

Decision of the National Commission sitting in restricted formation on the outcome of

Survey No. [...] conducted with Company A

Deliberation no. 23FR/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 July 17, 2020, the National Commission for  
data protection sitting in plenary session (hereinafter: the "Plenary Panel")  
Plenary") decided to open an investigation with Company A operating under the  
trade name "A" on the basis of article 37 of the law of August 1, 2018 on

organization of the National Commission for Data Protection and the regime

General on Data Protection (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 as its

purpose of controlling the application and compliance with the GDPR and the law of August 1, 2018, and more

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

2. Company A is [...] registered with the Luxembourg Trade and Companies Register under

the number [...], with registered office at L – [...] (hereinafter: the “controlled”).

The controlled [is active in the operation of internet portals and the provision of services via these portals].<sup>1</sup>

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

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

- on the processing carried out by the said company in connection with the operation of the site internet [...] and the mobile application [...] (hereinafter: the “website” respectively

the “mobile application”), and checked by CNPD agents; And

- 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

control. This moment is later referred to in this decision as “at the beginning

of the investigation”. The controller responded by email dated September 21, 2020, following

an extension of time granted by the investigation department of the CNPD by e-mail from the

September 10, 2020. After an on-site visit that took place on October 8, 2020, the controlled

and the CNPD investigation department exchanged letters.<sup>2</sup>

<sup>1</sup> [...].

<sup>2</sup> See Statement of Objections, point 9 for a detailed list of exchanges throughout the investigation.

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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 April 30, 2021 (hereinafter: the “Investigation Report”).

It appears from the investigation report<sup>3</sup> 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, it is given the following example: “in the event that the controller informs the persons concerned that their personal data are kept for a period

2 years, CNPD officials will be able to check that the controller does not not retain said data for a different period. On the other hand, the agents of the CNPD will not comment on the legality of this 2-year period applied by the

controller" 4.

The survey focused on users of the website and mobile application, and did not target other categories of data subjects such as employees of the controlled.<sup>5</sup>

3 Investigation report, page 7, point "3.1 Control objectives".

4 Investigation report, page 6, point "2.3 Reservations".

5 Investigation report, page 6, point "2.2 Scope".

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The investigation report has as appendices the documents collected by the investigation department of the CNPD and on which the investigation report is based (appendix 1), as well as the visit in relation to the on-site visit by CNPD agents of October 8, 2020 cited above (appendix 2) (hereinafter: the "minutes").

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 January 13, 2022 a statement of objections detailing the shortcomings he considered constituted in this case in relation to the requirements prescribed by Article 12.1 of the GDPR (transparency obligation).

The head of investigation proposed to the Restricted Panel to adopt four measures different corrective measures, as well as to impose on the person controlled an administrative fine of one amount of 1,300 euros.

The ability to submit written observations on the statement of objections was

offered to the control. The latter did not communicate any observations to the head of investigation.

8. The president of the Restricted Formation informed the controller by letter dated

May 20, 2022 that his case would be registered for the session of the Restricted Panel of

July 13, 2022 and that he was offered the opportunity to be heard there. The control confirmed

his presence at the said meeting by email of July 7, 2022.

During this session, the head of the investigation and the controller, represented by [...] presented their

oral submissions in support of their written submissions and responded to questions

posed by the Restricted Panel. The Restricted Formation gave the controlled the

possibility of sending

until July 22, 2022 from

further information

requested during that meeting. The controller spoke last.

9. By email of July 22, 2022, the controller sent the additional information

requested by the Restricted Panel during the session of July 13, 2022.

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II. Place

II.1. On the reasons for the decision

On the breach of the obligation of transparency

1. On the principles

10. 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. »

11. Transparency is a fundamental aspect of the principles relating to the treatment of personal data.<sup>6</sup> 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 GDPR), and communications regarding data breaches (Article 34 of the GDPR).<sup>7</sup>

They further underline that a “primary aspect of the principle of transparency put in place light in these provisions is that the data subject should be able to determine in advance what the scope and consequences of the processing encompass in order to

<sup>6</sup> See in particular Articles 5.1.a) and 12 of the GDPR, see also recitals (39), (58) to (60) of the GDPR.

<sup>7</sup> WP 260 rev.01, point 7.

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not to be caught off guard at a later stage as to how their data

of a personal nature were used”<sup>8</sup>.

12. 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 transparency<sup>9</sup>.

2. In this case

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

13. The Restricted Committee recalls that Article 12.1 of the GDPR requires, among other things, that required information should be provided in a concise and transparent manner.

Under the Transparency Guidelines “the requirement that the provision of information to the persons concerned and that the communications which are addressed are carried out in a “concise and transparent” manner means that the controllers should present the information/communications in a way effective and succinct in order to avoid overwhelming the persons concerned with information”<sup>10</sup>.

2.1.1 At the level of processing mentioned in the data protection policy which are not carried out by the data controller

14. In the context of objective 511, the head of investigation expected, among other things, that “the data protection policy reflects the reality of the processing actually carried out place, that is to say without anticipation of processing that could possibly be put in place by the auditee in the future (cf. Test 5)”.<sup>12</sup>

It appears from the investigation report that the CNPD agents therefore inspected “the data protection policy to verify that it reflects the reality of the processing actually put in place, i.e. without anticipating processing that could possibly be put in place by the controller in the future. To do this, agents of

Endorsement decision

8 WP 260 rev.01, point 10.

9 View

[https://edpb.europa.eu/sites/edpb/files/files/news/endorsement\\_of\\_wp29\\_documents\\_en\\_0.pdf](https://edpb.europa.eu/sites/edpb/files/files/news/endorsement_of_wp29_documents_en_0.pdf).

10 WP 260 rev.01, point 8.

11 “Objective 5 - Ensure that information is concise, transparent, understandable, and transmitted in clear and simple terms”; Investigation report, page 33 et seq.

12 Investigation report, page 34, point 4.4.5.1.

of the EDPS

available

May 25

1/2018

2018,

below :

of

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the CNPD compared the content of the data protection policy with the explanations obtained from the control during the interview of 08/10/2020”<sup>13</sup>.

15. According to the Statement of Objections, “the CNPD officials noted that the data protection policy of the Controlled indicates treatments that are not still in place in practice, in this case profiling”<sup>14</sup>.

In addition, the head of investigation noted that during the on-site visit of October 8, 2020 the controlled had explained to CNPD officials that “profiling was mentioned in the data protection policy with a view to future integration of this activity”



[...]”<sup>15</sup>.

Thus, it held that the conditions of article 12.1 of the GDPR "as to loyalty and transparency of information" were not respected<sup>16</sup>.

16. The controller for his part had explained to the CNPD agents during the on-site visit aforementioned that

- for the future, it planned a profiling activity [...]”<sup>17</sup>;

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processing for profiling purposes was already mentioned in the privacy policy data in anticipation of future integration of this activity;<sup>18</sup>

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[...]”<sup>19</sup>.

[...]

17. The Restricted Panel notes that the “Site and App Privacy Policy [...]”

extracted by the head of investigation from the website of the controller dated August 27, 2020<sup>20</sup> (here after: the "privacy policy") mentioned in the sections "[...]”<sup>21</sup>, "[...]”<sup>22</sup>,

<sup>13</sup> Investigation report, page 36, point 4.4.5.2.5.1.

<sup>14</sup> Statement of Objections, point 18.

<sup>15</sup> Statement of Objections, point 19.

<sup>16</sup> Statement of Objections, point 20.

<sup>17</sup> Minutes, section “III. Presentation of Company A” under “Activities”.

<sup>18</sup> Minutes, section “IV. Summary of the main exchanges between Company A and the CNPD” in the point “Objective Control No. 2 [...]”.

<sup>19</sup> Same.

<sup>20</sup> Appendix 1 to the investigation report, exhibit 1.

<sup>21</sup> Appendix 1 to the investigation report, exhibit 1, pages 4 to 5.

<sup>22</sup> Appendix 1 to the investigation report, exhibit 1, page 7.

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"[...]23 and "[...]24 (at points "[...]25, "[...]26 and "[...]27) that the data To

personal character of the users were used by the controlled to follow their

behaviours [...].

18. However, the inspector had explained to the CNPD agents at the start of the investigation that he was not still engaged in the profiling activity [...] (see point 16 of this decision).

19. The Restricted Training considers that the provision of information to users who

corresponded to processing that was not carried out, such as information

on profiling not yet carried out by the controlled party listed in the protection policy

of data, sowed confusion and hindered the required information

were presented to users of the website and the mobile application in a way

efficient and succinct.

2.1.2 At the level of the processing carried out by the data controller which is not

mentioned in the data protection policy

20. In the context of objective 228, the head of investigation expected, among other things, that “the

controlled must provide the persons concerned with complete information, i.e. it must

must provide information on all the processing carried out that concerns them (see Tests 15 and

17) »29.

CNPD officials then inspected “the register of processing activities to

identify whether for each treatment listed in the register and for which users

website or platform are identified as a category of data subjects,

mention is made in the policy”30 as well as “the conceptual data model for

identify for a selection of fields clearly related to a user whether the collection and

processing of the corresponding data were mentioned in the policy”<sup>31</sup>.

21. From the statement of objections it appears that "in the context of the analysis of the salaries carried out by the Controlled and the information provided by the controller to the

23 Appendix 1 to the investigation report, exhibit 1, pages 8 to 9.

24 Appendix 1 to the investigation report, exhibit 1, page 10.

25 Appendix 1 to the investigation report, exhibit 1, page 12.

26 Appendix 1 to the investigation report, exhibit 1, pages 14 to 15.

27 Appendix 1 to the investigation report, exhibit 1, page 15.

28 “Objective 2 - Ensure information is complete”; Investigation report, page 12 et seq.

29 Investigation report, page 12, point 4.4.2.1.

30 Investigation report, pages 18 to 20, point 4.4.2.2.15.1.

31 Investigation report, page 21, point 4.4.2.2.17.1.

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data subjects, it was found that the data protection policy does not

did not mention some of the data processing carried out by the Controlee”<sup>32</sup>.

The head of the investigation noted in particular that "the CNPD agents noted that

the Controlled's processing register included processing which was not

mentioned by the data protection policy, in particular: [...]”<sup>33</sup>

Thus, it held that the conditions of article 12.1 of the GDPR "as to loyalty and  
transparency of information" were not respected<sup>34</sup>.

22. The controller had attached a copy of his log of processing activities to his email  
of September 21, 2020<sup>35</sup> (hereinafter: the “registry of processing activities”).

23. The Restricted Committee notes in particular that certain processing activities

identified by CNPD officials (see point 21 of this decision) were not mentioned in the data protection policy, although they were mentioned in the register of processing activities, namely: [...]36; [...]37; [...]38; [...]39; [...]40; [...]41, [...] (see among others [...]42, [...]43) and [...]44.

It therefore considers that the information provided to users of the website and the mobile application by means of the data protection policy were not complete.

24. In view of the foregoing, the Restricted Panel concludes that at the start of the Commission's investigation CNPD, the auditee had breached the obligation of transparency arising from Article 12.1 of the GDPR to provide the required information in a concise and transparent manner.

25. As for the measures taken by control after the on-site visit by CNPD officials, the Restricted Training refers to it in point 51, as well as in Chapter II.2, Section 2.2 of this decision.

32 Statement of Objections, point 21.

33 Statement of Objections, point 25.

34 Statement of Objections, point 26.

35 Appendix 1 to the investigation report, exhibit 11.

36 Appendix 1 to the investigation report, exhibit 11, pages 34 to 37.

37 Appendix 1 to the investigation report, exhibit 11, pages 44 to 45.

38 Appendix 1 to the investigation report, exhibit 11, pages 58 to 60.

39 Appendix 1 to the investigation report, exhibit 11, pages 61 to 62.

40 Appendix 1 to the investigation report, exhibit 11, pages 65 to 66.

41 Appendix 1 to the investigation report, exhibit 11, pages 34 to 37.

42 Appendix 1 to the investigation report, exhibit 11, pages 63 to 64.

43 Same.

44 Appendix 1 to the investigation report, exhibit 11, pages 38 to 40.

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

26. The Restricted Committee recalls that Article 12.1 of the GDPR requires, among other things, that  
required information must be provided in an easily accessible manner.

According to the Transparency Guidelines, "the 'readily accessible' criterion  
means that the data subject should not have to search for the information but  
should be able to access it immediately: for example, this information could be  
communicated to the persons concerned directly or by means of a link which  
would be addressed", and they recommend for an online context that a "link to the  
privacy statement or notice is provided at the point of collection.

personal data, or that this information can be consulted on the same  
page than the one where the personal data is collected"<sup>45</sup>.

2.2.1 At collection points on the mobile application

27. In the context of objective 846, the head of investigation expected, among other things, that "on  
the mobile application, the information relating to the protection of privacy must be  
easily accessible, before and after downloading the application (see Tests 3 and  
4). »<sup>47</sup>

The CNPD agents then inspected the control's mobile application "to assess  
the ease of access to information relating to the protection of privacy, once  
the downloaded mobile application"<sup>48</sup> and "checked whether a link to the protection policy  
data was available before downloading the mobile application [...]"<sup>49</sup>.

28. From the statement of objections it appears that "it was noted that several points of  
collection of personal data of the mobile application did not contain a link to

the data protection policy”<sup>50</sup>.

In addition, the head of investigation noted in particular that "the CNPD agents found that the pages [information collection points] did not contain a link to the data protection policy”<sup>51</sup>.

45 WP 260 rev.01, point 11.

46 “Objective 8 - Ensure that information is easily accessible”; Investigation report, page 40 et seq.

47 Investigation report, page 40, point 4.4.8.1.

48 Investigation report, page 41, point 4.4.8.2.3.1.

49 Investigation report, page 41, point 4.4.8.2.4.1.

50 Statement of Objections, point 27.

51 Statement of Objections, paragraph 31.

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Thus, it retained that the conditions of article 12.1 of the GDPR "as to the accessibility (at the level of collection points)" were not respected<sup>52</sup>.

29. The Restricted Panel finds that it was documented by screenshots taken by CNPD officials<sup>53</sup> only after downloading the mobile application, the policy data protection was not made available to users on the pages of the mobile application [information collection points] so that users were forced to search for information instead of being able to access it immediately.

30. 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 to provide the required information in an easily accessible way.

## 2.2.2 At the level of the transmission of information before the deposit of cookies

31. In the context of objective 954, the head of investigation expected, among other things, that

“the information is transmitted at the following stages: [...] Before or at the beginning of the

data processing cycle, i.e. when the personal data

are collected from the data subject or otherwise obtained (cf.

Tests 1 and 2); »55.

CNPD officers then inspected “Company A’s website and the application

mobile if necessary to assess the transmission time of information relating to the

data protection (when entering the website, when launching

the app,

at the time of

registering a user on

the site, etc.)”56 and “[...]

that immediately upon first connection to the site or application, the user is

informed that cookies and/or other tracers will collect personal data

and/or deposit information on the terminal”57.

32. From the statement of objections it is apparent that “according to the guidelines on the compendium

of consent for the deposit of cookies, adopted on October 2, 2013 by the Group of

Work "Article 29" on data protection, the operator of a website should

52 Statement of Objections, paragraph 32.

53 Annex 1 to the investigation report, exhibits 19 and 21.

54 “Objective 9 - Ensure that information is transmitted during the key stages of processing”; Report

of investigation, page 43 et seq.

55 Investigation report, page 43, point 4.4.9.1.

56 Same.

57 Investigation report, page 43, point 4.4.9.2.2.1.

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introduce a valid consent mechanism with a clear warning,  
complete and visible relating to the use of cookies, when and where the  
consent is requested, for example on the web page on which a user  
starts a browsing session (entrance page)"<sup>58</sup>.

In addition, the head of the investigation noted that "the cookie banner displayed during the  
first connection to the site did not specify that cookies were going to be placed on the  
user's terminal"<sup>59</sup>, and that "the CNPD agents noted that in order to obtain  
details relating to cookies, the user should refer to the policy of  
Data protection. The banner presented cannot therefore be considered as  
as "banner cookies" and the time limit for transmitting information relating to cookies  
is not respected"<sup>60</sup>.

Thus, it retained that the conditions of article 12.1 of the GDPR "as to the accessibility (at the  
level of information to be provided before the deposit of cookies)" were not respected<sup>61</sup>.

33. The Restricted Committee observes that the obligation to obtain the prior consent of  
the user to deposit or read "non-essential" cookies (for example, a cookie  
deposited for behavioral tracking purposes) on his terminal equipment, after having  
provided the required information, is imposed by Article 4.3.e) of the amended law of 30 May  
2005 relating to the specific provisions for the protection of persons with regard to  
processing of personal data in the communications sector  
(hereinafter: the "amended law of 30 May 2005"),<sup>62</sup> and that the CNPD  
recommends that operators of websites and applications inform users  
also on the fact that they use "essential" cookies.<sup>63</sup>



34. It also recalls that if the use of cookies leads, in addition to the deposit or the reading information on the user's terminal equipment governed by law amended of May 30, 2005 "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

58 Statement of Objections, point 35.

59 Statement of Objections, point 33.

60 Statement of Objections, point 36.

61 Statement of Objections, point 37.

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

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

63 CNPD guidelines on cookies and other trackers, point 3.1.2., available at:

<https://cnpd.public.lu/fr/dossiers-thematiques/cookies/principes-applicables.html>.

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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".<sup>64</sup>

Indeed, the case law of the Court of Justice of the European Union<sup>65</sup> confirms that it is

possible that the processing falls both within the material scope of the Directive

"privacy and electronic communications"<sup>66</sup> and that of the GDPR<sup>67</sup>.

35. However, given that monitoring the application and compliance with the amended law of the

May 30, 2005 was not within the scope of the investigation in question, the Restricted Training

does not rule in this decision on the compliance of the audit with the

requirements set by this law, and in particular the validity of the consent mechanism

deployed by the controller and the information to be provided to users in this context.

2.3 As to the requirements to provide information in a way that is “understandable” and “in clear and simple terms”

36. 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.

She first notes that the guidelines on transparency indicate that

“the requirement that this information be “understandable” means that it should

be able to be understood by the majority of the target audience”, “comprehensibility is

closely linked to the requirement to use clear and simple terms” and that a “responsible

processing knows the people about whom it collects information and can

use this knowledge to determine what this audience would be likely to

understand”<sup>64</sup>.

She then notes that according to the Transparency Guidelines, “the requirement of

plain and simple terms means that information should be provided in the way that is most

as simple as possible, avoiding complex sentences and linguistic structures. THE

information should be concrete and reliable; they should not be formulated in

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

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

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

66 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, as amended.

67 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.

68 WP 260 rev.01, point 9.

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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. »69. Among other things, it specifies that

"qualifiers such as 'may', 'could', 'some', 'often' and 'possible' are

to be avoided"70 and that "a translation into one or more languages should be provided

when the data controller targets data subjects who speak these

languages"71.

2.3.1 At the level of the translation of the data protection policy

37. In the context of objective 572, the head of investigation expected, among other things, that "the

data protection policy is available in the same languages as those

offered on the website, i.e. the languages of the customers targeted by the services of the

controlled (cf. Test 3)"73.

CNPD officials then inspected "the data protection policy to

identify the existence of a translation in the same languages as those for which

the site is available"74.

38. From the statement of objections, it appears that "the CNPD officials noted that the

data protection policy was only available in language A while the site

internet, like the mobile application, was available in other languages, namely

in B and C languages at the time of the analysis of the site » »75.

Furthermore, the chief investigator noted that

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during the on-site visit of October 8, 2020, the control had explained to the agents of the CNPD that it was planned "to translate the data protection policy into languages B and C" [...];<sup>76</sup>

- on the day of the statement of objections "language C has [...] been withdrawn"<sup>77</sup>.

69 WP 260 rev.01, point 12.

70 WP 260 rev.01, point 13.

71 Same.

72 "Objective 5 - Ensure that information is concise, transparent, understandable, and transmitted in clear and simple terms"; Investigation report, page 33 et seq.

73 Investigation report, page 34, point 4.4.5.1.

74 Investigation report, page 36, point 4.4.5.2.3.1.

75 Statement of Objections, point 41.

76 Statement of Objections, point 42.

77 Statement of Objections, point 41.

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Thus, it retained that the conditions of article 12.1 of the GDPR "as to the nature comprehensible information (at the translation level)" were not respected<sup>78</sup>.

39. Control on its side, had declared to the CNPD agents during the on-site visit that it was planned to translate the data protection policy "in the same languages than those offered on the site (languages B, C)" and that "as part of the data protection policy, language A is the authoritative language. It's always about of one of the official languages [...]. In case of discussion, reference should be made to the only version

in language A”.<sup>79</sup>

40. The Restricted Panel notes that at the start of the CNPD's investigation, the policy of data protection was only available in language A although the website was available in languages A and B.

41. It considers that the fact that the controller made the website available to users in language B, shows that it was also aimed at an audience [...] not necessarily mastering language A, and from which he could not expect he would be likely to understand a data protection policy written in language A, regardless of whether it is the official language of the country or not.

42. In view of the fact that the auditee did not provide users of its website with language B a data protection policy in language B, Restricted Training believes that it did not provide them with the required information in a form that was easily understandable.

### 2.3.2 At the level of clarity of information

43. In the context of objective 580, 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)”<sup>81</sup>.

The CNPD agents then inspected “the website and the data protection policy”.

Company A data to assess clarity and simplicity of information

<sup>78</sup> Statement of Objections, point 42.

<sup>79</sup> Minutes, section “IV. Summary of the main exchanges between Company A and the CNPD” in point “Control objective no. 5 [...]”.

<sup>80</sup> “Objective 5 - Ensure that information is concise, transparent, understandable, and transmitted in clear and simple terms”; Investigation report, page 33 et seq.

<sup>81</sup> Investigation report, page 34, point 4.4.5.1.

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communicated. The CNPD agents notably checked the absence of structures  
complex linguistics, abstract or ambiguous terms, vague terms or terms that leave the  
room for different interpretations (in particular for the purposes and foundations  
legal)"82.

44. From the statement of objections it is apparent that "in the context of the analysis of the policy  
of the Controlled's data protection, it was noted that this was not always  
very clear at the level of certain information"83.

The head of the investigation noted in particular that

- "despite the presence of information relating to the data processed, the purposes, the  
legal bases, to the recipients of data and to the retention periods of the  
given, this information was provided only in a general and  
were not linked to specific treatments, which does not contribute to a  
good comprehensibility for the user"84;
- "the retention period was imprecise"85;
- "certain terms in the data protection policy were imprecise or too  
waves"86;
- "concerning the readability of the data protection policy, the agents of the  
CNPD noted that certain information was found in several  
sections" so that "the user can thus find himself 'drowned' in the middle of the  
information"87.

Thus, the head of investigation held that the conditions of article 12.1 of the GDPR "as to the  
comprehensibility of the information" were not respected88.

45. Regarding the granularity of the information provided in the protection policy

of the data criticized by the head of the investigation, the Restricted Panel observes the following:

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Information relating to the personal data processed

82 Investigation report, page 35, point 4.4.5.2.2.1.

83 Statement of Objections, point 44.

84 Statement of Objections, point 48.

85 Statement of Objections, paragraph 49.

86 Statement of Objections, point 50.

87 Statement of Objections, point 51.

88 Statement of Objections, point 52.

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Section "[...]" of the Data Protection Policy contained a definition

general [...]89, and the "...90 section contained more detailed information.

However, the enumeration of data was introduced with the words "are among

the types of [personal data] [...]", which gave the impression that

the information provided to users was not complete.

-

Information relating to the purposes and legal basis of the processing

The information relating to the purposes of the processing was dispersed in

different sections of the data protection policy, and in particular the

sections "[...]91 and "[...]92, and information on the legal bases

in the "[...]" section (under "[...]93 were formulated in terms

abstract.

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Information relating to recipients of personal data

Section “[...]” (under point “[...]”)<sup>94</sup> mentioned several categories of recipients, namely [...], to whom “the [personal data] may be accessible”. Their locations were not specified, and it was indicated that a “updated list of parties” could be requested from the controller, which gives also the impression that the information provided was not complete.

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Information on retention periods

The criteria provided in the section “[...]” (under point “[...]”)<sup>95</sup> did not allow us to determine the retention period for specific data or for a specific purpose. In particular, it was stated that “the [personal data personal] are processed and stored for as long as required for the purpose for which they were collected.

- Use of imprecise or too vague terms

89 Appendix 1 to the investigation report, exhibit 1, page 2.

90 Appendix 1 to the investigation report, exhibit 1, page 5.

91 Appendix 1 to the investigation report, exhibit 1, page 7.

92 Appendix 1 to the investigation report, exhibit 1, pages 8 to 9.

93 Appendix 1 to the investigation report, exhibit 1, page 6.

94 Appendix 1 to the investigation report, exhibit 1, pages 5 to 6.

95 Appendix 1 to the investigation report, exhibit 1, pages 6 to 7.

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The terms "may", "could" and/or "some" (respectively "may", "could" and/or "some") were used repeatedly in the policy of data protection, and in particular in sections [...].

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Information found in several sections of the data protection policy data

As mentioned above, the information relating to the purposes of the processing was dispersed in several sections of the data protection policy. In addition, the information in these sections was not all the same.

The Restricted Committee considers that the information in question was not concrete enough and left room for different interpretations so that the controlled could not expect users of the website or the mobile app understands them.

46. 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 to provide the required information in a way that is understandable and in clear and simple terms.

## II. 2. On the fine and corrective measures

### 1. On the principles

47. 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;

(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;

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(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. »

48. 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.

49. Article 83 of the GDPR provides that each supervisory authority shall ensure that fines administrative measures imposed are, in each case, effective, proportionate and 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;

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- 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”.

50. The Restricted Committee wishes to specify 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.

51. 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.

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2. In this case

## 2.1 Regarding the imposition of an administrative fine

52. In the Statement of Objections, the Head of Investigation proposed to the Restricted Panel to impose an administrative fine on the person checked in the amount of 1,300 euros.<sup>96</sup>

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

- As for the nature and seriousness of the violation (article 83.2 a) of the GDPR), it recalls in with regard to the breach of Article 12 of the GDPR that the applicable transparency to the processing of personal data is an essential obligation weighing on data controllers so that people are fully aware of the use that will be made of their personal data, a once collected. A breach of this article of the GDPR is thus constitutive of an infringement of the rights of the persons concerned. The right to transparency has been strengthened under the GDPR, which speaks to its very importance. 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 CNPD investigation and until, where applicable, a possible modification of the data protection policy. She recalls that guidance relating to principles and obligations provided for by the GDPR was available from the CNPD, especially on its website. [...]

- As to the number of data subjects (article 83.2 a) of the GDPR), the Training Restricted finds that these are all users of the website and the application mobile, of which [...]<sup>97</sup>.

- 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

96 Statement of Objections, point 57.

97 Statement of Objections, point 55.b. ; Minutes, section “III. Presentation of Company A” at the end of point “Activities”.

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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 the survey<sup>98</sup>.

- 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 controlled and refers to Chapter II.2, Section 2.2 of this decision for the related explanations.

54. The Restricted Committee 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.

55. 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 50 of this Decision).

56. 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 breach of GDPR article 12.1.

57. 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.

98 Statement of Objections, point 55.d.

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58. In view of the relevant criteria of Article 83.2 of the GDPR mentioned above, the Training Restricted considers that the pronouncement of a fine of one thousand (1,000) euros appears at the effective, proportionate and dissuasive, in accordance with the requirements of Article 83.1 of the GDPR.

## 2.2 Regarding the taking of corrective measures

59. 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 changes:

To. Update the data protection policy ensuring that the information contained in the data protection policy of the Company A reflect reality, in particular with regard to the use of the profiling;

b. Add a redirect link to the data protection policy to information collection points on the mobile application and ensure that the user is informed of the deposit of cookies during the first connection on the site;

vs. Translate the data protection policy into the same languages as those proposed for the website;

d. Specify in the data protection policy the information on the durations of data retention”<sup>99</sup>.

60. As for the corrective measures proposed by the head of investigation and by reference to the point 51 of this decision, the Restricted Panel takes into account the procedures carried out by the controller in order to comply with the provisions of article 12.1 of the GDPR, as detailed by the controller during the Restricted Training session of the July 13, 2022 and in her email of July 22, 2022. More particularly, she notes of the following facts:

<sup>99</sup> Statement of Objections, point 53.

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- As for the corrective measure proposed by the head of investigation listed under a. of point 59 of this Decision concerning the compliance of the audit with Article 12.1 of the GDPR by updating the data protection policy by ensuring



that the information contained therein reflects reality, in particular with regard to concerns the use of profiling, the inspected explained during the session of the Restricted Training of July 13, 2022 that he had stopped the profiling activity [...].

The Restricted Panel notes the copies of the modified version of its policy of data protection dated [...] that the controller attached to his email of July 22, 2022 (in languages A and B) (hereinafter: the “data protection policy modified”).

It notes that the controller has made changes to the said policy, and in particular only in the new section “[...]” (at the point “[...]”) [...]. However, in the section “[...]” (in point “[...]”) it is always mentioned that the personal data personal users are used by the controlled to track their behaviors [...].

The Restricted Committee therefore considers that the reality with regard to the use of the profiling by the controlled does not emerge clearly from the information contained in the modified data protection policy. Especially since the content of both language versions of this policy are not identical.

Added to this is a formatting error that slipped into the numbering of the section “[...]” of the modified data protection policy in both versions linguistics.

In view of the insufficient compliance measures taken by the control in the present case and point 51 of this decision, the Restricted Panel considers as of when there is reason to pronounce the corrective measure proposed by the head of investigation to this regard and taken up in point 59 of this decision under a. There is also reason to pronounce a corrective measure concerning the aforementioned formatting error.

- As for the corrective measure proposed by the head of investigation listed under b. of point 59 of this Decision concerning the compliance of the audit with Article

12.1 of the GDPR by adding a redirect link to the data protection policy

data at the information collection points on the mobile application, the controller has indicated during the Restricted Training session of July 13, 2022, that it would have been found that redirect links were present on the pages in question of its

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mobile application from the beginning, but that these links were hidden because of a technical problem which would have been corrected in the meantime.

In addition, the controller attached screenshots to his email of July 22, 2022 which show that a redirect link to the data protection policy is now available on the pages of its mobile application [collection points for information].

In consideration of the sufficient compliance measures taken by the control in the present case and point 51 of this decision, the Restricted Panel considers as of when there is no reason to pronounce the corrective measure proposed by the chief of investigation in this respect and taken up in point 59 of this decision under b. in what relates to the mobile application.

- As for the corrective measure proposed by the head of investigation listed under b. of point 59 of this Decision concerning the compliance of the audit with Article 12.1 of the GDPR by ensuring that users are informed of the deposit of cookies during the first connection to the website, the Restricted Training has already made observe that the obligation to obtain the prior consent of the user to the deposit or reading “non-essential” cookies results from article 4.3.e) of the amended law of May 30, 2005, and that it does not rule in this decision on the conformity of the

controlled with the requirements of this law (see point 35 of this decision).

For the same reason, it also does not rule on the corrective measure proposed

by the head of investigation in this respect and taken up in point 59 of this decision under b.

with respect to the controlled website.

- As for the corrective measure proposed by the head of investigation listed under c. from item 59

of this decision concerning compliance of the audit with Article 12.1 of the

GDPR by translating the data protection policy into the same languages

than those proposed for the website, the control has during the on-site visit of the

October 8, 2020 explained to CNPD officials that it was planned to translate the policy

data protection “in the same languages as those offered on the site

(languages B, C)”.<sup>100</sup>

During the Restricted Training session of July 13, 2022, the control indicated that

the data protection policy would now be available in all

100 Minutes, section “IV. Summary of the main exchanges between Company A and the CNPD” in point

“Control objective no. 5 [...]”.

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languages in which the website would be made available, and that it would no longer have

the intention to translate the data protection policy into the C language, [...].

In addition, it has attached copies of the data protection policy amended in

languages A and B to his email of July 22, 2022.

The Restricted Panel had already noted that at the start of the investigation the website

only existed in the A and B languages (see point 40 of this decision). In consideration

sufficient compliance measures taken by the auditee in this case and the

point 51 of this decision, the Restricted Committee therefore considers that there is no appropriate to pronounce the corrective measure proposed by the head of investigation in this regard and taken up in point 59 of this decision under c.

However, the Restricted Committee would like to point out that "when the information are translated into one or more languages, the controller must ensure that all translations are accurate and that the phraseology and syntax make sense in the target language so that the translated text does not have to be deciphered or reinterpreted. »<sup>101</sup>. However, regarding the modified versions of the protection policy data it should be noted that the content of the two language versions is not not completely identical. It therefore considers that it is necessary to pronounce a measure corrective in this regard.

- As for the corrective measure proposed by the head of investigation listed under d. of point 59 of this Decision concerning the compliance of the audit with Article 12.1 of the GDPR by specifying in the data protection policy the information on the data retention periods, the Restricted Committee finds that the modified data protection policy now mentions the durations of retention of personal data relating to processing specific in the sections "[...]" and "[...]".

In consideration of the sufficient compliance measures taken by the control in the present case and point 51 of this decision, the Restricted Panel considers as of when there is no reason to pronounce the corrective measure proposed by the chief of investigation in this respect and taken up in point 59 of this decision under d.

61. With regard to the alleged breach of Article 12.1 of the GDPR due to the processing carried out by the controller which was not mentioned in  
  
101 WP 260 rev.01, point 13.

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the data protection policy, the Restricted Committee finds that they are

now mentioned in the modified data protection policy in the

section " [...]" [...].

In consideration of the sufficient compliance measures taken by the control in

case and point 51 of this decision, the Restricted Committee therefore considers that it

no remedial action is warranted in this regard.

62. With regard to the alleged breach of Article 12.1 of the GDPR due to the lack

clarity of the data protection policy, and more particularly the granularity

information provided, the Restricted Committee finds that in the policy of

modified data protection, information relating to the purposes of the processing and

to the legal basis of the processing are now attached to specific processing

in the section " [...] ". However, they still do not include reliable information and

concrete information relating to the recipients of personal data and the control

always uses vague terms like "may", "might" and "some".

In view of the insufficient compliance measures taken by the control

in this case and point 51 of this decision, the Restricted Panel therefore considers

that corrective action should be taken in this respect.

In view of the foregoing developments, the National Commission sitting

in restricted formation, after having deliberated, decides:

- to retain a breach of Article 12.1 of the GDPR;

- impose an administrative fine on Company A in the amount of

one thousand (1,000) euros, with regard to the breach constituted by article 12.1 of the GDPR;

- issue against Company A an injunction to bring the

processing with the obligations resulting from Article 12.1 of the GDPR, within two months following the notification of the decision of the Restricted Committee, and, in particular,

- o ensure that the information contained in the data protection policy reflect reality regarding the use of profiling;
- o correct the formatting error that crept into the numbering of the section "[...]" of the amended data protection policy;

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- o ensure that the content of the different language versions of the policy data protection intended for users of its website is identical;

And

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provide the required information in a way that is understandable and in terms clear and simple regarding the recipients of personal data personal, and without using vague terms.

Belvaux, December 13, 2022.

For the National Commission for Data Protection sitting in restricted formation

Tine A. Larsen Thierry Lallemand

President

Commissioner

Alain Hermann

Commissioner

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 must be introduced through a lawyer at the Court of one of the Bar Associations.

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