Deliberation SAN-2020-016 of December 7, 2020 National Commission for Computing and Liberties Nature of the deliberation: Sanction Legal status: In force Date of publication on Légifrance: Thursday, December 31, 2020 Deliberation of the restricted committee no SAN-2020-016 of December 7 2020 concerning the company PERFORMECLICThe National Commission for Computing and Liberties, meeting in its restricted formation composed of Messrs Alexandre LINDEN, president, Philippe-Pierre CABOURDIN, vice-president, and Mesdames Anne DEBET, Dominique CASTERA and Christine MAUGÜE, members ;Having regard to Convention No. 108 of the Council of Europe of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data;Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 relating to the protection of personal data and the free movement of such data; Having regard to law no. 78-17 of January 6, 1978 relating to information atics, files and freedoms amended, in particular its articles 20 and following; Having regard to decree no. 2019-536 of May 29, 2019 taken for the application of law no. files and freedoms; Having regard to deliberation no. 2013-175 of July 4, 2013 adopting the internal regulations of the National Commission for Computing and Freedoms; Having regard to decision no. 2019-136C of June 26, 2019 of the President of the National Commission for Computing and Liberties to instruct the Secretary General to carry out or have carried out a mission to verify the processing carried out by this organization or on behalf of the company PERFORMECLIC; Having regard to the decision of the President of the National Commission for Computing and Liberties appointing a rapporteur to the Restricted Committee, dated May 26, 2020; Having regard to the report from the SIGNAL SPAM association received by the National Commission for Computing and Libe rtés on June 12, 2019; Having regard to the report of Mrs Valérie PEUGEOT, reporting auditor, notified to the company PERFORMECLIC on October 22, 2020; Having regard to the email sent by the company on November 25, 2020; Having regard to the other documents in the file; of the restricted committee meeting of December 3, 2020: Mrs. Valérie PEUGEOT, commissioner, heard in her report; As a representative of the company PERFORMECLIC:[…]; The company PERFORMECLIC having had the floor last; The restricted committee has adopted the following decision: I - Facts and procedure The company PERFORMECLIC (hereinafter the company) is a limited liability company in operation for eight years. It employs between one and two employees. In 2018, it achieved a turnover of €107,089 and in 2019 a turnover of €182,672. The company's activity is to send commercial prospecting by e-mail on behalf of advertisers. As such, it has a database of 20 million email addresses of prospects, which it states that it compiled from purchases made from the company […] in 2014 and 2015, before the latter was liquidated. in 2017. On June 12, 2019, the association SIGNAL SPAM – which

collects reports from Internet users relating to the receipt of unsolicited e-mails and with which the National Commission for Computing and Liberties (hereinafter the Commission or the CNIL ) has a partnership since October 30, 2007 – sent a report to the CNIL concerning the actions of the company. The association thus indicated that the company regularly appears at the top of the ranking of companies sending the most messages reported as spam by French Internet users. Thus, between January 1 and June 11, 2019, more than 163,000 reports from Internet users were recorded for emails sent by this company. Following an order of September 11, 2019 from the judge of freedoms and the detention of the tribunal de grande instance of Pontoise authorizing the CNIL to carry out an on-site inspection at the company's premises, located at the private residence of its manager, a delegation from the CNIL carried out such an inspection mission on 18 September 2019, pursuant to Decision No. 2019-136C of the President of the Commission of June 26, 2019. The purpose of this mission was to verify compliance by the company with all the provisions of Law No. 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms (hereinafter the amended law of January 6, 1978 or the Data Protection Act) and Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 (hereafter GDPR). The manager being absent, the delegation drew up a deficiency report, notified to the company on September 19, 2019 by registered letter with acknowledgment of receipt. The manager of the company was summoned for a hearing at the premises of the CNIL on October 15, 2019, pursuant to article 19-III of the amended law of January 6, 1978. On October 14, 2019, the company's board informed the CNIL that the manager of the company could not be heard due to his state of health and requested a postponement. No representative of the company having appeared at the premises of the CNIL on October 15, 2019, a deficiency report was drawn up and notified to the company by registered mail with acknowledgment of receipt. On October 15, 2019, the CNIL sent the manager of the company a second summons for a hearing on October 31, 2019. During the hearing, the company was represented by its counsel, the manager being unable to attend due to his state of health. The company's counsel provided the CNIL delegation with information relating to the conditions for the acquisition of the prospect database by the company, the collection of people's consent to the receipt of prospecting messages by e-mail, the right to opposition of these as well as to the retention periods of the personal data of prospects. commercial prospecting, proof of obtaining the consent of the persons prospected and the retention periods of the personal data processed. For the purposes of examining these elements, the President of the Commission appointed Mrs. 2020, in accordance with Article 39 of Decree No. 2019-536 of May 29, 2019. At the end of her investigation, the rapporteur had a bailiff serve submitted to PERFORMECLIC, on October 23, 2020, a report detailing the

breaches of the GDPR and the postal and electronic communications code (the CPCE) that it considered constituted in this case. This report proposed to the restricted training of the Commission to issue an injunction to bring the processing into compliance with the provisions of Articles 5, 14, 21 and 28 of the Regulation and Article L. 34-5 of the CPCE, accompanied by a penalty payment, as well as an administrative fine . It also proposed that this decision be made public and no longer allow the company to be identified by name at the end of a period of two years from its publication. On October 22, 2020, the company was called to the meeting of the restricted training of December 3, 2020. On November 25, 2020, the company sent an email to the CNIL services. The company and the rapporteur presented oral observations during the restricted training session.II - Reasons for the decisionA .On the jurisdiction of the CNILAunder the terms of article 3, paragraph 1, of the GDPR, this regulation applies to the processing of personal data carried out within the framework of the activities of an establishment of a data controller or a processor on the territory of the Union, whether or not the processing takes place in the Union. Article 3, paragraph 2, of the GDPR provides that This Regulation applies to the processing of personal data relating to data subjects who are located on the territory of the Union by a data controller or a processor. which is not established in the Union, when its activities are related to: The supply of goods or services to such data subjects in the Union, whether or not payment is required from such persons (…) . Under the terms of Article 8 I° of the Data Protection Act, the CNIL (…) is the national supervisory authority within the meaning and for the application of Regulation (EU) 2016/679 of April 27, 2016 (…) . Under the terms of article 3 I° of the Data Protection Act, all the provisions of this law apply to the processing of personal data carried out within the framework of the activities of an establishment of a data controller. or a subcontractor on French territory, whether or not the processing takes place in France. Under the terms of Article L. 34-5, paragraph 6, of the CPCE The National Commission for Computing and Liberties ensures, with regard to direct prospecting using the contact details of a subscriber or a natural person, compliance with the provisions of this article by using the skills recognized by law n° 78-17 of January 6, 1978 mentioned above. To this end, it may in particular receive, by any means, complaints relating to breaches of the provisions of this article. During the on-site inspection carried out by the CNIL delegation on September 18, 2019, the manager of the company indicated to the delegation that the operational activities of the company were implemented from Morocco and that, in the near future, he intended to put an end to the company's activities in France in order to carry them out entirely from Morocco. The rapporteur considers that assuming that certain operational activities of the company are actually carried out from Morocco and that the company's servers are located in Morocco, which the company does not provide proof, the criteria

provided for in Article 3, paragraphs 1 and 2, of the GDPR are met – the company in question being established in France and the company sending its prospecting messages to the only French public. Consequently, the GDPR is applicable to the processing of personal data implemented by the company. First, the restricted committee notes that the company is established in France. Indeed, the company has been registered with the RCS of Pontoise under number 789 335 015 since November 13, 2012 and has premises in France. The Restricted Committee observes that the company does not have other premises for the implementation of the processing related to the sending of commercial prospecting by electronic means. The Restricted Committee recalls that the Court of Justice of the European Union (hereafter after the CJEU) consistently considers that the notion of establishment must be assessed in a flexible manner. Indeed, according to the CJEU, the concept of establishment extends to any real and effective activity, even minimal, carried out by means of a stable installation, the criterion of stability of the installation being examined with regard to the presence of human and technical resources necessary for the provision of the specific services in question (CJEU Weltimmo, 1 October 2015, C□230/14, points 30 and 31). Thus, the Court considered that the presence of a single representative may, in certain circumstances, be sufficient to constitute a stable establishment. In this case, the Restricted Committee notes that on the day of the inspection, the company was registered in France, had premises in France and published a website written in French (www.website.performeclic.fr) intended for the French public .Therefore, the Restricted Committee considers that the processing of personal data implemented by the company was carried out within the framework of the activities of an establishment of a data controller on the territory of the Union, in this case on French territory, in accordance with the criteria laid down by Article 3, paragraph 1, of the GDPR and Article 3 I° of the Data Protection Act, so that the CNIL is competent to sanction breaches of the GDPR and the CPCE committed by the company. Secondly, the Restricted Committee notes that the company indicated to the CNIL delegation, on December 27, 2019, that only France was targeted for [s]its campaigns and that it bought a French prospect database ais for the purpose of carrying out French campaigns. Therefore, the Restricted Committee considers that the company's prospecting operations target the French public, which makes the GDPR also applicable under the targeting criterion provided for in Article 3, paragraph 2, of the GDPR. the GDPR and French law are applicable and that the CNIL is competent to exercise its powers, including that of taking a sanction measure. B. On the determination of the data controllerUnder the terms of article 4, point 7 of the GDPR, the controller is defined as the natural or legal person, public authority, service or other body which, alone or jointly with others, determines the purposes and means of the processing. The rapporteur considers that in this case the

company is responsible for the processing of personal data related to the management and provision of its database for the sending of advertising campaigns to prospects by e-mail on behalf of advertisers. This observation is established in particular from the analysis of the contractual relations between the company and its customers, from which it appears that the company undertakes vis-à-vis the advertisers to have the electronic addresses of Internet users who have given their consent. to receive advertising messages from third parties and is remunerated to do so by its partners, and that the company uses its own database of prospects for this purpose, of which it defines the personal data it contains, the durations during which they are kept and any updates that must be made. of its personal database for the purposes of commercial prospecting by e-mail. Indeed, the notion of data controller must be subject to an concrete ation taking into account all the elements making it possible to attribute this quality to an entity. In this sense, by way of clarification, in its opinion 1/2010 of February 16, 2010 on the concept of controller and processor, the Article 29 working group (G29) states that the concept of controller is a functional notion, aiming to attribute responsibilities to people who exercise de facto influence, and [that] it is therefore based on a factual analysis rather than a formal one. In addition, this opinion specifies that it is appropriate, when it comes to assessing the determination of the purposes and means with a view to assigning the role of data controller, to adopt a pragmatic approach placing greater emphasis on the discretionary power to determine the purposes and on the latitude left to make decisions . This factual approach is reaffirmed by the European Data Protection Board (EDPS) in its guidelines 07/2020 on the concept of controller and processor, submitted for public consultation on September 2, 2020, from which it emerges that the qualification of data controller must be established on the basis of an assessment of the factual context surrounding the processing. All relevant factual circumstances must be taken into account in reaching a conclusion as to whether a particular entity exercises decisive influence over the processing of personal data (§ 23). As a preliminary point, the Restricted Committee notes that in its letter of December 27, 2019, the company explicitly indicated to the CNIL's delegation of control that it is the company responsible for processing in carrying out processing relating to prospecting. commercial carried out with the people, whose data appearing in its base. The Restricted Committee considers that several elements confirm this qualification. Firstly, with regard to the determination of the purposes, the Restricted Committee notes that the provision of its prospect base for commercial prospecting purposes is at the heart of the company activity. Thus, the company undertakes contractually vis-à-vis advertisers to have e-mail addresses of Internet users who have given their consent to receive advertising e-mails from third parties and is remunerated for this by its partners. restricted formation further notes that the company owns the database used

in the context of prospecting campaigns, advertisers and web agencies do not provide the personal data of prospects to contact and do not have access to the personal data of prospects. Secondly, the Restricted Committee considers that the company determines the essential means of processing in that it defines the personal data which appears in its prospect database, the durations during which this data is there kept and any updates to be made. Consequently, and in this case it is not necessary to comment on a possible the joint responsibility of the advertising partners of the company PERFORMECLIC, the restricted formation retains that the latter has defined the purposes and means of the processing related to the management and the provision of its personal database for the purposes of commercial prospecting by mail electronics.C.On the qualification of the facts with regard to the general regulations on data protection and the postal and electronic communications code1. On the breach of the obligation to obtain the consent of the person concerned by a direct marketing operation by means of e-mail Article L. 34-5 paragraph 1 of the CPCE specifies that Direct marketing by means of a system is prohibited automated electronic communications within the meaning of 6° of Article L. 32, a fax or electronic mail using the contact details of a natural person, subscriber or user, who has not previously expressed his consent to receive direct surveys by this means. For the purposes of this article, consent means any expression of free, specific and informed will by which a person accepts that personal data concerning him be used for the purpose of direct marketing. Thus, the consent of the persons must be obtained before any prospecting by e-mail. The rapporteur notes in her sanction report that the company does not have any element allowing the consent of the persons concerned to receive prospecting other than two invoices drawn up in 2014 and 2015 by the company […], mentioning a partner opt-in for opener base files 17 million emails and a partner double opt-in for opener base files 3 million emails, which leads it to consider that the constituent elements of a breach of Article L. 34-5 of the CPCE have been met. During the restricted training session, the company argued that, if it does not have elements materializing the effective collection of the consent of the prospects, it remunerated the company […] from which it acquired the prospect databases precisely so that the latter contain personal data they of persons who have consented to the sending of commercial prospecting. The Restricted Committee notes that the company is not able to prove either that it has actually obtained the consent of the persons prospected or that the company […] would have validly obtained the consent of said prospects prior to the transfer of its base to the company in 2014 and 2015, it being specified that this company was liquidated in 2017. In this sense, the Restricted Committee observes that, during the hearing of October 31 2019, the company's counsel indicated that to its knowledge, apart from the mention indicating opt-in appearing on the

invoices, the company PERFORMECLIC does not have any other material elements relating to the conditions for obtaining consent. However, the Restricted Committee considers that such mentions are not sufficient to certify the effective collection of the consent of the persons concerned for the purposes of commercial prospecting by e-mail, whether by the company itself or by the company […] to purposes of transmission to the company PERFORMECLIC for the achievement of such a purpose. vis-à-vis its co-contractors to have a database of e-mail addresses of people who have given their consent to receive commercial prospecting from third-party partners, by e-mail, in compliance with the regulations relating to data protection at personal nature. However, the Restricted Committee notes that this commitment with regard to the partners is not based on any element materializing the existence of the consent ment of the persons concerned and making it possible to demonstrate it, for example by checks which would have been carried out beforehand with the company […] on this point or by directly obtaining such consent and by documenting it. The absence of elements, apart from the invoices produced by the company, attesting to the effective existence of valid consent from the persons concerned, compared to the number of reports received by the SIGNAL SPAM association concerning the company, namely 163,126 reports over the period from 1 January 2019 to June 11, 2019, which makes it, over this period, the sender of e-mails most reported by French Internet users to SIGNAL SPAM, leads the Restricted Committee to consider that the elements constituting a breach of Article L. 34-5 of the CPCE are met.2. On the breach of the obligation to ensure the adequacy, relevance and non-excessive character of the personal data processed by the companyUnder the terms of Article 5, paragraph 1, c) of the GDPR the personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (data minimization). The rapporteur notes in her sanction report that the CNIL's control delegation noted that the postal code and telephone number fields were filled in on a prospect's contact sheet, whereas it appears from the minutes of the hearing that this information is not used by the company and that it probably already appeared on the cards when the lists of prospects were purchased. It thus criticizes the company for disregarding its obligations resulting from the aforementioned article. During the restricted training session, the company indicated that it uses the postal code to send certain promotional messages only to people living in targeted departments. , in particular with regard to the sending of promotional messages in the real estate sector. The Restricted Committee notes that the postal code is relevant data for the company's activity and that it is used by the latter for this title. However, it retains that the telephone number is not operated by the company, which only sends prospecting by email, which the company does not dispute. The Restricted Committee therefore considers that the telephone number should

not have been collected and processed by the company in connection with the purchase of the databases in 2014 and 2015 and that it should, in any event , be immediately deleted upon receipt of said bases. Under these conditions, the restricted formation considers that the company has failed in the obligation provided for in Article 5, paragraph 1, c) of the GDPR to process only adequate personal data , relevant and limited to what is necessary in relation to the purposes for which they are processed.3. On the breach of the obligation to process personal data for a period not exceeding that necessary in relation to the purposes for which they are processedArticle 5, paragraph 1, e) of the GDPR provides that personal data must be kept in a form allowing the identification of the persons concerned for a period not exceeding that necessary with regard to the purposes for which they are processed; personal data may be stored for longer periods insofar as they will be processed exclusively for archival purposes in the public interest, for scientific or historical research purposes or for statistical purposes in accordance with Article 89 , paragraph 1, provided that the appropriate technical and organizational measures required by this Regulation are implemented in order to guarantee the rights and freedoms of the data subject (limitation of storage). It appears from the findings of the CNIL delegation that the company keeps the contact details of approximately 5 million prospects for more than three years who have only opened the prospecting emails sent by the company, without any other action on their part, in particular without having clicked on one of the links present in the said prospecting emails. The rapporteur considers that the action making it possible to materialize the starting point set by the company to calculate the retention period for prospect data - namely three years from the last contact from of the prospect - can not be the simple opening of an email insofar as the opening of an email does not necessarily reflect the interest of the prospect for the products or services of the sender of the message, the prospect may have opened the email by mistake or automatically, in particular due to the operation of its email software (for example, when deleting another message g). Therefore, the rapporteur considers that the company is in breach of its obligations under Article 5, paragraph 1, e) of the GDPR. During the restricted training session, the company indicated that, in its view, the opening of an email materializes the prospect's interest in the sender's message. consist of simply opening an e-mail. Indeed, the company must ensure that the persons concerned are genuinely interested in the commercial prospecting messages that it sends before being able to consider that there has indeed been contact with the prospect, such as to extend the duration of retention of personal data. In this respect, the mere opening of an email, insofar as it can be done by mistake or automatically, cannot be sufficient to materialize this effective interest, a fortiori, insofar as the company has not itself collected the personal data of the persons concerned, but acquired them from the company […], which implies a less

strong commitment of the persons concerned towards the company than during direct collection. By way of clarification, the restricted training recalls that the simplified standard n° NS-048 concerning the automated processing of personal data relating to the management of customers and prospects, published by the CNIL in 2005, as well as the draft reference system on management processing commercial updating No. NS-048, submitted for public consultation on November 29, 2018, recommend that personal data relating to a non-customer prospect be kept for a period of three years from counting from the last contact from the prospect, materialized for example by a click on a hypertext link contained in an e-mail. In view of all these elements, the Restricted Committee considers that the consideration by the company of the opening of one of its e-mails by prospects in order to determine their last contact leads it to process personal data for a period exceeding that necessary with regard to the purposes for which they are processed. The Restricted Committee considers that the company has thus failed to comply with its obligations under Article 5, paragraph 1, e) of the GDPR.4. On the breach of the obligation to inform data subjects When the personal data has not been collected from the data subject, Article 14 of the GDPR requires the controller to provide the data subject with several pieces of information, relating in particular to the identity and contact details of the controller, the purposes of the processing, its legal basis, the categories of personal data concerned, where applicable, the recipients or categories of recipients of the personal data, the period of retention of personal data, the existence of the various rights enjoyed by individuals, the right to lodge a complaint with a supervisory authority and the source from which the personal data originates. This information must be provided at the latest at the time of the first communication with the person, pursuant to Article 14, paragraph 3, b) of the GDPR. It appears from the findings of the CNIL delegation that the information of prospects is ensured by means of a standard mention affixed at the bottom of the e-mails which are sent to prospects, worded as follows: You are receiving this message because you are registered on the database [for example, la-bonne-table or ciel-info ] which relays the offer above. In accordance with the law of January 6, 1978 relating to data processing, files and freedoms, you have the right to oppose, access, modify, rectify and delete your personal data. This information is declared to the National Commission for Computing and Liberties (CNIL) and further down, in smaller print, To unsubscribe from our databases, click here . The rapporteur criticizes the company for not providing complete information to the persons concerned, the aforementioned mention not containing all the elements provided for by Article 14 of the GDPR. The rapporteur also notes that no hypertext link refers to more complete information notices than those reproduced above. The company does not produce any defense on this point. The Restricted Committee notes that the mention of information at the bottom of

prospecting emails sent to people whose personal data has been collected indirectly does not comply with Article 14 of the GDPR in that it does not specify the identity of the data controller , its legal basis, the categories of personal data concerned, the data retention period, all the rights of individuals (in particular the right to portability and the right to limit processing), the right to introduce a complaint to a supervisory authority and the source from which the data comes. The Restricted Committee also observes that no additional information procedure has been put in place by the company for provide complete information to the persons concerned, for example by means of a link appearing in the prospecting emails referring to a dedicated page containing all the information provided for by the GDPR or even those missing from those appearing in the prospecting email. However, the Restricted Committee recalls that the company must provide people with complete information, whether from this first level of information given in the emails or by allowing them easy access to additional information, within a second level of information. With regard to all of these elements, the Restricted Committee holds that the information provided to the persons concerned by the company is not complete and that the company has disregarded its obligations to the title of Article 14 of the GDPR.5. On the breach relating to the right of opposition of data subjectsArticle 21, paragraph 2, of the GDPR provides: When personal data is processed for prospecting purposes, the data subject has the right to object at any time to the processing of personal data concerning him for such prospecting purposes, including profiling insofar as it is linked to such prospecting. The delegation of control noted that a link making it possible to oppose the receipt of new prospecting emails is present at the bottom of the emails sent by the company. However, the rapporteur notes in her sanction report that the company carries out its commercial prospecting activity in silos, the personal data of prospects contained in the database being replicated within nine different data compartments, called accounts (for example perfo13 or perfo20 ), and each account being associated with two different domain names (for example […]). This division into domain names makes it possible to distribute the mailings by addressing them to different domains, to smaller lists of prospects, thus limiting the risk of blocking the sender of the message by the Internet service providers of the people targeted by the prospecting campaign. The rapporteur indicates that when a person clicks on an unsubscribe link to exercise their right to object, they are unsubscribed from the account used to send the prospecting campaign concerned but not from the other accounts used by the company for other campaigns. For example, a person who unsubscribes from an email from a domain linked to the perfo13 account may continue to receive commercial prospecting from domains linked to the perfo20 account. Individuals' right to object is therefore not effectively taken into account. In addition, the rapporteur notes that the company has indicated to the delegation of control that, in order to be

unsubscribed from all accounts used for sending prospecting emails by the company, the person concerned must either make this request by replying by return message to the prospecting emails received, or complete an online form available from the PERFORMECLIC.FR domain. The rapporteur criticizes the company for not informing the persons concerned of the two other channels allowing them to unsubscribe from all accounts and for not inviting them at any time to exercise their right of opposition other than by clicking on the link , so that prospects' right of opposition is not effectively guaranteed by the company. The company does not produce any defense on this point. The Restricted Committee notes that the management of prospecting campaigns by company renders ineffective the opposition of persons to the processing of their data by the latter for the purposes of prospecting by e-mail when this right is exercised by means of the unsubscribe link at the bottom of e-mail messages. Indeed, when a person clicks on an unsubscribe link to exercise his right of opposition, he is only unsubscribed from the account used to send the prospecting campaign concerned but not from the other accounts used by the company to other campaigns. Moreover, the Restricted Committee recalls that Article 12, paragraph 2, of the GDPR requires the data controller to facilitate the exercise of the rights conferred on the data subject under Articles 15 to 22 of the GDPR, which in any case the company did not do, by not offering the persons concerned a satisfactory method of exercising their rights and by not informing them of the existence of channels allowing them to unsubscribe from the all of the accounts and inviting them to use them to exercise their right of opposition. Consequently, the restricted formation holds that the aforementioned facts constitute a breach of Article 21, paragraph 2, of the GDPR, since the company don't allow and not to oppose in a simple and effective way the processing of his personal data by the company for the purposes of commercial prospecting by e-mail.6. On the breach of the contractual framework obligation of the subcontractorArticle 28 of the GDPR provides that the processing carried out by a subcontractor on behalf of a data controller is governed by a contract. The latter must define the conditions under which the subcontractor undertakes to carry out the processing operations on behalf of the controller, as well as information relating to the obligations and rights of the controller and the subcontractor. In this case, the company is a marketing agency which is responsible, on behalf of advertisers, for sending their advertising campaigns to prospects by e-mail. To do this, the company uses a subcontractor, to whom the company has entrusted the technical distribution of its clients' prospecting campaigns, the hosting of its database and the processing of advertisers' advertising campaigns, which covers in particular the processing of requests for unsubscription from the persons concerned who no longer wish to receive prospecting messages. contains several clauses provided for in Article 28 of the GDPR, in particular with regard to the purpose of the processing, the

type of personal data processed and the obligations and rights of the controller. However, it notes that certain clauses are missing. The company does not produce any defense on this point. The Restricted Committee notes in this respect that the contract concluded between the company and its subcontractor does not contain clauses providing that the processor: ensures that the persons authorized to process personal data undertake to respect confidentiality or are subject to an appropriate legal obligation of confidentiality; provides the data controller with all the information necessary to demonstrate compliance with the obligations provided for in this article and to enable audits to be carried out, including inspections, by the controller or another auditor appointed by it, and contribute to these audits. The Restricted Committee therefore considers that a breach of Article 28 of the GDPR has been established.III. On corrective measures and advertising Under the terms of III of Article 20 of the law of January 6, 1978 as amended: When the person responsible for processing or its subcontractor does not comply with the obligations resulting from Regulation (EU) 2016/679 of 27 April 2016 or from this law, the President of the National Commission for Computing and Liberties may also, if necessary after have sent him the warning provided for in I of this article or, if necessary in addition to a formal notice provided for in II, seize the restricted formation of the commission with a view to the pronouncement, after adversarial procedure, of one or several of the following measures: […] 2° An injunction to bring the processing into compliance with the obligations resulting from Regulation (EU) 2016/679 of 27 April 2016 or from this law or to satisfy the requests presented by the data subject; identified with a view to exercising its rights, which may be accompanied, except in cases where the processing is implemented by the State, by a penalty payment the amount of which may not exceed €100,000 per day of delay from the date set by the restricted committee; […] 7° With the exception of cases where the processing is implemented by the State, an administrative fine not exceeding 10 million euros or, in the case of a company, 2% of the turnover total worldwide annual business for the previous fiscal year, whichever is greater. In the cases mentioned in 5 and 6 of Article 83 of Regulation (EU) 2016/679 of April 27, 2016, these ceilings are increased, respectively, to 20 million euros and 4% of said turnover. The restricted committee takes into account, in determining the amount of the fine, the criteria specified in the same article 83 . Article 83 of the GDPR further provides that each supervisory authority shall ensure that the administrative fines imposed […] are, in each case, effective, proportionate and dissuasive, before specifying the elements to be taken into account in deciding whether it is necessary to impose an administrative fine and to decide on the amount of this fine. On the pronouncement of a fine and its amount, the Restricted Committee considers that, in the present case, the aforementioned breaches justify that either imposed an administrative fine on the company. With regard to the fine proposed

by the rapporteur, the company maintains that the amount of the proposed fine is excessive, taking into account these financial capacities. The Restricted Committee analyzes the criteria drawn up by Article 83 as follows. First of all, the Restricted Committee notes that the breaches observed are serious in view of the infringement of the fundamental rights and freedoms of the persons concerned. té breached several fundamental principles provided for by the GDPR and the CPCE aimed at guaranteeing effective protection of personal data. Indeed, the Restricted Committee considers that the carrying out of massive prospecting campaigns by e-mail, without the consent of the persons, the absence of clear and complete information on the processing carried out and the absence of the establishment of a mechanism for effective opposition constitute a substantial violation of the right to respect for private life and the protection of personal data of individuals, as demonstrated by the number of reports received by the association SIGNAL SPAM, which places the company in top of the ranking of companies emitting the most spam. The Restricted Committee also points out that the company's failure to comply with the regulations relates precisely to the sending of commercial prospecting by electronic means, which is at the heart of the company's activity. Furthermore, the Restricted Committee considers that the the seriousness of the breaches is established in view of the particularly large number of people concerned, the database of electronic addresses held by the company comprising nearly 20 million addresses. Finally, the Restricted Committee observes that on the day of the meeting the company n has taken no measures to comply with the provisions of the GDPR and the CPCE. All of these breaches and their seriousness justify the imposition of a fine. With regard to the amount of the administrative fine, the Restricted Committee notes that in 2018 the company's turnover amounted to €107,089 with a net accounting result of €7,676. In 2019, the company's turnover amounted to €182,672 with a net accounting result of €483. Therefore, in the light of the relevant criteria of Article 83, paragraph 2, of the GDPR mentioned above, the Restricted Committee considers that the imposition of a fine of 7,300 euros appears effective, proportionate and dissuasive, in accordance with the requirements of Article 83, paragraph 1, of the GDPR, with regard to the size of the company and its financial situation. On the issuance of an injunction, the Restricted Committee notes that, with regard to all the breaches, the company has not provided any information since the start of the procedure that would allow it to be considered that it has complied with the provisions of the GDPR. During the restricted training session, the company indicated that it needed a month and a half to bring itself into compliance. Therefore, the company's failure to comply with Article L. 34-5 of the CPCE and Articles 5, paragraph 1, c), 5, paragraph 1, e ), 14, 21 and 28 of the GDPR, the Restricted Committee considers that an injunction should be issued, accompanied by a penalty payment of

one thousand euros (1,000 euros) per day of delay at the end of a period of two months following the notification of the deliberation of the restricted formation. On the publicity of the decision, the restricted formation considers , firstly, that the seriousness of certain breaches justifies, in itself, the publication of this decision. million email addresses of prospects. It considers that the publicity of its decision makes it possible to inform people of the existence of the breaches committed by the company. It results from all the foregoing and from taking into account the criteria set out in article 83 of the regulation that an administrative fine of 7,300 euros, accompanied by an injunction to bring the processing into conformity, as well as an additional sanction of publication for a period of two years are justified and proportionate. FOR THESE REASONS The Restricted Committee of the CNIL, after having deliberated, decides to: Pronounce against the company PERFORMECLIC an administrative fine in the amount of seven thousand three hundred euros (7,300 euros ), with regard to breaches of Article L. 34-5 of the Post and Electronic Communications Code and Articles 5, paragraph 1, c), 5, paragraph 1, e), 14, 21 and 28 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016; issue an injunction against the company PERFORMECLIC to bring the processing into compliance with the provisions of Articles L. 34-5 of the French Postal and electronic communications and Articles 5, paragraph 1, c), 5, paragraph 1, e), 14, 21 and 28 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, together with a penalty payment of one thousand euros (1,000 euros) per day of delay at the end of a period of two months following the no. tification of the deliberation of the Restricted Committee and in particular: with regard to the breach of the obligation to obtain the consent of the persons concerned for the purposes of commercial prospecting by electronic means:obtain the consent of the persons concerned, prior to sending any commercial prospecting by e-mail and justify the deletion of the personal data of the persons who have not consented; with regard to the breach of the obligation to minimize data personal:

delete the telephone number of prospects whose contact details are recorded in the database and justify it; with regard to the breach of the obligation to limit the retention period of personal data:

stop taking into account as the last point of contact from prospects the simple opening of an email; with regard to the breach of the obligation to inform the persons concerned of the processing of their personal data:

inform data subjects in a clear and complete manner, in accordance with the provisions of Article 14 of the GDPR, in particular by providing information relating to the identity of the data controller, its legal basis, the categories of personal data concerned, the data retention period, to all of the rights of individuals (in particular the right to portability and the right to limit processing),

to the right to lodge a complaint with a supervisory authority and to the source where the data comes from; with regard to the breach of the obligation to respect the right of opposition of the persons concerned:

implement a procedure to ensure the effectiveness of the right of opposition expressed by the prospected persons, in particular by ensuring that the unsubscribe link at the bottom of the prospecting electronic messages allows them to unsubscribe definitively from the prospecting all of the company's mailing lists; with regard to the breach of the obligation to regulate by a formalized legal act the processing carried out on behalf of the data controller:

complete the service provision contract, signed between the company and its subcontractor, which governs the processing of personal data carried out by the latter, so that it includes all the information referred to in Article 28-3 ) of the GDPR; justify to the CNIL that all of the aforementioned requests have been complied with, and this within the time limit, by sending the proof of compliance with the restricted training within this time limit; make public, on the site of the CNIL and on the Légifrance website, its deliberation, which will no longer identify the company by name at the end of a period of two years from its publication. The chairman Alexandre LINDEN This decision is likely to be subject to an appeal to the Council of State within two months of its notification.