Conseil d'État, 10ème - 9ème chambres réunies, 19/06/2020, 434684

Council of State - 10th - 9th joint chambers

Reading for Friday, June 19, 2020

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Rapporteur
Mrs. Christelle Thomas

Public Rapporteur
Mr. Alexandre Lallet

Lawyer(s)
SCP GATINEAU, FATTACCINI, REBEYROL

Full text

FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

Having regard to the following procedure:

By a summary application, a supplementary brief and three reply briefs, registered on 18 September and 1 November 2019 and on 29 January, 3 April and 13 May 2020 at the litigation secretariat of the Council of State, the association of communication consulting agencies, the federation of e-commerce and distance selling, the grouping of publishers of online content and services, the Interactive Advertising Bureau France, the Mobile Marketing Association France, the national union for direct communication from data to logistics, the union of internet agencies, the union of media consulting and purchasing companies and the union of brands, request the Council of State:

1°) primarily, to annul for abuse of power deliberation no. 2019-093 of 4 July 2019 of the National Commission for Information Technology and Civil Liberties (CNIL) adopting guidelines relating to the application of Article 82 of the law of January 6, 1978 amended to read and write operations in a user's terminal (in particular to cookies and other tracers);

2°) in the alternative, to stay the proceedings pending the decision of the Court of Justice of the European Union on thirteen questions referred for a preliminary ruling concerning the interpretation of the combined provisions of Directive 2002/58/EC of 12 July 2002, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on consent and Directive 2019/2161 amending Directive 2011/83/EU, structured as follows:
- Question No. 1: Articles 2(f) and 5(3) of Directive 2002/58EC, read in conjunction with Articles 4(11) and 95 of Regulation (EU) 2016/679, and with Article 4(2)(b) of Directive 2019/2161 amending Directive 2011/83/EU, must they be interpreted as meaning that, in principle, offers and contracts relating to access to digital content and services, by virtue of which the consumer undertakes to provide personal data to the professional, are prohibited?
- Question No. 2: If the answer to the first question is in the negative, must the aforementioned provisions be interpreted as prohibiting the national supervisory authority from imposing, in general, a prohibition on offers and contracts relating to access to digital content and services, by virtue of which the consumer provides or undertakes to provide personal data to the professional?
- Question 3: Should Articles 2(f) and 5(3) of Directive 2002/58EC, read in conjunction with Articles 4(11), 5(1)(b) and 95, and recitals 32 and 42 of Regulation 2016/679, be interpreted as requiring that users' consent, in order to be valid, be expressed by a separate action for each of the distinct purposes brought to their attention for the storage of information or access to information already stored in their terminal equipment?
- Question 4: Should Articles 2(f) and 5(3) of Directive 2002/58EC, read in conjunction with Articles 4(11), 95 and recital 4 of Regulation (EU) 2016/679, be interpreted as requiring, prior to the storage of information or access to information stored in the user's terminal equipment, to request and collect the expression of a possible prior refusal from the latter '

If the answer to the fourth question is in the affirmative, must the aforementioned provisions be interpreted as:
* laying down an obligation which applies both to the purposes for which the user's consent is required and to the purposes for which the user's consent is not required (question no. 5) '
* requiring that the expression of the user's prior refusal be retained for a certain period (question no. 6) '

If the answer to the sixth question is in the affirmative, must the aforementioned provisions be interpreted as:
- leaving the national supervisory authority the choice of itself setting the period for which the expression of the user's refusal is retained, as this must be fixed by prescription by the Member States (question no. 7) '
- prohibiting the re-requesting, during the retention period of the expression of refusal, the prior consent of the user or as authorizing the termination of the retention period of the expression of prior refusal when, requested again, the user expresses prior consent in place of his refusal (question no. 8)'
- Question 9: Should Articles 2(f) and 5(3) of Directive 2002/58EC read in conjunction with Articles 4(11), 6(1)(a) and 95 of Regulation (EU) 2016/679 be interpreted as requiring, as a condition for the validity of the user's consent, that the user be informed of the categories of entities pursuing the purposes brought to his attention relating to the recording or reading operations of information stored on his terminal, including where such operations do not constitute processing of personal data?
- Question 10: Should those same provisions be interpreted as requiring, where there are multiple entities pursuing the purposes brought to the user's attention, the user be informed of the identity of each of the entities likely to be recipients of information stored on his terminal, as a condition for the validity of the user's consent? terminal in the context of the recording and reading operations of this information'
- If the answer to question 10 is in the affirmative, must these same provisions be interpreted as meaning that, for a constant purpose having been the subject of valid consent from the user, they require the list of recipient entities to be constantly updated and this list to be brought to the attention of the user to request the expression of his consent again, when new recipient entities had not been listed when he previously expressed his consent for the same purpose (question 11)'
- Question 12: must Articles 2(f) and 5(3) of Directive 2002/58EC, read in conjunction with Articles 4(11), 7(1)(a), 13, 14 and 95 of Regulation (EU) 2016/679, be interpreted as meaning that they require that the consent of the user, to be valid, must be accompanied by the retention of the information provided to the latter, relating to the identification of each of the entities receiving the information stored or read in his terminal'
- If the answer to question no. 12 is yes, must the aforementioned provisions be interpreted as requiring that the list of recipient entities be updated and renewed, when they are modified, and that the information given in this respect to the user be retained, failing which his consent would not be valid even if the purpose to which he consented remains unchanged (question no. 13) '

3°) to charge the CNIL the sum of 15,000 euros under Article L.761 of the Code of Administrative Justice.

Having seen the other documents in the file;

Having seen:
- the Constitution, in particular its Preamble;
- Directive No. 2002/58/EC of the European Parliament and of the Council of 12 July 2002;
- Regulation (EU) No. 2016/679 of the European Parliament and of the Council of 27 April 2016;
- Law No. 78-17 of 6 January 1978;
- Decree No. 2019-536 of 29 May 2019;
- the judgment of the Court of Justice of the European Union C-673/17 Bundesverband der Verbraucherzentralen un Verbraucherverbände - Verbraucherzentrale Bundesverband eV v Planet49 GmbH of 1 October 2019;
- the Code of Administrative Justice and Ordinance No. 2020-305 of 25 March 2020 as amended;

Having heard in public session:

- the report of Ms. Christelle Thomas, Master of Requests in extraordinary service,

- the conclusions of Mr. Alexandre Lallet, public rapporteur;

The floor having been given, before and after the conclusions, to SCP Gatineau, Fattaccini, Rebeyrol, lawyer for the Association of Communication Consulting Agencies, the Federation of E-commerce and Distance Selling (Fevad), the Group of Online Content and Services Publishers (Geste), the company Interactive Advertising Bureau France (IAB France), the company Mobile Marketing Association France (MMA France), the National Union of Direct Communication from Data to Logistics (SNCD), the Union of Internet Agencies (SRI), the Union of Media Consulting and Purchasing Companies (UDECAM) and the Union of Brands;

Having regard to the note in deliberation, registered on June 12, 2020, presented by the CNIL;

Considering the following:

1. It appears from the documents in the file that the National Commission for Information Technology and Civil Liberties (CNIL) adopted, on July 4, 2019, a resolution No. 2019-093 by which it established "guidelines" relating to the application to reading and writing operations in a user's terminal of Article 82 of the law of January 6, 1978 relating to information technology, files and civil liberties. These guidelines are part of an action plan on advertising targeting announced on June 28, 2019, of which they constitute the first stage, and are intended to be supplemented, following a phase of consultation with professionals in the sector and civil society, by the adoption of a recommendation intended to guide operators with regard to the practical arrangements for obtaining consent provided for by Article 82 of the law of January 6, 1978 applicable to "cookies" and other connection trackers. This deliberation, on the one hand, provides the CNIL's interpretation of the applicable regulations in this area, recalling that failure to comply with them may give rise to sanctions on its part and, on the other hand, sets out recommendations for good practice for the operators concerned.

On the regularity of the procedure for adopting the contested deliberation:

2. Contrary to what is argued, it is clear from the endorsements of the deliberation of 4 July 2019 and from the documents that the CNIL added to the file that this deliberation was adopted following a procedure in accordance with the requirements of the decree of 19 May 2019 adopted for the application of law no. 78-17 of 6 January 1978 relating to information technology, files and freedoms, after a summons of the members of the commission by its chair including the agenda of the meeting, in compliance with the quorum and majority rules required for the adoption of deliberations and after collecting the observations of the government commissioner.

On the CNIL's competence to take the contested decision:

3. On the one hand, in accordance with I of Article 8 of the Law of 6 January 1978, the CNIL is the national supervisory authority within the meaning and for the application of Regulation (EU) 2016/679 of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC of 24 October 1995, known as the General Data Protection Regulation (GDPR). It is in particular responsible for informing all data subjects and all data controllers of their rights and obligations. Pursuant to 2° of I of this Article 8, the CNIL ensures that the processing of personal data is carried out in accordance with the provisions of the Law of 6 January 1978 and other provisions relating to the protection of personal data provided for by legislative and regulatory texts, European Union law and France's international commitments. In this capacity, it may establish and publish guidelines, recommendations or reference documents intended to facilitate compliance of personal data processing with applicable texts. The first paragraph of Article 16 of the Law of 6 January 1978 further provides that the CNIL's restricted formation "shall take measures and impose sanctions against data controllers

or processors who fail to comply with the obligations arising from Regulation (EU) 2016/679 of 27 April 2016 and this Law under the conditions set out in Section 3 of this Chapter." Article 20 of this Law gives its President the power to take corrective measures in the event of non-compliance with the obligations arising from Regulation (EU) 2016/279 or its own provisions, as well as the possibility of referring matters to the restricted formation with a view to imposing the sanctions that may be imposed.

4. On the other hand, under the terms of Article 82 of the law of 6 January 1978 relating to information technology, files and freedoms: "Any subscriber or user of an electronic communications service must be informed clearly and completely, unless previously informed, by the data controller or his representative: 1° Of the purpose of any action aimed at accessing, by electronic transmission, information already stored in his electronic communications terminal equipment, or at recording information in this equipment; / 2° Of the means at his disposal to oppose it. / Such access or recording may only take place on condition that the subscriber or user has expressed, after receiving this information, his consent which may result from appropriate parameters of his connection device or any other device under his control. / These provisions are not applicable if access to information stored in the user's terminal equipment or the recording of information in the user's terminal equipment: / 1° Either has the exclusive purpose of enabling or facilitating communication by electronic means; / 2° Or is strictly necessary for the provision of an online communication service at the express request of the user." These provisions ensure the transposition into national law of Article 5, point 3, of Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. They must therefore be interpreted in light of the provisions of this article, which states: "Member States shall ensure that the storage of information, or the obtaining of access to information already stored, in the terminal equipment of a subscriber or user is permitted only on condition that the subscriber or user has given his or her consent, after having received, in compliance with Directive 95/46/EC, clear and complete information, inter alia, on the purposes of the processing. This provision shall not preclude storage or technical access aimed exclusively at carrying out the transmission of a communication via an electronic communications network, or which is strictly necessary for the provider to provide an information society service expressly requested by the subscriber or user." Pursuant to Article 94 of Regulation (EU) 2016/679 of 27 April 2016, "references to the repealed Directive shall be construed as references to this Regulation."

5. It follows from the general scheme of the law of 6 January 1978 and, in particular, from the provisions cited in the preceding points, that the CNIL is responsible for ensuring that any data processing falling within its scope, whether or not it concerns personal data, complies with its provisions and with the obligations resulting from the regulation of 27 April 2016. In order to carry out its missions, it has the power to implement its prerogatives in the manner it deems most appropriate, including by using soft law instruments. It follows that the argument that the CNIL lacked jurisdiction to adopt "guidelines" applicable, in general, to "cookies" and other connection trackers must be dismissed.

On the regime applicable to "cookies" and other connection trackers:

6. Firstly, it follows from the provisions cited in point 4 as interpreted by the Court of Justice of the European Union in its judgment C-673/17 of 1 October 2019, that the conditions for obtaining user consent provided for by the regulation of 27 April 2016 are applicable to reading and writing operations in a user's terminal. It follows that the CNIL was able, without error of law, to apply to these data processing operations the regime of consent required for the processing of personal data.

7. Secondly, by referring, in adopting its "guidelines", to the various works of the European Data Protection Board (EDPB) which is, under Articles 68 and 70 of the Regulation of 27 April 2016, responsible for ensuring uniform application of the provisions of said Regulation between Member States and may issue guidelines to this end, the CNIL, which in doing so did not seek to confer on this work a binding value of which it is devoid, did not commit any error of law.

On the prohibition of the use of "cookie walls":

8. Article 2 of the contested decision provides, under the heading of "free consent", that "the Commission considers that consent can only be valid if the data subject is able to validly exercise his or her choice and does not suffer major disadvantages in the event of absence or withdrawal of consent. / In this respect, the Commission recalls that the EDPS, in its "statement on the revision of the "ePrivacy" directive and its impact on the protection of privacy and the confidentiality of electronic communications", considered that the practice of blocking access to a website or mobile application for those who do not consent to being tracked ("cookie walls") is not compliant with the GDPR. The EDPS considers that, in such a case, users are not able to refuse the use of trackers without suffering negative consequences (in this case, the impossibility of accessing the site consulted)".

9. On the one hand, with regard to "cookie walls", a practice which consists of blocking access to a website or mobile application for anyone who does not consent to the storage or reading of connection trackers on their terminal, it is clear from the terms of the aforementioned Article 2 that the CNIL merely recalled that the EDPS considers it to be non-compliant with the requirements arising from the GDPR. By recalling the EDPS's position on this point, without adopting it, the CNIL, which did not misunderstand the scope of the Committee's recommendations, did not intend to give them binding force.

10. On the other hand, the CNIL states, in the same Article 2, that the validity of consent is subject to the condition that the data subject does not suffer any major inconvenience in the event of the absence or withdrawal of their consent, such major inconvenience being able, according to it, to consist of the impossibility of accessing a website, due to the practice of "cookie walls". By deducing such a general and absolute prohibition from the sole requirement of free consent, laid down by the regulation of 27 April 2016, the CNIL has exceeded what it can legally do, within the framework of a soft law instrument, enacted on the basis of 2° of I of Article 8 of the law of 6 January 1978 cited in point 3. It follows that the contested deliberation is, to this extent, tainted with illegality.

On the independence, specificity and informed nature of consent:

11. It follows from the provisions of Article 5, paragraph 3, of Directive 2002/58/EC of 12 July 2002 cited in point 4,that reading and writing operations in the terminal of a subscriber or user must give rise to clear and complete information for the latter, in compliance with the requirements of the GDPR, in particular with regard to the purposes of the processing.

12. Firstly, under Article 13 of the GDPR, the clear and complete information that must be available to the individual before obtaining their consent includes "a) the identity and contact details of the controller and, where applicable, of the controller's representative; (...) / (e) the recipients or categories of recipients of the personal data, if any (...)". It follows from the provisions of Article 82 of the aforementioned Law of 8 January 1978, clarified by the respective provisions of Directive 2002/58/EC as interpreted by the Court of Justice of the European Union in its judgment C-673/17 of 1 October 2019 and the aforementioned Regulation of 27 April 2016, that for prior consent to be considered informed, the user must be able to have the identity of the data controller(s) as well as the list of recipients or categories of recipients of their data. In particular, if the publisher of a site that places "cookies" must be considered a data controller, including when it subcontracts to third parties the management of "cookies" set up on its own behalf, third parties that place cookies when visiting a publisher's site must also be considered data controllers when they act on their own behalf. It follows that the CNIL was legally able, on the one hand, to recall that, among the information that must be brought to the user's attention, is included in particular and at the very least "the identity of the data controller(s)", and, on the other hand, to specify that the user "must be able to identify all the entities using tracers before being able to consent to them" insofar as these entities, which do not include the data recipients, appear as data controllers or joint controllers of the data processing.

13. Secondly, Article 7, point 1, of the Regulation of 27 April 2016 provides that "where processing is based on consent, the data controller shall be able to demonstrate that the data subject has given consent to the processing of personal data concerning them". It is clear from these provisions that the data controller must be able, at any time, to provide proof of the valid collection of the user's consent. As a result, the CNIL was able to legally remind that an exhaustive and regularly updated list of entities using tracers as defined in the previous point must be made available to the user directly when obtaining their consent.

14. Thirdly, it follows from the aforementioned provisions of Article 82 of the Law of 8 January 1978 that the user's consent must relate to each of the purposes pursued by the data processing and that any new subsequent purpose, compatible with the initial purpose(s), assigned to the data processing is subject to the collection of a specific consent. Compliance with such a requirement implies at the very least, in the event that the collection of consent is carried out globally, that it be preceded by information specific to each of the purposes. It follows that by recalling that "the person concerned must be able to give his or her consent independently and specifically for each distinct purpose", the CNIL, which, in doing so, did not define the concrete methods by which consent should be collected, did not disregard the applicable provisions in this area.

On the other obligations formulated by the contested decision:

15. First, Article 4, point 11, of the GDPR defines the consent of the data subject as "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." Under Article 7, paragraph 3, of the same regulation: "The data subject shall have the right to withdraw consent at any time." It is clear from these provisions, combined with those of Article 82 of the Law of 6 January 1978 cited in point 3, that, on the one hand, in the absence of consent expressed by a clear affirmative action, the user must be considered to have refused access to his or her terminal or the recording of information on it, and that, on the other hand, he or she may withdraw his or her consent at any time. It follows that the CNIL, which, by indicating that it should "be as easy to refuse or withdraw consent as to give it", limited itself to characterising the conditions for the user's refusal without defining specific technical methods for expressing such a refusal, did not taint its deliberations with any disregard for the rules applicable in this area.

16. Secondly, it follows from the aforementioned provisions of Article 82 of the Law of 6 January 1978 that operations of reading or writing information stored in a user's terminal which are strictly necessary for the technical functioning of the site or which correspond to the provision of an online communication service at the express request of the user are exempt from the collection of consent. It is apparent from the documents in the case file that the CNIL, in Article 5 of the contested decision, listed the conditions that audience measurement trackers must meet to benefit from such an exemption from the collection of consent, stating in particular that the trackers used by these processing operations which fall into one of the two categories referred to in the same Article 82, must not have a lifespan exceeding thirteen months and that the information collected through these trackers must not be kept for a period exceeding twenty-five months. By defining such indicative durations for the use of trackers and for the retention of information collected through them, the CNIL, which could not legally set a time limit for the validity of audience measurement cookies, merely recommended, through non-binding guidelines, the durations of use of these cookies so as to allow for the periodic review of their necessity in light of the exceptions to the consent rule provided for in the last two paragraphs of Article 82. It follows that, contrary to what is argued, the contested decision is not tainted by illegality on this point.

17. Finally, it is clear from the very terms of the contested decision that the CNIL stated, in Article 6, that in order to ensure the objective of full transparency on cookies and other trackers not subject to prior consent, users must be informed of their existence and purpose, for example by means of a mention in the confidentiality policy of the organizations using them. By setting such a transparency objective, after recalling that the law does not subject these cookies to any obligation to obtain the user's prior consent, nor does it require offering the possibility of opposing the use of such tracers, the CNIL did not intend to impose a new information obligation not provided for by law, but simply to promote the dissemination of good practices for the user of tracers not subject to prior consent, as it can legally do in application of 2° of I of article 8 of the law of 6 January 1978 cited in point 3. It follows that, contrary to what is argued,the contested decision is not tainted by illegality on this point.

18. It follows from all of the above, without there being any need to refer questions to the Court of Justice of the European Union for a preliminary ruling, that the applicants are only entitled to request the annulment of the fourth paragraph of Article 2 of the decision they are contesting. In the circumstances of the case, it is appropriate to order the CNIL to pay the total sum of EUR 3,000 to the applicant associations under Article L. 761-1 of the Code of Administrative Justice.

DECIDES:

Article 1: The fourth paragraph of Article 2 of the CNIL decision of 4 July 2019 is annulled.

Article 2: The CNIL shall pay the applicant associations a total sum of EUR 3,000 under Article L. 761-1 of the Code of Administrative Justice.
Article 3: The remainder of the conclusions of the application of the Association of Communication Consulting Agencies and Others is dismissed.
Article 4: This decision will be notified to the association of communication consultancy agencies, the federation of e-commerce and distance selling, the group of publishers of online content and services, the Interactive Advertising Bureau France, the Mobile Marketing Association France, the national union for direct communication from data to logistics, the union of internet agencies, the union of media consulting and purchasing companies, the union of brands and the National Commission for Information Technology and Civil Liberties.

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Analysis

Abstracts

Summary

Case law references