

Deliberation SAN-2021-013 of July 27, 2021 National Commission for Computing and Liberties Nature of the deliberation: Sanction

Legal status: In force Date of publication on Légifrance: Thursday July 29, 2021 Deliberation of the restricted committee n°SAN-2021-013 of 27 July 2021 concerning SOCIETE DU FIGAROLThe National Commission for Computing and Liberties, meeting in its restricted formation composed of Messrs Alexandre LINDEN, president, Philippe-Pierre CABOURDIN, vice-president, Mesdames Anne DEBET and Christine MAUGÜE and Messrs Alain DRU and Bertrand du MARAIS, members;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 relating to the protection of personal data and the free movement of such data; Having regard to Directive 2002/ 58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the communications sector electronic systems, as amended by Directive 2009/136/EC of the European Parliament and of the Council, of November 25, 2009; Having regard to Law No. 78-17 of January 6, 1978 relating to data processing, files and freedoms, 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. 78-17 of January 6, 1978 relating to data processing, 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 Liberties; Having regard to referral no. 18016566; Having regard to decision no. 'Informatique et des Libertés to instruct the Secretary General to carry out or have carried out a mission to verify any processing accessible from the "lefigaro.fr" domain or relating to personal data collected from the latter; the decision of the President of the National Commission for Computing and Liberties appointing a rapporteur before the restricted committee of December 21, 2020; Having regard to the report of Mrs Valérie PEUGEOT, rapporteur commissioner, notified to SOCIETE DU FIGARO on April 1, 2021; Having regard to the observations written submissions by SOCIETE DU FIGARO on May 17, 2021; Considering the rapporteur's response to these observations notified to SOCIETE DU FIGARO on June 7, 2021; Considering the written observations submitted by SOCIETE DU FIGARO on June 25, 2021; Considering the observations oral statements made during the restricted committee meeting; Having regard to the other documents in the file; Were present at the restricted committee meeting of July 8, 2021: - Mrs. Valérie PEUGEOT, commissioner, heard in her report; As representatives of the SOCIETE DU FIGARO:- [...];- [...];- [...];- [...];- [...]. The SOCIETE DU FIGARO having had the floor last;The Restricted Committee adopted the following decision:I. Facts and procedure1. SOCIETE DU FIGARO (hereinafter "the company"), whose registered office is located at 14 boulevard Haussmann in Paris (75009), is a subsidiary of the FIGARO group, whose main activity is the publishing of newspapers, in

paper versions and digital. Founded in 1856, it has 670 employees.<sup>2</sup> For the purposes of its business, the company publishes the news website [www.lefigaro.fr](http://www.lefigaro.fr) (hereinafter "the lefigaro.fr website") on which advertising space is marketed to advertisers. The site has a free offer, making certain content accessible to any Internet user. It also has a paid offer, for which the company indicates that it allows the Internet user to access all the content published on the site, to connect to his personal space and to benefit from a "limited advertising display".<sup>4</sup> For the year 2019, SOCIETE DU FIGARO achieved a turnover of [...] euros for a result [...] euros. The number of visitors per month, for the last twelve months, to the lefigaro.fr site in mainland France, was around [...]. The number of digital subscribers as of December 1, 2020 was [...]. [...].<sup>5</sup> On August 16, 2018, the National Commission for Computing and Liberties (hereinafter "the CNIL" or "the Commission") received complaint no. 18016566 from a user of the lefigaro.fr site. The complainant notably mentioned the deposit of cookies on her terminal before any action on her part on the lefigaro.fr site and without obtaining her consent.<sup>6</sup> For the purposes of investigating the complaint and in order to verify the responses provided by the company during the procedure, five online checks of the lefigaro.fr site were carried out pursuant to decision no. 2020 -008C of December 27, 2019 from the President of the CNIL. These missions were carried out respectively on January 14, 2020, September 9, 2020, November 25, 2020, February 18, 2021 and June 1, 2021.<sup>7</sup> The purpose of these assignments was in particular to verify compliance with the provisions of law no. any processing accessible from the lefigaro.fr domain or relating to personal data collected from the latter. More specifically, it was a question of carrying out investigations in connection with the operations of reading or writing information in the terminal of Internet users from the site lefigaro.fr.<sup>8</sup> During the first two checks, the CNIL delegation mainly focused on checking when cookies were placed on the user's terminal from the lefigaro.fr site, what was the purpose of each of the cookies placed, what information was delivered to users in connection with these cookies and, finally, what system was implemented to allow the user to refuse their deposit when he goes to the home page of this site.<sup>9</sup> At the end of these checks, the minutes n° 2020-008/1 and n° 2020-008/2 were notified to SOCIETE DU FIGARO by letters dated 17 January and 10 September 2020 respectively. sent to the Commission services, by emails of 5 February and 5 October 2020, the additional documents requested at the end of these inspection missions.<sup>10</sup> In view of the answers provided on October 5, 2020 by the company, indicating in particular, in connection with the procedures for deleting cookies, that a "page reload (or navigation to another page) is necessary, so that depositors can delete cookies", a new check was carried out on November 25, 2020 in order to make the same findings by checking the consequences of reloading the page or navigating to another page of the site after withdrawing consent to the

deposit of cookies.11. At the end of this check, the report n° 2020-008/3 was notified to the SOCIETE DU FIGARO by letter dated November 25, 2020. The company transmitted to the services of the Commission, by email dated December 18, 2020 , the documents requested at the end of this control mission.12. For the purposes of examining all of these elements, the President of the Commission, on December 21, 2020, appointed Mrs Valérie PEUGEOT as rapporteur on the basis of Article 22 of the law of January 6, 1978 as amended. 13. By email of January 13, 2021, the SOCIETE DU FIGARO sent a request for a hearing to the rapporteur, who replied indicating that it did not appear necessary at this stage.14. New investigations were carried out on February 18, 2021, to supplement the findings previously made on November 25, 2020, in order to verify the consequences of browsing to another page of the site when the user refused to consent to the deposit of cookies as soon as its arrival on the lefigaro.fr site (the previous findings concerning the hypothesis of a subsequent withdrawal of consent).15. At the end of this check, the report n° 2020-008/4 was notified to the SOCIETE DU FIGARO by letter dated February 25, 2021. The company transmitted to the services of the Commission, by email dated March 12, 2021 , the documents requested during this control mission.16. At the end of her investigation, the rapporteur, on April 1, 2021, had the SOCIETE DU FIGARO notified of a report detailing the breach of Article 82 of the "Informatique et Libertés" law, which she considered constituted in the case and indicating to the company that it had a period of one month to communicate its written observations pursuant to the provisions of Article 40 of Decree No. 2019-536 of May 29, 2019. The report notification letter also included a notice to attend the restricted committee meeting of June 3, 2021.17. This report proposed that the restricted committee of the Commission impose an administrative fine on SOCIETE DU FIGARO for the breach of Article 82 of the "Informatique et Libertés" law. He also proposed that this decision be made public, but that it would no longer be possible to identify the company by name after the expiry of a period of two years from its publication.18. By email of April 23, 2021, SOCIETE DU FIGARO requested an extension of the one-month period provided for in Article 40 of Decree No. 2019-536 of May 29, 2019 to produce its observations. This request was accepted by the Chairman of the Restricted Committee by email of April 27, 2021.19. On May 17, 2021, the company filed its observations in response to the sanction report.20. In view of the observations raised by the company in this response, according to which the delegation of control had carried out its checks only from a Firefox browser and, consequently, no breach could be found with regard to an Internet user visiting the lefigaro.fr site using the Chrome browser, new investigations were carried out on June 1, 2021.21. On May 31, 2021, the rapporteur requested an extension to respond to the observations made by the SOCIETE DU FIGARO. By email of June 1, 2021, the President of the Restricted

Committee informed the rapporteur that she had an additional period of six days to submit her observations. By letter dated June 1, 2021, the company was informed that it also benefited from an additional period of six days and that, therefore, the restricted training session initially scheduled for June 3, 2021 was postponed.<sup>22</sup> By letter dated June 7, 2021, the rapporteur's response to the company's observations was sent to her, accompanied by a new invitation to the restricted training session of July 8, 2021.<sup>23</sup> On June 25, 2021, the SOCIETE DU FIGARO produced new observations in response to those of the rapporteur.<sup>24</sup> SOCIETE DU FIGARO and the rapporteur presented oral observations during the restricted session of July 8, 2021.

II. Reasons for decision

A. On respect for the rights of the defense<sup>25</sup> The company argues that the procedure followed by the CNIL does not respect the rights of the defense and the adversarial principle, as guaranteed by article 6 of the European Convention on Human Rights and article 16 of the Declaration human and civic rights.<sup>1</sup> [...] <sup>26</sup>. [...] <sup>27</sup>. [...] <sup>28</sup>. [...] <sup>29</sup>. [...] <sup>2</sup>.

2. On the absence of prior formal notice<sup>30</sup> The company argues that the rules on cookies and the responsibilities of the various actors linked to them are not sufficiently clear to directly initiate a sanction procedure, so that the latter criticizes the president of the CNIL for not having previously given formal notice to correct the shortcomings giving rise to the facts in dispute.<sup>31</sup> In the first place, with regard to the grievance relating to the absence of prior formal notice, the Restricted Committee notes first of all that it is apparent from the provisions of Article 20 of the law "Informatique et Libertés" amended by the law n° 2018-493 of June 20, 2018 that the supervisory authority has a set of corrective measures, adapted according to the specific characteristics of each case, which can be combined with each other and may or may not be preceded by a formal notice . Corrective measures can be taken directly in all cases.<sup>32</sup> The Restricted Committee also notes that in its decision no. 2018-765 of June 12, 2018, the Constitutional Council did not express a reservation regarding the possibility for the President of the CNIL to initiate sanction proceedings without notice. prior notice. Finally, the Restricted Committee recalls that the Council of State has ruled (EC, October 9, 2020, SERGIC Company, No. 433311) that "it clearly follows [from the provisions of article 20 of the law of January 6, 1978 as amended ], that the pronouncement of a sanction by the restricted formation of the CNIL is not subject to the prior intervention of a formal notice to the controller or its subcontractor by the president of the CNIL [...]".<sup>33</sup> Secondly, with regard to the complaint relating to the lack of clarity of the rules on cookies and the liability of the actors, the Restricted Committee firstly underlines, in summary and as developed in points 48 to 62, that the various branches of the breach alleged against the company have as their sole legal basis the provisions of article 82 of the "Informatique et Libertés" law, the content of which has remained unchanged for ten years.<sup>34</sup> The Restricted Committee then emphasizes that

the practices at the origin of the various branches of the breach alleged against the company in this case have been continuously considered as non-compliant by the CNIL and that the existence of a responsibility of the publisher of the site was the subject of a decision by the Council of State, which specifies the scope of this responsibility (CE, 6 June 2018, Éditions Croque Futur, n° 412589, Rec.).<sup>35</sup> Finally, the Restricted Committee notes that on the basis of these provisions, it has already adopted several sanction decisions.<sup>36</sup> [...]3. On the regularity of the present proceedings<sup>37</sup>. Firstly, the company argues, on the one hand, that the rapporteur refused the request for a hearing that she had sent to it on January 13, 2021 and, on the other hand, that the president of the CNIL also provided an unfavorable response to an interview request requested on February 10, 2021.<sup>38</sup> With regard to the request for a hearing, the Restricted Committee notes that the rapporteur responded to it by explaining the reasons for which she did not give a favorable response to this request. The rapporteur thus indicated that, on the day of her response, she had the information necessary for her to understand the file and that she considered herself sufficiently informed by the investigations carried out by the CNIL services. The Restricted Committee recalls in this respect that the hearing of the organization by the rapporteur is an option offered to it by Article 39 of Decree No. 2019-536 of May 29, 2019, and not an obligation.<sup>39</sup> With regard to the request addressed to the President of the CNIL, the Restricted Committee considers that it is not for it to comment on the President's decision.<sup>40</sup> Secondly, the company argues that the complaint at the origin of the procedure was not the subject of an investigation by the services of the CNIL since the latter did not carry out an online check before requesting his observations in the context of the investigation of this complaint.<sup>41</sup> The Restricted Committee notes that it follows from the provisions of Article 8, I, 2° d) and g) of the "Informatique et Libertés" law that the CNIL may decide following receipt of a referral, in opportunity and depending on the circumstances of the case, to carry out an inspection or to immediately send a letter to the organization in order to request its observations. It is in no way compulsory for formal checks to be carried out by a CNIL control delegation pursuant to article 19 of the aforementioned law in order to be able to proceed with the investigation of a complaint referred to it.<sup>42</sup> Thirdly, the company considers that the president of the CNIL would not have taken into account the elements of response provided on December 18, 2020 by the company to the additional requests of the delegation of control, since she was informed only three days later late, i.e. on 21 December 2020, of the referral to the Restricted Committee and the appointment of a rapporteur with a view to the delivery of any corrective measure.<sup>43</sup> The Restricted Committee notes first of all that the decision of the President of the CNIL to seize the Restricted Committee - pursuant to Article 20 III of the "Informatique et Libertés" law - and to appoint a rapporteur - in

accordance with Article 39 of Decree No. 2019-536 of May 29, 2019 - is taken into account all the elements collected during the procedure (control reports, documents, findings, letters in response to additional requests from the delegation control, etc.) and not just the letter of 18 December 2020, which however, according to the rapporteur, was duly analyzed in the same way as all the elements of the procedure.<sup>44</sup> The Restricted Committee then recalls that its referral does not constitute the end of the procedure and that it does not prejudge the pronouncement of a corrective measure by the latter. Indeed, the applicable texts organize the holding of an adversarial procedure, within the framework of which the organization concerned can put forward its observations. Article 40 of Decree No. 2019-536 of May 29, 2019 thus provides that the respondent to whom a report proposing a sanction is notified first has a period of one month to submit his observations to the restricted formation and to the rapporteur. Where warranted by the circumstances of the case or the complexity of the case, the chairman of the Restricted Committee may decide, at the request of the respondent, to extend this period by up to one month. This same article then grants the data controller a second period, of at least fifteen days, to respond to the rapporteur's observations in response. These deadlines are such as to guarantee respect for the rights of the defence. Finally, the data controller may present oral observations during the session before the Restricted Committee.<sup>45</sup> In the present case, the Restricted Committee considers that the procedure followed did not deprive the company of its right to defend itself, the aforementioned provisions having been applied. The company benefited from a period of more than five weeks to produce its observations, the chairman of the Restricted Committee having agreed to grant it additional time, then it had a new period to produce new written observations in response to those of the rapporteur and she finally had the opportunity to speak again during the sitting before the Restricted Committee.<sup>46</sup> Finally, the company argues that the proliferation of online checks carried out as part of the procedure has hampered its ability to defend itself effectively. She explains that these numerous checks led to a situation of asphyxiation and that she was no longer able to defend herself under normal conditions. It therefore considers that it is placed in a situation of clear disadvantage compared to the CNIL.<sup>47</sup> The Restricted Committee notes that the fact of carrying out several checks on the lefigaro.fr site cannot in itself constitute an infringement of the rights of defence. The Restricted Committee then notes that the rapporteur indicates in her writings that these online checks were carried out to verify some of the elements put forward by the company. In addition, the Restricted Committee considers that the checks only related to elements of which the company is supposed to have full knowledge and full control, in this case, its website. Finally, it notes that all the checks were carried out over a relatively long period of time - between January 2020 and June 2021 - and that only

one check was carried out after the notification of the penalty on which the company had the opportunity to submit its observations. Consequently, the Restricted Committee considers that this procedure and the various actions carried out in this context have not infringed the rights of defense of the company and have respected the adversarial principle.

B. On the existence and extent of SOCIETE DU FIGARO's liability with regard to cookies deposited from its website<sup>48</sup>. Under the terms of Article 82 of the "Informatique et Libertés" law, which constitutes the transposition into domestic law of Article 5(3) of Directive 2002/58/EC of the European Parliament and of the Council of July 12, 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, "any subscriber or user of an electronic communications service must be informed in a clear and complete manner, unless he has been beforehand, by the controller or his representative: 1° The purpose of any action seeking to access, by electronic transmission, information already stored in his electronic communications terminal equipment, or to enter information in this equipment; 2° The means at his disposal to oppose it. These accesses or registrations can only take place on condition that the subscriber or the user has expressed, after having received this information, his consent which may result from appropriate parameters of his connection device or any other device placed under his control. These provisions are not applicable if access to information stored in the user's terminal equipment or the registration of information in the user's terminal equipment: 1° Either, has the exclusive purpose of allowing or facilitating communication by electronic means; 2° Either, is strictly necessary for the provision of an online communication service at the express request of the user" <sup>49</sup>. The rapporteur considers that SOCIETE DU FIGARO, as it publishes the lefigaro website. fr, has a share of responsibility in respecting the obligations of article 82 of the law "Informatique et Libertés" for the operations of reading and / or writing information carried out in the user's terminal during the visit of its website, including those carried out by third parties who are its business partners (hereinafter "third-party cookies"). It emphasizes that if the obligation incumbent on the company is indeed an obligation of means, it also clearly appears that "In this case, the means implemented by the company were insufficient. Furthermore, the rapporteur argues that the analysis she develops in her report is not new, that it was developed with regard to the applicable case law and that the training remains intact has already sanctioned breaches of article 82 of the aforementioned law in connection with operations to read and/or write information carried out by third parties.<sup>50</sup> In defence, the company contests this analysis and argues that the present sanction procedure would violate the principle of legality of offenses and penalties, guaranteed in Article 8 of the Declaration of the Rights of Man and of the Citizen, since There is no doctrine from the CNIL or any of the European regulators on the distribution

of responsibilities between site editors and issuers of third-party cookies. As such, it provides a summary of the state of the CNIL's reflections dating from 2017, [...], and a letter from the President of the CNIL sent on March 26, 2021 to the Group of online content and services publishers ( gesture). It also indicates that the sanction decisions of November and December 2020 against the companies CARREFOUR BANQUE and AMAZON EUROPE CORE are not relevant in that they do not deal with the distribution of liability between the publishers and third parties depositing cookies. Finally, she considers that in any case, she is not responsible for the operations of reading and / or writing information carried out by third parties on her site and that the rapporteur places an obligation of result on her and not the means to comply with the provisions of article 82 of the law "Informatique et Libertés" when it does not have the technical possibilities to enforce these provisions. These operations are indeed entirely carried out by third parties who do not respect the signal that it transmits to them in the absence of the user's consent to the operations of reading and / or writing information on his terminal. In this sense, the company maintains that all the cookies identified in the report as "internal" cookies, that is to say, deposited by the domains of the site it publishes ("www.lefigaro.fr" , ".lefigaro.fr" or "player-video.lefigaro.fr" ), are actually deposited by third parties using a Javascript code executed by the page of the publisher's website visited by the Internet user. The company indicates that, in this case, it "is not aware of the existence of this cookie and has no means of controlling its deposit or reading". Therefore, the company considers that it is solely responsible for providing prior information to users of its lefigaro.fr site and the procedures for obtaining user consent to operations to read and/or write information. .51. In the first place, the Restricted Committee notes, first of all, that the company is not justified in maintaining that the obligations incumbent on it in terms of cookies as a site publisher were not identified before receipt of the report and were subject to uncertain rules insofar as these rules are not new. Indeed, the Restricted Committee emphasizes again that the various branches of the breach alleged against the company - namely the deposit of cookies on the user's terminal as soon as he arrives on the home page of the lefigaro.fr site before any action on his part without obtaining consent or after he has expressed his refusal to such operations of reading and / or writing such information - have as their sole legal basis the provisions of article 82 of the law "Informatique et Libertés" which transposed the provisions relating to cookies and tracers of the "ePrivacy" directive. It points out that if these requirements were formerly provided for in Article 32, paragraph II, of this same law, before the text was recast as a whole by Ordinance No. 2018-1125 of December 12, 2018, their content is remained unchanged since 2011.<sup>52</sup> The Restricted Committee then recalls that the Council of State ruled (CE, June 6, 2018, Editions Croque Futur, No. 412589, Rec.), that under the obligations



incumbent on the publisher of a site which files "third-party cookies", include that of ensuring with its partners, on the one hand, that they do not issue, through its site, tracers that do not comply with the regulations applicable in France and , on the other hand, that of taking any useful steps with them to put an end to breaches. The Council of State has in particular ruled that "site editors who authorize the deposit and use of such "cookies" by third parties when visiting their site must also be considered as data controllers, even though they are not subject to all the obligations imposed on the third party who issued the "cookie", in particular when the latter retains sole control over compliance with its purpose or its retention period. As part of the obligations incumbent on the site editor in such a case, include that of ensuring with its partners that they do not issue, through its site, "cookies" which do not respect the regulations applicable in France and that of taking any useful steps with them to put an end to breaches" (emphasis added).<sup>53</sup> The Restricted Committee also notes that while the recommendations issued by the CNIL Plenary Committee on cookies have recently changed to take into account the changes brought about by the GDPR in terms of consent in particular, these changes have no impact on the present case and it has continuously been considered, as indicated in deliberation no. 2013-378 of December 5, 2013 adopting a recommendation relating to cookies and other tracers referred to in law of January 6, 1978 since repealed, that "when several actors are involved in the deposit and reading of cookies (for example when publishers facilitate the deposit of cookies which are then read by advertising agencies), each of them must be considered as co-responsible for the obligations arising from the provisions of the aforementioned article 32-II [current article 82 of the law of January 6, 1978]". This deliberation specifies that this is the case for "website publishers (or mobile application publishers, for example) and their partners (advertising agencies, social networks, publishers of audience measurement solutions, etc.). Indeed, insofar as site editors are often the only point of contact for Internet users and the deposit of third-party cookies is dependent on navigation on their site, it is their responsibility to proceed, alone or jointly with their partners , prior information and obtaining consent, explained in Article 2 of this recommendation" .<sup>54</sup> The Restricted Committee notes in this respect that the company is all the less justified in invoking the argument related to the fluctuating nature of the recommendations than the CNIL doctrine on the distribution of responsibilities between site editors and cookie issuers third party was included in a communication published on the CNIL website on October 1, 2020.<sup>55</sup> The Restricted Committee emphasizes that it emerges from all of these elements that the obligation incumbent on the company is indeed an obligation of means, and not an obligation of result, the scope of which is not uncertain and has been contrary specified both by the Council of State in its decision Editions Croque Futur and by the CNIL in its recommendations. The Restricted

Committee considers that the company is not justified in maintaining that the obligations incumbent on it in terms of cookies as a site publisher were not identified before receipt of the report and were subject to uncertain rules. 56. Finally, the Restricted Committee points out that it has, on several occasions, adopted pecuniary sanctions against site publishers for facts relating to the operations of reading and/or writing information, including by third parties, in the terminal of users visiting their site, in particular in deliberation n°SAN-2020-009 of November 18, 2020 against the company CARREFOUR BANQUE or in deliberation n°SAN-2020-013 of December 7, 2020 concerning the company AMAZON EUROPE CORE. It therefore considers, unlike society, that these decisions are relevant and reflect the responsibility of website publishers in connection with the deposit of cookies by third parties.<sup>57</sup> Secondly, with regard to the liability associated with cookies deposited by third parties under the domain name of the lefigaro.fr site, the Restricted Committee notes that, for operations to read and/or write information to be carried out by third parties under the domain names of the company, this is in principle only made possible by the inclusion by the company of a fragment of Javascript code on its site allowing third parties to deposit or not a cookie. 58. The Restricted Committee considers that it follows that two scenarios are possible: either the inclusion of these fragments of Javascript code in the pages that it distributes under its domain names is carried out at the initiative of the company or with its agreement, in which case, the company is at the origin of it or has full knowledge of it, or the company maintains that it cannot control the inclusion of these fragments of Javascript code in the pages that it distributes under its names domain, in which case this would attest to a major vulnerability of the lefigaro.fr site. Consequently, the Restricted Committee considers that in either of these two cases, the company is not justified in maintaining that it has no liability in this case.<sup>59</sup> Finally, if the Restricted Committee notes that these cookies cannot be qualified as "internal" cookies, it nevertheless considers that this does not exonerate the company from its share of responsibility, the latter having to ensure that its partners do not do not issue, through its site, cookies that do not comply with the applicable regulations and must take the necessary steps to put an end to the observed breach, as described above.<sup>60</sup> Thirdly, with regard to the obligation of means incumbent on the company, the Restricted Committee considers that recognizing the existence of a liability of third parties depositing cookies on the company's site in the absence of the consent of Internet users does not clear the publisher of the site - in this case, the SOCIETE DU FIGARO - of its own responsibility related to the operations of reading and / or writing information in the terminal of users browsing its site, to the extent where the latter has control of its site and its servers, thus enabling it to respect the obligations incumbent on it, namely, to ensure that its partners do not issue, through its site, "cookies " who do not comply with

the regulations applicable in France, and take the necessary steps to put an end to the observed breach. The Restricted Committee therefore considers that this liability – consisting of an obligation of means and not of result – justifies the company being targeted by the present proceedings.<sup>61</sup> Consequently, the Restricted Committee considers that, contrary to what SOCIETE DU FIGARO asserts, the scope of the latter's liability exists in the form of an obligation of means to ensure that its partners do not emit, through its site, cookies in violation of the regulations applicable in France.<sup>62</sup> It is therefore up to the restricted committee to assess in the specific case whether the company has implemented sufficient diligence to consider that it has fulfilled its obligation of means.

C. On the characterization of the breach of article 82 of the law "Informatique et Libertés"<sup>63</sup>. As recalled in point 48, Article 82 of the "Informatique et Libertés" law constitutes the transposition into domestic law of Article 5(3) of the "ePrivacy" Directive.<sup>64</sup> With regard to the provisions of Article 82 of the law, the rapporteur essentially considers that the findings highlight two series of significant negligence by SOCIETE DU FIGARO in the use of cookies, relating to: - the deposit of cookies on advertising purpose by partners on the user's terminal when the latter visits the lefigaro.fr site, before any action on his part and without obtaining his consent; - the impossibility for the user to refuse to effectively the deposit of cookies for advertising purposes by partners on his terminal although he has expressed the wish.<sup>65</sup>

The rapporteur notes that the CNIL services carried out five online control operations and that, at each of these checks, it was found that cookies for advertising purposes were placed on the Internet user's terminal without the collection of his consent as soon as he arrives on the home page of the lefigaro.fr site and before any action on his part. The rapporteur considers that with regard to these checks, the means implemented by the company to avoid the deposit of cookies for advertising purposes by partners in disregard of the applicable rules are insufficient. The rapporteur also considers that the deposit of such cookies for advertising purposes as soon as the user arrives on the lefigaro.fr site and before any action on his part, necessarily prevents the latter from validly expressing his consent. It recalls that the "Informatique et Libertés" law expressly provides that these operations, subject to exceptions, can only take place after the latter has expressed his consent.<sup>66</sup> The rapporteur then considers that with regard to the online checks carried out on September 9, 2020 and February 18, 2021, the system put in place by SOCIETE DU FIGARO to refuse the deposit and/or reading of information for advertising purposes on the terminal of the user also appears faulty since several operations of reading and / or writing of information for advertising purposes have taken place in the terminal equipment of the user by partners of the company, after he has expressed his refusal and navigated to another page of the lefigaro.fr site, which renders the user's refusal ineffective, in violation of the requirements of

article 82 of the "Informatique et Libertés" law .67. In defence, the company develops two sets of arguments. The first relates to the cookies concerned by this procedure and the findings made by the delegation of control, which would contain errors. The second relates to the company's lack of responsibility for the facts with which it is charged. It indicates that all of the operations of reading and/or writing information in the terminal of users visiting the lefigaro.fr site mentioned in the report and for which the consent or refusal of users has not been taken into account is the fact of third parties and is not their responsibility. The company adds that in any event it considers that it has fulfilled its obligation in connection with article 82 of the "Informatique et Libertés" law, which constitutes an obligation of means by implementing several tools, namely a management of consent, a monitoring tool and the issuance of a refusal signal to third parties who carry out operations to read and/or write information in the user's terminal when browsing the lefigaro site. en.1. On the cookies in question and findings made by the CNIL<sup>68</sup> delegation of control. The rapporteur considers that the verifications carried out by the CNIL services took place within the framework of the procedures set by the Data Protection Act and its implementing decree and that they made it possible to note, at each of the control operations , the deposit (operation "writing / registration of information") and / or reading (operations of "reading / access to information") of cookies on the user's terminal.<sup>69</sup> In defence, the company considers that the findings made by the CNIL services contain errors.<sup>70</sup> Firstly, the company notes a clerical error, namely that a cookie named "[...]" was wrongly identified in the sanction report as being deposited by the domain "[...]" when it was filed by the domain "[...]".<sup>71</sup> The Restricted Committee notes that this is indeed an error, contained in the penalty report, but which does not retroactively affect the findings made by the delegation and the characterization of the breach insofar as the delegation has clearly noted the deposit of this cookie "[...]", which is a cookie for advertising purposes, in the absence of the user's consent, and the error linked to the domain name associated with this cookie has no impact on its purpose and the fact that it is deposited without the consent of the user.<sup>72</sup> Secondly, while not calling into question the advertising purpose of the cookie called "[...]" deposited by the domain "[...]", of the cookies called "[...]" and "[...]" deposited by the domain "[...]" and the cookie called "[...]" deposited by the domains "www.lefigaro.fr" and "player-video.lefigaro.fr" in the Internet user's terminal when arriving on the site lefigaro.fr, the company argues that, insofar as the latter are cookies with a limited lifespan, corresponding for the most part to the lifespan of the user's session, they do not require the consent of the user prior to depositing them on the latter's terminal.<sup>73</sup> The Restricted Committee notes that, in accordance with Article 82 of the "Informatique et Libertés" law, only cookies whose exclusive purpose is to allow or facilitate communication by electronic means or cookies being strictly

necessary for the provision of a online communication service at the express request of the user are exempt from the obligation to obtain consent prior to their filing. These are technical cookies without which a website could not function or, for example, shopping cart cookies without which a user could not validate an order. Therefore, the Restricted Committee considers that the lifespan of a cookie cannot be considered as an exemption criterion defined by law. On the contrary, only the purpose can be or the fact that the tracer is strictly necessary for the provision of an online communication service at the express request of the user.<sup>74</sup> The Restricted Committee therefore considers that the lifespan of cookies has no influence on the fact that they pursue an advertising purpose and that they cannot, therefore, be considered as having the exclusive purpose of allowing or facilitating communication by electronically, or as being strictly necessary for the provision of an online communication service at the express request of the user.<sup>75</sup> Therefore, the Restricted Committee notes that, for these cookies for advertising purposes having the lifespan of one session, the company must not allow them to be deposited on the user's terminal when they arrive on the lefigaro.fr site, before any action on their part and in the absence of collection of their consent, except to disregard its obligations resulting from article 82 of the law "Informatique et Libertés" .<sup>76</sup> Thirdly, the company questions the "integrity of the control operations" carried out on February 18, 2021. It maintains that the "[...]" cookie deposited by the "[...]" domain and the "[...]" cookie ]" deposited by the domain "[...]" despite the user's refusal to deposit cookies for advertising purposes, do not appear in the HAR file, making it possible to prove that they continue to be read. In other words, the company argues that the fact that a cookie is carried by an http request does not mean that this cookie is necessarily read by the domain to which the http request is made. It also notes that the rapporteur herself acknowledges that the methodology used by the delegation of control does not allow exhaustive capture of all http requests carrying a cookie. It therefore considers that the findings made by the CNIL regarding these cookies do not allow it to certify that they have been read. Furthermore, the company considers that it cannot be deduced that a cookie whose presence has not been noted in a HAR file has indeed been placed on a user's terminal.<sup>77</sup> The Restricted Committee notes firstly, with regard to the cookie "[...]" deposited by the domain "[...]", that it does not appear in the writings of the rapporteur proposing to the Restricted Committee to impose a sanction on against the company and therefore does not fall within the scope of these proceedings.<sup>78</sup> The Restricted Committee then recalls that the provisions of Article 82 of the "Informatique et Libertés" law require, with some exceptions, the collection of consent before any action aimed at entering information or accessing information already stored in the equipment. user's terminal. The Restricted Committee considers that, contrary to what is put forward by the company, the

only operation of entering information in the user's terminal (in this case the deposit of cookies for advertising purposes), before any action of his part or despite his refusal, is sufficient to characterize the existence of a breach of article 82 of the law "Informatique et Libertés" .79. The Restricted Committee notes in the sense that the delegation of control carried out the findings on the lefigaro.fr site in two stages. The first consists in identifying which cookies have been deposited on the user's terminal ("information writing / registration" operations). The second step consists of identifying which cookies have sent information to the domain that deposited them ("read / access to information" operations). This information is compiled during the check in a file called "HAR" which contains the HTTP requests related to the pages visited by the Internet user during his navigation. This file supplements the documents collected by the delegation, taking a copy of the number of cookies deposited in the user's terminal equipment and making it possible to certify, during a given period of time, that cookies are read.<sup>80</sup> Thus, with regard to the "[...]" cookie for advertising purposes, the deposit of which by the "[...]" domain was noted during the check of February 18, 2021 after the user's refusal and then browsing, the restricted training observes that the rapporteur did not indicate in her writings, contrary to what the company seems to put forward in defence, that this cookie appeared in the HAR file, thus making it possible to prove that it was read. On the other hand, the rapporteur indicated in her writings that it appears from the findings that this cookie was placed on the user's terminal when the latter had not given his consent. Thus, if it is true that the HAR file does not report in this case, as evidenced by other parts of the procedure, the proof of an operation to read this cookie in the user's terminal, it the fact remains that the delegation of control noted his deposit on the latter's terminal even though he had refused to give his consent to such deposit.<sup>81</sup> Consequently, the Restricted Committee considers that, contrary to what is put forward by the company, the sole operation of filing information for advertising purposes, before any action by the user or despite his refusal, is sufficient to characterize the existence a breach of article 82 of the "Informatique et Libertés" law .82. Regarding the cookie "[...]" for advertising purposes, the deposit of which was noted during the check of February 18, 2021 by the domain of validity www.lefigaro.fr when the Internet user arrives on the website and before any action, the Restricted Committee notes, on the one hand, that it remained stored on the user's terminal equipment after he had expressed his refusal and navigated to another page of the lefigaro.fr site and , on the other hand, that the "HAR" file made it possible to report the proof that the content of this cookie continued to be read. The Restricted Committee considers that, with regard to this cookie, the delegation has indeed noted its deposit and then its reading.<sup>83</sup> Therefore, the Restricted Committee considers, on the one hand, that the findings were made in compliance with the applicable procedure and, on the other hand,

that these findings make it possible to characterize a breach of Article 82 of the law " Computing and Freedom" . It is therefore up to the restricted committee to assess in the specific case whether the company has implemented sufficient diligence to consider that it has fulfilled its obligation of means.<sup>2</sup> On the means implemented by the company to meet its obligations<sup>84</sup>.

The rapporteur considers that with regard to each of the checks carried out by the services of the CNIL, the means implemented by the company to avoid the deposit and the reading of cookies for advertising purposes by partners in disregard of the applicable rules are insufficient, whether as soon as the user arrives on the site or after he has expressed his refusal. The company has thus disregarded its obligations under article 82 of the "Informatique et Libertés" law.<sup>85</sup> In defence, the company indicates that all the operations of reading and/or writing information in the terminal of users visiting the lefigaro.fr site mentioned in the report and for which the consent or refusal of users does not has not been taken into account is the fact of third parties and is not their responsibility. In addition to providing satisfactory information and procedures for obtaining consent, the company adds that it fulfills its obligation in connection with article 82 of the "Informatique et Libertés" law, which constitutes an obligation of means, by putting implemented three solutions. She first indicates that she has set up a consent management platform that she describes as "avant-garde". It then indicates that it has developed a monitoring tool intended to identify the cookies deposited by third parties in violation of the regulations in order to then take the necessary steps with them. On this point, the company adds that this monitoring tool was mainly designed for the Chrome browser, since its use would be the most widespread among its users. It indicates that this tool would not, however, detect the deposit of certain cookies on the terminal of users visiting the site using the Firefox browser. The company notes that the CNIL's findings were made from this browser, which would be used very little by Internet users visiting the lefigaro.fr site. The company specifies that this is particularly the case with regard to the cookie called "[...]" whose deposit by the domain "[...]" was noted during its check of November 25, 2020, carried out by means of the browser Firefox. The company specifies that it "voluntarily relies" on the Chrome browser because visitors to the lefigaro.fr site are on average only 4.42% using the Firefox browser. Finally, the third solution mentioned, implemented by the company until August 15, 2020, consisted of issuing a temporary refusal signal, in the absence of a browsing act or refusal of cookies by a user, "so that third parties cannot rely on such inaction or silence to place advertising cookies". Finally, the company considers that the rapporteur imposes an obligation of result, which ultimately amounts to preventing site publishers from using cookies to display advertising, which represents a significant part of their income.<sup>86</sup> As a preliminary point, the Restricted Committee recalls, as it has set out in points 48 to 62, that it considers that

the company is not justified in maintaining that it has no obligation or liability incumbent on it with regard to the transactions carried out by third parties tending to access information already stored in users' electronic communications terminal equipment, or to enter information in this equipment, without their consent, when they visit its site, as soon as it transmits a signal to said third parties to inform them of their lack of consent.<sup>87</sup> Indeed, within the scope of its responsibility as site editor and in the event of the deposit of cookies by third-party issuers, the Restricted Committee considers that it is up to the company to meet various obligations in connection with Article 82 of the Data Protection Act and in particular, as judged by the Council of State, to "ensure with its partners that they do not issue, through its site, "cookies "who do not comply with the regulations applicable in France and to take any useful steps with them to put an end to the breaches" .<sup>88</sup> In this case, firstly, the Restricted Committee points out that the CNIL services carried out five control operations and that at each of these checks, it was found that cookies for advertising purposes were placed on the terminal of the Internet user without obtaining his consent as soon as he arrives on the home page of the lefigaro.fr site and before any action on his part.<sup>89</sup> Thus, with regard to the cookies called "tb\_t\_ppg" and "tb\_sess\_r" deposited by the domain of validity "www.lefigaro.fr" whose purpose is the dissemination of targeted advertising, the delegation noted their deposit on the user's terminal when it arrives on the lefigaro.fr site and before any action on its part during the control operations of January 14, 2020 and September 9, 2020. The Restricted Committee infers that this cookie will have been deposited without action on the part of the user and in the absence of consent for at least two control operations and eight months.<sup>90</sup> With regard to the cookie called "[...]" deposited by the domain "www.lefigaro.fr" or the domain "player-video.lefigaro.fr" whose purpose is the dissemination of targeted advertising, its deposit was noted during the four other control operations of January 14, 2020, September 9, 2020, November 25, 2020 and February 18, 2021. The Restricted Committee infers that this cookie will have been deposited without action on the part of the user and in the absence of consent during at least four control operations and one year.<sup>91</sup> Finally, with regard to the cookie called "[...]" deposited by the domain "[...]" or the domain "[...]" for which the company has indicated that it was intended for "targeted advertising", the delegation noted its deposit when the user arrived on the lefigaro.fr site and before any action on his part during three of the five control operations carried out on January 14, September 9 and November 25, 2020. Restricted training in deduces that this cookie will have been deposited without action on the part of the user and in the absence of consent for at least three control operations and ten months. The Restricted Committee notes that this plotter is filed by the organization "[...]", which has been contacted several times by email by the company for having carried out operations to read and / or write



information in the terminal users visiting the lefigaro.fr site in violation of the applicable rules, without prompt action being taken to put an end to the recurring deposit of this particular cookie.<sup>92</sup> Therefore, the Restricted Committee considers that in view of these findings, the means implemented by the company are manifestly insufficient to comply with the provisions of Article 82 of the "Informatique et Libertés" law.<sup>93</sup> Secondly, the Restricted Committee observes first of all that, in response to the argument raised in defense by the company - according to which the CNIL delegation wrongly carried out its findings only from a Firefox browser, whereas no cookie or other tracer would be deposited in contravention of the applicable rules when the Internet user visits the site using the Chrome browser - the CNIL services made new findings on June 1, 2021. The Restricted Committee notes that 'on this occasion, the delegation noted, both on the Chrome browser and on the Firefox browser and from a blank browsing history, the deposit in the browser's local storage space of a tracer named "[...]" and containing a unique identifier as soon as the user arrives on the home page of the lefigaro.fr site and before any action on his part.<sup>94</sup> The Restricted Committee then notes that after the user expressed his refusal to deposit cookies, the CNIL services noted the presence of requests containing the identifier of this tracer and the page visited by the latter, intended for the "[...]" domain, identified by the company as a domain related to the delivery of targeted advertising. Therefore, the Restricted Committee notes that these findings demonstrate the existence of operations carried out by third parties seeking to access information already stored in the users' terminal equipment, or to enter information in this equipment, in violation of the refusal expressed by users, whether browsing using Firefox or Chrome.<sup>95</sup> browsers. As mentioned in point 91, the Restricted Committee notes again that this tracer relates to the organization "[...]", which was contacted on several occasions by email to the company for having carried out operations reading and/or writing information in the terminal of users visiting the lefigaro.fr site in violation of the applicable rules.<sup>96</sup> Consequently, the Restricted Committee considers that it follows that, both on the Firefox browser and on the Chrome browser, the tools and means implemented by the company, namely a consent management platform, a monitoring tool and the issuing of a refusal signal are manifestly insufficiently effective and do not make it possible to put an end to the infringement.<sup>97</sup> Thirdly, with regard to the configuration of the monitoring tool implemented by the company which only controls cookies deposited in violation of the rules applicable during navigation for users using the Chrome browser (which corresponds to [...] of users of the site, according to the company), the Restricted Committee notes first of all that, among the [...] visitors on average per month to the lefigaro.fr website, the tool as configured does not allow not to ensure compliance with the rules applicable by the partners for, at a minimum, approximately [...] of its users who use the Firefox

browser (which corresponds to [...] of the users of the site, according to the company). The Restricted Committee specifies that this number also seems to be a low assumption, given the existence of browsers other than the two mentioned above, which Internet users can use to visit the lefigaro.fr site. In this sense, the Chrome browser being used, according to the company, by only approximately 45% of the users of the site, the Restricted Committee therefore deduces that approximately 55% of the users of this site are not concerned by this tool. Finally, the Restricted Committee considers that a tool which detects whether cookies are deposited as soon as the user arrives on a site and before any action does not, in principle, present any particular difficulty to implement. The CNIL thus offers free access to the visualization tool called "Cookieviz" to measure the impact of cookies and other tracers during a user's browsing, and several other free tools are also available on the market. Although the Restricted Committee considers that the system implemented by the company is undoubtedly adapted to its needs and to the operation of its site, it does not seem out of reach to have a tool that works with the main browsers.<sup>98</sup> . The Restricted Committee then recalls that even with this monitoring tool, non-compliance with the applicable rules was also observed on the Chrome browser, as evidenced by the findings made on June 1, 2021. Consequently, the Restricted Committee observes that it emerges from these findings that operations to read and write information on the user's terminal are carried out in violation of the applicable rules - in this case, despite the user's refusal -, that the latter browse using Firefox or Chrome. In any event, the Restricted Committee recalls that the obligations resulting from Article 82 of the "Informatique et Libertés" law must apply regardless of the browser used by the visitor to the lefigaro.fr site, which is clearly not the case here.<sup>99</sup>. Therefore, the Restricted Committee considers that the monitoring tool implemented by the company, which is configured only to carry out a check from the Chrome browser and which therefore concerns less than half of the users of the site, is a manifestly insufficient means to ensure compliance with the provisions of article 82 of the law "Informatique et Libertés".<sup>100</sup>. Fourthly, the Restricted Committee considers first of all that it is indeed the publisher of the site - in this case the SOCIETE DU FIGARO -, which chooses its partners and authorizes them, both legally and by the computer coding of the site, to place cookies on user terminals. If the company argues that the operation of its site does not allow it to block cookies deposited by third parties, the Restricted Committee notes that this results from a technical choice it has made, other choices making it possible to offer greater control of the site to the editor. If the Restricted Committee does not question this technical choice, it considers that it does not exonerate the company from its responsibility and that it is up to it to put in place means in line with the choice it has made. , both upon the user's arrival on the site and after having expressed his

refusal.<sup>101</sup> Thus and in addition to the foregoing, the Restricted Committee observes that it is indeed SOCIETE DU FIGARO, having control over its site and allowing operations to read and / or write information to be carried out by third parties under its domain names, which can, in this case, decide if one of its partners does not comply with the regulations, to implement all necessary means to put an end to the breach, then, as a last resort , to terminate the contractual relationship or to take action against it.<sup>102</sup> The Restricted Committee then considers that, when a company finds that one of its partners continues to carry out such transactions in violation of the applicable rules despite the tools it has implemented to avoid this situation and its subsequent requests for such violations do not recur, it is up to him to consider the various legal means at his disposal which are necessary to put an end to these breaches, by providing for example contractually the possibility of initiating actions against his partners and by activating it (for example, an action for damages or the temporary suspension of the contract until the fulfillment of its commitments by the partner), and, as a last resort, by assessing the opportunity to put an end to the commercial relationship. However, the restricted training notes under the means mobilized that, if the company has implemented tools and contacted some of its partners, the fact remains that a breach of article 82 of the law " Computing and Liberties" lasted for several months with regard to certain cookies, in particular with regard to the operations of reading and / or writing information in the terminal of users visiting the lefigaro.fr site relating to the organization " [...]" . The Restricted Committee considers that this failure is aggravated by the fact that the behavior of the partners is not carried out without the knowledge of the company since everyone, and a fortiori the company, has the possibility of checking the cookies and tracers deposited on a website. Moreover, the Restricted Committee considers that in order for the rules relating to the operations of reading and/or writing information in the terminal of users visiting a site to be applied and respected, each of the players must fulfill their obligations at their level. , and ensure compliance with the rules or take the necessary measures to put an end to any breach, at the risk otherwise that these rules are not respected, each actor rejecting his own responsibility on the others. The Restricted Committee also considers that it subscribes to the analysis according to which the company would have no responsibility in the operations of reading and / or writing information carried out by third parties in the terminal of users visiting the site lefigaro.fr would amount to accepting that the company has no control over its site and that it is in no way responsible for the operations carried out on its site as long as it implements tools - in this case a consent management platform, a monitoring tool and the emission of a signal of refusal, which are, moreover, manifestly ineffective – and that it takes steps with its partners, independently of the real effects of these steps.<sup>103</sup> Finally, it follows from all of the foregoing that the Restricted

Committee does not impose an obligation of result which would prevent the company from resorting to read and/or write operations to broadcast advertising on its site but that it imposes on the other hand, an obligation of means which implies that compliance can be achieved by implementing a set of necessary adjustments. The Restricted Committee considers in this case that the company does not satisfy this obligation of means.<sup>104</sup> Therefore, in view of all the above, the Restricted Committee considers that the company has failed to comply with its obligations under Article 82 of the "Informatique et Libertés" law by allowing the deposit of cookies on the user's terminal before any action on their part and nullifying their refusal to deposit and/or read cookies subject to consent. The company has failed in its obligations by not ensuring that its partners do not issue, through its site, cookies that do not comply with the applicable regulations and by not taking the necessary steps to stop the breach noted.<sup>III</sup>. On corrective measures and publicity<sup>105</sup>. Under the terms of article 20, paragraph III, of the "Informatique et Libertés" law: "When the data controller or its subcontractor does not comply with the obligations resulting (...) from this law, the president of the Commission National Computing and Liberties may also, if necessary after having sent it 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 pronouncing, after adversarial proceedings, one or more of the following measures: [...] 7° With the exception of cases where the processing is implemented by the State, an administrative fine cannot exceed 10 million euros or, in the case of a company, 2% of the total worldwide annual turnover of the previous financial year, whichever is higher. Article 83 of Regulation (EU) 2016/679 of April 27, 2016, these ceilings are respectively increased 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". "it is not responsible for the processing in question and that the Restricted Committee should exempt it from all liability and not pronounce corrective measures. It criticizes all the more the initiation of the sanction procedure with regard to the legal uncertainty which, in its view, surrounds the regulations on cookies and trackers.<sup>107</sup> The Restricted Committee first recalls, as has been demonstrated in the context of the rapporteur's writings and recalled above, that this analysis does not is not new, that it has been validated by case law and that the restricted committee has already taken decisions including a breach of article 82 of the aforementioned law in connection with operations of reading and / or writing of information made s by third parties in the user's terminal.<sup>108</sup> The Restricted Committee then recalls that it must take into account, for the imposition of an administrative fine, criteria such as the nature, gravity and duration of the violation, the measures taken by the controller to mitigate the damage suffered by the data subjects, the degree of cooperation with the

supervisory authority and the categories of personal data affected by the breach.<sup>109</sup> With regard to the nature of the processing and with regard to the central role played by cookies and other tracers in advertising targeting processes, the Restricted Committee notes that the seriousness of the breach is characterized by the fact that by not complying with the requirements of article 82 of the "Informatique et Libertés" law, users have been deprived of the choice they must be able to express as to the methods by which their personal data will be used. In addition, the Restricted Committee recalls that the CNIL services carried out five control operations spread over a period of eighteen months and that, at each of these checks, it was found that cookies for advertising purposes were deposited on the Internet user's terminal without obtaining their consent, as soon as they arrive on the home page of the lefigaro.fr site and before any action on their part, as well as after having expressed their refusal, which clearly attests to the failure to comply with the rules applicable by the company, for a significant period.<sup>110</sup> With regard to the scope of the breach, the Restricted Committee emphasizes that SOCIETE DU FIGARO is a particularly important player in the media world, whose website has been well known and published for many years, since the domain name was registered in August 1996. In addition, the lefigaro.fr site has an average of 24.5 million visitors per month, for the last twelve months of the year in 2020, and was ranked, in January 2021, second among the 199 sites "fixed" websites (ie sites whose content does not vary according to the characteristics of the request) the most frequented.<sup>111</sup> Finally, the Restricted Committee notes that the measures put in place during the sanction procedure do not exonerate the company from its responsibility for the past in view of the breach of Article 82 of the "Informatique et Libertés" law observed.<sup>112</sup> .

Consequently, the Restricted Committee considers that an administrative fine should be imposed for the breach of Article 82 of the "Informatique et Libertés" law.<sup>113</sup> Secondly, with regard to the amount of the administrative fine proposed by the rapporteur, the company argues that the amount of the fine proposed is disproportionate and that the aforementioned breach does not in any way constitute a deliberate violation of Article 82 of the "Informatique et Libertés" law. The company then criticizes the rapporteur for not taking the result into account [...].<sup>114</sup> The Restricted Committee first recalls, in general terms, that Article 20, paragraph III, of the "Informatique et Libertés" law gives it jurisdiction to impose various sanctions, in particular administrative fines, the maximum amount of which may be equivalent to 2 % of the total worldwide annual turnover of the previous financial year achieved by the data controller.<sup>115</sup> The Restricted Committee then recalls that administrative fines must be dissuasive but proportionate. It considers in particular that the activity of the company, the means implemented by the company to bring itself into compliance and its financial situation must be taken into account for the determination of the

sanction and in particular, in the event of an administrative fine, of its amount. It notes in this respect that the company reports a turnover, for the year 2019, of [...] euros for a net result [...] euros. At the end of 2020, the company reports a provisional turnover of approximately [...] euros, for a net result [...] euros. It further notes that the company derived a definite financial advantage from the breach, since part of the company's income is linked to the advertising activities carried out on its website.<sup>116</sup> Therefore, in view of these elements, the Restricted Committee considers that the pronouncement of a fine of 50,000 euros appears justified, for the breach of Article 82 of the "Informatique et Libertés" law.<sup>117</sup> Finally, with regard to the publication of the decision, the company considers that it is not necessary, that it would have no educational effect and that other means could allow the restricted training to achieve this objective.<sup>118</sup> The Restricted Committee considers that the publication of this decision is justified in view of the seriousness of the breach in question, the scope of the processing and the number of persons concerned. The Restricted Committee considers in particular that this measure will make it possible to alert users, insofar as the disputed cookies were deposited without their knowledge, of the nature of the breaches in question.<sup>119</sup> Finally, the Restricted Committee considers that the measure is not disproportionate since the decision will no longer identify the company by name at the end of a period of two years from its publication.

FOR THESE REASONS

The Restricted Committee of the CNIL, after having deliberated, decides to: pronounce against SOCIETE DU FIGARO an administrative fine of 50,000 (fifty thousand) euros for the breach of article 82 of the Data Protection Act; make public, on the CNIL website and on the Légifrance website, its deliberation, which will no longer identify the companies by name at the end of a period of two years from its publication. The chairman Alexandre LINDEN

This decision may to be the subject of an appeal before the Council of State within two months of its notification.