

Deliberation SAN-2022-024 of December 20, 2022 National Commission for Computing and Liberties Legal status: In force  
Date of publication on Légifrance: Friday December 23, 2022 Deliberation of the restricted committee no. SAN-2022-024 of December 20, 2022 concerning the company LUSHA SYSTEMS INC. The National Commission for Computing and Liberties, meeting in its restricted formation composed of Mr. Alexandre LINDEN, President, Mrs. Christine MAUGÜÉ and Mr. Bertrand du MARAIS and Mr. Alain DRU, members; Having regard to Regulation (EU) 2016/ 679 of the European Parliament and of the Council of April 27, 2016 relating to the protection of personal data and the free movement of such data; Having regard to law no. 78-17 of January 6, 1978 relating to data processing, files and freedoms, in particular its articles 20 and following; Having regard to decree no. 2019-536 of May 29, 2019 adopted for the application of law no. deliberation no. 2013-175 of July 4, 2013 adopting the internal regulations of the National Commission for Computing and Liberties; Having regard to decision no. 2018-020C of January 24, 2018 of the President of the National Commission for Computing and Freedoms to instruct the Secretary General to carry out or have carried out a mission to verify any processing relating to the "lusha.co" domain and/or the extension for Chrome and Chromium browsers called "Lusha"; Having regard to decisions no. ° 2019-228C, 2019-231C and 2019-232C of 17 December 2019 of the President of the National Commission for Computing and Liberties to instruct the Secretary General to carry out or to have carried out a mission to verify any accessible processing from the "Simpler", "Mailbook" and "Cleaner Pro" applications; Having regard to the report of Mr. François PELLEGRINI, reporting commissioner, notified to the company LUSHA SYSTEMS INC. June 15, 2022; Having regard to the written observations submitted by the board of the company LUSHA SYSTEMS INC. August 30, 2022; Having regard to the rapporteur's response to these observations notified to the company LUSHA SYSTEMS INC. on September 30, 2022; Having regard to the new written observations submitted by the board of LUSHA SYSTEMS INC., received on November 7, 2022; Having regard to the oral observations made during the restricted training session of November 24, 2022; Having regard to the other exhibits of the file; Were present, during the session of the restricted formation: - Mr. François PELLEGRINI, commissioner, heard in his report; As representatives of the company LUSHA SYSTEMS INC. :- [...] ;The company LUSHA SYSTEMS INC. having spoken last;The Restricted Committee adopted the following decision:I. Facts and procedure1. Founded in April 2016 and having its registered office at 800 Boylston Street, Suite 1410 in Boston (USA), LUSHA SYSTEMS INC. (hereinafter "the company") is a 100% subsidiary of YT DEV LTD, located in Israel. It does not have an establishment on the territory of the European Union. In 2021, the company achieved a turnover of [...] dollars.2. The company markets an extension (hereinafter "the Lusha

extension"), available from the "lusha.co" site, running on Chrome and Chromium browsers and allowing its users to obtain professional contact details. (telephone number and e-mail address) of people whose profile they visit on the LinkedIn social network or on the Salesforce.com customer relationship platform (hereinafter "Salesforce").<sup>3</sup> The company also publishes, via the companies SIMPLER APPS INC., LOBSTER APPS INC. and TOP FLOOR INC which it wholly owns, the smartphone applications called "Simpler", "Mailbook" and "Cleaner Pro", which were available from French territory on Android and iOS systems until August 2022 and which presented as offering a "contact management" service to the user.<sup>4</sup> On January 24 and February 1, 2018, following a report received in January 2018, a CNIL delegation carried out an online check on the "lusha.co" website pursuant to decision no. 2018-020C of 24 January 2018 from the President of the National Commission for Computing and Liberties (hereinafter "the CNIL" or "the Commission").<sup>5</sup> The purpose of this mission was to verify compliance, by the company, with the provisions of law n° 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms (hereinafter "the Data Protection Act" or "law of January 6, 1978"), in connection with processing relating to the "lusha.co" domain and/or the extension for Chrome and Chromium browsers called "Lusha".<sup>6</sup> On March 6, 2019, the delegation of control carried out a new online control to verify the compliance of processing relating to the "lusha.co" domain and the Lusha extension, in particular for the purpose of verifying the investigation of two complaints received by the CNIL services respectively on October 22, 2018 and February 14, 2019. <sup>7</sup> Representatives of the company were heard at the premises of the Commission on July 18, 2019. <sup>8</sup> On December 19 and 20, 2019, pursuant to Decisions Nos. 2019-228C, 2019-231C and 2019-232C of December 17, 2019 from the President of the CNIL, the Commission services carried out, from a mobile terminal, three online checks on the "Simpler", "Mailbook" and "Cleaner Pro" applications. <sup>9</sup> The purpose of these checks was to verify the compliance of the processing operations accessible from these mobile applications, or relating to personal data collected from them with any organization concerned by their implementation, with the provisions of Regulation (EU ) 2016/679 of the European Parliament and of the Council relating to the protection of personal data (hereinafter "the GDPR" or "the Regulation") and the Data Protection Act.<sup>10</sup> By e-mails sent between July 2019 and May 2020, the company sent the CNIL several documents and response elements requested by the Commission services in the context of the investigations.<sup>11</sup> On March 29, 2021, on the basis of Article 22 of the law of January 6, 1978, the President of the Commission appointed Mr François PELLEGRINI as rapporteur for the purposes of examining these elements.<sup>12</sup> On June 15, 2022, at the end of his investigation, the rapporteur notified the company of a report detailing the breaches of the GDPR that he considered

constituted in this case. The notification letter for the report indicated to the company that it had one month to submit its written observations under the provisions of Article 40 of Decree No. 2019-536 of May 29, 2019 as amended, taken for the application of the Data Protection Act (hereinafter "the decree of May 29, 2019").<sup>13</sup> This report proposed to the Restricted Committee to pronounce an administrative fine against the company, as well as an injunction to bring the processing into compliance with Articles 6 and 15 of the GDPR on a principal basis and Articles 14 to 15 on a purely subsidiary, together with a penalty at the end of a period of three months following the notification of the deliberation. It also proposed that this decision be made public and no longer allow the company to be identified by name after the expiry of a period of two years from its publication.<sup>14</sup> By letter dated June 22, 2022, the company requested additional time from the chairman of the restricted committee to produce its observations in response to the rapporteur's report, which was granted to it on the following June 24, on the basis of Article 40 , paragraph 4, of the decree of 29 May 2019.<sup>15</sup> On August 30, 2022, the company filed observations in response.<sup>16</sup> On September 30, 2022, the rapporteur responded to the company's observations.<sup>17</sup> On 7 November 2022, the company submitted new observations in response to those of the rapporteur.<sup>18</sup> By letter dated November 8, 2022, the rapporteur informed the company's board that the investigation was closed, pursuant to Article 40, III, of amended decree no. 2019-536 of May 29, 2019.<sup>19</sup> By letter of the same day, the company was informed of the inclusion of the file on the agenda of the restricted meeting of November 24, 2022.<sup>20</sup> The rapporteur and the company presented oral observations during the restricted committee session.

II. Reasons for decision

A. On the processing in question and the quality of the Lusha company vis-à-vis this processing

1. On the processing of personal data in question: the Lusha<sup>21</sup> extension. Pursuant to Article 4(2) of the GDPR, processing of personal data constitutes "any operation or set of operations whether or not carried out using automated processes and applied to data or sets personal data, such as the collection, recording, organization, structuring, storage, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of provision, reconciliation or interconnection, limitation, erasure or destruction".<sup>22</sup> In this case, the Restricted Committee notes that once installed on a Chrome or Chromium browser and after creating a "Lusha" account, the extension marketed by the company allows a user browsing the LinkedIn social network or the Salesforce.com platform to obtain information about a person whose profile is visited by the user (hereinafter "the target person"), namely the professional contact details of this person (telephone number(s) and/or or email address(es), which will be displayed in a floating window on the visited page.<sup>23</sup> When the user views the target person's LinkedIn profile or Salesforce page, the extension will compare

the target person's name with possibly identical names stored in the company's database. In the event that at least one result is returned, the extension will verify that the company entered as the employer of the target person on the LinkedIn or Salesforce profile visited corresponds to the one listed in its database. If the preceding criteria return a result and the telephone number and/or e-mail address associated with the target person appears in the digital address books of at least two distinct persons registered in the database of the company, the number and/or associated email address will be displayed in the floating window of the user visiting the target person's page.<sup>24</sup> Company representatives clarified during the July 18, 2019 hearing that the extension works in a free version, with a credit of five contacts, and in a paid version, with a number of contacts depending on the amount of credits subscribed. <sup>25</sup> Between 2016 and August 2022, the data constituting the company's contact database was collected using the three contact management mobile applications "Simpler", "Mailbook" and "Cleaner Pro", developed by subsidiaries of the company, who sucked up their users' digital address books and transferred them to Lusha.<sup>26</sup> More concretely, at the initial opening of the applications a pop-up window appeared to inform users that by creating their account they were about to share their contacts with the "community of applications to help with identity verification". The company then filtered the data transmitted to keep only "professional" contact data (telephone number(s) and/or email address(es)), excluding contact data for personal use. To perform this filtering, the company used, on the one hand, publicly available information to understand the structure of a company's email address and/or telephone number (e.g.: firstname.lastname@ societe.com and for a French company based in Paris: + 33 1) and, on the other hand, to a white list of names of professional contacts drawn up by the company CRUNCHBASE including, on the date of the checks, the contacts from 5 to 7 million businesses. Only contacts belonging to this whitelist were included in the Lusha.<sup>27</sup> company database. The aforementioned applications having been withdrawn from the French market in August 2022, the operation of the extension therefore previously involved three distinct categories of people:- first, users of mobile applications, i.e. people whose address books containing the contact data of the persons concerned were sucked up by the mobile applications and then transmitted to the Lusha database; - then, the persons concerned, also known as target persons, i.e. the persons whose contact data is present in the Lusha database and who are the subject of the processing in question; - finally, the users of the Lusha extension, that is to say the company's customers, using the extension in free or paid version, who visit the LinkedIn profiles or Salesforce of the target persons in order, in particular, to obtain their professional contact details in order to canvass them.<sup>28</sup> Thus, the persons concerned (in the sense that this term will be used below), whose data are consulted by Lusha's customers,

are neither users of the Lusha extension, nor users of the applications developed by the company's subsidiaries. , their presence in the Lusha database being explained solely by the fact that their contact details appeared in the address book of one or more of their contacts (friend, family, colleague, etc.) who downloaded the applications "Simpler", "Mailbook" or "Cleaner Pro".<sup>29</sup> The Restricted Committee notes that the fact that the database in question used for the operation of the Lusha extension is, in principle, only made up of people's "professional" contact details has no impact on the "personal" nature of this data, according to well-established case law of the Court of Justice of the European Union (see, in particular, CJEU, 9 November 2010, Volker and others, cases C-92/09 and C-93/09, pt. 59).<sup>30</sup> It notes, moreover, that it emerges from the foregoing that the operations of sucking up the address books of users of mobile applications and then of filtering this data necessarily lead the company to also process the so-called "personal" contact details of contacts appearing in the aspired address books (personal contact details and other data such as contact notes), even if this data would not subsequently be added to the database used for the operation of the Lusha extension.<sup>31</sup> . The company says the extension is intended to fight online fraud by allowing its users to ensure that the target person whose profile they are visiting "is who they say they are or who works for the company. society to which she claims to belong" (hearing of July 18, 2019).<sup>32</sup> The Restricted Committee also notes that it was found on the company's website, during the online check of March 6, 2019, that the company presents its service as allowing its users to "fulfill the challenge of enabling genuine contact with your customers, knowing [their] correct phone numbers, email address and company data. Access the data you need to contact your prospects via social media, web, Salesforces or API" and quote the testimonial of one of its users, according to which it would be "the best application to find telephone numbers and information relating to individuals, fast and easy to use" (free translation).<sup>33</sup> It follows from the foregoing that all of the different processing operations mentioned above, all essential to the operation of the Lusha extension, and which consist, in particular, in the collection, storage, structuring, crossing and distribution of personal data, in particular "raw" contact data of users of the "Simpler", "Mailbook" and "Cleaner Pro" applications and data from the CRUNCHBASE whitelist, participate in a single data processing of a personal nature pursuing the purposes of combating online fraud and providing the contact details of prospects (hereinafter "the processing in question").<sup>2</sup> On the quality of the company Lusha<sup>34</sup>. Under Article 4(7) of the GDPR, data controller is "the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of treatment ".<sup>35</sup> In this case, the company declared to the CNIL to be "responsible for the processing resulting from the use of [the Lusha extension]" and that the companies SIMPLER

APPS INC., LOBSTER APPS INC. and TOP FLOOR INC. were controllers of the mobile applications they developed (namely the "Simpler", "Mailbook" and "Cleaner Pro" applications).<sup>36</sup> Regardless of this distribution, the Restricted Committee considers that the company must be considered responsible for all the processing operations necessary for the operation of its extension.<sup>37</sup> Thus, the company's responsibility also extends to the operations of collecting contact data from people appearing in the address books of users of mobile applications and transmitting this data to the Lusha database, from then on. that these two operations were, at the date of the inspections, essential for supplying the database of contacts without which the Lusha extension could not operate.<sup>38</sup> If, in fact, these two processing operations were carried out within the mobile applications developed by the company's subsidiaries, the Restricted Committee emphasizes that the company was necessarily at the origin of them via the decision-making power it exercises over these three companies that it owns 100% and which have no employees. Consequently, and without there being any need to determine whether the subsidiaries have the status of sole data controllers for the data extraction operation, while Lusha would be solely responsible for the data transmission operation to its base, co-controllers with the company Lusha for the two operations, or subcontractors of the company Lusha for these two operations, the Restricted Committee considers that the parent company determines, at least in part, the purposes and means of these processing operations and is therefore responsible for processing.<sup>39</sup> It follows from the above that the company is responsible for the processing in question.

B. On the applicability of the GDPR<sup>40</sup>. The rapporteur maintains that the CNIL was competent under the Data Protection Act, then under the GDPR, to initiate a control procedure and then a sanction procedure against the company. More specifically, it considers that the GDPR is applicable to the processing in question under its Article 3, paragraph 2, b), when the processing concerns personal data relating to data subjects on the territory of the Union. European Union and that it is linked to the monitoring of the behavior of these persons.<sup>41</sup> The company considers that the CNIL is incompetent since the start of the control procedure. In particular, it considers that the GDPR does not apply to it insofar as it does not process personal data related to the "behaviour" of the persons concerned and does not implement "monitoring" or "profiling" activities. " and attaches to this support the conclusions of an expert report commissioned at its initiative. It adds that the inapplicability of the GDPR to its activities would have been confirmed by the National Commission for Data Protection, the Luxembourg data protection authority (hereinafter "the CNPD"), which would have ruled on the subject in an email dated June 9, 2022.<sup>42</sup> Article 3 of the GDPR, relating to the territorial scope, provides that this text applies: "1. [...] to the processing of personal data carried out within the framework of the

activities of an establishment of a responsible processing or a processor on the territory of the Union, whether or not the processing takes place in the Union 2. [...] to the processing of personal data relating to data subjects who are located on the territory of the Union by a controller or processor who is not established in the Union, where the processing activities are related to: a) the provision of goods or services to such data subjects in the Union, whether or not payment is demanded of such persons; or (b) monitoring the conduct of such persons, insofar as it is conduct which takes place within the Union". 43.

According to Article 4, paragraph 4, of the GDPR, profiling is defined as "any form of automated processing of personal data consisting of the use of such personal data to evaluate certain personal aspects relating to a natural person, in particular to analyze or predict matters relating to that natural person's job performance, economic situation, health, personal preferences, interests, reliability, behavior, whereabouts, or movements".44. Recital 24 of the GDPR specifies in this respect that "The processing of personal data of data subjects who are located in the Union by a controller or a processor who is not established in the Union should also be subject to this Regulation where such processing is related to the monitoring of the behavior of such persons insofar as it relates to their behavior within the Union In order to determine whether a processing activity can be considered as monitoring of behavior of data subjects, it must be established whether natural persons are tracked on the Internet, which includes the possible subsequent use of personal data processing techniques which consist of the profiling of a natural person, in order to including making decisions about them or analyzing or predicting their preferences, behaviors and mindsets". By way of clarification, in its guidelines 3/2018 relating to the territorial scope of the GDPR in their version of 12 November 2019, the European Data Protection Board (hereinafter "the EDPS") notes that, " contrary to the provision of Article 3(2)(a), neither Article 3(2)(b) nor Recital 24 expressly introduces a necessary degree of "intent to target" of the controller or processor to determine whether the monitoring activity would trigger the application of the GDPR to the processing activities. However, the use of the word "monitoring" implies that the controller is pursuing a specific objective in view to the collection and subsequent reuse of relevant data relating to an individual's behavior within the Union The Committee does not consider that the online collection or analysis of personal data relating to in the Union would automatically be considered as "follow-up". It will be necessary to take into account the purpose of the data processing by the data controller and, in particular, any subsequent behavioral analysis or profiling techniques involving this data. The Board takes into account the wording of recital 24, which indicates that in order to determine whether the processing involves the monitoring of the behavior of a data subject, the monitoring of natural persons on the Internet, including the potential subsequent use of profiling techniques,

constitutes an important factor".<sup>46</sup> In this case, since the company has no establishment in the European Union and the Lusha extension is not linked to an offer of goods or services to "persons data subjects" as defined in § 28 of this decision, the Restricted Committee notes that neither the criterion of establishment provided for in paragraph 1 of Article 3 of the GDPR, nor that relating to the offer of services to data subjects in the Union provided for in paragraph 2, a) of the same article are not applicable. applicability is invoked by the rapporteur, the Restricted Committee notes that although the company does indeed process personal data of persons located in the European Union and, in particular, in France, it has not been established that these persons are subject to behavior monitoring by the company. Indeed, the Restricted Committee notes that the constitution of the database by the company is based solely on the reconciliation between professional contact data (telephone, e-mail address) with the identity of the people whose profile is visited on LinkedIn in order to verify its veracity. It is therefore not, in this case, a processing which consists in analyzing or predicting a behavior, the personal preferences or the movements of a person, his interests, his economic situation or his state of health. The Restricted Committee considers that the company does not use personal data processing techniques which consist of the profiling of a natural person.<sup>48</sup> It follows from the foregoing that the GDPR is not applicable to the processing in question. Consequently, it is not within the powers of the Restricted Committee to impose a sanction.<sup>49</sup> It seems appropriate that all users of the applications in question be informed that the processing implemented by Lusha is not subject to the GDPR. It is therefore appropriate to order the publication of this deliberation. on the CNIL website and on the Légifrance website, its deliberation, which will no longer allow the company to be identified by name at the end of a period of two years from its publication. The chairman Alexandre LINDEN This decision is subject to appeal before the Council of State within four months of its notification.