

Decision of the National Commission sitting in restricted formation on
the outcome of survey no. [...] conducted with Company A (formerly:
AA Company)

Deliberation no. 20FR/2022 of December 13, 2022

The National Commission for Data Protection sitting in restricted formation,
composed of Mrs. Tine A. Larsen, president, and Messrs. Thierry Lallemand and Alain
Herrmann, commissioners;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 relating
the protection of natural persons with regard to the processing of personal data
personnel and on the free movement of such data, and repealing Directive 95/46/EC;

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

Having regard to the internal rules of the National Commission for Data Protection
adopted by decision no. 3AD/2020 dated January 22, 2020, in particular its article 10.2;

Having regard to the regulations of the National Commission for Data Protection relating to the
investigation procedure adopted by decision No. 4AD/2020 dated January 22, 2020, in particular
its article 9;

Considering the following:

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I. Facts and procedure

1. During its deliberation session of 17 July 2020, the National Commission sitting in
plenary formation (hereafter: the “Plenary Formation”) has decided to open an investigation
with Company A (formerly: Company AA) on the basis of article 37 of the law of the 1st

August 2018 on the organization of the National Commission for Data Protection

and the general data protection regime (hereinafter: the “Law of 1 August 2018”)

and to appoint Mr. Christophe Buschmann as head of investigation.

The said decision specified that the investigation carried out by the National Commission for the

data protection (hereinafter: the “CNPD” or the “National Commission”) had

for the purpose of monitoring the application and compliance with the GDPR and the law of August 1, 2018, and

specifically compliance with Articles 12.1, 13 and 14 of the GDPR.

2. Company A (formerly: Company AA)¹ is a [...] registered in the Commercial Register

and Companies in Luxembourg under number [...], with registered office at L-[...], [...] (hereafter

after: the “controlled”).

The controlled [is active in the operation of internet portals and the provision of services via these

portals]. [...]. The internet portal put “in relation [...] and the users of the portal

web”.²

3. The decision of the National Commission sitting in restricted formation (hereafter: the

“Restricted Training”) on the outcome of the investigation will be based

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on the processing carried out by the controller in relation to the operation of the site

internet “[...]” (hereinafter: the “website”) and checked by CNPD officials;

And

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on the legal and regulatory provisions taken into account by the head of investigation

in its Statement of Objections.

4. By letter dated August 26, 2020, the head of investigation sent a preliminary questionnaire to the

to which the latter responded by letter dated September 23, 2020. The date of September 26,

August 2020 is later referred to in this decision as the “beginning of

¹ Company AA filed the change of its name to Company A on [...] with the Commercial Register and

Luxembourg companies.

2 See Statement of Objections, page 5, point 7.

3 See Statement of Objections of 13 January 2022.

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investigation ". After an on-site visit which took place on October 15, 2020, the inspection and

CNPD investigation department exchanged letters.⁴

5. Following this exchange, the head of investigation drew up Investigation Report No. [...] based on the

deliberation of July 17, 2020 relating to compliance with Articles 12 point 1, 13 and 14 of the

GDPR dated July 29, 2021 (hereinafter: the "Investigation Report").

It appears from the investigation report⁵ that in order to structure the investigation work, the chief

investigation has defined nine control objectives, namely:

- 1) ensure that the information is available;
- 2) ensure that the information is complete;
- 3) ensure that the absence of information is motivated by a valid exception;
- 4) ensure that information is transmitted by appropriate means;
- 5) ensure that the information is concise, transparent, understandable, and conveyed in clear and simple terms;
- 6) ensure that the information is appropriate for the category of data subjects;
- 7) ensure that information is free;
- 8) ensure that information is easily accessible; And
- 9) ensure that the information is transmitted during the key stages of the processing.

It is specified in the investigation report that the CNPD agents did not check "the

legality of the processing carried out by the controller". In this context, the example is given

following: “in the event that the controller informs the data subjects

that their personal data are kept for a period of 2 years, the

CNPD agents will be able to verify that the controller does not keep

said data for a different duration. On the other hand, the CNPD agents do not

4 See Statement of Objections, page 6, point 10 for a detailed list of exchanges throughout the investigation.

5 Investigation report, point “3.1 Control objectives”.

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will not comment on the legality of this 2-year period applied by the person responsible for the treatment. »6

The survey focused on users of the website and did not target other

categories of persons concerned such as the employees of the audit.⁷

The investigation report has as an appendix, among other things, the documents collected by the service of CNPD investigations and on which the investigation report is based (appendix 18), as well as

that the report of the on-site visit by CNPD agents of October 15, 2020

cited above (appendix 29) (hereinafter: the “Report”).

6. During its deliberation of July 23, 2021, the Plenary Formation appointed Mr. Marc

Lemmer, commissioner, as head of investigation replacing Mr. Christophe

Buschmann, resigned.

7. At the end of his investigation, the head of investigation notified the person inspected on

13 January 2022 a statement of objections (hereinafter: the “statement of objections”)

detailing the shortcomings that he considered constituted in this case in relation to the requirements

prescribed by Article 12.1 of the GDPR (obligation of transparency) and non-compliance

the requirements prescribed by Article 13 of the GDPR (right to information).

The head of investigation proposed to the Restricted Panel to adopt eight corrective measures different, as well as to impose on the controlled an administrative fine of an amount of 4,200 euro.

8. The controller responded to the statement of objections by email of 24 February 2022¹⁰.

9. By letter dated May 20, 2022, the president of the Restricted Formation informed the controlled that his case would be registered for the Restricted Panel session of July 6, 2022 and that he could attend this session. On June 4, 2022, the controller informed the Restricted Training that he could not attend the said session.

10. During the meeting of July 6, 2022, the head of investigation, Mr. Marc Lemmer, was here. He presented his oral observations in support of his written observations and

6 Investigation report, point "2.3 Reservations".

7 Investigation report, point "2.2 Scope".

8 Investigation report, point "5.1 Exhibits".

9 Investigation report, point "5.2 Report".

10 At the request of the controller, additional time was granted for the production of its response to the statement of objections.

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answered the questions posed by the Restricted Panel. The control was not present during the session. On July 15, 2022, the Restricted Training sent a letter to the controller for additional information.

11. By email of July 22, 2022, the auditee sent the additional information requested by the Restricted Panel in its letter of July 15, 2022.

II. Place

II. 1. On the reasons for the decision

A. On the breach related to the obligation of transparency

1. On the principles

12. According to Article 12.1 of the GDPR, the “controller shall take measures appropriate to provide any information referred to in Articles 13 and 14 as well as to carry out any communication under Articles 15 to 22 and Article 34 with regard to concerns processing to the data subject in a concise, transparent, understandable easily accessible, in clear and simple terms, in particular for any information intended specifically for a child. The information is provided by in writing or by other means including, where appropriate, electronically.

When the data subject so requests, the information may be provided orally, provided that the identity of the data subject is demonstrated by other means. »

13. Transparency is a fundamental aspect of the principles relating to the treatment of personal data.¹¹ The obligations in this area have been clarified by the Article 29 Working Party in its guidelines on transparency within the meaning of the Regulation (EU) 2016/679, the revised version of which was adopted on April 11, 2018 (hereinafter: “WP 260 rev.01” or the “transparency guidelines”).

These guidelines explain in particular the general rules of transparency established by Article 12 of the GDPR, and which are applicable to the communication of information to data subjects (Articles 13 and 14 of the GDPR), to communications addressed to data subjects regarding the exercise of their rights (Articles 15 to 22 of the

¹¹ See in particular Articles 5.1.a) and 12 of the GDPR, see also recitals (39), (58) to (60) of the GDPR.

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GDPR), and communications regarding data breaches (Article 34 of the GDPR).¹²

They underline that a “primary aspect of the principle of transparency highlighted in these provisions is that the data subject should be able to determine at in advance what the scope and consequences of the processing encompass in order not to be taken unawares at a later stage as to how his personal data personnel were used”¹³.

14. It should be noted that the European Data Protection Board (hereinafter: the “EDPS”), which succeeded the Article 29 Working Party on 25 May 2018, took over and reapproved the documents adopted by the said Group between May 25, 2016 and May 25, 2018, as specifically the aforementioned guidelines on transparency¹⁴.

2. In this case

2.1. Regarding the requirement to provide information in a “concise and transparent” way

15. In the context of objective 215 the head of investigation expected, among other things, that “the following information is accessible through the data protection policy, in accordance with the appendix “Information to be communicated to a person concerned under Article 13 or Article 14” of the guidelines on the transparency of the Article 29 Working Party on data protection:

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[...]

- The categories of data processed (see Tests 5 and 16),

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[...],

With regard to cookies and other tracers, information is expected as defined in Working Document No. 02/2013 setting out guidelines

guidelines on obtaining consent for the deposit of cookies adopted by the Group

of Work “Article 29”¹ (cf. Test 14): [...]. Like any other data processing, it

12 WP 260 rev.01, point 7.

13 WP 260 rev.01, point 10.

14 See

https://edpb.europa.eu/sites/edpb/files/files/news/endorsement_of_wp29_documents_en_0.pdf.

15 “Objective 2 - Ensure that the information is complete”; Investigation report, point 4.4.2.

Endorsement decision

of the EDPS

May 25

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2018,

of

available

below :

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is also expected to indicate the legal bases for each type of

cookie and other tracer. » 16

CNPD officials therefore inspected “the register of processing activities to

identify whether, for each processing listed in the register for which users

of the website are identified as a category of data subjects, mention of this is

made in the data protection policy”¹⁷ (cf. Test 15).

16. In this context, it is apparent from the statement of objections that “[i]n the context of

the analysis of the processing carried out by the Controlee and the information provided by the data controller to data subjects, it was found that the data protection policy data protection as it was available on the internet portal of the Controlee at beginning of the investigation [...] does not mention some of the processing carried out by the controlled”¹⁸.

17. More specifically, CNPD officials noted that the data categories indicated in the data protection policy are described as follows:

“the creation of your personal space requires that you provide us with certain personal data (your surname, first name, contact details, etc.)”¹⁹.

However, they noted that in the register of processing activities of the controller, "the sheet" Management of Customer data" indicates that the identifier of the users on social networks in case of login of the user account through of a social network. This is confirmed by the presence on the internet portal of the social plugin [...], while no information is given about the existence of this plugin in the policy data protection. »²⁰

It was also found that the Data Protection Policy provided some information relating to cookies following the information relating to the protection of data. However, the list of certain third-party cookies was designated by the terms "no exhaustive", which, according to CNPD officials, did not allow "the user of the

¹⁶ Investigation report, Ad Objective 2, points 4.4.2 and 4.4.2.1.

¹⁷ Investigation report, point “4.4.2.2.15 Test 15: Reconciliation with the processing register – processing performed by the audited body.

¹⁸ Statement of Objections, page 8, point 15.

¹⁹ Statement of Objections, page 9, point 19.

²⁰ Statement of Objections, page 9, point 19.

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Company A's internet portal to have a clear understanding of all types of third-party cookies used [...]”²¹.

In addition, CNPD officials noted that "the Controller's processing register is reference to the treatment of [...] users of Company A's internet portal in the framework of [...], the users' bank details in the event of reimbursement, and data from messages sent by users to Company A. However, the data protection policy does not provide any information relating to the processing of this data as described and detailed in the Controlled's processing register

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Finally, it was noted that "the data protection policy specifies that Company A will never ask users for data relating to their health" but that "the users of Company A's internet portal have the ability to [...]”.²³

18. It was noted that the auditee had carried out "a substantial update of the policy of data protection after the opening of this investigation" and that the said new data protection policy²⁴ indicated "now more precisely the processing by the Control of the identification data of users, their contact details (email address, postal address and telephone number), [...] as well as the bank details of a user in the event of a request for reimbursement by this last in his bank account.

In addition, it was noted that the new data protection policy indicated "now that the user of Company A's internet portal can provide information [...]”.

On the other hand, the CNPD agents also specified that the new policy of data protection "still did not provide the information relating to the

cookies necessary for the proper understanding by the data subject of the processing carried out by the Controlled party and no mention is made of the presence of the social plugin [...] on Company A's internet portal”²⁵.

21 Statement of Objections, page 9, point 19.

22 Statement of Objections, page 9, point 20.

23 Statement of Objections, page 9, point 21.

24 Investigation Report, Appendices, Exhibits 4.

25 Statement of Objections, point 22.

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19. Thus, the head of the investigation held that "the conditions of Article 12, paragraph 1, of the GDPR, as regards the principle of fairness and transparency, have not been respected”²⁶.

20. The Restricted Committee recalls that Article 12.1 of the GDPR requires, among other things, that information required by Articles 13 and 14 of the GDPR must be provided in a way transparent.

She notes that “transparency” has not been defined in the GDPR. Guiding lines on transparency specify that “[r]ecital 39 of the GDPR provides information on the meaning and effect of the principle of transparency in the context of data processing:

“The fact that personal data relating to natural persons is collected, used, accessed or otherwise processed and the extent to which this data is or will be processed should be transparent to individuals physical involved. The principle of transparency requires that all information and communication relating to the processing of this personal data are easily accessible, easy to understand, and formulated in clear and

simple. »

According to those guidelines, this principle also includes the right of persons concerned "to obtain confirmation and communication of personal data personal data relating to them which are the subject of processing."²⁷

21. The Restricted Committee notes that the data protection policy available in date of August 26, 2020 on the website of the controller (hereinafter: "the old policy of data protection"²⁸) mentioned the processing of "certain personal data (your surname, first name, contact details, etc.)" ²⁹, a non-exhaustive list of cookies (contained in a "cookie policy"³⁰ which has been added to the old data protection policy) and also the affirmation that the controlled will never ask users of its website for data relating to their health.

²⁶ Statement of Objections, point 23.

²⁷ WP 260 rev.01, point 6.

²⁸ Investigation Report, Appendices, Exhibit 3.

²⁹ Investigation Report, Appendices, Exhibit 3, page 2.

³⁰ Investigation Report, Appendices, Exhibit 3, page 2 and ss ("Policy on the use of cookies", point 3 "What cookie do we use?" ").

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However, it notes in the register of processing activities³¹ that the controller has also treaty³²

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the identifier of the users on the social networks in the event of connection of the account

user through a social network,

- of the [...],
- the users' bank details in the event of reimbursement,
- data from messages sent by users to the controller, and
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if the user so wishes, data relating to [...].

22. With regard to information on cookies, the Restricted Committee recalls that the deposit or reading of information on the user's terminal equipment are framed by the amended law of 30 May 2005 relating to specific provisions for the protection of person with regard to the processing of personal data in the sector of electronic communications (hereinafter: "amended law of 30 May 2005"). If the use of cookies leads in addition to said deposit or the reading of information on the equipment user's terminal "to the collection (or any other processing) of personal data personal (for example, when cookies are used to collect data about the purchasing preferences of a specific user), all the rules of the GDPR will be must also be observed, which implies in particular that the processing must be based on a separate condition of lawfulness (Article 6 of the GDPR) and that information in accordance with Articles 12 to 14 of the GDPR must be provided to the data subject".³³

31 Investigation Report, Appendices, Exhibit 8.

32 According to the "register of processing activities" of the audit transmitted on September 23, 2020 (see Report Investigation, Appendices, Exhibit 8).

33 CNPD guidelines on cookies and other tracers, point 2., available at:

<https://cnpd.public.lu/fr/dossiers-thematiques/cookies/legal-context.html>.

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Indeed, the case law of the Court of Justice of the European Union³⁴ has confirmed that it is possible that the processing falls both within the material scope of the Directive

“privacy and electronic communications”³⁵ and that of the GDPR.³⁶

However, as the control of the application and compliance with the aforementioned law of 30 May 2005 was not within the scope of the investigation in question, the Restricted Panel does not rule not in this decision on the compliance of the audit with the requirements posed by this law.

23. Finally, it takes note of the fact that the auditee has put in place a new policy of

data protection (hereinafter: the “new data protection policy”³⁷)

and a new cookie management policy (hereinafter: the “new cookie management policy”)

of cookies”³⁸) which were sent to CNPD officials before the on-site visit and

well before the notification of the statement of objections.

24. In view of the foregoing, the Restricted Panel concurs with the opinion of the head of investigation and concludes that at the start of the CNPD's investigation, the control had failed in the obligation to transparency arising from Article 12.1 of the GDPR, and more specifically from the requirement of provide the categories of personal data that are subject to processing.

2.2. As to the requirement to provide information in an "easily accessible" way

2.2.1. At the level of written communication of information

25. In the context of objective 439 the head of investigation expected, among other things, that “the information relating to data protection is communicated on the website controlled by at least the following means:

☐ contextual information at information collection points (see Test 1),

34 “Planet 49” case, CJEU, C-673/17, 1 October 2019, points 42 and 65.

35 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on the processing of personal data and the protection of privacy in the electronic communications sector,

as amended.

36 EDPS, Opinion 5/2019 on the interactions between the “Privacy and Electronic Communications” Directive and the GDPR, in particular with regard to the competence, tasks and powers of data protection authorities of data, adopted on March 12, 2019, point 30. et seq.

37 Investigation Report, Appendices, Exhibit 4.

38 Investigation Report, Appendices, Exhibit 5.

39 “Objective 4 - Ensure that information is transmitted by appropriate means”; Investigation report, item 4.4.4.

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☐ a reference to the data protection policy at each footer of the website (cf.

Test 1). »40

26. In this context, it appears from the investigation report that the CNPD agents “have connected to the website of the controlled to put themselves under the same conditions as a user, in order to identify the way in which the information relating to the protection of data is communicated to the data subjects”.41

They noted that “information relating to data protection is sent in writing to the persons concerned through two links “Privacy” and “Cookies” accessible on Company A’s internet portal”.42 However, they also noted that “by clicking on the “Privacy” link, a page entitled “Data Protection Notice [...]” opens and provides the user with general information on data protection legislation data, unrelated to the processing carried out by Company A (PIECE 2). It’s in clicking on the “Cookies” link, a page appears entitled “Charter for the protection of personal data and the processing relating to cookies” giving the user

information on the processing of personal data carried out by the Company

A (PIECE 3 – old data protection policy)”. 43

27. In the Statement of Objections, the Head of Investigation therefore considered that “in the present case the choice to provide information relating to the processing of personal data personal information under the "Cookies" link, while there is also a link entitled “Privacy” may mislead data subjects.

Indeed, in such a situation, the users of the Internet portal of Company A expect to find the information relating to the processing carried out by Company A under the "Privacy" link and, not finding them, might think that the information does not are not available rather than looking for them under the "Cookies" link. Information is therefore difficult for the user of Company A's internet portal to find.”44

28. He also observed that the auditee made changes to his website after the opening of the investigation and that “the information relating to the processing carried out by the Controlled (excluding cookies) are now accessible by clicking on the "Privacy" link and

40 Investigation report, Ad Objective 4, point 4.4.4.1.

41 Investigation report, point 4.4.4.2.1.1.

42 Investigation report, point 4.4.4.2.1.2. ; Investigation Report, Appendices, Exhibit 1.

43 Investigation report, point 4.4.4.2.1.2. ; Investigation Report, Appendices, Exhibits 2 and 3.

44 Statement of Objections, point 26.

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information relating to cookies is now accessible under the link “Cookies”, which allows the user of Company A's internet portal to find more easily”45.

29. For this reason, the head of the investigation held that the "conditions of article 12, paragraph 1 of the GDPR were not met at the start of the investigation with regard to the criterion accessibility of information. »⁴⁶

30. The Restricted Panel refers in this context, on the one hand, to the text of Article 12.1 of the GDPR which states that "[t]he information shall be provided in writing or by other means including, where appropriate, electronically" and, on the other hand, to guidelines on transparency stating that "[t]he position of the G29 with regard to written electronic means is that, when a data controller feeds (or operates in part or in whole) a website, it is recommended that he use a statement or notice on the protection of privacy at different levels allowing site visitors to navigate through specific aspects of the statement or opinion on the protection of privacy that most interests them"⁴⁷.

It notes that the said guidelines also specify that "[a] direct link to this privacy statement or notice should be clearly visible on each page of this website under a commonly used term (such as "Privacy", "Privacy Policy" or "Privacy Shield Notice").

Text or links whose layout or choice of color makes them less visible or difficult to find on a web page are not considered easily accessible"⁴⁸.

31. It considers that the fact that at the start of the investigation, the information relating to the processing personal data of users of the website were provided under the "Cookies" link and not under the "Privacy" link, which also existed, did not make not this information easily accessible, nor directly accessible via a direct link and under a commonly used term.

32. In addition, the Restricted Panel takes note of the assertion of the head of investigation according to which the controlled had made changes to its website after the opening

45 Statement of Objections, paragraph 27.

46 Statement of Objections, point 26.

47 WP 260, point 17.

48 WP 260, point 11, page 9 ("Example").

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of the survey and it notes that the information relating to the processing carried out by the
controlled (excluding cookies) are now accessible under the "Privacy" link and those
relating to cookies under the link "Cookies"⁴⁹.

33. In view of the foregoing, the Restricted Panel concurs with the opinion of the head of investigation and
concludes that at the start of the CNPD's investigation, the control had failed in the obligation to
transparency arising from Article 12.1 of the GDPR, and more specifically from the requirement of
provide the required information in an easily accessible manner.

2.2.2. In terms of updates to the data protection policy

34. As part of objective 450, the lead investigator expected, among other things, "that
all material updates to the Privacy Policy will be
the subject of active communication (informative e-mail, pop-up on the website, etc.) with
a summary of the (main) changes (see Test 5).

A preamble summary of the data protection policy is also
expected as soon as the reading of the policy exceeds 5 minutes. In fact, the summary
eliminates the need for the user to scroll through large amounts of text to
search for specific information. For shorter policies, this constitutes a
good practice (see Test 6). »⁵¹

35. In this context, it appears from the investigation report that the CNPD agents "have

interviewed with the controller on October 15, 2020 to identify the presence of a
updated the data protection policy and have inspected [if] the website of the
checked to identify the presence of information relating to this update, if applicable
appropriate (electronic communication, pop-up, information banner, etc.)”⁵².

They found that the controlled had updated the old protection policy of
data in September 2020⁵³ but that “the persons concerned were not
informed of this update”⁵⁴ and that “on Company A’s internet portal, no
pop-up, information banner or electronic communication has not been put in place by the
49 Statement of Objections, page 11, point 27; Website : [...].

50 “Objective 4 - Ensure that information is transmitted by appropriate means”; Investigation report,
item 4.4.4.

51 Investigation report, point 4.4.4.1.

52 Investigation report, point 4.4.4.2.5.1.

53 Investigation report, point 4.4.4.2.5.2.

54 Statement of Objections, page 12, point 29.

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Controlled to inform users [...]”⁵⁵. Furthermore, they found that “no
summary of the main changes made has not been made available to users
while the changes to the data protection policy were
substantial”⁵⁶.

36. For this reason, the head of the investigation held that “the conditions of article 12,
paragraph 1 of the GDPR have not been complied with with regard to the requirements of the
transmission of information. »⁵⁷

37. The Restricted Training refers in this context to the guidelines on the transparency indicating that the "controller should respect the same principles when communicating the initial opinion or declaration on the protection of life privacy and any subsequent material changes to this notice or this declaration" and "that a change notification should always be communicated by a suitable means (for example, e-mail, postal mail, pop-up window on a web page or other means that effectively captures the attention of the data subject) specifically devoted to modification (for example, separate from a content of direct marketing), and this communication must comply with the requirements of Article 12 [...]. The information contained in the privacy notice or statement stating that the data subject should regularly check the notice or statement on privacy in order to find out about any changes or updates are considered not only insufficient, but also unfair [...]"⁵⁸.

38. It also recalls that "the data controller should also, when notification of changes to the persons concerned, explain to them the impact that these modifications could have on them"⁵⁹.

39. In this context, the Restricted Committee notes that the former protection policy of the data did not mention whether and, if so, how the updates substantial

said former data protection policy would be communicated to the persons concerned⁶⁰. It notes, for example, that it emerges of the investigation report that the modifications made to the former protection policy

⁵⁵ Statement of Objections, page 12, point 33.

⁵⁶ Statement of Objections, page 13, point 33.

⁵⁷ Statement of Objections, point 34.

⁵⁸ WP 260 rev.01, point 29.

59 WP 260 rev. 01, item 31.

60 See Investigation Report, Appendices, Exhibit 3.

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data in September 2020 had not been shared with people

concerned by an appropriate means and that a data subject could only

note the date of the last update at the top of the page of the new policy of

Data protection. It also notes that the changes made to the former

data protection policy were substantial. Indeed, in the old

data protection policy it lacked, among other things, all the purposes of the

processing carried out as well as their legal bases⁶¹ and it is clear from the new policy

of data protection that the purposes of the processing and their legal bases have

been added⁶².

40. In view of the foregoing, the Restricted Panel concurs with the opinion of the head of investigation and

concludes that the auditee breached the transparency obligation arising from Article 12.1

of the GDPR, and more specifically the requirement to provide the required information in a way

easily accessible.

2.3. As for the requirements to provide information in a way that is "understandable" and "in

clear and simple terms"

41. In the context of objective 563 the head of investigation expected, among other things, that "the

information must be transmitted in clear and simple terms, without structures

complex linguistics, without abstract or ambiguous terms, without vague terms and without

leave room for different interpretations (cf. Test 2)"⁶⁴.

Also in the context of objective 565 the head of investigation expected, among other things, that

that “the data protection policy is available in the same languages as those offered on the website, namely the languages of the customers targeted by the services of the controlled (cf. Test 3)”⁶⁶.

42. The CNPD agents then inspected “the website and the data protection policy audit data to assess the clarity and simplicity of the information communicated.

CNPD officials notably checked the absence of linguistic structures

61 Statement of Objections, point 48.

62 Statement of Objections, point 53.

63 “Objective 5 - Ensure that information is concise, transparent, understandable, and transmitted in clear and simple terms”; Investigation report, point 4.4.5.

64 Investigation report, point 4.4.5.1.

65 “Objective 5 - Ensure that information is concise, transparent, understandable, and transmitted in clear and simple terms”; Investigation report, point 4.4.5.

66 Investigation report, point 4.4.5.1.

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complex, abstract or ambiguous terms, vague terms or leaving room for different interpretations (in particular for purposes and legal grounds)”⁶⁷

From the statement of objections it appears that in the context of the analysis of the former data protection policy of the controlled, it was found that the terms used were vague and abstract. The head of investigation noted in particular that this was the case in particular the words “Company A is likely to collect certain information of a personal nature intended to offer you personalized and optimal use of the site and applications [...]”, “requires you to provide us with

certain personal data (your surname, first name, contact details, etc.)

“, “we also collect certain information relating to your habits of navigation”, or even “Cookies are also necessary for the proper functioning of certain services [...]”⁶⁸.

Thus, the head of the investigation considered that these terms would have the consequence “that the users of Company A’s web portal are unable to determine precisely which personal data are processed by the controller nor the purposes of such processing”.

43. With regard to the translation of the old data protection policy, the CNPD officials inspected “the data protection policy to identify the existence of a translation in the same languages as those for which the site is available »⁷⁰.

It appears from the statement of objections that the former data protection policy data was only available in French “while the internet portal itself is also available in French, German and Luxembourgish. »⁷¹

44. It was noted that with regard to the clarity of the information required, “[t]he new data protection policy is more detailed and uses terms more precise and clear”⁷².

67 Investigation report, point 4.4.5.2.2.1.

68 Statement of Objections, page 14, point 39

69 Statement of Objections, page 14, point 39.

70 Investigation report, point 4.4.5.2.3.1.

71 Investigation report, point 4.4.5.2.3.2.

72 Statement of Objections, page 14, point 40.

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On the other hand, with regard to the translation of this new data protection policy data, it appears from the statement of objections that “no translation of this new data protection policy is not yet available on the internet portal of Company A”⁷³ but that the auditee had expressed his intention to “update available on the internet portal of Company A a translation of the protection policy data in English and German languages, as mentioned during the on-site visit of 15 October 2020”⁷⁴.

45. In view of the above developments, the head of investigation noted that the controlled “has breached its obligation under Article 12(1) of the GDPR”⁷⁵ and more particularly with regard to the requirements of comprehensibility, clarity and simplicity of the terms employees.

46. The Restricted Committee recalls that Article 12.1 of the GDPR requires, among other things, that required information must be provided in a comprehensible manner and in terms clear and simple.

As for the clarity of the information required, she notes first of all that the lines Transparency Guidelines state that “the requirement that such information be “understandable” means that they should be able to be understood by the majority of the intended audience”, “comprehensibility is closely linked to the requirement to use clear and simple” and that a “controller knows the people about from which it collects information and can use this knowledge to determine what that audience would be likely to understand.

She then notes that the Transparency Guidelines state that “the requirement plain and simple terms means that the information should be provided in the manner as simple as possible, avoiding complex sentences and linguistic structures.

The information should be concrete and reliable; they should not be formulated in abstract or ambiguous terms or leave room for different interpretations. More in particular, the purposes and legal bases of the processing of the data to personal character should be clear. »77. Among other things, it specifies that

73 Statement of Objections, page 14, point 40.

74 See Minutes, last page; Statement of Objections, page 14, point 41.

75 Statement of Objections, page 15, paragraph 43.

76 WP 260 rev.01, point 9.

77 WP 260 rev.01, point 12.

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"qualifiers such as 'may', 'could', 'some', 'often' and 'possible' are to be avoided"78.

As for the translation of the old data protection policy, she notes that said guidelines specify that a "translation into one or more languages should be provided when the controller targets data subjects speaking these languages.

47. With regard to the clarity of the information provided in the former policy of data protection criticized by the head of the investigation, the Restricted Panel observes that said policy included, among other things, that a non-exhaustive list of the data to be personal character concretely processed by the controller ("certain information to be personal character" or even "certain personal data"80) and a lack of precision in relation to the use of cookies ("cookies"81) and still a lack precision relating to several information required by article 13 GDPR to which article

12 GDPR refers (such as, for example, the purposes and legal bases of the treatments; see Part B of this Decision for further details).

In addition, the Restricted Panel takes into account the assertion of the head of investigation according to which the new data protection policy of the controlled was more detailed and applied more precise and clear terms.

48. With regard to the translation of the old data protection policy, the Restricted Formation notes that at the start of the investigation, the former policy for the protection of data was only available in French although the website was updated arrangement in four different languages: in French, English, German and Luxembourgish⁸³.

It considers that the fact that the controller made the website available to users in four languages, shows that it was aimed at a multilingual audience and therefore also users who do not necessarily master French, and of whom he could not

78 WP 260 rev.01, point 13.

79 Same.

80 Statement of Objections, page 14, point 39.

81 Statement of Objections, page 14, point 39.

82 Statement of Objections, page 14, point 40.

83 Statement of Objections, page 14, point 40.

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expect they are likely to understand a privacy policy

data written in French.

In view of the fact that the controller had not provided multilingual users of its site

internet a data protection policy in languages other than French,

Formation Restreinte believes that it had not provided them with the information required under

an easily understandable form.

49. In view of the foregoing, the Restricted Panel concurs with the opinion of the head of investigation and

concludes that at the start of the CNPD's investigation, the control had failed in the obligation to

transparency arising from Article 12.1 of the GDPR, and more specifically from the requirement of

provide the required information in a way that is understandable and in terms that are clear and

simple.

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

1. On the principles

50. Article 13 of the GDPR provides the following:

“1. Where personal data relating to a data subject is

collected from this person, the data controller provides him, at the time

where the data in question is obtained, all of the following information:

a) the identity and contact details of the controller and, where applicable, of the

representative of the controller;

b) where applicable, the contact details of the data protection officer;

c) the purposes of the processing for which the personal data are intended as well as

the legal basis for the processing;

d) where the processing is based on Article 6(1)(f), the legitimate interests

sued by the controller or by a third party;

e) the recipients or categories of recipients of the personal data,

if they exist; And

(f) where applicable, the fact that the controller intends to carry out a

transfer of personal data to a third country or to an organization

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international community, and the existence or absence of an adequacy decision issued by the

Commission or, in the case of transfers referred to in Article 46 or 47, or Article 49,

paragraph 1, second subparagraph, the reference to the appropriate or suitable safeguards and the

means of obtaining a copy or where they have been made available;

2. In addition to the information referred to in paragraph 1, the controller shall provide the

the data subject, at the time the personal data is obtained,

the following additional information which is necessary to guarantee a

fair and transparent treatment:

a) the retention period of the personal data or, where this is not

possible, the criteria used to determine this duration;

b) the existence of the right to request from the controller access to the data to

personal character, the rectification or erasure of these, or a limitation of the

processing relating to the data subject, or the right to oppose the processing and

right to data portability;

c) where the processing is based on point (a) of Article 6(1) or on Article 9,

paragraph 2(a), the existence of the right to withdraw consent at any time,

without affecting the lawfulness of the processing based on the consent made before the

withdrawal thereof;

d) the right to lodge a complaint with a supervisory authority;

(e) information on whether the requirement to provide data to

personal nature has a regulatory or contractual nature or if it conditions the

conclusion of a contract and whether the data subject is obliged to provide the data to personal character, as well as on the possible consequences of the non-provision of those data ;

f) the existence of automated decision-making, including profiling, referred to in Article 22, paragraphs 1 and 4, and, at least in such cases, useful information concerning the underlying logic, as well as the significance and intended consequences of such processing for the person concerned.

3. When he intends to carry out further processing of personal data
personal data for a purpose other than that for which the personal data

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have been collected, the data controller provides the data subject beforehand
concerned information about this other purpose and any other information
relevant referred to in paragraph 2.

4. Paragraphs 1, 2 and 3 do not apply where and to the extent that the person
concerned already has this information. »

51. The communication to data subjects of information relating to the processing of
their data is an essential element in the context of compliance with the general obligations
transparency within the meaning of the GDPR.⁸⁴ These obligations have been clarified by the Group
of Article 29 in its guidelines on transparency which have been taken up and
re-approved by the EDPS.⁸⁵

52. For the rest, the Restricted Panel refers to points 12 to 14 of this
decision with regard to the principles to be observed under the obligation to
transparency in accordance with Article 12.1 of the GDPR.

2. In this case

53. Under objective 286 the head of investigation expected, among other things, that “the following information is accessible through the data protection policy, in accordance with the appendix “Information to be communicated to a person concerned under Article 13 or Article 14” of the guidelines on the transparency of the Article 29 Working Party on data protection:

-

[...]

- The purpose(s) and legal basis of the processing (it is expected that the legal basis specific to each treatment is filled in, and not just the list of databases that exist under the GDPR) (see Test 3),

- The legitimate interests pursued when the processing is based on Article 6, paragraph 1, point f), of the GDPR (cf. Test 4),

-

[...],

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

85 See points 13 and 14 of this decision.

86 “Objective 2 - Ensure information is complete”; Investigation report, point 4.4.2.

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- The recipients or categories of recipient of the data (see Tests 6),
- Transfers of data to third countries where applicable (see Tests 7),
- The data retention period or, when this is not possible, the criteria used to determine this period (see Tests 8 and 20),

- The rights of data subjects: access, rectification, erasure, limitation of processing, objection to processing, data portability, complaint to a supervisory authority, the right to withdraw consent at any time. Additionally, a information is expected on the means made available to exercise one's rights access (e-mail address or specific contact form allowing the responsible for processing to receive requests relating to the protection of data) (cf. Tests 9 and 10),
- Information of the existence of automated decision-making (including profiling) and, in such a case, at least useful information concerning the underlying logic, as well as the importance and the foreseen consequences of this treatment for the person concerned (see Test 13),
- [...].

With regard to the forms on the website, it is expected that they are clearly indicated the mandatory fields, the optional fields and the consequences if fields mandatory and/or optional are left empty (cf. Tests 11 and 19). »⁸⁷

54. To identify the presence of the information mentioned above, the agents of the CNPD inspected, among other things, the controller's website, the former policy of data protection and register of processing activities⁸⁸ of the controller.

55. Moreover, CNPD officials noted in the statement of objections that the controlled could not rely on the exception provided for in Article 13.4 of the GDPR because that, in this case, the persons concerned did not already have all the information mentioned in point 53 in their possession⁸⁹.

⁸⁷ Investigation report, point 4.4.2.1.

⁸⁸ Investigation Report, Appendices, exhibit 8.

⁸⁹ Statement of Objections, point 47.

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2.1. As for information on the purposes and legal bases of the processing

56. It emerges from the investigation report that “[t]he purposes of the processing as mentioned in the old data protection policy available on the internet portal of the Company A are “to offer you a personalized and optimal use of the site and the applications of Company A” (EXHIBIT 3, page 1)”. CNPD officials observed that the purposes of the processing were “more detailed in the processing register provided by the controller (PIECE 8)” and that “[t]all the purposes of the processing carried out by Company A on the data of users of the internet portal are therefore not indicated in the old data protection policy”⁹⁰.

With regard to the legal legal bases of the processing, the agents of the CNPD noted “that no legal basis was indicated in the old policy of data protection (PART 3)”⁹¹.

For these reasons, the head of investigation noted in the statement of objections that “the conditions of Article 13, paragraph 1, letter c) of the GDPR have not been complied with. »⁹²

Nevertheless, it was noted by the CNPD agents that the new policy of data protection contained “more information relating to the purposes of the processing, detailed by category of data processed” and that the legal bases were “also presented in the new data protection policy”. In

However, they also observed that the new cookie management policy⁹³ did not indicate “the legal basis of the cookies used on the internet portal”.

57. The Restricted Committee notes that the former data protection policy does not did not mention all of the purposes of the processing carried out by the controller. She

also notes that no legal basis for the processing was indicated in the said data protection policy.

58. In view of the foregoing, the Restricted Panel concurs with the opinion of the head of investigation and concludes that at the start of the CNPD's investigation, the control had not provided users with of its website all the information made mandatory by article 13.1.c) of the GDPR.

90 Investigation report, point 4.4.2.2.3.2.

91 Investigation report, point point 4.4.2.2.3.2.

92 Statement of Objections, point 54.

93 Investigation Report, Appendices, exhibit 5.

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2.2. As for information on the legitimate interests pursued

59. It emerges from the investigation report that the person inspected "did not communicate to the persons concerned, namely the users of Company A's internet portal, the legitimate interests prosecuted for the processing of their personal data for the purposes sending a newsletter and [...]"⁹⁴.

For this reason, the head of investigation noted in the statement of objections that "the conditions of Article 13, paragraph 1, letter d) of the GDPR were not complied with at the time of start of the investigation. »⁹⁵

Nevertheless, it was noted by the CNPD agents that the new policy of

data protection now indicated "the legitimate interests pursued by the

Controlled for the processing of personal data of portal users

company A's website for the purpose of sending a newsletter and [...]"⁹⁶.

60. The Restricted Committee notes that the former data protection policy does not did not mention the legitimate interest as a legal basis for the processing regarding the newsletter and [...] (unlike the record of processing activities provided by the controlled).

Furthermore, the Restricted Panel notes that the new policy for the protection of control data now shows

□
the processing of the data of the users of the website operated by the controller at for marketing purposes, and

□
the possible processing of [...],
which are based on the legitimate interest of the controlled⁹⁷.

61. In view of the foregoing, the Restricted Panel concurs with the opinion of the head of investigation and concludes that at the start of the CNPD's investigation, the control had not provided users with of its website all the information made mandatory by article 13.1.d) of the GDPR.

94 Investigation report, point 4.4.2.2.4.2.

95 Statement of Objections, point 59.

96 Statement of Objections, point 58.

97 Investigation Report, Appendices, Exhibit 4, page 4.

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2.3. As for the information on the recipients or categories of recipients of the data personal

62. It appears from the investigation report that the former data protection policy does not contained "no information relating to the recipients (or categories of recipients) personal data of users of Company A's internet portal (PIECE 3) »⁹⁸.

For this reason, the head of investigation noted in the statement of objections that "the conditions of Article 13, paragraph 1, letter e) of the GDPR were not complied with at the time of start of the investigation. »⁹⁹

Nevertheless, it was noted by the CNPD agents that the new policy of data protection now indicated "[...] as recipients of the data to be personal nature of users when they validate an online order"¹⁰⁰.

63. The Restricted Committee notes that the former data protection policy does not indeed contained no information on the recipients of the data of the users of the website of the controller (unlike the register of processing activities provided by the controlled which indicated that personal data would be transferred [...] in order to allow the latter to ensure [...] using the website¹⁰¹).

Furthermore, the Restricted Panel notes that the new policy for the protection of controlled data now indicates [...] as recipients of personal data staff of website users when they validate an online order.

64. In view of the foregoing, the Restricted Panel concurs with the opinion of the head of investigation and concludes that at the start of the CNPD's investigation, the control had not provided users with of its website all the information made mandatory by article 13.1.e) of the GDPR.

2.4. As for information on a transfer of data to a third country

65. It appears from the investigation report that the former data protection policy does not contained "no information relating to a transfer of user data to

⁹⁸ Investigation report, point 4.4.2.2.6.2.

99 Statement of Objections, paragraph 64.

100 Statement of Objections, point 63.

101 Investigation Report, Appendices, Exhibit 8.

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third countries. However, according to the processing register, Company A uses several
external platforms located at [...], such as [...] (PIECE 8, page 10), [...] (PIECE 8,
page 12). In addition, the presence of the social plugin [...] was noted without any
information is provided on this subject to users of the Internet portal of Company A
(EXHIBIT 9) »¹⁰².

For these reasons, the head of investigation noted in the statement of objections that "the
conditions of Article 13, paragraph 1, letter f) of the GDPR have not been complied with".¹⁰³
Nevertheless, he found that the new data protection policy indicated
now "the use of social networks and [...], but without specifying that the
user data may be transferred to these service providers who are located in
third countries. The use of the provider [...] and the presence of non-technical cookies,
as entered in the controller's processing register, are also
information missing from the new data protection policy, as well as
the use of the social plugin [...]"¹⁰⁴.

66. The Restricted Committee notes that the former data protection policy does not
indeed contained no information as to a transfer of personal data
personnel of the users of the website of the controlled to third countries, while it appears
of the register of processing activities¹⁰⁵ that the controller uses several platforms
external [...], such as [...], and that it uses the social plug-in "[...]"

67. In view of the foregoing, the Restricted Panel concurs with the opinion of the head of investigation and concludes that at the start of the CNPD's investigation, the control had not provided users with of its website all the information made mandatory by article 13.1.f) of the GDPR.

2.5. As for the information on the duration of data retention

68. It appears from the investigation report that the former data protection policy does not contained "no information relating to the retention periods for the data to be personal character of users of Company A's internet portal (Exhibit 3)"¹⁰⁶.

¹⁰² Investigation report, point 4.4.2.2.7.2.

¹⁰³ Statement of Objections, paragraph 69.

¹⁰⁴ Statement of Objections, paragraph 68.

¹⁰⁵ Investigation Report, Appendices, Exhibit 8.

¹⁰⁶ Investigation report, point 4.4.2.2.8.2.

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For this reason, the head of investigation noted in the statement of objections that "the conditions of Article 13, paragraph 2, letter a) of the GDPR have not been complied with".¹⁰⁷

Nevertheless, he noted in the statement of objections that the new policy of data protection now indicated "the retention periods by category of processing and [made] a distinction in the event that the user of the internet portal of the Company A had or did not have a user account". It is also specified that the new cookie management policy indicated "the cookies used or any other element allowing [to] identify [the user] for the purposes of audience statistics or advertisements have a maximum lifespan of 13 months" but that "the durations of

retention of data obtained using cookies other than cookies for purposes

statistics [were] not indicated in the new data protection policy

nor in the new cookie management policy”¹⁰⁸.

69. The Restricted Committee notes that the former data protection policy does not

contained no information as to the retention period of the data.

Furthermore, it takes into account the finding of the head of the investigation that the

new data protection policy now indicates retention periods

by treatment category and will come back to this in Chapter II.2., Section 2.2. of this

decision.

70. In view of the foregoing, the Restricted Panel concurs with the opinion of the head of investigation and

concludes that at the start of the CNPD's investigation, the control had not provided users with

of its website all the information made mandatory by article 13.2.a) of the

GDPR.

2.6. With regard to information relating to the exercise of their rights by persons

concerned

71. It emerges from the investigation report that “[t]he rights of users are mentioned in

the old data protection policy based on the amended old law of 2

August 2002 on the protection of individuals with regard to the processing of personal data

personal character, repealed since the entry into force of the GDPR on May 25, 2018.

¹⁰⁷ Statement of Objections, paragraph 75.

¹⁰⁸ Statement of Objections, paragraph 75.

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thus generically mentioned the rights of access, modification, rectification and

deletion (Exhibit 3, page 2).

The right to object to the processing of personal data by the Company

A, as well as the right to restriction of processing and the right to data portability

are not mentioned in the old data protection policy”¹⁰⁹.

For these reasons, the head of investigation noted in the statement of objections that "the conditions of Article 13, paragraph 2, letter b) of the GDPR were not complied with at the time of start of the investigation".¹¹⁰

Nevertheless, the CNPD agents noted that the new protection policy of data now informed "users of Company A's internet portal of their rights of access, modification, erasure, limitation and opposition to the processing of their personal data, as well as their right to the portability of their data. To exercise these rights, data subjects have the possibility to send an e-mail to the address [...]"¹¹¹.

72. The Restricted Committee notes that the former data protection policy does not did not mention the right to oppose the processing of personal data personal by the controller, nor the right to limit processing, nor the right to data portability data¹¹².

However, the Restricted Panel finds that the new data protection policy audited data now mentions all the rights available to people concerned with regard to Article 13.2.b) of the GDPR.

73. Notwithstanding the foregoing, the Restricted Panel agrees with the opinion of the head of investigation and concludes that at the start of the CNPD's investigation, the control did not provide users with its website all the information made mandatory by article 13.2.b) of the GDPR.

¹⁰⁹ Investigation report, point 4.4.2.2.9.2.

¹¹⁰ Statement of Objections, point 80.

¹¹¹ Statement of Objections, paragraph 79.

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2.7. As for the information relating to the right to lodge a complaint with a
supervisory authority

74. It emerges from the investigation report that "[t]he right to appeal to a competent authority
of control is not indicated in the old data protection policy (PIECE

3). The contact details of the CNPD are indicated at the end of the document visible under the tab
"Privacy", but without explaining that the CNPD is the supervisory authority with
which users of Company A's internet portal can exercise
complaint (EXHIBIT 2, page 4)"¹¹³.

For these reasons, the head of investigation noted in the statement of objections that "the
conditions of Article 13, paragraph 2, letter d) of the GDPR were not complied with at the time of
start of the investigation".¹¹⁴

Nevertheless, the CNPD agents noted that the new protection policy
data now mentioned the right to appeal to the CNPD¹¹⁵.

75. The Restricted Committee notes that the former data protection policy does not
did not mention the right to appeal to a supervisory authority,
even if the contact details of the CNPD were indicated at the end of this document¹¹⁶.

However, the Restricted Panel finds that the new data protection policy
data of the controlled now indicates this right provided for by article 13.2.d) of the GDPR¹¹⁷.

76. In view of the foregoing, the Restricted Panel concurs with the opinion of the head of investigation and
concludes that at the start of the CNPD's investigation, the control had not provided users with
of its website all the information made mandatory by article 13.2.d) of the

GDPR.

2.8. As for the personal data to be provided by the person

concerned

77. It appears from the investigation report that CNPD officers inspected the website and

the former data protection policy “to identify the communication

113 Investigation report, point 4.4.2.2.10.2.

114 Statement of Objections, paragraph 85.

115 Statement of Objections, paragraph 84.

116 Investigation Report, Appendices, Exhibit 3.

117 Investigation Report, Appendices, Exhibit 4, page 7, point 14.

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information relating to the obligation for users to provide their data to

personal character, as well as the consequence of the non-provision of these data”¹¹⁸.

It is specified there that “[w]hen creating a personal space on the Internet portal of

Company A, all the information requested (first name, surname, telephone number and

e-mail address) are mandatory in the sense that, in the event that the data subject

does not wish to provide all of this information, it does not have the possibility of

create a personal space and use the services offered by the Internet portal of the

Company A (PARTS 11 and 12). Indeed, Company A's internet portal cannot be

used without the prior creation of a personal space.

Mandatory fields are not mentioned as such in the registration form.

creation of a personal space when the form is still empty (PIECE 11). It is

in the event that the user attempts to create an account by clicking on the "Register" button

you” that the mandatory nature of the fields is indicated (PIECE 12)”¹¹⁹.

CNPD officials also noted that the former data protection policy

data “does not mention the mandatory nature of the information requested when

the creation of a personal space nor the consequence of not providing these

information”¹²⁰ and that such “accumulation of the absence of information of the character

mandatory data, both in the account creation form and in the

data protection policy as available at the start of the inquiry, constitutes

a breach of Article 13, paragraph 2, letter e), of the GDPR”¹²¹.

For these reasons, the head of investigation noted in the statement of objections that “the

conditions of Article 13, paragraph 2, letter e) of the GDPR have not been complied with”.¹²²

Nevertheless, it was noted by the CNPD agents that the new policy of

data protection now mentions that “the communication of contact details

of users (i.e. email address, postal address and telephone number) [was]

mandatory to allow them to benefit from the services of the Company's internet portal

A and ensure [...]” but he considered that this is not sufficient to comply with the

obligations arising from Article 13.2.e) of the GDPR¹²³.

¹¹⁸ Investigation report, point 4.4.2.2.11.1.

¹¹⁹ Investigation report, point 4.4.2.2.11.2.

¹²⁰ Statement of Objections, paragraph 89.

¹²¹ Statement of Objections, paragraph 90.

¹²² Statement of Objections, paragraph 92.

¹²³ Statement of Objections, paragraph 91.

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78. The Restricted Committee recalls that Article 13.2.e) of the GDPR requires that

"information on whether the requirement to provide personal data

personal has a regulatory or contractual nature or if it conditions the conclusion

of a contract and whether the data subject is required to provide the personal data

personnel, as well as on the possible consequences of not providing these

data ".

It also recalls that the guidelines on transparency specify in this regard

that "online forms should clearly identify required fields,

optional fields and the consequences in the event that mandatory fields are

left empty"¹²⁴.

79. In the present case, it notes that at the start of the investigation a user of the website, who wanted

create a personal space to be able to use the services offered by the controlled, was

obliged to fill in all the information requested by the form for creating a

personal space on the website. However, the fields of the said form were not

mentioned as mandatory. It was only trying to move on

the next step without having completed all the fields of the form that the user

was informed of the mandatory nature of the said fields¹²⁶.

In addition, it notes that the old data protection policy did not mention

nor the mandatory nature of the information requested, nor the consequence of

failure to provide this information.

80. In view of the foregoing, the Restricted Panel concurs with the opinion of the head of investigation and

concludes that at the start of the CNPD's investigation, the control did not provide users with

its website all the information made mandatory by article 13.2.e) of the GDPR.

2.9. Regarding information on the existence of profiling

81. It appears from the investigation report that CNPD officials "inspected the policy of

data protection and met with the audited body on 15

October 2020 to identify the presence of information relating to the existence of

automated decisions / profiling within the meaning of Article 22 of the GDPR”¹²⁷ and this because they

¹²⁴ WP 260 rev.01, Annex, page 48.

¹²⁵ Investigation Report, Appendices, Exhibit 11.

¹²⁶ Investigation Report, Appendices, Exhibit 12.

¹²⁷ Investigation report, point 4.4.2.2.13.1.

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"noted the presence of a connection on the internet portal of Company A at [...], a

social plugin performing profiling” ¹²⁸.

They noted that during the on-site visit of October 15, 2020, the control had "indicated

CNPD officials not to make decisions based exclusively on a

automated processing, including profiling, within the meaning of Article 22 of the GDPR”¹²⁹ and they have

also found that the old data protection policy did not give any

information “about the connection to the social plugin [...]”.

For these reasons, the head of investigation noted in the statement of objections that "the

conditions of Article 13, paragraph 2, letter f) of the GDPR have not been complied with”.¹³⁰

In addition, he also noted that the new cookie management policy does not

contained no information about the social plugin “[...]”.¹³¹

82. The Restricted Committee recalls that Article 13.2.f) of the GDPR requires that a person responsible

of the processing informs the person concerned of "the existence of a decision-making

automated, including profiling, referred to in Article 22(1) and (4) and, at least

in such cases, useful information about the underlying logic, as well as

the significance and intended consequences of such processing for the data subject”.

However, while the Restricted Formation does not have enough information on the functioning of the social plugin "[...]", it does not consider itself in a position to rule on this regard.

II. 2. On the fine and corrective measures

1. On the principles

83. In accordance with article 12 of the law of 1 August 2018, the National Commission has the powers provided for in Article 58.2 of the GDPR:

"(a) notify a controller or processor of the fact that the operations of the envisaged processing are likely to violate the provisions of this Regulation;

128 Statement of Objections, page 24, point 93.

129 Investigation report, point 4.4.2.2.13.2.

130 Statement of Objections, paragraph 96.

131 Statement of Objections, paragraph 95.

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(b) call a controller or processor to order when the processing operations have resulted in a breach of the provisions of this Regulation;

(c) order the controller or processor to comply with requests submitted by the data subject with a view to exercising their rights under this Regulation;

(d) order the controller or the processor to put the operations of processing in accordance with the provisions of this Regulation, where applicable, of specific manner and within a specified time;

(e) order the controller to communicate to the data subject a

personal data breach;

(f) impose a temporary or permanent restriction, including prohibition, of the processing;

g) order the rectification or erasure of personal data or the

limitation of processing pursuant to Articles 16, 17 and 18 and the notification of these

measures to the recipients to whom the personal data have been disclosed

pursuant to Article 17(2) and Article 19;

(h) withdraw a certification or order the certification body to withdraw a

certification issued pursuant to Articles 42 and 43, or order the body to

certification not to issue certification if the requirements applicable to the certification

are not or no longer satisfied;

(i) impose an administrative penalty under section 83, in addition to or in addition to

instead of the measures referred to in this paragraph, depending on the characteristics

specific to each case;

j) order the suspension of data flows addressed to a recipient located in a

third country or an international organisation. »

84. In accordance with article 48 of the law of 1 August 2018, the CNPD may impose fines

administrative as provided for in Article 83 of the GDPR, except against the State or

of the municipalities.

85. Article 83 of the GDPR provides that each supervisory authority shall ensure that fines

administrative measures imposed are, in each case, effective, proportionate and

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deterrents, before specifying the elements that must be taken into account to decide

whether an administrative fine should be imposed and to decide on the amount of this

fine :

“(a) the nature, gravity and duration of the breach, taking into account the nature, scope or the purpose of the processing concerned, as well as the number of data subjects affected and the level of damage they suffered;

b) whether the breach was committed willfully or negligently;

c) any action taken by the controller or processor to mitigate the damage suffered by the persons concerned;

d) the degree of responsibility of the controller or processor, account given the technical and organizational measures they have implemented under the sections 25 and 32;

e) any relevant breach previously committed by the controller or the subcontractor ;

f) the degree of cooperation established with the supervisory authority with a view to remedying the breach and to mitigate any negative effects;

g) the categories of personal data affected by the breach;

h) the manner in which the supervisory authority became aware of the breach, in particular whether, and the extent to which the controller or processor notified the breach ;

(i) where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned for the same purpose, compliance with these measures;

(j) the application of codes of conduct approved pursuant to Article 40 or certification mechanisms approved under Article 42; And

k) any other aggravating or mitigating circumstance applicable to the circumstances of the species, such as the financial advantages obtained or the losses avoided, directly or indirectly, as a result of the breach”.

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86. The Restricted Committee would like to point out that the facts taken into account in the context of the
this Decision are those found at the start of the investigation. The possible
changes relating to the data processing under investigation
subsequently, even if they make it possible to establish in whole or in part the
conformity, do not make it possible to retroactively cancel a breach noted.

87. Nevertheless, the steps taken by the control to comply with the
the GDPR during the investigation procedure or to remedy the shortcomings identified
by the head of investigation in the statement of objections, are taken into account by the
Restricted training as part of any corrective measures to be taken
and/or setting the amount of any administrative fine to be imposed.

2. In this case

2.1. Regarding the imposition of an administrative fine

88. In the statement of objections, the head of investigation proposes to the Restricted Panel to
pronounce against the controlled an administrative fine relating to the amount of
4,200 euro.

89. In order to decide whether it is necessary to impose an administrative fine and to decide, if
applicable, of the amount of this fine, the Restricted Panel analyzes the criteria set
by article 83.2 of the GDPR:

- As to the nature and gravity of the breach (Article 83.2 a) of the GDPR), with regard to
concerns breaches of Articles 12 and 13 of the GDPR, it recalls that
information and transparency relating to the processing of personal data
personnel are essential obligations weighing on data controllers

so that people are fully aware of the use that will be made of their personal data, once collected. Several breaches of Articles 12.1 and 13 of the GDPR thus constitute an infringement of the rights of data subjects. The right to transparency and the right to information have also been strengthened under the GDPR, which demonstrates their importance quite particular.

- As for the duration criterion (article 83.2.a) of the GDPR), the Restricted Panel finds that these shortcomings have lasted over time, at least since the beginning of the investigation and until, if necessary, a possible modification of the policy of

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Data protection. It recalls that guidance relating to the principles and obligations provided for by the GDPR was available from the CNPD, in particular on his website.

- As for the number of data subjects (article 83.2. a) of the GDPR), the Training Restricted notes that these are at least "[...] active users on the platform from Company A (users who placed an order in the last 3 months) but that the controller did not provide the total number of users (the number of personal spaces created) of Company A's platform"¹³².

- As to whether the breaches were committed deliberately or not (by negligence) (article 83.2.b) of the GDPR), the Restricted Panel recalls that "no deliberately" means that there was no intention to commit the violation, although the controller or the processor has not complied with the obligation to due diligence required by law.

In this case, the Restricted Committee is of the opinion that the facts and breaches observed do not reflect a deliberate intention to violate the GDPR on the part of the control.

- As to the degree of cooperation established with the supervisory authority (Article 83.2. f) of the GDPR), the Restricted Panel takes into account the statement of the head of investigation according to which the auditee has shown constructive participation throughout investigation.¹³³

- As for the categories of personal data concerned (article 83.2.g) of the GDPR), it should be taken into account that the control is likely to process data falling under special categories of data, and more specifically user health data if a user decides to enter [...].¹³⁴

- As for the measures taken by the inspected party to mitigate the damage suffered by the persons concerned (article 83.2.c), the Restricted Training takes into account the measures taken by the auditee and refers to Chapter II.2. Section 2.2. of this decision for the related explanations.

¹³² Statement of Objections, page 28, point 100; see Report, page 5 “Number of users [...]”.

¹³³ Statement of Objections, page 28, point 100.

¹³⁴ Investigation report, point 4.4.2.2.5.2.

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90. The Restricted Panel notes that the other criteria of Article 83.2 of the GDPR are not neither relevant nor likely to influence its decision on the imposition of a fine administrative and its amount.

91. It also notes that while several measures have been put in place by the control in order to

remedy in whole or in part certain shortcomings, these were only adopted following the launch of the investigation by CNPD agents on August 26, 2020 (see also point 86 of this decision).

92. Consequently, the Restricted Panel considers that the imposition of an administrative fine is justified with regard to the criteria set out in Article 83.2 of the GDPR for breaches of the articles 12.1 and 13 of the GDPR.

93. With regard to the amount of the administrative fine, the Restricted Panel recalls that Article 83.5 of the GDPR provides that violations of the rights enjoyed by individuals concerned under Articles 12 to 22 of the GDPR may be subject to fines administrative costs of up to EUR 20,000,000 or, in the case of a company, up to 4% of the total worldwide annual turnover of the preceding financial year, the amount higher being retained.

94. With regard to the relevant criteria of Article 83.2 of the GDPR mentioned above, the Training Restricted considers that the pronouncement of a fine of three thousand (3,000) euros appears both effective, proportionate and dissuasive, in accordance with the requirements of Article 83.1 of the GDPR.

2.2. About taking corrective action

95. In the statement of objections, the head of investigation proposes to the Restricted Panel to adopt the following corrective measures: "within a period of 1 month from the notification to Control of the decision taken by the Restricted Training:

Order, pursuant to Article 58 (2) d) of the GDPR, the Controlled to comply with Article 12 (1) of the GDPR by making the following amendments":

a) "update the cookie management policy to ensure the correct understanding by the persons concerned of all the processing carried out by the controlled using the cookies present on the internet portal of Company A,

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in particular by giving an exhaustive list of the types of cookies used and by

informing of the presence of the social plugin [...]”;

b) "put in place the necessary measures so that, in the event of a change

substantial part of the data protection policy or the management policy

cookies, users of Company A's internet portal are informed of a

such modification by appropriate means”;

c) “translate the data protection policy into languages other than the only

French language so that the data protection policy is understandable

by all users of Company A's internet portal.

Order, pursuant to Article 58 (2) d) of the GDPR, the Controlled to comply with

Article 13 of the GDPR by making the following changes”:

d) “modify the cookie management policy in order to inform data subjects

on the legal bases of the cookies used on the Internet portal of Company A”,

e) “amend the data protection policy in order to inform individuals

concerned on all transfers made of their personal data

personnel as well as on the existence of a transfer of their data to third countries

in the event that the control uses service providers such as [...] etc. » ;

f) “modify the cookie management policy in order to inform data subjects

on the retention periods of their personal data obtained from

using the presence of cookies on Company A's internet portal, other than the

cookies for statistical purposes”;

g) "modify the form for creating a personal space so that it is clear, as soon as

first reading, that the fields requesting personal data are

mandatory”;

h) “modify the cookie management policy in order to inform data subjects

on the existence of the social plugin [...] allowing user profiling

of the Internet portal of Company A. »

96. As to the corrective measures proposed by the head of investigation and with reference to point

87 of this decision, the Restricted Panel takes into account the steps

carried out by the control in order to comply with the provisions of articles 12.1 and 13 of the

GDPR, as detailed in his email of September 12, 2020, his letter of 30

October 2020 and in his emails of February 24, 2022 and July 22, 2022. More

in particular, it takes note of the following facts:

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a) As for the corrective measure proposed by the head of investigation mentioned under a) of the

point 95 of this Decision concerning the update of the management policy

cookies in order to inform the persons concerned of all the

processing carried out using cookies present on the website (in particular

giving an exhaustive list of the types of cookies used and informing of the

presence of the social plugin [...]), the Restricted Panel notes, firstly,

that the new data protection policy now mentions all the

categories of personal data missing from the old privacy policy

data protection (see point 21), except for more specific information

relating to cookies. Second, it finds that the controlled has created a

“new cookie management policy”¹³⁵ dated [...] September 2020 and

that it is now a separate document from the new protection policy

Datas. Said new cookie management policy indicates that only “technical” cookies, allowing you to browse the website and use its functionalities, would be used by the controlled, without these cookies being precisely indicated. On the other hand, she notes that this assertion “seems to be in contradiction with the statement that the retention period of the data obtained using analytical or advertising cookies would be 13 months” as already observed by the head of investigation in his investigation report¹³⁷. For this reason, it notes that the persons concerned are still not informed about all the processing carried out using the cookies present on the website, as provided for in article 12.1 of the GDPR. It therefore considers that the compliance measures taken by the control in this case were insufficient. Nevertheless, it refrains from imposing the measure correction proposed by the head of the investigation in this regard and repeated in point 95 of the this Decision under (a) because the controlled [...].

b) As for the corrective measure proposed by the head of investigation mentioned under b) of the point 95 of this Decision concerning the introduction of measures necessary so that, in the event of a substantial change in the policy of data protection or cookie management policy, users of the website are informed of such modification by appropriate means, the

135 Investigation Report, Appendices, Exhibits 5.

136 Investigation Report, Appendices, Exhibits 5, page 1.

137 Investigation report, point 5.3.6; Investigation Report, Appendices, Exhibits 5, page 2.

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Restricted Training notes that the new data protection policy mentions in its chapter 16 (entitled "Changes to this Privacy Policy") that "Company A reserves the right to update this Privacy Policy at any time. Company A will review at this effect the date of last update at the bottom of this page. Company A encourages Users to frequently check for changes made to this page and will send an Electronic Communication to the Subscribed Users or will inform Users by means of information integrated into the Platform ("pop-up") when the changes made to the this Privacy Policy are obvious. [...]".

However, the Restricted Panel does not have evidence to support the claim. creation of information integrated into the website in the "pop-up" style or a electronic communication sent to subscribed users of the website.

It therefore considers that the compliance measures taken by the control in this case were insufficient. Nevertheless, it refrains from imposing the measure correction proposed by the head of the investigation in this regard and repeated in point 95 of the this Decision under b) because the controlled [...].

c) As for the corrective measure proposed by the head of investigation mentioned under c) of the point 95 of this decision concerning the translation of the policy of data protection in languages other than French, the Training

Restricted notes that the new data protection policy dating from [...] September 2020 was also only available in French language even if the audited website is available in French, English, German and Luxembourgish. She notes that the controller had expressed his intention to "update available on Company A's internet portal a translation of the privacy policy data protection in the English and German languages, as has been

mentioned during the on-site visit of 15 October 2020". However, she does
does not have evidence to support the provision of one or more
translation(s) of the new data protection policy.

It therefore considers that the compliance measures taken by the control
in this case were insufficient. Nevertheless, it refrains from imposing the measure

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correction proposed by the head of the investigation in this regard and repeated in point 95 of the
this Decision under c) because the controlled [...].

d) As for the corrective measure proposed by the head of investigation mentioned under d) of the
point 95 of this decision regarding the modification of the new policy

management of cookies in order to inform the persons concerned about the bases
of the cookies used by the controller, the Training first of all wishes to specify
that it notes that the new data protection policy contains

now a list of processing purposes, detailed by category of data
processed. It also notes that the legal bases are also there
presented as the following:

□

the legal basis for processing mandatory data when creating a
personal space is indicated as the contract between the user of the site
internet and the controlled; And

□

the legal basis for data processing for marketing purposes is indicated
as being the legitimate interest of the auditee.

On the other hand, it observes that the new cookie management policy does not indicate still not the legal basis for the cookies used on the website.

It therefore considers that the compliance measures taken by the control in this case were insufficient. Nevertheless, it refrains from imposing the measure correction proposed by the head of the investigation in this regard and repeated in point 95 of the this Decision under (d) because the controlled [...].

e) As for the corrective measure proposed by the head of investigation mentioned under e) of the point 95 of this decision concerning the modification of the policy of data protection in order to inform data subjects about all of the transfers made of their personal data as well as on the existence of a transfer of their data to third countries, the Training Restricted notes that the new data protection policy indicates henceforth the use of social networks and [...], in particular to collect data via social media. However, she notes that it does not specify that user data may be transferred to these service providers who potentially located in third countries.

138 Investigation Report, Appendices, Exhibit 4, page 3.

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It also notes, as the head of investigation has already done in his report survey, that “the use of the service provider [...] and the presence of non-techniques, as entered in the processing register, are also information missing from the new data protection policy, as well as that the use of the social plugin [...]”¹³⁹.

It therefore considers that the compliance measures taken by the control in this case were insufficient. Nevertheless, it refrains from imposing the measure correction proposed by the head of the investigation in this regard and repeated in point 95 of the this Decision under e) because the controlled [...].

f) As for the corrective measure proposed by the head of investigation mentioned under f) of the point 95 of this decision regarding the modification of the new policy management of cookies in order to inform the persons concerned about the duration of retention of their personal data obtained using the presence of cookies on the internet portal of Company A, Restricted Training first of all wishes to point out that it notes that the new protection policy of data now indicates the retention periods by category of processing¹⁴⁰ (with the exception of the processing of data obtained using Cookies). She observes that the new data protection policy makes also a distinction between users of the website who have a user account and those who have not created a user account and that the durations conservation are mentioned there for each case.

With regard to retention periods for cookies, the Training Restricted notes that the new cookie management policy indicates a retention period relating to cookies used “for statistical purposes audience or advertising” but that no retention period in relation to the data obtained using other cookies (only cookies for the purposes of statistics or advertising) is indicated¹⁴¹.

¹³⁹ Investigation report, point 4.4.2.2.7.2.

¹⁴⁰ Investigation Report, Appendices, Exhibit 4, page 6, chapter 11.

¹⁴¹ Investigation Report, Appendices, Exhibit 5, page 2 (“How long do we keep cookies?”).

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It therefore considers that the compliance measures taken by the control

in this case were insufficient. Nevertheless, it refrains from imposing the measure

correction proposed by the head of the investigation in this regard and repeated in point 95 of the

this Decision under f) because the controlled [...].

g) As for the corrective measure proposed by the head of investigation mentioned under g) of the

point 95 of this decision concerning the modification of the creation form

of a personal space so that it is clear, from first reading, that the fields

requesting personal data are mandatory, the Training

Restricted notes that the new data protection policy indicates that

the communication of user contact details (i.e. the email address, the address

postal address and telephone number) is mandatory to enable them to benefit

website services and provide [...]142.

However, she notes that the new data protection policy indicates

also that the mandatory data “will always be identified in a way

specific within the forms”143. The Restricted Panel considers, as

has already raised the head of investigation, that “such an assertion means that the fields

mandatory within a form should be indicated and understood as such

from the first reading of the form and not following an error message after a

first attempt to submit said form".

It therefore considers that the compliance measures taken by the control

in this case were insufficient. Nevertheless, it refrains from imposing the measure

correction proposed by the head of the investigation in this regard and repeated in point 95 of the

this Decision under g) because the controlled [...].

h) As for the corrective measure proposed by the head of investigation mentioned under h) of the point 95 of this decision regarding the modification of the new policy management of cookies in order to inform the persons concerned of the existence of the social plugin "[...]", the Restricted Training refers to point 82 of this decision and points out that it does not have enough precision on the functioning of said social plugin. For these reasons, it does not rule on the

142 Investigation Report, Appendices, Exhibit 4, page 2, point 3.

143 Investigation Report, Appendices, Exhibit 4, page 3, point 3.

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corrective measure proposed by the head of investigation in this regard and repeated in point 95 of this decision under h).

In view of the foregoing developments, the National Commission sitting in restricted formation, after having deliberated, decides:

- to retain breaches of Articles 12.1 and 13 of the GDPR;
- to impose an administrative fine on Company A in the amount of three one thousand (3,000) euros, with regard to the breaches constituted in Articles 12.1 and 13 of the GDPR.

Belvaux, December 13, 2022.

For the National Commission for Data Protection sitting in restricted formation

Tine A. Larsen Thierry Lallemand

President

Commissioner

Alain Hermann

Indication of remedies

This administrative decision may be subject to an appeal for review within three months following its notification. This appeal is to be brought before the administrative court and must be introduced through a lawyer at the Court of one of the Bar Associations.

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