

Decision of the National Commission sitting in restricted formation on

the outcome of survey no. [...] conducted with "Company A"

Deliberation No. 15FR/2021 of May 12, 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 27 April 2016 on the protection of natural persons with regard to the processing of personal data

and the free movement of such data, and repealing Directive 95/46/EC;

Having regard to the law of August 1, 2018 on the organization of the National Commission for the Protection of data and the general data protection regime, in particular Article 41 thereof;

Having regard to the internal rules of the National Commission for Data Protection

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 procedure investigation adopted by decision No. 4AD/2020 dated January 22, 2020, in particular its article 9;

Considering the following:

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I. Facts and procedure

1. During its deliberation session of February 14, 2019, the National Commission for data protection sitting in plenary formation (hereafter: "Plenary Formation") had decided to open an investigation with the ABCD1 group on the basis of article 37 of the law of August 1 2018 on the organization of the National Commission for Data Protection and the general data protection regime (hereinafter "Law of 1 August 2018") and to designate Mr. Christophe Buschmann as head of investigation.

2. According to the decision of the Plenary Formation, the investigation carried out by the Commission National Data Protection Authority (hereinafter: "CNPD") was intended to verify the

compliance with the provisions of the regulations relating to the protection of natural persons with regard to the processing of personal data and the free movement of such data, and
repealing Directive 95/46/EC (hereinafter "GDPR") and the law of August 1, 2018, in particular
by setting up video surveillance and geolocation systems where appropriate
installed by the four companies of the ABCD group.

3. On September 24, 2019, CNPD agents carried out a visit to the
premises of Company A. Given that the minutes no. [...] relating to the said fact-finding mission
on the spot only mentions, among the four companies of the ABCD group, as responsible for the
controlled processing company "Company A" 2, the decision of the National Commission for the
data protection sitting in restricted formation on the outcome of the investigation (hereinafter: "Restricted Training") will be limited to processing controlled by CNPD agents and
made by company "Company A".

4. "Company A" is a [...] registered in the Trade and Companies Register of
Luxembourg under number [...], with registered office at L- [...] (hereinafter "the controlled"). [...].

5. During the aforementioned visit of September 24, 2019 by CNPD agents to the
premises of the controlled, the "data protection delegate" of the controlled and the "facility manager

1 And more specifically with companies Company A, registered in the Trade and Companies Register of
Luxembourg under number [...], with registered office at L- [...]; Company B, registered in the commercial register
and Luxembourg Companies under number [...], with registered office at L- [...]; Company C, listed on
Luxembourg Trade and Companies Register under number [...], with registered office at L- [...] and
Company D, registered in the Luxembourg Trade and Companies Register under number [...], with
registered office at L- [...].

2 See in particular Minutes no. [...] relating to the on-site fact-finding mission carried out on 24
September 2019 with Company A.

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and invoicing manager" of the control confirmed to the CNPD agents that a system of

CCTV is installed but the person being monitored does not use a surveillance device.

geolocation.³

6. According to the explanations provided to CNPD officials, it was confirmed that the system of video surveillance is managed by the controlled party as data controller⁴ and that the purposes of the implementation of the video surveillance system are the protection of the property of the company and securing access⁵.

7. At the end of his investigation, the head of investigation notified the person inspected on February 3 2020 a statement of objections detailing the shortcomings which he considered constituted in case, and more specifically non-compliance with the requirements prescribed by Article 5.1.c) of the GDPR with respect to:

i) the field of view of a camera that includes part of the canteen terrace of the controlled⁶, and

ii) the fields of view of several cameras allow the surveillance of the domain “ [...]” ⁷.

8. By letter dated February 26, 2020, the auditee produced written observations on the statement of objections.

9. By letter dated August 10, 2020, an additional letter to the statement of objections was sent to the controller. In this letter, the head of investigation proposed to the Restricted Panel to take a corrective measure, as well as to impose an administrative fine on the controlled person for an amount of 2,900 EUR.

³ See Minutes no. [...] relating to the on-site fact-finding mission carried out on 24 September 2019 with Company A.

⁴ See finding 1 of minutes no. [...] relating to the on-site fact-finding mission carried out on 24 September 2019 with Company A.

⁵ See finding 9 of minutes no. [...] relating to the on-site fact-finding mission carried out on 24 September 2019 with the company Company A.

6 See finding 11 of minutes no. [...] relating to the on-site fact-finding mission carried out on 24 September 2019 with Company A.

7 See finding 10 of minutes no. [...] relating to the on-site fact-finding mission carried out on 24 September 2019 with Company A.

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10. By letter dated September 14, 2020, the auditee produced written observations by report to the supplementary letter to the statement of objections.

11. The president of the Restricted Formation informed the control by letter of October 16 2020 that his case would be registered at the Restricted Panel session of November 27, 2020.

The controller confirmed his presence at the said meeting on October 27, 2020.

12. During the Restricted Training session of November 27, 2020, the head of investigation and the controller presented their oral observations in support of their written observations and answered the questions posed by the Restricted Panel. It was found that there were still open questions and it was agreed that the control would produce the answers to these questions open, among other things by means of explanatory documents. The controller spoke last.

13. By letter dated December 14, 2020, the controller communicated elements and documents complementary to the questions raised by the Restricted Panel during the meeting of November 27, 2020.

II. Place

II. 1. As to the reasons for the decision

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

1. On the principles

14. In accordance with Article 5.1.c) of the GDPR, personal data must be “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (data minimization)”.

15. The principle of data minimization in video surveillance implies that it is

should only be filmed what appears strictly necessary to achieve the purpose(s)

pursued and that the processing operations must not be disproportionate.⁸

⁸ See

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

“collected for specified, explicit and legitimate purposes, and not to be processed

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

17. Prior to the installation of a video surveillance system, the data controller must

define, precisely, the purpose(s) it wishes to achieve by using such

system, and will not then be able to use the personal data collected at

other purposes.⁹

18. The necessity and proportionality of video surveillance is analyzed on a case-by-case basis and,

in particular, with regard to criteria such as the nature of the place to be placed under video surveillance, its

location, configuration or frequentation.¹⁰

2. In this case

2.1. Regarding the field of vision of the camera filming the terrace of the canteen

19. During the on-site investigation, the CNPD agents noted that the field of vision

of a camera includes part of a space intended for employees to rest, in this case the

terrace of the canteen of the Contrôle.¹¹

20. It was explained to CNPD officials that the purposes of setting up the system of video surveillance are the protection of company assets and the securing of access.¹²

In his letter of February 26, 2020, the controller mentioned a third purpose in relation to the observation mentioned above, and more specifically the assurance of employee safety, customers, visitors and suppliers.

21. The head of the investigation was of the opinion that “surveillance of employees in a space reserved for taking meals, relaxing and resting (such as a terrace of a canteen) is however at consider as disproportionate when the persons present there will be, in a way of

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11 See finding 11 of minutes no. [...] relating to the on-site fact-finding mission carried out on 24 September 2019 with Company A.

12 See finding 9 of minutes no. [...] relating to the on-site fact-finding mission carried out on 24 September 2019 with Company A.

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permanent, subject to video surveillance as they choose these places as places to

meeting to have a good time over a meal, to communicate, have fun or

loosen. However, employees who stay in this type of place for a period of time more or less

long, must be able to legitimately expect not to be filmed during these private moments.

The use of cameras in these spaces is likely to film the behavior of

persons concerned and can create discomfort or even psychological pressure for these

latter who feel observed throughout their presence in these spaces. Such a

permanent monitoring constitutes an invasion of the privacy of the persons concerned. »

(statement of objections, [...]).

22. In his letter of February 26, 2020, the auditee explained in more detail the configuration

places where the terrace of the canteen is located, in particular that the latter is located [...]. the

controlled specified that the camera in question made it possible to monitor the access door of the canteen

towards the outside where there are [...] tables and that the main consumption area of the canteen

is located inside the building and is not in the field of vision of said camera. Control

added that after discussions with CNPD officials on the day of the on-site visit on 24

September 2019, it had already significantly reduced the field of vision of the

camera in question using the technique of masking the tables, so that only the door

would now be part of the camera's field of view. He clarified that masking

full tables would now be set by default and could not be deleted or modified

by the employees of the control.

23. The Restricted Panel notes that appendix 1 of the audit letter of February 26

2020 contains a photo of the new field of view of said camera which shows the masking tables to limit the field of view of the camera, which now includes only the access door to the controlled building.¹³

24. In addition, the Restricted Committee notes that this compliance took place while immediately after receipt of the statement of objections of 3 February 2020.

25. La Formation Restreinte would like to point out that employees have the right not to be subject continuous and permanent monitoring in the workplace. To achieve the goals pursued, it may seem necessary for a data controller to install a system CCTV in the workplace. On the other hand, respecting the principle of proportionality,
13 Annex 1 to the audit letter of February 26, 2020.

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the data controller must use the most protective means of monitoring the employee's private sphere and, for example, limit the fields of vision of the cameras to the sole area necessary to achieve the purpose(s) pursued.

26. When it comes to places reserved for employees in the workplace for private use, as in this case the terrace of the canteen of the controlled on which the employees can meet over a meal, surveillance cameras are still considered disproportionate to the aims sought. The same goes for places such as, for example, changing rooms, toilets, smoking areas, rest areas, canteen, 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 legitimate interests sued by the employer.

27. In view of the foregoing, the Restricted Panel concurs with the finding¹⁴ of the head of investigation that the non-compliance with article 5.1.c) of the GDPR was acquired on the day of the on-site visit CNPD officers.

2.2.

With regard to the field of vision of the cameras filming the area "[...]"

28. During the on-site investigation, the CNPD agents noted that the fields of vision of five cameras in the CCTV system included land that was not part of the property of the controlled, in this case the park "[...]".¹⁵

29. The disputed cameras are installed all along the path connecting the car park of the controlled to the buildings of the controlled by crossing the park "[...]".

30. It was explained to CNPD officials that the purposes of setting up the system of video surveillance are the protection of company assets and the securing of access.¹⁶

In his letter of February 26, 2020, the controller mentioned a third purpose in relation to the observation mentioned above, more specifically the assurance of employee safety, customers, visitors and suppliers.

14 Finding A.1. of the statement of objections of 3 February 2020.

15 See finding 10 of minutes no. [...] relating to the on-site fact-finding mission carried out on 24 September 2019 with Company A.

16 See finding 9 of minutes no. [...] relating to the on-site fact-finding mission carried out on 24 September 2019 with Company A.

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31. The head of investigation was of the opinion that "surveillance of land not forming part of the property of the controller, in this case a public park, is also at consider disproportionate. (statement of objections, [...])

32. The Restricted Committee notes that on the day of the on-site visit, CNPD officials assumed that the "... park was a public park, accessible by the public sidewalk, and that it was not private.

33. In his letter of February 26, 2020, the controller reported that the domain "[...]" is not not a public park but that it is private land belonging to a private owner and that this

owner had given express, written and prior authorization for the installation of a system CCTV on the path in question¹⁷.

34. Besides

the authorization of the owner in relation to

installation of the system

video surveillance on this path, the controlled sent by mail of February 26, 2020, parts

showing that the CCTV system had been installed at the explicit request of certain

of its employees worried about their safety on this path and in particular a request from the

control staff delegation of August 16, 2016 as well as an extract from the minutes of the

Joint Committee meeting of August 31, 2016¹⁸.

35. At the request of the Restricted Panel during the meeting of November 27, 2020, the

controlled has sent new exhibits to answer questions regarding the ownership of

lands. [...]

36. It was only after receiving the new documents that the Restricted Formation

been able to observe that the property of the controlled constitutes an isolated island within a

large private property and that the path connecting its buildings to the parking [...] is

also on this private property.

37. On the basis of these elements, the Restricted Panel finds that the ground on which

finds the path monitored by the CCTV system of the controlled does not constitute a

public land but private land, admittedly accessible to the public.

¹⁷ The authorization of the owner of the land was sent as Annex 2 to the courier of the control of 26 February 2020.

¹⁸ Appendices 3 and 4 of the audit letter of February 26, 2020.

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38. On the other hand, the Restricted Committee would like to point out that the private nature of the land in

question was not apparent during the on-site investigation on September 24, 2019 (nor for agents

of the CNPD, nor for passers-by) and that the owner or, in this case the person controlled, has not reported the privacy of this property. Thus, the park gives the impression of being a public park in which one cannot expect permanent video surveillance.

39. In this regard, the Panel notes that in its letter of February 26, 2020, the auditee reported that he has already asked the owner of the private land for permission to complete the posting of signs clearly indicating that the path is located on a property private and that a video surveillance system has been installed there.

40. Furthermore, the Restricted Panel notes that after receiving the letter complementary to the statement of objections, the auditor carried out an impact analysis relating to data protection ("AIPD") as indicated in its letter of 14 September 2020.

41. The Restricted Committee recalls that Article 35.1. of the GDPR requires that a DPIA be carried out "when a type of processing, in particular through the use of new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely create a high risk for the rights and freedoms of natural persons, (...)". One of three cases in which a DPIA is particularly required is "the systematic surveillance large scale of an area accessible to the public. »¹⁹

42. The controller indicates in his letter of September 14, 2020 that he carried out this DPIA looking for mitigation measures and he confirms that he is "in the process of installing signage very visible see additional signs at the entrance to the path » ²⁰.

43. The Restricted Committee recalls that at the time of drafting the communication of the objections and the additional letter to the statement of objections, the head of investigation was not in possession of the new elements that the control had transmitted by the couriers of the 14 September 2020 and December 14, 2020.

44. The Restricted Committee also recalls that the new elements transmitted by the letter from the audit dated December 14, 2020 refer to the situation as it was at

19 Article 35.3.c) of the GDPR.

20 Letter from the audit dated September 14, 2020.

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time of the on-site visit by CNPD agents on September 24, 2019 and that it is not a question of compliance after the on-site visit.

45. Based on all of these elements, the Restricted Panel concludes that the breach of Article 5.1.c) with regard to the fields of vision of the cameras filming the domain "[...]" is not constituted.

II. 2. On corrective measures and fines

1. Principles

46. 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 data processing operations processing 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 regulation;
- d) order the controller or the processor to put the operations of processing in accordance with the provisions of this Regulation, where applicable, in a manner specific and within a specific period;
- e) order the controller to communicate to the data subject a violation of personal data;
- (f) impose a temporary or permanent restriction, including prohibition, of the processing;

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- g) order the rectification or erasure of personal data or the restriction of the processing pursuant to Articles 16, 17 and 18 and the notification of these measures to recipients to whom the personal data have been disclosed pursuant to Article 17, paragraph 2, and Article 19;
- (h) withdraw a certification or direct the certification body to withdraw a certification issued pursuant to Articles 42 and 43, or order the certification body not to issue certification if the requirements applicable to the certification are not or no longer satisfied;
- (i) impose an administrative penalty pursuant to section 83, in addition to or instead of the measures referred to in this paragraph, depending on the specific characteristics of each case ;
- j) order the suspension of data flows addressed to a recipient located in a third country or an international organization. »

47. 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 the State or of the municipalities.

48. Article 83 of the GDPR provides that each supervisory authority shall ensure that fines administrative measures imposed are, in each case, effective, proportionate and dissuasive, before specifying the elements that must be taken into account in deciding whether to impose an administrative fine 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 have 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, taking into account the technical and organizational measures which they have implemented pursuant to Articles 25 and 32;
- e) any relevant breach previously committed by the controller or sub-processor treating;
- (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) how the supervisory authority became aware of the breach, including whether and in the extent to which the controller or processor notified the breach;
- (i) where measures referred to in Article 58(2) have previously been ordered to against the controller or processor concerned for the same purpose, the compliance with these measures;
- (j) the application of codes of conduct approved under Article 40 or mechanisms certificates approved pursuant to Article 42; and
- k) any other aggravating or mitigating circumstance applicable to the circumstances of the case, such as financial benefits obtained or losses avoided, directly or indirectly, as a result of the breach”.

49. The Restricted Committee would like to point out that the facts taken into account in the context of the this Decision are those found at the start of the investigation. Possible changes relating to the processing of data that is the subject of the investigation that took place subsequently, even if they allow full or partial establishment of conformity, do not allow to retroactively cancel a violation found.

50. Nevertheless, the steps taken by the control to comply with the the GDPR during the investigation procedure or to remedy the breaches identified by the

head of investigation in the statement of objections, are taken into account by the Panel

Restricted in the context of any corrective measures to be taken.

2. In this case

2.1. Regarding the imposition of an administrative fine

51. In his supplementary letter to the statement of objections of 10 August 2020, the

head of investigation proposed to the Restricted Panel to impose an administrative fine on the controlled for an amount of 2,900 euros.

52. In its response to said additional letter of September 14, 2020, the audited

maintained that he had promptly carried out all the recommended corrective measures and that he had, compared to the cameras filming the "[...]" area, also carried out a DPIA.

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

applicable, of the amount of this fine, the Restricted Panel takes into account the elements provided for by 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 Panel

Restreinte notes that with regard to the breach of Article 5.1.c) of the GDPR by

compared to the field of vision of the camera filming the terrace of the canteen of the controlled, it

constitutes a breach of one of the fundamental principles of the GDPR (and of the

of data protection in general), namely the principle of minimization of

data devoted to Chapter II "Principles" of the GDPR.

Regarding the breach of Article 5.1.c) of the GDPR with regard to the fields of vision

cameras filming the "[...]" area, the Restricted Panel finds that this

breach has not been established and that it will therefore assess the criteria laid down by

Article 83.2 of the GDPR by taking into consideration only the breach mentioned

in Chapter 2.1 of this Decision.

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As for the duration criterion (article 83.2.a) of the GDPR), the Restricted Panel notes that the alleged breach has lasted over time, at least since May 25, 2018 and until the day of the on-site visit. The Restricted Training recalls here that two years have separated the entry into force of the GDPR from its entry into application to allow

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controllers to comply with the obligations incumbent on them and this even if the obligation to respect the principle of data minimization already existed pursuant to Article 4.1. b) the repealed law of 2 August 2002 on the protection of individuals with regard to the processing of personal data.

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As for the number of data subjects (article 83.2.a) of the GDPR), the Training Restreinte notes that these are people going to the canteen terrace.

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As to the question of whether the failure found to have been committed deliberately or not (by negligence) (article 83.2.b) of the GDPR), the Restricted Panel recalls that "no deliberately" means that there was no intention to commit the violation, although the controller or processor has not complied with the duty of care incumbent upon him by law.

In this case, the Restricted Panel is of the opinion that the facts found and the breach retained do not reflect a deliberate intention to violate the GDPR on the part of the checked and the Restricted Training takes into account the assertion of the head of investigation according to which the terrace of the canteen was in the field of vision of the camera in issue only incidentally.

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As to the degree of cooperation established with the supervisory authority (Article 83.2.f) of the GDPR),

the Restricted Panel takes into account the assertion of the head of investigation that the

The co-operation of the controller throughout the investigation was good.

As for the setting of the fine, the head of investigation determined the fine at

2,900 EUR on the basis of two breaches. However, the Restricted Panel finds that the

grievance concerning the cameras in the domain "[...]" is not characterized and that there is no

there is therefore no need to take it into account when setting the financial penalty for this

regard. It is only necessary to base the fine on the basis of the breach

concerning the camera filming the terrace of the canteen.

The Restricted Committee considers that in view of the measures taken by the company,

in particular the limitation of the field of vision of the camera in question by using the

masking technique, so that only the access door to the building is now

in the camera's field of view and the masking technique is defined by

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default and cannot be deleted or modified by its employees, it has exercised

good faith in the process.

The Restricted Panel notes that the other criteria of Article 83.2 of the GDPR are not

neither relevant nor likely to influence its decision on the imposition of a fine

administrative and its amount.

54. The Restricted Committee also notes that while several measures have been put in place by

audited in order to remedy in whole or in part certain shortcomings, these have not been

adopted only following the control of CNPD agents on September 24, 2019 (see

also point 49. of this Decision).

55. Consequently, the Restricted Committee considers that the imposition of an administrative fine

is justified under the criteria set out in Article 83.2 of the GDPR for violation of Article 5.1.c)

of the GDPR.

56. With regard to the relevant criteria of Article 83.2 of the GDPR mentioned above, the

Restricted Formation considers that the pronouncement of a fine of 2,400 euros appears at the same time effective, proportionate and dissuasive, in accordance with the requirements of Article 83.1 of the GDPR.

2.2. About taking corrective action

57. The adoption of the following corrective action was proposed by the Head of Investigation to the

Restricted Panel in its supplementary letter to the statement of objections of August 10

2020:

"Order the controller to only process data that is relevant, adequate

and limited to what is necessary with regard to the purposes of protection of property and

securing access and, in particular, adapting the video device so as not to film the road

public respectively the employees who are on the terrace of the canteen, for example in

removing or reorienting cameras named "[...]", "[...]", "[...]", "[...]" and "[...]"

respectively the camera called "[...]". »

58. As to the obligation to only process data that is relevant, adequate and limited to

what is necessary with regard to the determined purposes, the Restricted Training takes

take into account the measures taken by the person being checked, in particular the limitation of the field of vision of the

camera filming the terrace of the canteen using the technique of masking so that only

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the building's access door is now in the camera's field of vision and the

masking technique is set by default and cannot be deleted or modified by its

employees so as not to film the employees who are in the canteen. Annex 1 of the mail

of February 26, 2020 of the controlled contains a photo demonstrating the reduction of the field of vision of

said camera. Consequently, the Restricted Committee considers that there is no need to pronounce

a compliance measure in this regard.

59. With reference to point 45. of this decision concerning the cameras filming the domain “[...]”, the Restricted Committee considers that there is no need to pronounce a measure of compliance in this regard.

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

- to pronounce against the company "Company A" an administrative fine of an amount of two thousand four hundred euros (2,400 euros), with regard to the violation of article 5.1.c) of the GDPR.

Thus decided in Belvaux on May 12, 2021.

For the National Commission for Data Protection sitting in restricted formation

Tine A. Larsen Thierry Lallemand

Marc Lemmer

President

Commissioner

Commissioner

Indication of remedies

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This administrative decision may be subject to an appeal for review within 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 Bar Associations.

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