

Decision of the National Commission sitting in restricted formation

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

Deliberation No. 35FR/2021 of October 6, 2021

The National Commission for Data Protection sitting in restricted formation

composed of Ms. Tine A. Larsen, President, and Messrs. Thierry Lallemand and Marc

Lemmer, commissioners;

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

article 10 point 2;

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 on 16 January 2019, the National Commission

for data protection sitting in plenary session (hereafter: “Formation Plenary”) had decided to open an investigation with Group A1 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 carried out by the National Commission for Data Protection (hereinafter: “CNPD”) had as its purpose of monitoring the application of and compliance with the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of persons physical with regard to the processing of personal data and to the free circulation of this data, and repealing Directive 95/46/EC (hereinafter: “GDPR”) and of the law of August 1, 2018, in particular by setting up systems for video surveillance and geolocation, where applicable, installed by the three companies in the Group A.

3. On February 20, 2019, CNPD agents carried out a visit to the premises of Group A. Given that the minutes relating to the said fact-finding mission on site only mentions, among the three companies of Group A, as responsible of the controlled processing Company A,² the decision of the National Commission for the data protection sitting in restricted formation on the outcome of the investigation (hereafter: “Restricted Training”) will be limited to processing controlled by CNPD agents and carried out by Company A.

4. Company A is a public limited company registered in the Trade and Luxembourg companies under number B [...], with registered office at L-[...] (hereinafter “the

1 And more specifically with companies B, registered in the Luxembourg Trade and Companies Register under number B [...], with registered office at L-[...]; 2. C, registered in the Trade and Companies Register of

Luxembourg under number B [...], with registered office at L-[-...]; 3. and A, registered in the commercial register and Luxembourg Companies under number B [...], with registered office at L-[-...].

2 See in particular Minutes no. [...] relating to the on-site fact-finding mission carried out on 20 February 2019 with Company A (hereinafter: “minutes no. [...]").

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control "). The controlled [is active in the retail trade of furniture and appliances lighting in specialized stores.] [...].

5. During the aforementioned visit of February 20, 2019 by CNPD agents to the controlled premises, it was confirmed to CNPD officials that the controlled uses a video surveillance system composed of seventy-five cameras including sixty-seven were in working order and that he installed a geolocation device in some of the vehicles used by its employees to travel to customers.³

6. The controller replied to the report drawn up by the CNPD agents by letter dated April 2, 2019.

7. At the end of his investigation, the head of investigation notified the person inspected on 6 September 2019 a statement of objections detailing the shortcomings he considered constituted in this case, and more specifically:

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with regard to video surveillance: non-compliance with the requirements prescribed by Article 13 of the GDPR (right to information) with regard to persons concerned, i.e. employees and non-employees, i.e. customers, suppliers, service providers and visitors (hereinafter “the third parties”) and non-compliance with the provisions of Article 5.1.c) of the

GDPR (data minimization principle);

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with regard to geolocation: non-compliance with the requirements prescribed by

Article 13 of the GDPR (right to information) with regard to employees.

8. On October 2, 2019, the auditee produced written observations on the statement of objections.

9. A supplementary letter to the statement of objections was sent to the checked on August 17, 2020. In this letter, the head of investigation offered the Restricted Formation to adopt two different corrective measures, as well as to inflict to the control an administrative fine of 5,300 euros.

3 See findings 8.10 and 9.1 of minutes no. [...].

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10. By letter dated September 21, 2020, the controller produced written observations on the supplementary letter to the statement of objections.

11. The president of the Restricted Formation informed the controller by mail of 5 January 2021 that his case would be registered for the session of the Restricted Panel on 11 February 2021. The controller confirmed his presence at the said meeting dated January 14 2021.

12. During the Restricted Training session of February 11, 2021, the leader of investigation and the control, represented by Me [...], lawyer at the Court, presented their oral submissions in support of their written submissions and responded to questions posed by the Restricted Panel. The president granted the auditee the possibility to send additional information on the sheets until the end of the month

information signed by employees. The controller spoke last.

II. Place

II. 1. As to the reasons for the decision

II.1.1. About the CCTV system

A. On the breach related to the principle of data minimization

1. On the principles

13. In accordance with Article 5.1.c) of the GDPR, personal data

must be “adequate, relevant and limited to what is necessary in view of the purposes for which they are processed (data minimization)”.

14. The principle of data minimization in video surveillance

implies that only what appears strictly necessary to achieve

the purpose(s) pursued and that the processing operations must not be

disproportionate.⁴

4 See CNPD Guidelines (Point 4.), available at: <https://cnpd.public.lu/fr/dossiers-themes/videosurveillance/necessite-proportionnalite.html>.

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15. Article 5.1.b) of the GDPR provides that personal data must be

be “collected for specific, explicit and legitimate purposes, and not be

further processed in a manner incompatible with those purposes; [...] (limitation of purposes)”.

16. Before installing a video surveillance system, the person in charge of the

processing must precisely define the purpose(s) it wishes to achieve by

using such a system, and will not then be able to use the personal data

personal information collected for other purposes.⁵

17. The necessity and proportionality of video surveillance is analyzed on a case-by-case basis. case and, in particular, with regard to criteria such as the nature of the place to be placed under video surveillance, its location, configuration or attendance.⁶

2. In this case

18. During the on-site visit, it was explained to CNPD officials that the purposes of setting up the video surveillance system are the protection of property of the company and securing access.⁷

2.1 With regard to the field of vision of the camera aiming at the staff canteen

19. During the said visit, the CNPD agents noted that the field of vision of the camera called "[...]" includes, in the upper left corner, the refectory staff and allows the monitoring of employees during their free time.⁸

20. The head of investigation was of the opinion that even if the aforementioned purposes "may find one or more bases of lawfulness under Article 6, the supervision of employees in a space reserved for taking meals, relaxation and rest (such as a refectory of the personnel) is however to be considered as disproportionate since the

⁵ See Guidelines for

themes/videosurveillance/necessite-proportionnalite.html.

⁶ See CNPD Guidelines (Point 4.), available at: <https://cnpd.public.lu/fr/dossiers-themes/videosurveillance/necessite-proportionnalite.html>.

⁷ See finding 8.9 of minutes no. [...].

⁸ See finding 8.13 of minutes no. [...].

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persons present there will be permanently subject to video surveillance, so that they choose these places as meeting places to have a good time around a meal, to communicate, have fun or relax.” (communication of grievances, Ad. A.3.). For the head of the investigation, the assertion of the controlled person according to which the system video surveillance would not have the purpose of monitoring employees⁹ is not nature to irritate this finding and it thus retained against the controlled a non-conformity to the requirements of article 5.1. c) GDPR.

21. The auditee for his part explained in his reply letter to the statement of objections of 2 October 2019 that the disputed camera was not intended to film the refectory, but its purpose was to film the access corridors or platforms Delivery. Unfortunately, said camera would have captured in its field of vision the upper corner of the refectory window and the controller would thus have decided to remove this camera.

22. La Formation Restreinte would like to remind you that employees have the right not to be subject to continuous and permanent supervision in the workplace. To reach the purposes pursued, it may seem necessary for a data controller installing a CCTV system in the workplace. On the other hand, respecting the principle of proportionality, the controller must use the means of most protective of the employee's private sphere and, for example, limit the fields of vision of the cameras to the only surface necessary to reach the purpose(s) pursued.

23. When it comes to places reserved for employees in the workplace for a private use, such as a canteen where employees can meet around a meal, surveillance cameras are in principle considered as

disproportionate to the aims sought. The same goes for places such as, for example, changing rooms, toilets, smoking areas, rest, the kitchenette or any other place reserved for employees for private use. In these cases, the fundamental rights and freedoms of employees must prevail over the interests lawsuits pursued by the employer.

9 See audit letter of 2 April 2019.

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24. The Restricted Panel notes that the controlled removed the disputed camera which included in the upper left corner of his field of vision the refectory of the personal.

25. She nevertheless agrees with the finding of the head of the investigation that the non-compliance with Article 5.1.c) of the GDPR was acquired on the day of the on-site visit by the agents of the CNPD.

2.2 With regard to the field of vision of cameras aimed at public roads / land neighboring

26. During the on-site visit of February 20, 2019, CNPD officials noted that the field of vision of the camera called "[...]" allows the surveillance of a part of the public road and neighboring land, in this case the car park and access to the "[...]" store located opposite the control building, while the field of vision of cameras called "[...]" and "[...]" allow monitoring of part of the track public.¹⁰

27. In his letter of April 2, 2019, the controller specified that with regard to "the cameras placed outside the store to view the outdoor car park, the entrance and the

exit from the underground car park, emergency exits and doors, gates and entrances, it unfortunately seems inevitable that a small part of the public road respectively of the site [...] are within the field of vision. He felt that given the distance between the two enclosures or between the store and the public road, "the images that appear in the field of vision are more than blurry. It is impossible to recognize or identify individuals so that the invasion of privacy is more than minimal or even non-existent. The controlled nevertheless specified that he will try to remedy this problem by seeking a solution that best respects the privacy of physical persons.

28. In his Statement of Objections, the Head of Investigation, on the other hand, was of the opinion that an identification of the people who appear in the fields of vision of the affected cameras is not excluded. Like surveillance of public roads and

10 See findings 8.14, 15 and 16 of minutes no. [...].

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surrounding land would be considered disproportionate and that in view of the purposes pursued, it would not be necessary to encompass parts of the public highway or neighboring land in the fields of vision of the said cameras, he thus kept to against the controlled a non-compliance with the prescriptions of article 5.1. c) GDPR.

29. The Restricted Committee would like to point out that the cameras intended to monitor a place of access (entrance and exit, threshold, porch, door, awning, hall, etc.) must have a field of vision limited to the area strictly necessary to view people getting ready to get there. Those who film exterior accesses must not mark the entire width of a sidewalk along, where applicable, the building or public roads

adjacent. Similarly, outdoor cameras installed near or around a building must be configured so as not to capture the public thoroughfare or the surroundings, entrances, accesses and interiors of other neighboring buildings possibly entering into their field of vision.¹¹

30. She nevertheless admits that depending on the configuration of the premises, it is sometimes impossible to install a camera that would not include in its field of vision a part of the public thoroughfare, surroundings, entrances, accesses and interiors of other buildings. In such a case, it considers that the data controller should put in place masking or blurring techniques to limit the field of view to its property.¹²

31. The Restricted Panel finds that the audit letter of October 2, 2019 contains in appendix 5 photos showing that the fields of vision of the cameras called "[...]" and "[...]" have been modified, so as to no longer film public roads or nearby land. With regard to the camera named by the agents of the CNPD "[...]", the Restricted Panel finds that two cameras are however targeted having different fields of vision and referred to as "[...]" and "[...]".¹³ No photo attached to the aforementioned letter from the controller does not, however, demonstrate the modification of the

¹¹ See CNPD Guidelines (Point 4.1.), available at: <https://cnpd.public.lu/fr/dossiers-themes/videosurveillance/necessite-proportionnalite.html>.

¹² See CNPD Guidelines (Point 4.1.), available at: <https://cnpd.public.lu/fr/dossiers-themes/videosurveillance/necessite-proportionnalite.html>.

¹³ See photos [...] and [...] included in statement 16 of minutes no. [...].

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fields of vision of these two cameras allowing the monitoring of part of the track

public.

32. In view of the foregoing, the Restricted Panel concurs with the finding of Chief of investigation¹⁴ according to which the non-compliance with Article 5.1.c) of the GDPR with regard to the aforementioned cameras was acquired on the day of the on-site visit by the agents of the CNPD.

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

1. On the principles

33. 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 [...]». »

34. 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;

¹⁴ Statement of Objections, Ad. A.3.

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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,

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;

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(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.

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. »

35. 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.¹⁵ These 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”).

36. 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

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

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and reapproved the documents adopted by the said Group between May 25, 2016 and May 25

2018, as precisely the aforementioned guidelines on transparency.¹⁶

2. In this case

2.1. Information from third parties

37. With regard to the information of third parties, CNPD officials

noted during their on-site visit that the presence of the video surveillance system

was not reported to them.¹⁷ Furthermore, the head of investigation considered that the documentation

submitted by the control by mail of April 2, 2019 did not contain evidence

sufficient to counter non-compliance with the requirements of Article 13 of the GDPR

and that therefore, it is necessary to retain against the controlled a non-compliance with the prescribed

of article 13 of the GDPR with regard to third parties (communication of

grievances, Ad.A.1.).

38. By letter dated October 2, 2019, the controller specified that after the departure of the

CNPD officers, signaling pictograms in the form of stickers have been

pasted on all access doors to the building to indicate the presence of cameras

to third parties.¹⁸ In addition, to his letter of September 21, 2021, the auditee attached a

information sheet which has meanwhile been displayed at the entrance to the building.

39. 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).

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

17 See finding 8.2 of minutes no. [...].

18 Appendix 1 to the letter of October 2, 2019 from the auditee contains photos of the said pictograms.

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40. The Restricted Committee notes that during the on-site visit by the agents of the CNPD, third parties were not informed of the presence of the security system.

video surveillance.

41. 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 should generally include the most essential information, namely details of the purpose of the processing, the identity of the controller and the existence of the rights of data subjects, as well as that the information having the greatest impact on the processing or any processing likely to surprise those concerned. The second level of information i.e. all the information required under Article 13 of the GDPR, could

be provided or otherwise made available, such as a copy of the privacy policy sent by e-mail to employees or a link on the site internet to an information notice for third parties.¹⁹ It is important to note that first-level information (panel, information note, etc.) must clearly refer to the more detailed information of the second level which includes all the mandatory information required under Article 13 of the GDPR.²⁰

42. It notes, however, that in the present case, the signaling pictogram and the note information intended for the public, put in place after the on-site visit by the agents of the CNPD, did not contain all the elements required by article 13.1 and 2 of the GDPR.

43. In view of the foregoing, the Restricted Panel concurs with the opinion of Chief of investigation and concludes that at the time of the on-site visit by CNPD agents, Article 13 of the GDPR was not respected by the control in terms of video surveillance with regard to relates to third parties.

¹⁹ WP 260 rev.01., points 35 to 38.

²⁰ EDPS Guidelines 3/2019 on the processing of personal data by electronic devices video, version 2.0, adopted on 29 January 2020 (hereinafter: "Guidelines 3/2019") points 114 and 117.

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2.2. Employee information

44. With regard to informing employees about the system of video surveillance, the head of investigation noted that the simple information of the delegation personnel does not ensure that the company's employees have been informed of the

specific elements of article 13.1 and 2 of the GDPR and that the simple visibility of the cameras of supervision does not ensure that the employees of the company have been duly informed of all the precise points set out in said article 13.21 It thus considered that it should retain against the controlled a non-compliance with the prescriptions of article 13 of the GDPR for this concerning employees (statement of objections, Ad. A.1.).

45. By letter dated October 2, 2019, the inspector specified that all employees would have signed an "information sheet relating to the collection of personal data personnel" which would provide information, among other things, on "the identity of the data controller of their data, the purpose of the data collection, information on the existence of surveillance cameras and the geolocation system and their rights guaranteed by the GDPR. A blank copy of the said sheet was attached to the aforementioned letter. Control y indicated that the employees are also informed of the presence of the cameras by the stickers posted on the entrance doors, as well as an information notice hung on the information board inside the building intended for communication with staff.²²

46. 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).

47. With regard to the multi-level approach to communicating information transparency information to data subjects that can be used in a

21 See audit letter of 2 April 2019.

22 See appendix 3 of the audit letter of October 2, 2019.

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real environment such as personal data collected

by means of a video surveillance system, it refers to point 41 of this

decision.

48. The Restricted Panel then considers that the fact that the request

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, was countersigned by the staff delegation as

mentioned by the controller in his letter of April 2, 2019, does not ensure that the employees

of the company have been validly informed in accordance with article 13.1 and 2 of the GDPR,

unless the person controlled could have demonstrated the contrary, which is not the case in

species. Moreover, it agrees with the observation of the head of the investigation according to which the simple

visibility of surveillance cameras does not ensure that the employees of the company have been

duly informed on all the specific points set out in said article 13.

49. It also notes that appendix 3 to the inspection letter of 2 October 2019

contains a note dated June 7, 2018 that would have been posted on the information board

inside the control building. However, it does not have any documentation

demonstrating that the said note was actually posted prior to the check on

place by the CNPD agents, nor of any documentation that it would have been posted by

after. Said note could at most be qualified as collective information, but

not as individual information. In addition, it did not contain the required elements

by article 13.1 and 2 of the GDPR.

50. Furthermore, following a question posed during the training session

Restricted on February 11, 2021, the controller specified by email of February 24, 2021 that the “information sheet relating to the collection of personal data”, attached to the letter of the control of October 2, 2019 and which would have been signed by all the employees, did not yet contain a clause relating to video surveillance before the on-site check by CNPD officials. This clause had been added after the control of the agents of the CNPD in February 2019.

51. The Restricted Committee thus notes that during the on-site visit by the agents of the CNPD, the employees were not informed of the presence of the video surveillance in accordance with legal requirements.

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52. It also notes that the pictogram and the clause relating to the video surveillance, integrated in the “information sheet relating to the collection of data of a personal nature”, did not contain the information required within the meaning of Article 13 GDPR.

53. 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.

II.1.2. As for the geolocation system

On the breach of the obligation to inform the persons concerned

1. On the principles

54. With regard to the requirements to be met with regard to the obligation to inform the persons concerned in accordance with Article 13 of the GDPR, the Restricted Training refers to points 33 to 36 of this decision.

2. In this case

55. With regard to informing employees about the system of

geolocation, the head of the investigation considered that the observation of the controlled person contained in

its letter of April 2, 2019 that the employees had been informed orally, without

as much to present evidence in support of this claim, is not likely to irritate

the observation that the non-compliance with article 13 of the GDPR was established on the day of the visit

on the site. Furthermore, he considered that in "its letter of April 2, 2019, the company explains

that employees are informed about the geolocation system through a note

information hung in the dispatch room. However, said information note was not

attached to the letter of April 2, 2019. The company has therefore not provided any evidence or as to

the existence or the content of this information note. "From then on, the head of the investigation

considered that the non-compliance with article 13 of the GDPR was established on the day of the visit to

site with regard to employees concerning the geolocation system

(statement of objections, Ad.A.6).

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56. 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).

57. With regard to the multi-level approach to communicating information

transparency information to data subjects that can be used in a real environment such as personal data collected by means of a geolocation system, it refers to point 41 of this decision.

58. Furthermore, the Restricted Committee would like to point out that Article 12 of the GDPR does not exclude de facto that the information provided for in Articles 13 and 14 of the GDPR may be provided orally by the controller to the data subject.

However, the Article 29 Working Party insists that in this case, the head of the treatment should ensure “to keep a written record, and ensure that it is able to prove (for the purposes of compliance with the liability requirement), of: i) the request oral information, ii) the method by which the identity of the person concerned has been verified (if applicable, see point 20 above), and (iii) that the information has been transmitted to the person concerned. »²³

59. It notes, however, that none of the documentation submitted by the audit contained proof attesting that the employees had been duly informed, before the on-site visit, orally in accordance with Article 13 of the GDPR.

60. Furthermore, the fact that the geolocation authorization application, mandatory under the repealed law of 2 August 2002 on the protection of persons with regard to the processing of personal data, had been countersigned by the staff delegation as mentioned by the controller in his letter of April 2, 2019, does not ensure that the company's employees have been validly

23 WP 260 rev.01, point 21.

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informed in accordance with Article 13.1 and 2 of the GDPR, unless the control could not have demonstrate the contrary, which is not the case here. Moreover, in his letter of 2 April 2019, the inspector states that "employees know that their vehicle is fitted with a geolocation device because they are regularly called during the day by my client who asks them to modify their delivery schedule due to emergency repairs to fit into their schedule. The vehicle responsible for carrying out emergency repair is selected based on its proximity to where the repair must be carried out. The drivers are aware of this. But these explanations do not ensure to demonstrate that the company's employees have been duly informed of all the precise points set out in said article 13.

61. Annex 6 to the letter of October 2, 2019 from the auditee also contains a photo showing that a poster mentioning "As a reminder, this vehicle is equipped with a geolocation system" has since been pasted on the dashboards of vehicles equipped with such a system. The controller specified there that all the employees would have signed a "information sheet relating to the collection of personal data" which would provide information, among other things, on "the identity of the controller of their data, the purpose of the data collection, information on the existence of security cameras surveillance and the geolocation system and their rights guaranteed by the GDPR. " A blank copy of the said note was attached to the aforementioned letter.

62. Nevertheless, following a question posed during the training session Restricted on February 11, 2021, the controller specified by email of February 24, 2021 that said "information sheet relating to the collection of personal data" does not did not yet contain a clause relating to geolocation before the on-site inspection by CNPD officers. This clause was added after the control of the agents of the CNPD in February 2019.

63. In his letters of April 2, 2019 and October 2, 2019, the controller specified

moreover, that employees are also informed about the geolocation system through an informative note hung on the notice board for their information.

Said note dated February 29, 2016 was attached to the letter of October 2, 2019 (appendix 7). However, the Restricted Formation has neither documentation demonstrating that the said note was actually displayed prior to the on-site inspection by the CNPD agents, or documentation demonstrating that this was the case after the said check.

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The controller even mentioned in this context in his letter of April 2, 2019 that for “an unknown reason, this poster was removed at some point and no longer has been hooked afterwards. “The said note could at most not be qualified as collective information, but not as individual information. Moreover, it did not contain not the elements required by article 13.1 and 2 of the GDPR.

64. The Restricted Committee thus notes that during the on-site visit by the agents of CNPD, employees were not informed of the presence of the geolocation system in accordance with legal requirements.

65. 2. It also notes that the poster mentioning “As a reminder, this vehicle is equipped with a geolocation system” stuck on the dashboards of vehicles equipped with a geolocation system and the clause relating to integrated geolocation in the “information sheet relating to the collection of personal data”, did not contain the required information within the meaning of Article 13 of the GDPR.

66. 3. 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 geolocation as far as employees are concerned.

II. 2. On the fine and corrective measures

1. Principles

67. 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;

(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;

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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. »

68. 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.

69. 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

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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 object, compliance with these measures;
- (j) the application of codes of conduct approved pursuant to Article 40 or certification mechanisms approved under Article 42; and

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- 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”.

70. 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.

71. Nevertheless, the steps taken by the controller to put themselves 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

72. In its supplementary letter to the statement of objections of 17 August 2020, the head of investigation proposed to the Restricted Panel to impose a fine administrative control for an amount of 5,300 euros.

73. In his response to said additional letter of September 21, 2020, the checked asked, in view of the letters previously sent with the supporting documents and in view of his proactive attitude to reconsider the sanction proposed by the head of investigation.

74. 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 the breach of Article 5.1.c) of the GDPR, it constitutes a breach of the fundamental principles of the

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GDPR (and data protection law in general), namely the principle

minimization of data dedicated to Chapter II “Principles” of the GDPR.

As regards the breach of the obligation to inform the persons concerned in accordance with article 13 of the GDPR, the Restricted Training recalls that 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.

It should be noted that at the time of the on-site visit by CNPD agents, no signaling pictogram, nor any poster or information notice could be communicated to CNPD officials with regard to the information of employees and third parties with regard to the video surveillance system, of a hand, as well as concerning the employees as to the geolocation system, on the other go.

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 an obligation to respect the principle data minimization, as well as a comparable information obligation already existed pursuant to Articles 4.1. b), 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 law was available from the CNPD, in particular through mandatory prior authorizations for video surveillance and geolocation.

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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, it is all the employees working on the controlled site, as well as all third parties, i.e. customers, suppliers, service providers and visitors visiting said site.

With regard to the geolocation system, these are the employees of the company who use the vehicles for their trips to customers.

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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.

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.

75. 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.

76. 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 20 February 2019 (see also point 70 of this decision).

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77. 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 breach of Articles 5.1.c) and 13 of the GDPR.

78. With regard to the amount of the administrative fine, the Restricted Panel recalls that paragraph 3 of Article 83 of the GDPR provides that in the event of breaches multiple, as is the case here, the total amount of the fine cannot exceed the amount fixed for the most serious violation. To the extent that a breach of articles 5 and 13 of the RGPD is reproached to the controlled, the maximum amount of the fine that can be withheld amounts to 20 million euros or 4% of the annual turnover worldwide, whichever is higher.

79. With regard to the relevant criteria of Article 83.2 of the GDPR mentioned above, the Restricted Panel considers that the imposition of a fine of five thousand three hundred euros (5,300 euros) appears to be effective, proportionate and dissuasive, in accordance with the requirements of Article 83.1 of the GDPR.

2.2. About taking corrective action

80. The adoption of the following corrective measures was proposed by Chief of investigation to the Restricted Training in its additional letter to the statement of objections:

“a) Order the controller to complete the information measures intended for people concerned by video surveillance and geolocation, in accordance with the provisions of Article 13, paragraphs (1) and (2) of the GDPR in informing in particular the identity of the person in charge of the treatment, if necessary, the contact details of the data protection officer, the purposes of the processing and its legal basis, the categories of data processed, the legitimate interests pursued by the control, the recipients, the retention period of the data thus the rights of the person concerned and the manner of exercising them, and the right lodge a complaint with a supervisory authority;

b) Order the controller to only process data relevant, adequate and limited to what is necessary in relation to the purposes of protection of property and securing access and, in particular, adapting the

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video device so as not to film the staff canteen and the public thoroughfare,
for example by deleting or reorienting the camera called "[...]" and the
cameras called "[...]".

81. As for the corrective measures proposed by the head of investigation and by
reference to point 71 of this decision, the Restricted Formation takes into account
the steps taken by the control, following the visit of the CNPD agents, in order to
comply with the provisions of Articles 5.1.c) and 13 of the GDPR, as detailed in
his letters of April 2, 2019, October 2, 2019, September 21, 2020, as well as in
her email of February 24, 2021. More specifically, she notes the following facts:

1. As regards the implementation of information measures intended for persons
third parties involved in the video surveillance, in accordance with the provisions of
article 13.1 and 2 of the GDPR, the controller attached to his letter of October 2, 2019
pictograms of a camera which have been pasted on the access doors to the
building. In addition, to his letter of September 21, 2021 is attached a sheet
information intended for the public, as well as a photo showing that the said sheet has
was pasted on the front door of the building.

The Restricted Panel observes that the pictograms, combined with the form
information intended for the public do not contain all the information
required by Article 13 of the GDPR.

Thus, the basis of lawfulness (Article 13.1. c) of the GDPR), the right to request a
limitation of processing and the right to object to processing (Article 13.2. b) of the
GDPR) and the right to lodge a complaint with the CNPD (article 13.2. d)
of the GDPR) are not mentioned.

Furthermore, it is noted that the information provided by the controller does not
fulfill neither the conditions required for the first level of information, nor those for the
second level of information (see point 41).

2. Regarding the implementation of information measures for employees

affected by video surveillance, in accordance with the provisions of article 13.1

and 2 of the GDPR, the controller attached to his letter of October 2, 2019 a note

internal dated June 7, 2018. Nevertheless, the Restricted Training has neither

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documentation demonstrating that the notice was actually posted

prior to the on-site inspection by CNPD officials, nor of a

documentation that it would have been posted afterwards.

In addition, in a letter dated October 2, 2019, the controller stated that the employees

had been informed of the presence of the cameras by the stickers displayed on

the entrance gates and annex 2 of the said letter contained an "information sheet

relating to the collection of personal data". By email from 24

February 2021, the auditee nevertheless specified that the clause relating to the

video surveillance was added only after the visit of the CNPD agents in

February 2019.

The Restricted Panel notes first of all that the control dates and signs

employees the above-mentioned sheet and that they must tick a box which is

found at the bottom of the page indicating the following: "I have fully understood this

information notice and I give my express consent that [...] the Company

A collects about me the personal data detailed in point 4 of

this information notice. It should be emphasized in this context that the

signature of an information sheet by the employee can at most be considered

as an acknowledgment of receipt allowing the employer to document that he has

provided the information under Article 13 of the GDPR, but cannot in no case assert valid consent of the employee to the processing of data by his employer.²⁴ Indeed, an employee, given the imbalance in the balance of power existing within the framework of the employment relationship, cannot respond freely to a request for consent from his employer "without fear or incur negative consequences as a result of this refusal. ²⁵ Consent as the basis for the lawfulness of data processing (Article 6.1.a) of the GDPR) is therefore inoperative in this case due to the nature of the employer/employee relationship.

²⁴ See the definition of consent provided for in Article 4(10) of the GDPR, as well as the conditions applicable to consent provided for in Article 7 of the GDPR.

²⁵ Guidelines 5/2020 on consent within the meaning of Regulation (EU) 2016/679, Version 1.1, adopted 4 May 2020, point 21, see also opinion 15/2011 on the definition of consent (WP 187), adopted on 13 July 2011.

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She then notes that the pictograms, combined with the "information sheet relating to the collection of personal data" do not contain all the information required by article 13 of the GDPR.

Thus, the basis of lawfulness (Article 13.1. c) of the GDPR), the right to request a limitation of processing and the right to object to processing (Article 13.2. b) of the GDPR) and the right to lodge a complaint with the CNPD (article 13.2. d) of the GDPR) are not mentioned. The aforementioned internal note dated June 7, 2018 does not relate to additional information.

Furthermore, it is noted that the information provided by the controller does not

fulfill neither the conditions required for the first level of information, nor those for the second level of information (see point 41).

3. Regarding the implementation of information measures for employees

affected by geolocation, in accordance with the provisions of article 13.1

and 2 of the GDPR, the controller attached to his letter of October 2, 2019 a note

internal dated February 29, 2016. Nevertheless, the Restricted Training does not have

or documentation demonstrating that said note was actually posted

prior to the on-site inspection by CNPD officials, nor of a

documentation that it would have been posted afterwards. Furthermore, Annex 6 of the

letter dated October 2, 2019 from the controller contains a photo showing that a

poster mentioning "As a reminder, this vehicle is equipped with a

geolocation" has since been pasted on the dashboards of vehicles

equipped with such a system. Annex 2 of this same letter of October 2, 2019 contains

also an "information sheet relating to the collection of personal data

personal ". By email of February 24, 2021, the controller nevertheless specified that

the clause relating to geolocation was only added after the visit of the agents

of the CNPD in February 2019.

Regarding the box to be checked by employees at the bottom of the form

mentioned above, the Restricted Committee would like to reiterate that in view of the dependence

resulting from the employer/employee relationship, the consent of the employees cannot

not be considered as meeting the requirements set out in Articles 4.11 and

7 GDPR.

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She then finds that the stickers, combined with the "information sheet relating to the collection of personal data" do not contain all the information required by article 13 of the GDPR.

Thus, the basis of lawfulness (Article 13.1. c) of the GDPR), the recipients or categories of recipients of the personal data collected by the geolocation system (article 13.1. e) of the GDPR), the retention period personal data collected by the geolocation system (Article 13.2. a) of the GDPR), the right to request restriction of processing and the right to object to processing (Article 13.2. b) of the GDPR), as well as the right to lodge a complaint with the CNPD (article 13.2. d) of the GDPR) are only not mentioned. The aforementioned internal note dated February 29, 2016 does not include no additional information.

Furthermore, it is noted that the information provided by the controller does not fulfill neither the conditions required for the first level of information, nor those for the second level of information (see point 41).

In conclusion, considering the insufficient compliance measures taken by the auditee in this case and point 71 of this decision, the Restricted Panel therefore considers that it is necessary to pronounce the measure corrective action proposed by the head of investigation in this respect in point 79 (a) with regard to concerning the information of employees and third parties about the system video surveillance, on the one hand, as well as concerning employees with regard to the geolocation system, on the other hand.

4. As to the obligation to only process data that is relevant, adequate and limited to what is necessary with regard to the purposes of protecting property and securing access, and, in particular, adapting the video device so as not to not film the staff canteen and the public thoroughfare, Restricted Training

note that the controlled removed the disputed camera which included in the corner upper left of his field of vision the staff canteen, on the one hand, and that the fields of vision of the cameras called "[...]" have been modified,

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so as to no longer film the public road or neighboring land.²⁶ However, no part (for example an image capture reproducing the field of vision)

demonstrates the modification of the field of vision of the cameras called [...] allowing the surveillance of part of the public road.

In view of the insufficient compliance measures taken by the controlled in this case and point 71 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 respect in point 79 b) with regard to the cameras called [...].

In view of the foregoing developments, the National Commission sitting in restricted formation and deliberating unanimously decides:

- to retain the breaches of Articles 5.1.c) and 13 of the GDPR;
- impose an administrative fine on Company A in the amount of five thousand three hundred euros (5,300 euros) in respect of breaches of the articles 5.1.c) and 13 of the GDPR;
- issue an injunction against Company A to bring the processing with the obligations resulting from articles 5.1 c) and 13 of the GDPR, within a period two months following the notification of the decision of the Restricted Committee, and in particular :

☐ regarding the breach of the principle of minimization of personal data

staff (art 5.1.c of the GDPR):

- modify the field of vision of the cameras called [...];

26 See audit letter of 2 October 2019 and its appendix 5.

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☐ regarding the breach of the obligation to inform the persons concerned of the

processing of their personal data (Article 13 GDPR):

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

the video surveillance system by providing them with information relating to

the basis of lawfulness, the right to request restriction of processing and the right

to oppose the processing, as well as the right to lodge a complaint

with the CNPD;

-

individually inform employees in a clear and precise manner about the

video surveillance system by providing them with information relating to the

basis of lawfulness, the right to request restriction of processing and the right to

object to the processing, as well as the right to lodge a complaint with

the CNPD;

-

individually inform employees in a clear and precise manner about the

geolocation system by providing them with information relating to the

basis of lawfulness, to the recipients or the categories of recipients of the

personal data collected by the geolocation system,
the retention period of the personal data collected by the
geolocation system, the right to request a limitation of processing
and the right to object to processing, as well as the right to submit a
complaint to the CNPD.

Thus decided in Belvaux on October 6, 2021.

For the National Data Protection Commission sitting in formation
restraint

Tine A. Larsen

Thierry Lallemand

Marc Lemmer

President

Commissioner

Commissioner

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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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