

Decision of the National Commission sitting in restricted formation

on the outcome of investigation No. [...] conducted with Company A

Deliberation No. 11FR/2022 of April 22, 2022

The National Commission for Data Protection sitting in restricted formation

composed of Messrs. Thierry Lallemand and Marc Lemmer, commissioners, and Mr.

Marc Hemmerling, substitute member;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016

on the protection of individuals with regard to the processing of personal data

personal character and on the free movement of such data, and repealing Directive

95/46/EC;

Considering the law of August 1, 2018 on the organization of the National Commission for the

data protection and the general data protection regime, in particular

its article 41;

Having regard to the internal regulations of the National Commission for the Protection of

data adopted by decision no. 3AD/2020 dated January 22, 2020, in particular its

sections 3, 10.2 and 12;

Having regard to the regulations of the National Commission for Data Protection relating to the

inquiry procedure adopted by decision No. 4AD/2020 dated January 22, 2020,

in particular its article 9;

Considering the following:

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I. Facts and procedure

1. During its deliberation session of February 14, 2019, the National Commission

for data protection sitting in plenary session (hereafter: “Formation Plenary”) had decided to open an investigation with Company A on the basis of article 37 of the law of 1 August 2018 on the organization of the National Commission for the data protection and the general data protection regime (hereinafter “Law of August 1, 2018”) and to appoint Mr. Christophe Buschmann as Chief of investigation.

2. According to the decision of the Plenary Formation, the investigation conducted by the CNPD was intended to verify compliance with the provisions of the regulations relating to the protection natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (hereinafter “GDPR”) and the law of August 1, 2018, in particular by setting up systems for video surveillance and geolocation installed by Company A.

3. On April 3, 2019, CNPD officials visited the premises of Company A. The decision of the National Commission for the Protection of data sitting in restricted formation on the outcome of the investigation (hereinafter: “Formation Restricted”) will be limited to processing controlled by CNPD agents and to legal and regulatory provisions taken into account by the head of investigation in his statement of objections.

4. Company A is a [...] registered in the Trade and Companies Register of Luxembourg under number [...] and having its registered office at number [...], L - [...] (hereafter after “the controlled”). The purpose of the control is “[the collection, processing and disposal of waste]. »¹

5. During the aforementioned visit of April 3, 2019 to the premises of the control at [location 1], it has been confirmed to CNPD officials that the control uses a system of video surveillance at its sites at [location 1] and at [location 2]. By means of a connection remotely, the images captured and recorded by five of the six cameras installed on

1 According to the amendment to the Articles of [...].

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site of [locality 2] could be viewed, the sixth camera being outside service.

According to the explanations provided by the controller, the images captured by the seven cameras installed on the [locality 1] operating site would only be viewable in real time on independent control monitors and would not be recorded.

It was also confirmed to CNPD agents that the inspector installed two types geolocation devices in some of its vehicles: a first device

(referred to as “[geolocation tool A]”) in service since 2009 and active over approximately [...]

trucks and a second device (referred to as “[geolocation tool B]”) [...]

operational only in [...] trucks.²

6. By letter dated May 16, 2019, the controller responded to the report drawn up by CNPD officers.

7. At the end of his investigation, the head of investigation notified the person inspected on 28

August 2019 a statement of objections detailing the shortcomings he considered

constituted in this case, and more specifically a non-compliance with the prescribed requirements:

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by article 13 of the GDPR (right to information) with regard to information

of all persons concerned with regard to the video surveillance system and

concerning the information of employees about the geolocation system;

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by article 5.1.e) of the GDPR (principle of limitation of storage) with regard to

relates to the geolocation system.

8. On October 10, 2019, the auditee produced written observations on the statement of objections.

9. Following the departure of Mr. Christophe Buschmann, the Plenary Formation decided during its deliberation session of September 3, 2021 that Mr. Alain

2 See Minutes no. [...] relating to the on-site inspection mission carried out on April 3 2019 with Company A (hereinafter: "the minutes").

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Herrmann would take up the position of head of investigation from September 3, 2021 for the investigation in question.

10. A supplementary letter to the statement of objections was sent to the inspected on October 8, 2021. In this letter, the inspected party was informed of the replacement of the head of investigation, on the one hand, and that his arguments of October 10, 2019 in response to the statement of objections were included in the investigation file, on the other hand go. On the basis of these arguments, the head of the investigation informed the inspector that he did not retain plus the failure referred to in paragraph B.2. statement of objections of August 28, 2019 regarding non-compliance with Article 5.1.e) of the GDPR (principle of storage limitation) with regard to the geolocation system.

In addition, the head of investigation proposed to the Restricted Panel in the letter aforementioned complementary measure to adopt a corrective measure and to impose on the auditee a administrative fine of 1,500 euros.

11. By letter dated November 4, 2021, the inspector produced written observations on the supplementary letter to the statement of objections.

12. The president of the Restricted Formation informed the controller by letter of 17 January 2022 that his case would be registered for the session of the Restricted Panel on 24 February 2022 and that he could attend this meeting. By letter dated January 19, 2022, the audited lawyer has informed the Restricted Panel that his principal will not be present during this session.

13. During the Restricted Training session of February 24, 2022, the leader investigator presented his oral observations in support of his written observations and answered the questions posed by the Restricted Panel. The control was not present during the session.

II. Place

II. 1. As to the reasons for the decision

II.1.1. As for the CCTV system

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A. On the breach of the obligation to inform the persons concerned

1. On the principles

14. According to paragraph 1 of Article 12 of the GDPR, the “controller take appropriate measures to provide any information referred to in Articles 13 and 14 as well as to carry out any communication under Articles 15 to 22 and Article 34 with regard to the treatment to the data subject in a concise manner, transparent, understandable easily accessible, in clear and simple terms [...]». »

15. Article 13 of the GDPR provides the following:

“1. Where personal data relating to a data subject is collected from this person, the data controller provides him, at the time

where the data in question is obtained, all of the following information:

- a) the identity and contact details of the controller and, where applicable, of the representative of the controller;
- b) where applicable, the contact details of the data protection officer;
- c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;
- d) where the processing is based on Article 6(1)(f), the legitimate interests sued by the controller or by a third party;
- e) the recipients or categories of recipients of the personal data, if they exist; and
- (f) where applicable, the fact that the controller intends to carry out a transfer of personal data to a third country or to an organization international community, and the existence or absence of an adequacy decision issued by the Commission or, in the case of transfers referred to in Article 46 or 47, or Article 49,

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paragraph 1, second subparagraph, the reference to the appropriate or suitable safeguards and the means of obtaining a copy or where they have been made available;

2. In addition to the information referred to in paragraph 1, the controller shall provide to the data subject, at the time the personal data is obtained, the following additional information which is necessary to guarantee fair and transparent treatment:

- a) the retention period of the personal data or, where this is not possible, the criteria used to determine this duration;

b) the existence of the right to request from the controller access to the data to personal character, the rectification or erasure of these, or a limitation of the processing relating to the data subject, or the right to oppose the processing and right to data portability;

c) where the processing is based on point (a) of Article 6(1) or on Article 9, paragraph 2(a), the existence of the right to withdraw consent at any time, without affecting the lawfulness of the processing based on the consent made before the withdrawal thereof;

d) the right to lodge a complaint with a supervisory authority;

(e) information on whether the requirement to provide data to personal nature has a regulatory or contractual nature or if it conditions the conclusion of a contract and whether the data subject is obliged to provide the data to personal character, as well as on the possible consequences of the non-provision of those data;

f) the existence of automated decision-making, including profiling, referred to in Article 22, paragraphs 1 and 4, and, at least in such cases, useful information concerning the underlying logic, as well as the significance and intended consequences of such processing for the person concerned.

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3. When he intends to carry out further processing of personal data personal data for a purpose other than that for which the personal data have been collected, the data controller provides the data subject beforehand concerned information about this other purpose and any other information

relevant referred to in paragraph 2.

4. Paragraphs 1, 2 and 3 do not apply where and to the extent that the person concerned already has this information. »

16. The communication to data subjects of information relating to the processing of their data is an essential element in the context of compliance with general transparency obligations within the meaning of the GDPR.³ Said obligations have been explained by the Article 29 Working Party in its guidelines on the transparency within the meaning of Regulation (EU) 2016/679, the revised version of which has been adopted April 11, 2018 (hereinafter: "WP 260 rev.01").

17. It should be noted that the European Data Protection Board (hereinafter: "EDPS"), which has replaced the Article 29 Working Party since 25 May 2018, took over and reapproved the documents adopted by the said Group between May 25, 2016 and May 25 2018, such as the aforementioned guidelines on transparency.⁴

2. In this case

18. With regard to the information of the persons concerned, i.e. the customers, suppliers, service providers and visitors (hereinafter: "persons third parties") and employees with regard to the video surveillance system, CNPD agents noted during their visit to the site of [locality 1] that the presence of the cameras of CCTV was not reported to them.⁵

³ See in particular Articles 5.1.a) and 12 of the GDPR, see also recital (39) of the GDPR.

⁴ See EDPS Endorsement Decision 1/2018 of 25 May 2018, available at: https://edpb.europa.eu/sites/edpb/files/files/news/endorsement_of_wp29_documents_en_0.pdf.

⁵ Finding 8.1 of the minutes.

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19. By letter dated May 16, 2019, the controller responded to the minutes by attaching said letter in relation to the information of employees a report of the meeting of [...] of October 19, 2015, as well as an information note on video surveillance signed by the staff delegation on May 16, 2019.⁶ Control also has clarified that the video surveillance system had at the time been authorized of the CNPD (Deliberation No.[...] of [...]).

To this same letter the controller also attached "photos of the display which was in force in accordance with the authorization of 2015" as well as a "photo of the display at [location 1] and intended for all entrances to our [location 1] and [location 2] sites. »⁷ Finally, with regard to the information of third parties, the controller indicated that in addition to the aforementioned posters, "on our website [...], in the "[...]" section, we finds information that our operating sites are equipped with video surveillance ; this information refers to our privacy policy personal data which also appears on the website and in which we find more detailed information about video surveillance, including the purposes and shelf life. »

20. The head of investigation nevertheless considered, with regard to the information of the third parties that "the documentation submitted to the CNPD by letter of 16 May 2019 does not contain sufficient evidence to counter a non-compliance with the prescribed by Article 13 of the GDPR. Indeed, the displays invoked by the company, namely the sticker indicating the number of the old authorization issued by the CNPD under the repealed law of August 2, 2002, together with a pictogram including the words "site under video surveillance" as presented in appendix 3 is not likely to fulfill the conditions of the aforementioned article 13. The fact of presenting, after the on-site visit, a new more complete information poster (see appendix 4), makes it possible to document the will of the

controller to comply with the requirements of the GDPR. Non-compliance with article 13 of the GDPR was nevertheless established on the day of the site visit. »

(Statement of Objections, Ad.A.1.)

6 See Appendices 1 and 2 of the audit letter of 16 May 2019.

7 See annexes 3 and 4 of the audit letter of 16 May 2019.

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He thus held against the controlled a non-compliance with the prescriptions of article 13 of the GDPR for third parties.

Furthermore, the head of investigation considered in the statement of objections that the observations concerning third parties may be taken over *mutatis mutandis* with regard to informing employees about video surveillance and it has thus retained against the controlled a non-compliance with the prescriptions of article 13 of the GDPR as far as employees are concerned (statement of objections, Ad.A.2.).

21. By letter dated October 10, 2019, the auditee responded to the communication from the grievances of the chief of investigation by adding concerning the information of the employees, in addition to the details already contained in the letter of May 16, 2019, a certificate from the Chairman of the staff delegation, as well as a copy of an employment contract that he would have signed to its employees containing an article [...] entitled "PROCESSING OF DATA PERSONAL".⁸

22. With regard to the information of third parties, the audited lawyer has indicated in the said letter, again in addition to the details already contained in its letter of May 16, 2019, that it "is materially impossible, if not extremely difficult for my principal to prosecute each of the third parties passing within range of his cameras

security to deliver to them in person a document containing all the information required by Article 13 of the GDPR. Such a burden would obviously represent a disproportionate burden on my principal. The third parties in question do not present themselves in fact sometimes only once on and/or near the Operating Sites.

In this case, the presence of the thumbnail and the display panel is the only tool disposes my principal to provide the necessary information to the third parties concerned. For obtain additional information that cannot be delivered to them all at once given the circumstances, third parties can advantageously turn to the website of my principal or contact the DPO of Company A, whose contact details are clearly indicated on the notice board at the entrance to the Sites. It still fits to add the existence of an electronic terminal located at the entrance to the Company's premises A, giving a detailed information to visitors and which records their

8 See Appendices 2 and 3 of the audit letter of October 10, 2019.

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acknowledgment and acceptance of the Company's data protection policy

A." 9

23. In his letter of November 4, 2021, the audit finally attached projects of communication to the staff delegation, specifying that, as soon as the CNPD has taken a final decision, such communications would be notified to the delegation and to all staff.

24. The Restricted Committee would first like to point out that Article 13 of the GDPR

refers to the obligation imposed on the data controller to “provide” all the information mentioned therein. The word "provide" is crucial here and it "means that the data controller must take concrete measures to provide the information in question to the person concerned or to actively direct the person concerned to the location of said information (for example by means of a link direct, a QR code, etc.). (WP260 rev. 01. paragraph 33).

25. She also believes that a multi-level approach to communicating transparency information to data subjects can be used in a offline or non-digital context, i.e. in a real environment such as for example personal data collected by means of a system of video surveillance. The first level of information (warning sign, note information, etc.) should generally include the most important information essential, namely the details of the purpose of the processing, the identity of the person responsible for the processing, the existence of the rights of data subjects, the information with the most strong impact on the treatment or any treatment likely to surprise the data subjects, as well as a reference to the more detailed information of the second level (e.g. via QR code or website address)¹⁰. the second level of information, i.e. all of the information required under of Article 13 of the GDPR, could be provided or made available by other means,

⁹ See appendix 4 of the letter from the audit dated October 10, 2019 which contains a photograph of the electronic terminal and instructions explaining how it works.

¹⁰ See WP260 rev 01 (point 38) and EDPS Guidelines 3/2019 on data processing of a personal nature by video devices, version 2.0, adopted on 29 January 2020 (points 114. and 117.).

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such as a copy of the privacy policy emailed to employees or a link on the website to an information notice with regard to non-salaried third parties.¹¹

2.1. Information from third parties

26. The Restricted Committee notes that during the visit to the site of [locality 1] by CNPD agents, third parties were informed of the presence of the system of video surveillance by panels containing a poster of a camera, the mention "Site under video surveillance" and the old CNPD sticker, indicating the reference of the former CNPD authorisation.¹²

27. First of all, she would like to point out that since the old vignettes were issued by the CNPD under the former authorization regime of the amended law of 2 August 2002 on the protection of individuals with regard to the processing of personal data staff which was repealed by the law of August 1, 2018, they have become obsolete and since the entry into force of the GDPR, other rules in this area are applicable.

28. Furthermore, the aforementioned panels, in place at the time of the investigation, contained neither the information of the first level of information, nor of the second level information (see point 25 of this decision) and therefore did not comply with the conditions of article 13 of the GDPR.

29. The Restricted Panel then observes that the controlled party specified in its letters of May 16, 2019 and October 10, 2019 that third parties are also informed of the presence of surveillance cameras via its website by clicking on the "[...]" tab at the bottom of the page where it is indicated that the various sites are equipped with CCTV systems. This information refers to the protection policy personal data which also appears on the controlled website.

30. While the said policy does contain some of the statements provided for in

Article 13 of the GDPR, it nevertheless has the subtitle "[...]" concerning therefore any

a range of data processed by the controller and including all the legal bases

11 See WP260 rev. 01 (Item 38.)

12 See appendix 1 of the controller's response to the minutes of May 16, 2019.

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applicable to the various processing operations carried out by the controller and all recipients

of the data in question, without making a differentiation by treatment concerned.

This information therefore does not comply with the principle of transparency to which

each controller. According to this principle, information must be

addressed to the data subject "in a concise, transparent, comprehensible and

easily accessible, in clear and simple terms".¹³ Moreover, the said document does not

does not contain all the information within the meaning of Article 13 of the GDPR.

31. Furthermore, the Restricted Committee would like to point out that Article 13 of the

GDPR requires that when the controller collects personal data

personal contact with the person concerned, he "provides him, at the moment when the data in

question are obtained" the information listed therein. The word "provide" is crucial in

occurrence and as mentioned above in point 24 it "means that the person in charge of the

processing must take concrete steps to provide the information in question to

the data subject or to actively direct the data subject to

the location of said information (for example by means of a direct link, a code

QR, etc.). (WP260 rev. 01. paragraph 33).

32. Thus, "simply providing the information electronically and in writing, by

example in an online privacy statement or notice, may not be suitable or not work on a device collecting the data at personal character that does not have a screen (connected/smart devices) to display the website or this written information. In such a case, alternative means additional and suitable should be considered, for example the provision of the statement or notice on the protection of privacy in an instruction guide at the paper format or the supply in paper format, in the instructions or on the packaging, the URL address of the website (more precisely, the specific page of the website) where is the privacy notice or statement. (WP 260, rev.01, paragraph 19).

33. In the present case, the Restricted Panel considers that, as the panels in place at the time of the on-site visit contained only a poster of a camera, the

13 See Article 12.1. of the GDPR.

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mention "Site under video surveillance" and the old CNPD sticker, that they do not therefore contained no reference to the website of the controlled, a third party visiting one of the sites at [locality 1] or [locality 2] of the controlled did not know where to find the information in question. Moreover, we cannot wait until the moment when the data of a third party are obtained by the controlled, that is to say at the time when he visits one of the sites at [locality 1] or [locality 2] and falls within the field of vision of one of the cameras, that said person has previously visited the website of the controlled to read the information relating to the data processing carried out by the system of video surveillance.

34. The Restricted Panel also notes the affirmation of control contained in its letter of October 10, 2019 that it would be "materially impossible, if not extremely difficult" to give to third parties who present themselves on its sites and who pass through the cameras' fields of vision "in person a document containing all the information required by article 13 of the GDPR. »

The person inspected also indicated that "the presence of the sticker and the billboard is the only tool available to my principal to provide the necessary information to third parties concerned. To obtain additional information that cannot be provided to them in only once taking into account the circumstances, third parties can advantageously turn to my principal's website or contact the DPO of Company A, whose contact details are clearly indicated on the notice board at the entrance to the Site (s. »

35. However, it is not mandatory to hand deliver to all persons third parties a paper document containing all the information required by Article 13 of the GDPR. Indeed, and as also indirectly mentioned by the controlled in its aforementioned letter of October 10, 2019, a multi-level approach to Communicating transparency information to data subjects can to be used in the event of the collection of personal data by means of a video-surveillance system (see point 25 of this decision on the information to be two levels). Thus, the controlled could adapt the panels in place so that they include first-level information, i.e. details of the purpose of the processing, the identity of the data controller, the existence of the rights of persons concerned, the information having the greatest impact on the processing or any

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processing likely to surprise the persons concerned, as well as a reference to the more detailed information of the second level (for example, via a QR code or a website address). If the controlled intends to use the information on its website as second level of information, he must therefore insert a related reference on the panels and update its website so that it understands, understandably and in clear and simple terms, all the information provided for in Article 13 of the GDPR.

36. Finally, the controller mentions in his letter of October 10, 2019 the existence of an "electronic terminal located at the entrance to Company A's premises, giving detailed information to visitors and recording their recognition and their acceptance of Company A's data protection policy."

[...]

37. The Restricted Committee considers that the information made available to the visitor through the electronic terminal are neither those of the first level of information, nor those of the second level of information (see point 25 of this decision). In effect, in the event that the controller wants to proceed at several levels to communicate information to third parties, the first level information should be provided to the visitor during the registration procedure with the electronic terminal, whereas the second level information could be found on the website of the controlled to which the first level should refer.

On the other hand, if the controller wishes to provide all the information provided for in Article 13 GDPR to the visitor, then he should insert a data protection policy personal information which includes all the aforementioned information directly in the registration procedure carried out at the electronic terminal and not only mention its existence.

In this regard, the Restricted Committee wonders if really all third parties

must carry out this registration procedure with the terminal electronically and read the information provided there. It assumes that referred are only persons who participate in a visit to the controlled sites, and not all persons third parties, such as suppliers or service providers.

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38. Finally, as the controlled asks through the aforementioned terminal to the visitors to accept the personal data protection policy, it is necessary to point out that with regard specifically to the collection of personal data personnel through a video surveillance system, consent does not constitute in principle an appropriate basis of lawfulness. The “most appropriate condition of lawfulness will generally be that the processing is necessary for the purposes of the legitimate interests of the data controller, unless the interests or freedoms and rights prevail fundamentals of the person(s) subject to video surveillance (article 6.1, f) of the GDPR)”.¹⁴ In general, a data controller must “be aware that consent cannot be obtained by the same action as when a data subject accepts a contract or the terms and conditions of a service. The overall acceptance of the general conditions cannot be considered as an act clear positive aiming to give consent to the use of personal data personal. »¹⁵

39. In view of the foregoing, the Restricted Panel concludes that at the time of the on-site visit by CNPD agents, article 13 of the GDPR was not respected by the controlled in terms of video surveillance with regard to third parties.

40. As for the measures taken by the control after the on-site visit of the agents of

the CNPD, Restricted Training refers to point 66, as well as to Chapter II.2. Section

2.2. of this decision for the related explanations.

2.2. Employee information

41. With regard to

informing employees about the system of

video surveillance, the Restricted Panel notes first of all that at the time of the visit to

site by CNPD agents, they were informed of the video surveillance by the same

signs that third parties (see points 26 to 28 of this

decision).

14 CNPD video surveillance guidelines published on its website

<https://cnpd.public.lu/fr/dossiers-thematiques/videosurveillance.html>.

15 Guidelines on Consent under Working Party Regulation 2016/679

Article 29, version revised and adopted on April 10, 2018, p. 19.

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Regarding the information of employees on the presence of surveillance cameras via its

website, it wishes to refer to points 29 to 33 of this decision.

42. Next, it wishes to specify that the fact that the controlled person had a

authorization for video surveillance, mandatory under the repealed law

of 2 August 2002 on the protection of individuals with regard to the processing of personal data

of a personal nature, does not ensure that its employees have been validly informed

the time in accordance with Article 13.1 and 2 of the GDPR, unless the controlled could not have

demonstrate the contrary, which is not the case here.

43. Furthermore, the Restricted Committee notes that in its letter of 16 May 2019, the

appended a report of the meeting of the joint committee of October 19, 2015 having as the only point the “Monitoring of the operating site located at [locality 2] by video-surveillance”, as well as an information note on video surveillance signed by the delegation dated May 16, 2019¹⁶. By letter dated October 10, 2019, the auditee more forwards to the head of investigation a certificate from the president of the delegation of the staff, signed on October 7, 2019 and by which the said president confirms that “the staff delegation has received detailed information from the direction of Company A regarding surveillance cameras installed on and at surroundings of Company A's operating site. The information in question was communicated to the employees, who made no comments in this regard. »¹⁷

However, the Restricted Committee has no proof that such information with regard to employees has taken place, on the one hand, and it wishes to specify that the simple information of the staff delegation, or even its agreement on the installation of surveillance cameras, does not ensure that the controlled employees have been individually informed about the precise elements of article 13 of the GDPR.

44. In the letter of October 10, 2019, the inspector also attached a copy of a employment contract that he would have his employees sign containing an article [...] entitled

16 See annexes 1 and 2 of the audit letter of 16 May 2019.

17 See appendix 2 of the audit letter of October 10, 2019.

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“PROCESSING OF PERSONAL DATA”.¹⁸ However, the Restricted Panel notes that said article does not include the processing carried out by the video surveillance system.

45. In view of the foregoing, the Restricted Panel concludes that at the time of the

on-site visit by CNPD agents, article 13 of the GDPR was not respected by the

controlled in terms of video surveillance for employees.

46. As for the measures taken by the control after the on-site visit of the agents of the CNPD, Restricted Training refers to point 66, as well as to Chapter II.2. Section 2.2. of this decision for the related explanations.

II.1.2. As for the geolocation system

A. On the breach of the obligation to inform the persons concerned

1. On the principles

47. With regard to the principles to be observed with regard to the obligation to inform the persons concerned in accordance with Article 13 of the GDPR, the Restricted Training refers to points 14 to 17 of this decision.

2. In this case

48. During the on-site visit, it was explained to CNPD officials that the controlled has installed two types of geolocation devices in some of its vehicles:
a first device (called "[geolocation tool A]") in service since 2009 and active on approximately [...] trucks and a second device (referred to as "[tool of geolocation B]") [...] operational since 2018 in [...] trucks.

Furthermore, according to CNPD officials, no evidence has been provided that the persons concerned by the geolocation, i.e. the employees of the audited, have been

18 See appendix 3 of the audit letter of October 10, 2019.

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validly informed of the installation of geolocation devices in trucks of the controlled.¹⁹

49. By letter dated May 16, 2019, the controller replied to the report by attaching said letter a report of the meeting of the joint committee of June 18, 2007, as well as a note information concerning geolocation signed by the staff delegation dated of May 16, 2019.²⁰ The controller also specified that the geolocation device had at the time been authorized by the CNPD (deliberation no.[...] of [...]).

The controller mentioned in the said letter that the equipment [of the tool of geolocation A] (via on-board computers) and [of the geolocation tool B] (via tablets) allowing geolocation would be “completely visible” and its use well known to all staff “[...]. »²¹

Finally, with regard to [geolocation tool B], he appended the model of form provided when handing over a tablet to staff, as well as the module [...].²²

50. The head of investigation noted in the statement of objections that the “knowledge of the use of certain elements of the geolocation system and their visibility are not arguments to prove that the obligation to inform of Article 13 has been complied with by the controller. The documents invoked do not make it possible to prove compliance with the conditions of the said article either. In effect, there is in particular no indication of the purposes and categories of data details, the legal basis of the processing, the recipients of the data, the duration conservation of the data collected as well as the rights of the persons concerned.

The non-compliance with article 13 of the GDPR was therefore acquired on the day of the on-site visit. » (Statement of Objections, Ad.A.4.).

51. In response to the statement of objections, the auditee added in his letter of October 10, 2019, in addition to the explanations contained in his letter of May 16, 2019, that oral information would be given to employees during the first activation of the

19 See findings 9.12 and 9.13 of the Minutes.

20 Appendices 5 and 6 of the inspection letter of May 16, 2019.

21 See appendix 7 of the audit letter of 16 May 2019.

22 See appendices 8 and 9 of the audit letter of 16 May 2019.

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geolocation software and that information on data processing would be included

in the employee's employment contract. There is also attached a certificate from the president of the staff delegation signed on October 7, 2019.

In addition, the controller indicated that substantial information would be available on its website and that each "driver benefits from personalized training in registration system [...], the driver then being duly informed of this processing data and its purposes. »

52. In his letter of November 4, 2021, the audit finally attached projects of communication to the staff delegation, specifying that, as soon as the CNPD has taken a final decision, such communications would be notified to the delegation and to all staff.

53. The Restricted Panel would like to reiterate that the fact that the controlled party had a authorization in terms of geolocation, mandatory under the repealed law of 2 August 2002 on the protection of individuals with regard to the processing of personal data personal nature, does not ensure that its employees have been validly informed the time in accordance with Article 13.1 and 2 of the GDPR, unless the controlled could not have demonstrate the contrary, which is not the case here.

54. Furthermore, the Restricted Panel notes that in its letter of 16 May 2019, the appended a report of the meeting of the joint committee of June 18, 2007 having as only point the "implementation and use of a GPS location system", as well as a

information note on [...] geolocation signed by the delegation dated May 16, 2019. By letter dated October 10, 2019, the controller also sent the chief investigation a certificate from the chairman of the staff delegation, signed on October 7, 2019 and by which the said president confirms that the "fact that the computers of board and tablets used in Company A's vehicles are equipped with GPS software which registers the positions is also well known to the employees. [...]and [...] form regularly the drivers on the use of this material and the latter receive all the necessary information. They are also encouraged to contact the DPO of the Company A if they have any questions. »

55. However, the Restricted Panel has no evidence that such information with regard to the employees took place, on the one hand, and it wishes to specify that the simple information

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of the staff delegation, or even its agreement to the installation of safety devices geolocation, does not ensure that the audit employees have been informed

individually regarding the specific elements of Article 13 of the GDPR.

56. Moreover, she concurs with the opinion of the head of investigation that the "knowledge of the use of certain elements of the geolocation system and their visibility are not arguments to prove that the information obligation of Article 13 has indeed been complied with by the controller. (See statement of objections Ad.A.4.)

57. With specific regard to [geolocation tool B], Training

Restricted notes that the model form provided when handing over a tablet to the

staff only mentions that the employee is "informed that the tablet equipped with the application [...] has a geolocation system allowing [...]. »

However, as the legal basis for the processing is notably lacking, the recipients of the data, the retention period of the data collected, as well as all the rights of data subjects, the aforementioned module does not contain all the information required under Article 13 of the GDPR.

58. Moreover, as the person audited mentions in his letter of October 10, 2019 that oral information would be given to employees during the first activation of the geolocation software, the Restricted Training wishes to specify first of all that the article 12 of the GDPR does not exclude de facto that the information provided for in Articles 13 and 14 may be provided orally by the controller to the person concerned. On the other hand, the WP260 rev. 01 (paragraph 21) insists that in this case the controller should ensure "to keep a written record, and ensure that it is is able to demonstrate (for the purposes of compliance with the accountability requirement), to: i) the oral request for information, ii) the method by which the identity of the data subject has been verified (if applicable, see point 20 above), and (iii) because that the information has been transmitted to the data subject. »

Nevertheless, it notes that none of the documentation submitted by the audit contains proof attesting that its employees have been duly informed, before the on-site visit CNPD officials, orally in accordance with Article 13 of the GDPR.

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59. The Restricted Panel then notes that in the same letter of October 10 2019, the controller indicated that information on data processing would be included

in the employee's employment contract and that substantial information would be available on its website.

The Restricted Committee notes, however, that neither the article [...] entitled "PROCESSING PERSONAL DATA" of the employment contract that the controller sent to the head of investigation,²³ nor the personal data protection policy, available on the website of the controlled, do not include the processing carried out by the devices geolocation of the controlled.

60. In view of the foregoing, it therefore concludes that at the time of the on-site visit CNPD agents, article 13 of the GDPR was not respected by the control in geolocation for employees.

61. As for the measures taken by the control after the on-site visit of the agents of the CNPD, Restricted Training refers to point 66, as well as to Chapter II.2. Section 2.2. of this decision for the related explanations.

II. 2. On corrective measures and fines

1. Principles

62. In accordance with article 12 of the law of 1 August 2018, the CNPD has the power to adopt all the corrective measures provided for in Article 58.2 of the GDPR:

"(a) notify a controller or processor of the fact that the operations of the envisaged processing are likely to violate the provisions of this regulation;

(b) call a controller or processor to order when the processing operations have resulted in a breach of the provisions of this Regulation;

²³ See appendix 3 of the audit letter of October 10, 2019.

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- (c) order the controller or processor to comply with requests submitted by the data subject with a view to exercising their rights under this these regulations;
- d) order the controller or the processor to put the operations of processing in accordance with the provisions of this Regulation, where applicable, of specific manner and within a specified time;
- (e) order the controller to communicate to the data subject a personal data breach;
- f) impose a temporary or permanent restriction, including prohibition, of processing;
- g) order the rectification or erasure of personal data or the limitation of processing pursuant to Articles 16, 17 and 18 and the notification of these measures to the recipients to whom the personal data have been disclosed pursuant to Article 17, paragraph 2, and Article 19;
- (h) withdraw a certification or order the certification body to withdraw a certification issued pursuant to Articles 42 and 43, or order the body to certification not to issue certification if the requirements applicable to the certification are not or no longer satisfied;
- (i) impose an administrative penalty under section 83, in addition to or in addition to instead of the measures referred to in this paragraph, depending on the characteristics specific to each case;
- j) order the suspension of data flows addressed to a recipient located in a third country or an international organisation. »

63. In accordance with article 48 of the law of 1 August 2018, the CNPD may impose administrative fines as provided for in Article 83 of the GDPR, except against of the state or the municipalities.

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64. Article 83 of the GDPR provides that each supervisory authority shall ensure that the administrative fines imposed are, in each case, effective, proportionate and deterrents, before specifying the elements that must be taken into account to decide whether an administrative fine should be imposed and to decide on the amount of this fine :

“(a) the nature, gravity and duration of the breach, taking into account the nature, scope or the purpose of the processing concerned, as well as the number of data subjects affected and the level of damage they suffered;

b) whether the breach was committed willfully or negligently;

c) any action taken by the controller or processor to mitigate the damage suffered by the persons concerned;

d) the degree of responsibility of the controller or processor, account given the technical and organizational measures they have implemented under the sections 25 and 32;

e) any relevant breach previously committed by the controller or the subcontractor ;

f) the degree of cooperation established with the supervisory authority with a view to remedying the breach and to mitigate any negative effects;

g) the categories of personal data affected by the breach;

h) the manner in which the supervisory authority became aware of the breach, in particular whether, and to what extent the controller or processor notified the breach;

(i) where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned for the

same purpose, compliance with these measures;

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(j) the application of codes of conduct approved pursuant to Article 40 or

certification mechanisms approved under Article 42; and

k) any other aggravating or mitigating circumstance applicable to the circumstances of the species, such as the financial advantages obtained or the losses avoided, directly or indirectly, as a result of the breach”.

65. The Restricted Committee wishes to specify that the facts taken into account in the context of this decision are those found at the start of the investigation. The possible changes relating to the data processing under investigation

subsequently, even if they make it possible to establish in whole or in part the conformity, do not make it possible to retroactively cancel a breach noted.

66. Nevertheless, the steps taken by the control to put itself in compliance with the GDPR during the investigation process or to remedy the shortcomings noted by the head of investigation in the statement of objections, are taken taken into account by the Restricted Training in the context of any corrective measures and/or setting the amount of any administrative fine to be imposed.

2. In this case

2.1. Regarding the imposition of an administrative fine

67. In its supplementary letter to the statement of objections of 8 October 2021, the head of the investigation proposed to the Restricted Panel to impose a fine administrative control of an amount of 1,500 euros.

68. In order to decide whether to impose an administrative fine and to decide,

where applicable, the amount of this fine, the Restricted Panel takes into account the elements provided for in Article 83.2 of the GDPR:

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As to the nature and seriousness of the breach (Article 83.2.a) of the GDPR), the Restricted Panel notes that with regard to breaches of the obligation to inform data subjects in accordance with Article 13 of the GDPR,

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information and transparency relating to the processing of personal data personnel are essential obligations incumbent on those responsible for processing so that individuals are fully aware of the use that will be made of their personal data, once collected. A breach of Article 13 of the GDPR thus constitutes an infringement of the rights of the persons concerned. This right to information has also been reinforced in terms of the GDPR, which demonstrates their particular importance.

The Restricted Formation nevertheless takes into account that the delegation of the staff had been informed and had validated the use of the video surveillance at [locality 2] in 2015 and geolocation in 2007.

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As for the duration criterion (article 83.2.a) of the GDPR), the Restricted Training notes that these shortcomings have persisted over time, at least since the May 25, 2018 and until the day of the on-site visit. The Restricted Formation reminds here that two years separated the entry into force of the GDPR from its entry into application to enable data controllers to comply with the

obligations incumbent on them, even if information obligations comparables already existed pursuant to Articles 10.2 and 26 of the repealed law of 2 August 2002 on the protection of individuals with regard to the processing of personal data. Guidance on principles and obligations provided for in the said repealed law was available from the CNPD, in particular at through prior authorizations in terms of video surveillance and geolocation and on the CNPD website.

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As for the number of data subjects (Article 83.2.a) of the GDPR), the Restricted Training notes that for video surveillance, these are [...] people working on the [locality 1] and [locality 2] sites of the auditee²⁴, as well as that all third parties, i.e. customers, suppliers, service providers of services and visitors to these sites.

24 Information available on the controlled website: [...]

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With regard to the geolocation system, these are the various employees who used the [...] trucks equipped [with geolocation tool A], as well as [...] trucks equipped [with geolocation tool B].

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As to whether the breaches were committed deliberately or not (by negligence) (article 83.2.b) of the GDPR), the Restricted Panel reminds that “not deliberately” means that there was no intention to commit the breach, although the controller or processor has not

complied with the duty of care incumbent upon it under the law.

In this case, the Restricted Committee is of the opinion that the facts and breaches observed do not reflect a deliberate intention to violate the GDPR on the part of of the controlled.

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As for the degree of cooperation established with the supervisory authority (Article 83.2.f) of the GDPR), the Restricted Training takes into account the assertion of the head of investigation that the co-operation of the auditee throughout the investigation was good, as well as than its desire to comply with the law as soon as possible.

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As for the measures taken by the auditee to mitigate the damage suffered by the data subjects (article 83.2.c) of the GDPR), the Restricted Training takes account of the measures taken by the auditee and refers to Chapter II.2. section 2.2. of this decision for the related explanations.

69. The Restricted Committee notes that the other criteria of Article 83.2 of the GDPR are neither relevant nor likely to influence its decision on the taxation an administrative fine and its amount.

70. The Restricted Committee also notes that while several measures have been implemented place by the auditee in order to remedy in whole or in part certain shortcomings, these were only adopted following the inspection by CNPD officials on 3 April 2019 (see also point 65 of this decision).

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71. Consequently, the Restricted Committee considers that the imposition of a fine

administrative is justified with regard to the criteria laid down by article 83.2 of the GDPR for breaches of Article 13 of the GDPR.

72. With regard to the amount of the administrative fine, the Restricted Panel recalls that insofar as breaches of Article 13 of the GDPR are alleged at the time of the inspection, the maximum amount of the fine that can be withheld is 20 million euros or 4% of worldwide annual turnover, whichever is higher.

73. With regard to the relevant criteria of Article 83.2 of the GDPR mentioned above, the Restricted Formation considers that the pronouncement of a fine of one thousand five hundred (1,500) euros appears to be both effective, proportionate and dissuasive, in accordance with the requirements of GDPR Article 83.1.

2.2. About taking corrective action

74. The adoption of the following corrective action was proposed by Chief investigation to the Restricted Training in its additional letter to the communication grievances:

“Order the controller to complete the information measures intended for persons concerned (third parties and employees) by video surveillance and geolocation, in accordance with the provisions of Article 13, paragraphs (1) and (2) of the GDPR by providing in particular the identity of the data controller, the purposes of the processing and its legal basis, the categories of data processed, the legitimate interests pursued by the controlled, the recipients, the duration of retention of data as well as the indication of the rights of the person and the way to exercise them. In particular, it is appropriate to inform in a uniform manner and clear to all employees in an appropriate manner, specific to the company”.

75. As to the corrective measure proposed by the head of investigation and by reference in point 66 of this decision, the Restricted Panel takes into account the steps taken by the control, following the visit of the CNPD agents, in order to

comply with the provisions of Article 13 of the GDPR, as detailed in its letters of May 16, 2019, October 10, 2019 and November 4, 2021. More specifically, it takes note of the following facts:

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- As for the corrective measure proposed by the head of investigation in point 74 of the this Decision on the introduction of information measures aimed at to third parties on the video surveillance system in accordance with the provisions of Article 13 of the GDPR, the Restricted Panel finds that the panels put in place by the controller after the on-site visit do not contain information from the first level of information (see point 25 of this decision on information at two levels), because the identity of the person responsible is lacking of the processing, the existence of the rights of the persons concerned (and not only of the right of access), as well as a reference to the more detailed information of the second level.

If the information on the website of the controlled contained in the policy protection of personal data are to be considered as second level information, said information is not sent to third parties "in a concise, transparent, comprehensible and easily accessible manner, in plain and simple terms", on the one hand, and the mentioned policy does not contain all of the information within the meaning of Article 13 of the GDPR, because the legal basis and the recipients of the personal data processed by the system of CCTV is missing.

In view of the insufficient compliance measures taken by the

controlled in this case and point 66 of this decision, the Restricted Panel therefore considers that it is appropriate to pronounce the corrective measure proposed by the head of investigation in this regard as set out in point 74 of this decision in with regard to the information of third parties about the system of video surveillance.

- As for the corrective measure proposed by the head of investigation in point 74 of the this Decision on the introduction of information measures aimed at to employees on the video surveillance system in accordance with the provisions of Article 13 of the GDPR, the controller attached to his letter of November 4, 2021 draft communications to the staff delegation, specifying that, as soon as the CNPD would have taken a final decision, the said communications would be notified to the delegation and all staff.

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The Restricted Committee considers that the draft communication concerning the video surveillance contains the majority of the information provided for in Article 13 of the GDPR, except for the existence of the right to request from the data controller access to the personal data. Moreover, as this is only a project in place after the on-site visit by CNPD agents, and as the control has moreover indicated that he will await a final decision from the CNPD, it is not necessarily not yet reached the employees.

In view of the insufficient compliance measures taken by the controlled in this case and point 66 of this decision, the Restricted Panel therefore considers that it is appropriate to pronounce the corrective measure proposed by the

head of investigation in this regard as set out in point 74 of this decision in

with regard to informing employees about the video surveillance system.

- As for the corrective measure proposed by the head of investigation in point 74 of the

this Decision on the introduction of information measures aimed at

employees on geolocation devices in accordance with the provisions of

Article 13 of the GDPR, the controller attached to his letter of November 4, 2021

draft communications to the staff delegation, specifying that, as soon as the

CNPD would have taken a final decision, the said communications would be notified

to the delegation and all staff.

The Restricted Committee considers that, even if the communication project

concerning geolocation contains all the information required under

of Article 13 of the GDPR with regard to [geolocation tool B], as it

this is only a project set up after the site visit by CNPD agents,

and as the controller has moreover indicated that he will await a final decision from the

CNPD, said project has not necessarily yet reached the employees.

Moreover, the Restricted Panel noted that the project in question does not

not on the data processing carried out by [geolocation tool A].

In view of the insufficient compliance measures taken by the

controlled in this case and point 66 of this decision, the Restricted Panel

therefore considers that it is appropriate to pronounce the corrective measure proposed by the

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head of investigation in this regard as set out in point 74 of this decision in

with regard to informing employees about geolocation devices.

In view of the foregoing developments, the National Commission sitting

in restricted formation and deliberating unanimously decides:

- to retain breaches of Article 13 of the GDPR;

- impose an administrative fine on Company A in the amount of

one thousand five hundred (1,500) euros, with regard to the breaches constituted in article 13 of the GDPR;

- issue against Company A an injunction to bring the

processing with the obligations resulting from Article 13.1 and 2 of the GDPR, within a period of

2 (two) months following the notification of the decision of the Restricted Panel, and in

particular :

□

inform non-employee third parties in a clear and precise manner about the

video surveillance system, either by providing them in a single place or

in the same document (in paper or electronic format) information on

all the elements required under Article 13 of the GDPR, either by proceeding

by a first and a second level in:

- o adapting the signs in place so that they include the identity of the

responsible for

treatment,

the existence of human rights

concerned, as well as a reference to the more detailed information of the

second level;

- o adapting the information of the second level of information so that the

information is sent to third parties "in a concise,

transparent, understandable and easily accessible, in clear terms

and simple", on the one hand, and that they contain all the information

within the meaning of Article 13 of the GDPR, including information on the legal basis and

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the recipients of the personal data processed by the system

video surveillance.

☐

individually inform employees in a clear and precise manner about the system

video surveillance either by proceeding via a first and a second level, or

by providing them, in a single place or in the same document (in the format

paper or electronic), information on all the elements required at the

pursuant to Article 13 of the GDPR by supplementing the draft communication concerning

video surveillance by the existence of the right to ask the person in charge of the

processing access to personal data mentioned in point 75

second indent of this Decision;

☐

individually inform employees in a clear and precise manner about the measures

geolocation either by proceeding via a first and a second level, or by

providing them, in a single place or in the same document (in the format

paper or electronic), information on all the elements required at the

pursuant to Article 13 of the GDPR by supplementing the draft communication concerning

geolocation by the data processing carried out by [the geolocation tool

A] mentioned in the third indent of point 75 of this Decision.

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Thus decided in Belvaux on April 22, 2022.

For the National Data Protection Commission sitting in formation

restraint

Thierry Lallemand

Marc Lemmer

Commissioner

Commissioner

Marc Hemmerling

Substitute member

Indication of remedies

This administrative decision may be the subject of an appeal for review in the

three months following its notification. This appeal is to be brought before the administrative court.

and must be introduced through a lawyer at the Court of one of the Orders of

lawyers.

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