with regard to the breach of Article L34-5 CPCE, the Restricted Committee wishes to emphasise that [redacted] makes extensive use of sending commercial prospecting messages since it has indicated that, during the first three quarters of 2022, it sent more than 85,000 text messages and more than 7.3 million emails to nearly 54,000 people (i.e. one email every two days), whose contact details were collected by [redacted].

148. Furthermore, the Restricted Committee notes that some of the breaches in question have the effect of depriving the processing carried out of lawfulness. The same applies to the failure to comply with Article 9 GDPR, as the collection of "sensitive" data is prohibited as a matter of principle, and to the failure to comply with Article L34-5 CPCE, as commercial canvassing operations are only lawful if the controller has valid consent.

149. The Restricted Committee also emphasises that individuals using the remote fortune telling services offered by the company are likely to find themselves in a situation of vulnerability, which may lead them to lower their vigilance threshold and to easily communicate certain data concerning them, in particular sensitive data. In these circumstances, compliance with the requirements relating to the collection of consent is essential.

150. Finally, the Restricted Committee wishes to insist on the potentially very intrusive nature of some of the processing in question, in particular the full and systematic recording of telephone conversations (both with regard to the company's employees and its customers) and the sending of commercial prospecting messages, the frequency and multiplicity of which are likely to cause real discomfort for the recipients, for a particularly long period of time.

151. **Thirdly,** the Restricted Committee wishes to apply the criterion set forth in Article 83(2)(g) GDPR, relating to the categories of personal data concerned by the breach.

152. In this respect, while the breach of Article 9 GDPR specifically concerns the collection of sensitive data, the Restricted Committee notes that the breach of Article 5(1)(c) is also likely to relate to such data, insofar as the recordings made may potentially contain information relating to the sexual orientation or sex life of the data subjects, their religious beliefs or even their health.

153. **Fourthly,** the Restricted Committee wishes to take into account the degree of cooperation with the supervisory authority that the company has demonstrated, pursuant to Article 83(2)(f) GDPR.

It would appear that, following receipt of the Rapporteur's observations in response, the company has complied with the breach of Article L34-5 CPCE.

154. The Restricted Committee considers that all these elements justify the imposition of an administrative fine.

155. **With regard to the amount of the fine,** the Restricted Committee would point out that, pursuant to Article 83 GDPR, the breaches identified may be subject to an administrative fine of up to €20m or up to 4% of the worldwide annual revenue for the previous period, whichever is higher.

156. It took the view that the company's business and financial situation should be taken into account. It notes in this respect that [redacted] generated, for the year 2021/2022, revenue of approximately €[redacted], for a profit of more than €[redacted]. The following year, this revenue came to €[redacted], with a net loss of €[redacted].

157. 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 considers that a fine of two hundred and fifty thousand (250,000) euros appears justified.

158. **With regard to the publication of the sanction,** the Restricted Committee considers that this is 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 operations and the number of data subjects.

159. It also notes that this measure is intended in particular to inform the data subjects by the processing carried out by the company, whether these are prospects or customers. This provision of information would enable them to assert their rights if necessary.

160. 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, decides to:

- **impose an administrative fine on [redacted] in the amount of two hundred and fifty thousand (250,000) euros for breaches of Articles 5(1)(c), 5(1)(e) and 9 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 and L34-5 of the French Postal and Electronic Communications Code, which breaks down as follows:**
  - **two hundred thousand (200,000) euros for breach of Articles 5(1)(c), 5(1)(e) and 9 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016;**
  - **fifty thousand (50,000) euros for breach of Article L34-5 of the French Postal and Electronic Telecommunications Code;**
- **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 President

Philippe-Pierre Cabourdin

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