

Deliberation SAN-2022-023 of December 19, 2022 National Commission for Computing and Liberties Nature of the deliberation: Sanction Legal status: In force Date of publication on Légifrance: Thursday, December 22, 2022 Deliberation of the restricted committee n°SAN-2022-023 of 19 December 2022 concerning the company MICROSOFT IRELAND OPERATIONS LIMITED The National Commission for Computing and Liberties, meeting in its restricted formation composed of Mr. Alexandre LINDEN, Chairman, Mr. Philippe-Pierre CABOURDIN, Vice-Chairman, Ms. Christine MAUGÜÉ, Mr. Alain DRU and Mr. Bertrand du MARAIS, members; Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 relating to the protection of personal data and the free movement of such data; Having regard to Law No. 78 -17 of January 6, 1978 relating to data processing, files and freedoms, in particular its articles 20 and following; Having regard to decree no. January 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 Data Processing and Freedoms; Having regard to decision no. 2020-128C of September 8, 2020 of the President of the National Commission for Computing and Liberties to instruct the Secretary General to carry out or have carried out a mission to verify any processing accessible from the "bing.com" domain or relating to personal data collected from the latter, from any organization likely to be concerned by their implementation; Having regard to decision n ° 2020-253C of September 8, 2020 of the President of the National Commission and Freedoms to instruct the Secretary General to carry out or have carried out a mission to verify the processing implemented by the company MICROSOFT FRANCE or on its behalf, in any place likely to be affected by their implementation; decision of the President of the National Commission for Computing and Liberties appointing a rapporteur to the restricted committee, dated December 23, 2021; Having regard to the report of Mr. François PELLEGRINI, commissioner rapporteur, notified to the company MICROSOFT IRELAND OPERATIONS LIMITED on July 13, 2022; Having regard to the written observations submitted by the company MICROSOFT IRELAND OPERATIONS LIMITED on September 9, 2022; Having regard to the rapporteur's response to these observations notified on October 10, 2022 to the company's board; Having regard to the written observations of the company MICROSOFT IRELAND OPERATIONS LIMITED received on November 15, 2022; Having regard to the other documents in the file; Were present at the restricted committee meeting of December 1, 2022: - Mr. François PELLEGRINI, statutory auditor, heard in his report; As representatives of the company MICROSOFT IRELAND OPERATIONS LIMITED:- [...] The company MICROSOFT IRELAND OPERATIONS LIMITED having the floor last;The Restricted Committee adopted the following decision:I. Facts and procedure1. MICROSOFT CORPORATION, a

multinational company created in 1976 whose head office is located in the United States, has as its main activity the development and sale of operating systems, application software, hardware and derived services. It also has a consulting and support activity for all MICROSOFT products. Its turnover amounted to 143 billion dollars in 2020 and 168 billion dollars in 2021. In 2020, it employed nearly 148,000 people in 120 countries.² MICROSOFT IRELAND OPERATIONS LIMITED (hereinafter "MIOL"), is a subsidiary of MICROSOFT CORPORATION whose registered office is located at 1, Microsoft Place, South County Business Park, Leopardstown in Dublin. Its main activity is the marketing and sales of software for the Europe and Asia-Pacific region. Its turnover amounted, in 2020, to [...] for an annual profit of [...] and to [...] for an annual profit of [...] in 2021.³ MIOL operates and develops the Bing search engine in the European Economic Area. The "bing.com" domain accessible from France had 10,801,000 unique users residing in France in September 2020 and the turnover attributable to the "bing.com" domain in France amounted to [...] in 2020 and to [...] in 2021.⁴ MICROSOFT FRANCE, a subsidiary of MICROSOFT CORPORATION and sister company of MIOL, is a simplified joint-stock company, registered with the Nanterre Trade and Companies Register under number 327733184, whose registered office is located at 37/45, Quai du President Roosevelt, Issy-les-Moulineaux (92130). It specializes in the distribution, promotion and sale of computer products and services. In 2020, it achieved a turnover of 2.2 billion euros, for a net result of 77.9 million euros and, in 2021, of 2.6 billion euros for a net result of €92.4 million.⁵ Following a referral recorded on February 21, 2020 in which the complainant denounced the conditions for obtaining his consent to the deposit of tracers ("cookies") from the domain "bing.com", a delegation from the National Commission for l'informatique et des libertés (hereinafter "the CNIL" or "the Commission") carried out an online check on the "bing.com" website, on September 29, 2020, pursuant to Decisions No. 2020-128C and 2020-253C of September 8, 2020 from the President of the CNIL. The purpose of this control was to verify the compliance of any processing accessible from the "bing.com" domain from a terminal located in France with the law n ° 78-17 of January 6, 1978 modified relating to data processing, files and freedoms (hereinafter "the Data Protection Act") and Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 (hereinafter "the GDPR" or "the Regulation"). 6. The online report of findings No. 2020-128-1, drawn up at the end of the inspection and notified to the companies MICROSOFT CORPORATION, MIOL and MICROSOFT FRANCE on October 15, 2020, invited the companies to answer several questions relating in particular to the identification of the entity which determines the purposes and methods of implementation of the processing of personal data relating to targeted advertising on the various domains visited during the check and accessible

from the "bing.com" domain, as well as the purpose of each of the cookies mentioned in the minutes.⁷ On November 13, 2020, MICROSOFT FRANCE sent response elements to the CNIL.⁸ On February 4, 2021, the company MICROSOFT FRANCE was heard and provided answers to the questions posed by the delegation, relating in particular to the relations between the companies MICROSOFT FRANCE, MICROSOFT CORPORATION and MIOL, to the organization of the protection of personal data staff within MICROSOFT and responsible for targeted advertising processing linked to the Bing search engine. On February 16, 2021, MICROSOFT FRANCE sent additional response elements.⁹ On May 11, 2021, a second online check was carried out by a delegation from the CNIL. During this check, the delegation followed the following route in order to identify whether cookies are placed on the user's equipment:- the delegation went to the "bing.com" domain;- then, without click on any of the buttons or links that appear on the cookie management banner (entitled "Accept" or "More options" or "Privacy statement"), they continued browsing the search engine before being blocked by a pop-up window; - finally, the delegation clicked on the "Privacy statement" and "More options" links located on the pop-up window. From the "more options" link, the delegation authorized the deposit of cookies on its terminal by clicking on the "Allow all" button.¹⁰ The delegation of control asked the companies MICROSOFT FRANCE, MICROSOFT CORPORATION and MIOL, within the framework of the online report of findings drawn up at the end of the control, for additional details on the purposes of each of the cookies mentioned in the said report. verbal and explanations as to the triggering of the advertising purpose of the "MUID" cookie.¹¹ On July 12 and August 31, 2021, on the basis of information provided by the company MIOL, the company MICROSOFT FRANCE communicated additional elements of response to the requests made by the delegation.¹² For the purposes of examining these elements, the President of the Commission, on December 23, 2021, appointed Mr François PELLEGRINI as rapporteur on the basis of Article 39 of Decree No. 2019-536 of May 29, 2019.¹³ On March 30, 2022, the board of the company MIOL communicated to the CNIL a bailiff's report of March 29, 2022 noting the update of the banner relating to cookies.¹⁴ On July 13, 2022, the rapporteur notified MIOL of a report detailing the breach of Article 82 of the Data Protection Act that he considered constituted in this case. This report proposed that the Restricted Committee impose an administrative fine on the company, as well as an injunction, accompanied by a penalty, to stop depositing the "MUID" cookie subject to the collection of the consent of persons residing in France when they arrive on the "bing.com" website, even before they have had the opportunity to make a choice as to the operations for accessing or entering information in their terminal. It also proposed that the sanction 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 publication¹⁵. On September 9, 2022, the company filed its observations in response to the sanction report.¹⁶ On September 22, 2022, the board of the company MIOI sent a letter to the CNIL, demonstrating the update of the preference management center of the cookie banner of the "bing.com" website.¹⁷ The rapporteur responded to the company's observations on October 10, 2022.¹⁸ On November 15, 2022, the company produced new observations in response to those of the rapporteur.¹⁹ By letter dated November 16, 2022, the rapporteur informed the company's board that the investigation was closed, pursuant to Article 40, III, of amended decree no. 2019-536 of May 29, 2019.²⁰ By letter dated November 16, 2022, the company was informed that the file was on the agenda of the restricted meeting of December 1, 2022.²¹ The rapporteur and the company presented oral observations during the restricted committee session.

II. Reasons for decision

A. On the processing in question and the competence of the CNIL

1. On the material competence of the CNIL and the non-application of the "one-stop shop" mechanism provided for by the GDPR²² The processing covered by this procedure, relating to the deposit of cookies and tracers on the terminal of users residing in France when using the Bing search engine, is carried out in the context of the provision of electronic communications services accessible to the public through a public electronic communications network offered within the European Union. As such, they fall within the material scope of 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 electronic communications, as amended by Directive 2006/24/EC of March 15, 2006 and by Directive 2009/136/EC of November 25, 2009 (hereinafter the "ePrivacy" Directive).²³ Article 5(3) of this directive, relating to the storage of or access to information already stored in the terminal equipment of a subscriber or user, has been transposed into national law in Article 82 of the Data Protection Act, within chapter IV of the law relating to the Rights and obligations specific to processing in the electronic communications sector.²⁴ Under the terms of article 16 of the Data Protection Act, "the restricted committee takes measures and pronounces sanctions against data controllers or subcontractors who do not comply with the obligations arising [...] from the this law". Under Article 20, paragraph III, of this same law, "when the data controller or its processor does not comply with the obligations resulting from [...] this law, the President of the National Commission for data processing and freedoms [...] can seize the restricted formation".²⁵ The rapporteur considers that the CNIL is materially competent to control and sanction the operations of access or registration of information implemented by the company in the terminals of users of the "bing.com" domain residing in France.²⁶ In defence, the company did not comment on the jurisdiction of the CNIL²⁷. The Restricted Committee recalls that

the Council of State, in its decision Société GOOGLE LLC and société GOOGLE IRELAND LIMITED of January 28, 2022, confirmed that the control of operations for accessing or registering information in the terminals of users in France of an electronic communications service, even resulting from cross-border processing, falls within the jurisdiction of the CNIL and that the one-stop-shop system provided for by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (hereinafter "the GDPR") is not applicable: "it has not been provided for the application of the so-called "one-stop shop" mechanism applicable to cross-border processing, defined in Article 56 of this regulation, for the measures for the implementation and monitoring of Directive 2002/58/EC of 12 July 2002, which fall within the competence of the national supervisory authorities by virtue of Article 15a of this directive. , with regard to the control of information access and registration operations in the terminals of users in France of an electronic communications service, even if proceeding from cross-border processing, the control measures for the application provisions having transposed the objectives of Directive 2002/58/EC fall within the competence conferred on the CNIL by the law of January 6, 1978 [...]" (EC, 10th and 9th chambers combined, January 28, 2022, GOOGLE LLC and company GOOGLE IRELAND LIMITED, n° 449209, pt. 12). The Council of State very recently reaffirmed this position in a judgment of June 27, 2022 (CE, 10th and 9th chambers combined, June 27, 2022, company AMAZON EUROPE CORE, n° 451423).²⁸ Therefore, the Restricted Committee considers that the CNIL is competent to initiate a sanction procedure concerning the processing implemented by the company falling within the scope of the "ePrivacy" directive, provided that the processing is related to its competence. territorial.² On the territorial jurisdiction of the CNIL²⁹. The rule of territorial application of the requirements set out in Article 82 of the Data Protection Act is specified in Article 3, paragraph I, of the same law which provides: "without prejudice, with regard to processing falling within the scope of Regulation (EU) 2016/679 of 27 April 2016, of the criteria provided for in Article 3 of this regulation, all the provisions of this law apply to the processing of personal data carried out within the framework activities of an establishment of a data controller [...] on French territory, whether or not the processing takes place in France".³⁰ The rapporteur considers that the CNIL has territorial jurisdiction pursuant to these provisions when the processing, subject of this procedure, consisting of operations to access or register information in the terminal of users residing in France, when navigation on the "bing.com" website, is carried out within the "framework of the activities" of the company MICROSOFT FRANCE, which constitutes the "establishment" on French territory of the company MIOL.³¹ In defence, the company made no observations on this point.³² Firstly, with regard to the existence of an establishment of the data controller on French territory, the Restricted Committee recalls that the Court

of Justice of the European Union (hereinafter the "CJEU") considered that the concept of establishment should be assessed in a flexible manner and that to this end, it is necessary to assess both the degree of stability of the establishment and the reality of the exercise of activities in another Member State, taking into account the specific nature of the economic activities and the provision of services in question (see, for example, CJEU, *Weltimmo*, 1 Oct. 2015, C 230/14, pts. 30 and 31). The CJEU also considers that a company, an autonomous legal person, from the same group as the controller, can constitute an establishment of the controller within the meaning of these provisions (CJEU, 13 May 2014, *Google Spain*, C-131/ 12, pt 48).³³ In this case, the Restricted Committee notes, first of all, that MICROSOFT FRANCE is the headquarters of the French subsidiary of MICROSOFT CORPORATION. It notes the existence of a program entitled "Resident Guest Employee", allowing a person working in an entity other than MICROSOFT CORPORATION to be contractually employed by the local entity but dependent, hierarchically and in the tasks it performs, from another entity of the MICROSOFT group. MICROSOFT FRANCE specified that in this case, several people in the team responsible for managing advertising for the Bing search engine, namely the Microsoft Advertising team which reports to MIOL, are employees of MICROSOFT FRANCE and deal with the French market.³⁴ Secondly, with regard to the existence of processing carried out "in the context of the activities" of this establishment, the Restricted Committee notes that, in its AMAZON EUROPE CORE decision of June 27, 2022, the Council of State recalled that "it follows from the case law of the Court of Justice of the European Union, in particular from its judgment of 5 June 2018, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH* (C-210/16), that in view of the objective pursued by this directive [the "e-Privacy" directive], consisting in ensuring effective and complete protection of the fundamental rights and freedoms of natural persons, in particular the right to protection of privacy and the protection of personal data, a processing of personal data can be regarded as carried out "in the context of the activities" of a national establishment not only if this establishment intervenes itself in the implementation of this processing, but also in the case where the latter is limited to ensuring, on the territory of a Member State, the promotion and sale of advertising space making it possible to make profitable the services offered by the person responsible for processing consisting in collecting personal data through connection tracers installed on the terminals of visitors to a site" (CE, 10th and 9th chambers combined, June 27, 2022, company AMAZON EUROPE CORE, n° 451423, pt. 10). The Council of State considered in this same decision that this was the case when the activities of the establishment of the data controller consist of the promotion and marketing of advertising tools controlled and operated by the data controller operating in particular thanks to

the data collected through connection tracers placed on the terminals of users of the site operated by the data controller (pt. 15 of the aforementioned decision).³⁵ In this case, the Restricted Committee notes that the operations of accessing or entering information in the terminal of users located in France, when using the Bing search engine, are intrinsically linked to the activities of the company MICROSOFT FRANCE. Indeed, the company MIOL operates and develops in the European Economic Area (EEA) the Bing search engine, on which advertising space is purchased by advertisers, the promotion of these advertising tools being ensured, for the French market, by part of the Microsoft Advertising team.³⁶ Thus, the processing consisting of operations of access or registration of information in the terminal of users residing in France, when using the Bing search engine, is indeed carried out "within the framework of the activities" of the company MICROSOFT FRANCE. The Restricted Committee notes that the two criteria provided for in Article 3, paragraph I, of the Data Protection Act are therefore met.³⁷ It follows that French law is applicable and that the CNIL is materially and territorially competent to exercise its powers, including that of imposing sanctions concerning processing falling within the scope of the "ePrivacy" directive. B. On the determination of the data controller³⁸. The Restricted Committee notes, first of all, that Article 4, paragraph 7, of the GDPR is applicable to this procedure because of the use of the concept of "data controller" in Article 82 of the Data Protection Act and Freedoms, which is justified by the reference made by article 2 of the "ePrivacy" directive to directive 95/46/EC on the protection of personal data, which has been replaced by the GDPR.³⁹ According to Article 4(7) of the GDPR, the controller is "the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of treatment".⁴⁰ The rapporteur considers that the company MIOL acts as responsible for the processing in question, in that it determines the purposes and means of processing consisting of access operations or registration of information in the terminal of users residing in France when using the Bing.⁴¹ search engine. The company did not submit any observations on this point.⁴² The Restricted Committee points out that, in its letter of November 13, 2020, the company MICROSOFT FRANCE, which communicates "on the basis of the information which [it] was communicated by Microsoft Ireland Operations Limited", referred to the role of MIOL as responsible for data processing carried out from the "bing.com" domain for users in the EEA, the United Kingdom and Switzerland and specified that MIOL exercised a decisive influence on the purposes and methods of implementation of the processing and in particular processing relating to targeted advertising. Finally, the Restricted Committee notes that these comments were confirmed by MICROSOFT FRANCE during the hearing of February 4, 2021.⁴³ It follows from the foregoing that the company MIOL determines the purposes and means of processing

consisting of access operations or registration of information in the terminal of users residing in France, when using the search engine Bing, and therefore acts as the controller in question.C. On the breach of cookie obligations⁴⁴. Under the terms of article 82 of the Data Protection Act, transposing article 5, paragraph 3, of the "ePrivacy" directive, "any subscriber or user of an electronic communications service must be informed in a clear and complete manner , unless it has been done beforehand, by the controller or his representative: 1° The purpose of any action aimed at accessing, by electronic transmission, information already stored in his terminal communications equipment electronic devices, or to register 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 the 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° Or, is strictly necessary for the provision of a communication service in line at the express request of the user ".1. On the obligation to obtain the user's consent to the deposit and reading of cookiesa. Regarding the deposit of a cookie on the user's terminal before any action on his part, without obtaining his consent⁴⁵. In his report, the rapporteur notes that the checks carried out revealed that upon arrival on the bing.com site, before any action on the part of the user, the "MUID" cookie was placed on the user's terminal. 'user. According to the information communicated by MIOL within the framework of the control procedure, this is a multi-purpose cookie used to ensure the security of the service, to measure the use of the website and for the presentation of advertisements. . The company indicated that a mechanism for collecting consent made it possible to trigger the advertising purposes of this cookie. The company nevertheless specified that when the advertising purpose of this cookie was not activated, it was used for the detection and filtering of advertising fraud concerning non-targeted advertising. The rapporteur notes that cookies relating to the detection and filtering of advertising fraud are part of the broader purpose of contextual advertising, which covers all advertising techniques consisting in offering advertising content according to the context in which the individual exposed to the message. He considers that these cookies are therefore not exclusively intended to allow or facilitate communication by electronic means and cannot be regarded as strictly necessary for the provision of an online communication service at the express request of the user. 'user. The rapporteur thus considers that the company MIOL disregards the obligations of article 82 of the law "Informatique et Libertés" by depositing this cookie without the consent of the

user.⁴⁶ In defense, the company explains that the "MUID" cookie is a multi-purpose cookie, used for essential and non-essential purposes to avoid using several cookies each for one purpose, in order to reduce the number of reads and writes of information between the user's terminal and "bing.com". The company indicates that only essential purposes are activated before the user gives consent. The company asserts that it considers as purposes essential to the functionality of "bing.com": the purposes of combating fraud, including advertising fraud, security purposes such as the prevention of denial of service attacks, malware detection and countering misinformation. The company maintains that these inseparable purposes are strictly necessary for the provision of "bing.com" services as requested by the user. The company specifies that in the absence of user consent, the only advertising purpose for which the "MUID" cookie is used is non-targeted advertising in the context of the fight against advertising fraud.⁴⁷ In his answer, the rapporteur recalls that, when the advertising purpose of the "MUID" cookie was not activated, this cookie was nevertheless used for the detection and filtering of advertising fraud concerning non-targeted advertising. It therefore considers that the deposit of this cookie requires the prior consent of the user for this purpose. In addition, the rapporteur specifies, in response to the company's argument considering the purpose of combating fraud in the broad sense as an essential purpose exempt from consent, that only the purpose of combating denial of service attacks could be exempt from consent. The rapporteur notes that the other purposes mentioned do not fall within the scope of the exemptions provided for in Article 82 of the Data Protection Act since they are not intended to facilitate electronic communication and are not strictly necessary for the provision of a service expressly requested by the user.⁴⁸ The company, in its final submissions, argues that the purposes of detecting malware and combating misinformation, and ad fraud are strictly necessary for the provision of the "bing.com" service, a service that produces relevant search results, reliable and safe. The company maintains that the term service should be interpreted with reference to a user's legitimate expectations, as well as the provider's legal obligations, regarding integrity, quality and security. It maintains that in any case, once the "MUID" cookie is placed on the user's terminal for an essential purpose, article 82 of the Data Protection Act does not apply to subsequent uses by the company of the personal data stored in the cookie. In this sense, the company concludes that the fight against misinformation, fraud, spam and abuse is compatible with the prevention of denial of service attacks, cybercrime, load balancing and session-to-session continuity, in accordance with Article 6(4) of the GDPR. The company also argues that in this case, compliance with GDPR requirements would then be overseen by the Data Protection Commission, Ireland's data protection authority, under the GDPR's one-stop shop, not the CNIL.⁴⁹ Firstly, with regard to cookies and other multi-purpose

tracers, the Restricted Committee recalls that Article 82 of the Data Protection Act requires consent to the operations of reading and writing information in the terminal of a user but provides for specific cases in which certain tracers benefit from an exemption to consent: either when the latter has the exclusive purpose of allowing or facilitating communication by electronic means or when it is strictly necessary for the provision of a online communication service at the express request of the user. The Restricted Committee notes by way of illustration that the Commission specifies, in its guidelines of September 17, 2020, that "the use of the same tracker for several purposes, some of which do not fall within the scope of these exemptions, requires obtain the prior consent of the persons concerned, under the conditions set out in these guidelines. For example, in the case of a service offered via a platform requiring user authentication ("logged-in universe"), the publisher of the service may use a cookie to authenticate users without asking for their consent (because this cookie is strictly necessary for the provision of the online communication service). On the other hand, it may not use this same cookie for advertising purposes other than if the latter have actually consented beforehand to this specific purpose ".⁵⁰ The Restricted Committee thus considers that, if a multi-purpose cookie can be deposited without consent for an essential purpose which falls under one of the two exemptions provided for in Article 82 of the Data Protection Act, the company may not use this cookie for non-essential purposes only if the user has actually consented to these specific purposes prior to registering in his terminal, contrary to what the company maintains. Indeed, the Restricted Committee notes that depositing a multi-purpose cookie on the user's terminal for essential purposes exempt from obtaining consent under the exemptions provided for in Article 82 of the Data Protection Act, then having of the GDPR the subsequent processing carried out for non-essential purposes of said cookie, would amount to circumventing the provisions of the Data Protection Act since the user's consent would never again be requested prior to the deposit of cookies. of the purposes invoked by the company, the Restricted Committee recalls that the use of a multi-purpose tracer is a flexibility left to the data controller so as not to overload the user's terminal with a multitude of tracers, each corresponding to a particular purpose .⁵¹ Secondly, the Restricted Committee considers that in order to determine whether the registration of a multi-purpose cookie, such as the "MUID" cookie, on the user's terminal requires the prior collection of their consent, it is necessary to determine if among the purposes announced by the company, at least one of them requires the prior collection of consent.⁵² In this case, the Restricted Committee notes that the purpose of the "MUID" cookie is in particular to fight against advertising fraud, understood as all the practices of third parties aimed at manipulating the distribution and the advertising measurement operated by the company MIOL, that this fraud is carried out to the detriment of

the company MIOL or its advertising partners. It considers that this purpose is part of the broader purpose of contextual advertising, which covers all advertising techniques consisting of offering advertising content according to the context in which the individual exposed to the message is located. The Restricted Committee considers that this purpose concerns the distribution of advertising, for the benefit of MIOL and its advertiser clients, but does not impact the provision of the search engine service to users. It notes that the company is confusing the dissemination of malicious content by the search engine's advertising services, which is part of the company's internal management, and the detection of fraud operated by bots, which makes it possible to fight against the artificial creation of clicks on advertising content or affiliate links in order to prevent robots from artificially increasing the number of views of an advertisement, and which is referred to as the fight against advertising fraud.⁵³ The Restricted Committee considers that cookies for this purpose do not meet any of the conditions provided for in the two aforementioned exceptions, particularly since advertising is not the service requested by the user, and require the user's consent. The Restricted Committee recalls that this position is not new since it has been supported by the CNIL since March 18, 2021 in the FAQ "Questions and answers on the amending guidelines and the "cookie and other tracers" recommendation published on its site. The Restricted Committee recalls that this soft law instrument specifically indicates that cookies to combat advertising fraud are not intended to facilitate electronic communication and are not strictly necessary for the provision of a service expressly requested. by the user.⁵⁴ Given these elements and without there being any need to comment on the other purposes invoked by the company, the Restricted Committee considers that the deposit and reading of a multi-purpose cookie such as that the "MUID" cookie on the user's terminal, at least for the purpose of combating advertising fraud as defined in paragraphs 52 and 53, requires the user to give his prior consent, under the conditions provided by article 82 of the Data Protection Act, as clarified by article 4, paragraph 11, of the GDPR.⁵⁵ The Restricted Committee thus considers that by allowing, on the day of the online check of May 11, 2021, the deposit and reading of this cookie on the user's terminal when he arrives on the "bing.com" site without collecting prior to its consent, the company MIOL has disregarded the obligations of article 82 of the Data Protection Act.b. Regarding the deposit of a cookie on the user's terminal after browsing without obtaining their consent⁵⁶. The rapporteur notes that the online check of May 11, 2021 revealed that the "ABDEF" cookie was placed on the user's terminal after continuing to browse, without the user's consent having been obtained. According to the information provided by the company as part of the control procedure, the "ABDEF" cookie has an advertising purpose. The rapporteur therefore considered that the MIOL company disregarded the obligations of article 82 of the

"Informatique et Libertés" law by depositing this cookie, without the consent of the user, whereas cookies and other tracers for advertising purposes do not not part of the cookies exempted from consent under the aforementioned article. In addition, the rapporteur noted that, after the online check, the company indicated that this cookie had been added inadvertently and that it would rectify this error before July 30, 2021 by placing it only after having obtained the user consent.⁵⁷ In defense, the company indicates that it had miscategorized the "ABDEF" cookie due to simple human inadvertence and that the latter was only placed for a short period since, since July 30, 2021, this cookie is now subject to the collection of user consent. The company invokes a "right to error" and explains that it acted in perfect good faith since it would have itself indicated its error to the CNIL by declaring in complete transparency, by letter dated July 12, 2021, that this cookie had been inadvertently added to the site.⁵⁸ The Restricted Committee notes that the letter of July 12, 2021 in which the company admitted having incorrectly categorized the "ABDEF" cookie is an answer to the question posed by the delegation of control in the context of the minutes drawn up at the end of the online control of May 11, 2021, "Specify the purposes of the cookies whose deposit could be noted in the PV n ° 2020-128/3 of May 11, 2021". The Restricted Committee considers that, if the deposit of the "ABDEF" cookie without obtaining the consent of the user was not intentional, it nevertheless resulted from a gross error on the part of the company which did not dispute the purpose advertising of said cookie. Furthermore, it was only following the Commission's review that MIOL realized its error and put an end to it.⁵⁹ The Restricted Committee considers that by allowing, on the day of the online check of May 11, 2021, the deposit and reading of the "ABDEF" cookie on the user's terminal after browsing the "bing.com" site without first collecting its consent, the company MIOL has disregarded the obligations of article 82 of the law "Informatique et Libertés", cookies and other tracers for advertising purposes are not part of the cookies exempt from consent under the aforementioned article.² . On the conditions for obtaining consent⁶⁰. In law, the "ePrivacy" directive provides in its article 2, f), that the consent of a user or subscriber corresponds to the consent of the person concerned appearing in directive 95/46/EC, to which is replaced by GDPR.⁶¹ Thus, since the entry into force of the GDPR, the "consent" provided for in the aforementioned Article 82 must be understood within the meaning of Article 4, paragraph 11, of the GDPR, that is to say that it must be given in a free, specific, enlightened and unequivocal manner and be manifested by a clear positive act.⁶² In this regard, recital 42 of this Regulation provides that "consent should not be considered to have been given freely if the data subject does not have a real freedom of choice or is not in a position to refuse or withdraw consent without prejudice".⁶³ The CNIL considers that it follows from these combined provisions, as it interpreted them in its deliberation no. 2020-091 of

September 17, 2020 adopting guidelines relating to the application of Article 82 of the law of January 6, 1978 amended to read and/or write operations in a user's terminal (in particular to "cookies and other tracers") and No. 2020-092 adopting a recommendation proposing practical methods for implementing compliance in the event of the use of "cookies and other tracers", that it must be as easy to refuse or withdraw consent to tracers as to give it. The Restricted Committee recalls that although these instruments are certainly not mandatory, they aim to interpret the applicable legislative provisions and to enlighten the players on the implementation of concrete measures to guarantee compliance with the legal provisions, so that they implement these measures or measures having equivalent effect. In this sense, it is specified in the guidelines that the main purpose of these "is to recall and explain the law applicable to the operations of reading and/or writing information [...] in the terminal equipment electronic communications of the subscriber or user, and in particular the use of cookies". Therefore, the Restricted Committee recalls that it retains a breach of the obligations arising from Article 82 of the Data Protection Act and not the non-compliance with the recommendations which constitute relevant insight to shed light on the obligations provided for by European legislators and French, in particular by drawing all the consequences of the principle of freedom of consent as defined in Article 4, paragraph 11, of the GDPR, and by applying them to the assumptions of acceptance and refusal by the user to the deposit of cookies on his terminal. Indeed, this principle of freedom of consent implies that the user benefits from a "true freedom of choice", as underlined in recital 42 of the GDPR, and therefore that the methods offered to him to express this choice are not biased. in favor of consent.⁶⁴ With regard to the possible refusal procedures, in this same recommendation, the Commission "strongly recommended that the mechanism making it possible to express a refusal to consent to read and/or write operations be accessible on the same screen and with the same facility as the mechanism for expressing consent. Indeed, it considers that consent collection interfaces which require a single click to consent to tracking while several actions are necessary to "parameterize" a refusal to consent present, in most cases, the risk of biasing the choice of the user, who wants to be able to view the site or use the application quickly. For example, at the stage of the first level of information, users can have the choice between two buttons presented at the same level and on the same format, on which are written respectively "accept all" and "refuse all", "authorize" and "prohibit", or "consent" and "do not consent", or any other equivalent wording and clear enough. The Commission considers that this modality constitutes a simple and clear way to allow the user to express his refusal as easily as his consent".⁶⁵ The rapporteur noted that on the day of the online check of 11 May 2021, the banner displayed on the "bing.com" website contained a button allowing the immediate acceptance of cookies, no similar

means were offered to the user to be able to refuse, easily and with a single click, the deposit of these cookies. He had to perform at least two actions (first click on "More options", leave the sliders pre-checked on "Disable" by default, then click on "Save settings") to refuse cookies against a single action to accept them. Such a mechanism therefore did not, according to the rapporteur, offer the same facility as that allowing one to express one's consent, in disregard of the legal requirements of freedom of consent, which imply not inciting the user to accept cookies rather than refuse them. The rapporteur also notes that before the modification of the terms in the preference management center made on September 22, 2022, the presentation of the window allowing the user to refuse cookies could be ambiguous due to the use of the infinitive – "Disable" – which in principle implies that an action must be taken. The rapporteur therefore considered that the conditions for obtaining consent implemented by the company MIOL on the "bing.com" website did not comply with the provisions of article 82 of the Data Protection Act as explained by article 4, paragraph 11, of the GDPR on the freedom of consent, at the time of the online control from May 11, 2021 and until March 29, 2022, the date on which the company implemented a "Reject all" button.⁶⁶ In defence, the company argues that neither the "ePrivacy" directive, nor its transposition into French law in article 82 of the "Informatique et Libertés" law, nor the GDPR, provide for the rule that it must be as easy to refuse cookies than to accept them. It argues that the CNIL's recommendation of September 17, 2020 is not binding. The company considers in this respect that the CNIL accepts the presentation of a less easily accessible or less visible button to refuse the registration of cookies. The company maintains that the length of the implementation times, the tests and the technical and commercial consequences on the activity of its search engine justified it waiting for the final decision of the Council of State to avoid yet another modification of her banner cookies.⁶⁷ The company also explains that before the implementation of this "Refuse all" button, it relied on a preference management center and explicit consent from its users for the use of non-essential cookies and that no cookies non-essential was placed on users' terminals before they clicked the "Accept" button. It thus considers that the user refused to consent to non-essential cookies when he refrained from clicking on the "Accept" button and continued browsing or by clicking on "Save settings" after visiting the preference center by clicking on "More options", and that it was thus as easy to refuse as to consent to read and/or write operations. MIOL therefore considers that the user could accept or refuse the deposit of cookies in a very simple way and each time according to two methods, thus ensuring a free choice.⁶⁸ Firstly, the Restricted Committee notes that, if the company MIOL today argues that the lack of choice expressed by the user had the effect of not registering any non-essential cookies on his terminal, the information banner displayed to the user contained no such

information.⁶⁹ The Restricted Committee considers, as the Commission recalled in its aforementioned guidelines, that if the user's refusal to consent to cookies can be deduced from his silence, it is on condition that the user is fully informed. Otherwise, the balance between the terms of acceptance and refusal is not respected. However, that was not the case in this case: by viewing the banner, the user was not informed of the means at his disposal to opt out of simply consenting to cookies.⁷⁰ The Restricted Committee considers, on the contrary, that it was not intuitive for the user to consider that by continuing to browse without performing any action on the cookie banner, no cookie would be deposited. It also notes that, if such navigation without action on the banner was indeed possible, as the delegation of control noted during the online check carried out on May 11, 2021, a choice was imposed concerning the deposit of cookies after three searches from the search engine, through a pop-up window with an "Accept" button and a "More options" button. Therefore, the simplest choice for an Internet user was to accept cookies via the "Accept" button. Thus, the Restricted Committee considers that in the absence of information on the consequences of his inaction, the user wishing to refuse cookies was strongly encouraged to click on the "More options" button and then to perform the two actions described. above.⁷¹ In addition, the Restricted Committee notes the inexplicit nature of the "More options" button offered in the context of the first window, which did not clearly mention the existence of means for refusing cookies as well as the ambiguity of the use of the infinitive "Disable" in the context of the second window, which could lead the user to believe that cookies were by default authorized. It considers that the fact that the cookies were not deposited has no impact on the confusion generated by the information path which could give the user the feeling that it was not possible to refuse the deposit of cookies and that it did not have any control methods in this regard or even to be mistaken when deactivating these cookies.⁷² Secondly, the Restricted Committee notes that it appears from several studies that the organizations that have set up a "Refuse all" button on the consent collection interface at the first level have seen the consent rate relating to acceptance cookies decrease. Thus, according to the "Privacy barometer - 2021 edition" published by the company COMMANDERS ACT, the rate of consent on computers fell from 70% to 55% in April-May 2021, since the collection of consent is explicit. Similarly, according to a 366-Kantar study, it appears that 41% of Internet users in France refused, systematically or partially, the deposit of cookies in June 2021.⁷³ The Restricted Committee also considers that making the mechanism of refusing cookies more complex than that of accepting them actually amounts to discouraging users from refusing cookies and encouraging them to favor the ease of the "Accept" button. Indeed, an Internet user is generally led to consult many sites. Internet browsing is characterized by its speed and fluidity. Having to click on "More

options" and having to understand how the page to refuse cookies is constructed is likely to discourage the user, who would nevertheless wish to refuse the deposit of cookies. It is not disputed that in this case, the company offered a choice between accepting or refusing cookies before the insertion of the "Refuse all" button, but the methods by which this refusal could be expressed, in the context of Internet browsing, biased the expression of choice in favor of consent in such a way as to alter the freedom of choice.⁷⁴ In view of the foregoing, the Restricted Committee considers that a breach of the provisions of Article 82 of the Data Protection Act, interpreted in the light of the GDPR, is constituted, insofar as, at the time of the online check from May 11, 2021 and until the implementation of a "Deny all" button on March 29, 2022, the user did not have the possibility of refusing read and/or write operations with the same degree of simplicity he had in accepting them.^{III}. On corrective measures and their publicity⁷⁵. Under the terms of article 20, III, of the amended law of January 6, 1978, "When the data controller or its subcontractor does not comply with the obligations resulting from regulation (EU) 2016/679 of April 27, 2016 or this law, the president of the National Commission for Computing and Liberties may also, if necessary after having sent him the warning provided for in I of this article or, if necessary in addition to a formal notice provided for in II, seize the restricted formation of the commission with a view to the pronouncement, after adversarial procedure, of one or more of the following measures: [...]

2° An injunction to bring the processing into conformity with the obligations resulting from the regulation (EU) 2016/679 of April 27, 2016 or of this law or to satisfy the requests presented by the person concerned in order to exercise their rights, which may be accompanied, except in cases where the treatment is implemented by the State, a penalty payment the amount of which may not exceed €100,000 per day of delay from the date set by the restricted committee; [...]

7° With the exception of cases where the processing is implemented by the State, an administrative fine not exceeding 10 million euros or, in the case of a company, 2% of the turnover total worldwide annual business for the previous fiscal year, whichever is greater. [...] The restricted committee takes into account, in determining the amount of the fine, the criteria specified in the same article 83 ".⁷⁶. Article 83 of the GDPR provides that "each supervisory authority ensures that administrative fines imposed under this Article for breaches of this Regulation referred to in paragraphs 4, 5 and 6 are, in each case, effective, proportionate and dissuasive", before specifying the elements to be taken into account to decide s it is necessary to impose an administrative fine and to decide on the amount of this fine.^A. On the imposition of an administrative fine and its amount⁷⁷. The company considers that the proposed administrative fine is disproportionate to the alleged breaches and its conduct, the fragile position of "bing.com" in the search engine market dominated by a single player, the essential role that "bing.com" plays in offering an alternative to

French users and the small proportion by which "bing.com" contributes to its financial results.⁷⁸ The Restricted Committee recalls that Article 20, paragraph III, of the Data Protection Act gives it jurisdiction to pronounce 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 carried out by the data controller or 10 million euros. It adds that the determination of the amount of these fines is assessed in the light of the criteria specified by Article 83 of the GDPR.⁷⁹ Firstly, the Restricted Committee stresses that it is appropriate, in this case, to apply the criterion provided for in subparagraph a) of Article 83, paragraph 2, of the GDPR relating to the seriousness of the breach taking into account the scope of the processing and the number of data subjects.⁸⁰ The Restricted Committee notes that by not complying with the requirements of Article 82 of the Data Protection Act, the company deprives users of the "bing.com" search engine residing in France of the possibility of choosing methods that preserve the confidentiality of their data and methods allowing better personalization of the service offered to them, thus reducing their informational autonomy. Furthermore, the absence of prior consent to the deposit of cookies upon the arrival of users residing in France on the "bing.com" website and during their navigation on the latter, constitutes a substantial infringement of the right to respect for the privacy of the persons concerned. Finally, the imbalance between the methods offered to the user to accept or refuse the deposit of cookies on his terminal does not allow him to benefit from a real freedom of choice.⁸¹ The restricted training also highlights the massive nature of the treatment. She recalls that the company indicated that the Bing search engine had nearly 11 million unique visitors in France for the month of September 2020, i.e. one sixth of the French population. The number of people concerned by the processing in question is therefore significant on the scale of the French population.⁸² In addition, the Restricted Committee notes that it appears from publicly available information that the Bing search engine is the leading competitor to that offered by Google, although it represents only 5% of the market share in average monthly number of query. The Restricted Committee also notes that the "bing.com" search engine is used by default for queries made within Windows operating systems. The Restricted Committee notes that, in fact, the search engine user base is extended beyond the single segment of web browsing software.⁸³ Secondly, the Restricted Committee considers that it is appropriate to apply the criterion provided for in paragraph k) of Article 83, paragraph 2, of the Rules relating to the financial benefits obtained as a result of the breach and to any other circumstances. ⁸⁴ The Restricted Committee recalls that the deposit of the "MUID" cookie on the terminal of users in France, before any action on their part and without their consent for the purposes of combating advertising fraud is contextual advertising. The Restricted Committee also notes that the deposit

of the "ABDEF" cookie on the terminal of users in France, after navigation and without their consent, as well as the absence of a similar means of refusing cookies than of accepting them, have direct consequences on the use of cookies for non-essential purposes that fall under personalized advertising.⁸⁵ In this respect, the Restricted Committee notes that the clients of the Microsoft Advertising team for the French public, such as [...] buy advertising space on the Bing search engine and collaborate with the Microsoft Advertising team in order to target the public premises and thus offer the most relevant advertisements. The Restricted Committee notes that the display of personalized advertisements to an Internet user is only possible if the navigation of the latter could be traced using a tracer, in order to determine which content would be the most relevant to display. In addition, the Restricted Committee points out that it emerges from the studies mentioned above that the companies which have set up a "Refuse all" button on the consent collection interface have seen the consent rate relating to the acceptance decrease in cookies, since a large proportion of Internet users completely or partially refuse cookies and other tracers, which necessarily has an impact in terms of revenue linked to online advertising. Thus, the Restricted Committee considers that the processing in question carried out by the company MIOL – consisting of operations to access or register information in the terminal of users residing in France when using the Bing search engine, without implementing a mechanism for refusing consent as easy as accepting cookies until March 2022 – participates in this respect in generating advertising revenue in France, for the benefit of the company's activity.⁸⁶ . Although the placement of cookies for advertising purposes is not the main source of income for the company, which indicates that it derives most of its profits from the resale of hardware, the marketing and licensing and distribution of software , the Restricted Committee notes that invoiced advertising revenue relating to the "bing.com" domain and made in France, which increased from [...] in 2020 to [...] in 2021, shows an increase of [...]%. ⁸⁷. The Restricted Committee also notes that the accounts of Microsoft Corporation and its subsidiaries which are publicly available demonstrate that advertising constitutes one of the major economic models of the Microsoft group. The group's 2021 annual report mentions that its gross margin increased by 10% in 2021 thanks, in particular, to the advertising sector.⁸⁸ In addition, the restricted training recalls the context in which the MIOL company has chosen not to offer its users, on the "bing.com" search engine, the option of easily refusing cookies until March 2022. Indeed , the CNIL has implemented a compliance plan on the issue of cookies spread over several years. The CNIL has communicated publicly on its website, on several occasions, on the fact that it must be as easy for the Internet user to refuse cookies as to accept them. This was the case in particular on October 1, 2020, when the aforementioned guidelines and recommendation of September 17, 2020 were

published. Compliance was to take place by April 1, 2021. Hundreds of thousands of players, from the smallest sites to the largest, have complied and introduced a "Refuse" or "Continue without accepting".⁸⁹ The Restricted Committee also notes that before the online check of May 11, 2021, a first online check had been carried out by the delegation on September 29, 2020, and that a hearing of the company MICROSOFT FRANCE had been organized on February 4, 2021 with the delegation. In this sense, the Restricted Committee notes that MIOL was warned that the search engine was expected to be brought into compliance by the CNIL, that cookies were deposited when consent was necessary and that it had the necessary time in particular to set up a compliant means of obtaining the consent of users.⁹⁰ The Restricted Committee notes, however, that it was not until March 29, 2022 that the company chose to insert a "Refuse all" button, following the appointment of a rapporteur by the President of the Commission.⁹¹ Finally, the Restricted Committee recalls that pursuant to the provisions of Article 20, paragraph III, of the Data Protection Act, the company MIOL incurs a financial penalty of a maximum amount of 2% of its turnover. business or 10 million euros, whichever is higher. Given the company's turnover amounting to [...] in 2021, the maximum amount of the fine incurred in this case therefore amounts to more than [...].⁹² Therefore, with regard to the liability of the company, its financial capacity and the relevant criteria of Article 83, paragraph 2, of the Rules mentioned above, the Restricted Committee considers that a fine of sixty million euros against MICROSOFT IRELAND OPERATIONS LIMITED appears justified.

B. On the issuance of an injunction⁹³. The rapporteur proposed to the Restricted Committee, in its initial report, to issue a compliance injunction relating to the conditions under which the "MUID" cookie is placed on the user's terminal, accompanied by a penalty payment of an amount of sixty thousand euros per day of delay payable at the end of a period of three months.⁹⁴ The company argues that the issuance of an injunction is unnecessary.⁹⁵ Firstly, the Restricted Committee notes that the company MIOL continues to deposit on the terminal of the user residing in France, before any action, the multi-purpose cookie "MUID" which requires the collection of consent, as it serves the purpose of combating advertising fraud. It therefore considers it necessary to issue an injunction in order for the company to comply with the applicable obligations in this area.⁹⁶ Secondly, the Restricted Committee recalls that the amount of the penalty payment must be both proportionate to the seriousness of the breaches committed and adapted to the financial capacities of the controller.⁹⁷ In view of these elements, the Restricted Committee considers as justified the issuance of an injunction accompanied by a penalty payment in the amount of sixty thousand euros per day of delay and liquidable at the end of a period of three months.

C . On advertising⁹⁸. The company disputes the rapporteur's proposal to make this decision public. It considers that the publication of

the sanction would have significant and disproportionate consequences in terms of image and reputation. To justify this request for publicity, the rapporteur relies in particular on the number of persons concerned and the nature of the breach established in this case.⁹⁹ The Restricted Committee considers that the publication of this decision is justified in view of the seriousness of the breaches in question, the scope of the processing and the number of data subjects.¹⁰⁰ The Restricted Committee notes that this measure will make it possible to alert French users of the Bing search engine of the characterization of the breach of Article 82 of the Data Protection Act in its various branches and of the issuance of an injunction to remedy it.

101. Finally, the measure is proportionate when the decision no longer identifies the company by name at the end of a period of two years from its publication. to: pronounce against the company MICROSOFT IRELAND OPERATIONS LIMITED an administrative fine of sixty million euros (€60,000,000), with regard to the breach of Article 82 of the Data Protection Act ; pronounce against the company MICROSOFT IRELAND OPERATIONS LIMITED an injunction to obtain the consent of users when they arrive on the website "bing.com" before any operation of reading and writing information on the terminal of users residing in France for the purpose of combating advertising fraud; attach to the injunction a penalty payment of sixty thousand euros (€60,000) per day of delay at the end of a period of three months following the notification of this deliberation, the supporting documents of compliance must be sent restricted training within this period; make public, on the CNIL website and on the Légifrance website, its deliberation, which will no longer identify the company by name at the end of a period of two years from its publication.

President Alexandre LINDENThis decision may be appealed to the Council of State within four months of its notification.