Deliberation of restricted committee No SAN-2025-004 of 1 September 2025 concerning GOOGLE LLC and GOOGLE IRELAND LIMITED

Courtesy translation: in the event of any inconsistencies between the French version and this English courtesy translation, please note that the French version shall prevail and have legal validity.

The Commission nationale de l'informatique et des libertés, composed of Mr Philippe-Pierre CABOURDIN, President, Mr Vincent LESCLOUS, Vice-President, Ms Laurence FRANCESCHINI, Ms Isabelle LATOURNARIE-WILLEMS and Ms Didier KLING, members;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of personal data and on the free movement of such data;

Having regard to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector;

Having regard to the Postal and Electronic Communications Code;

Having regard to Law No 78-17 of 6 January 1978 on data processing, files and freedoms, in particular Articles 20 et seq. thereof;

Having regard to Decree No 2019-536 of 29 May 2019 implementing Law No 78-17 of 6 January 1978 on information technology, files and freedoms;

Having regard to Resolution No 2013-175 of 4 July 2013 adopting the rules of procedure of the Commission nationale de l'informatique et des libertés;

Having regard to Decision No 2025-1154 of 8 August 2025 of the Constitutional Council on the conformity with the rights and freedoms guaranteed by the Constitution of Article 22 of Law No 78-17 of 6 January 1978 on information technology, files and freedoms.

Having regard to Decision No 2022-175C of 29 September 2022 of the President of the National Commission for Informatics and Freedoms to instruct the Secretary-General to carry out or have carried out a verification mission of the processing of personal data relating to the implementation and use of the 'Gmail' email service and any processing, including advertising, linked to any body likely to be concerned by their implementation;

Having regard to Decision No 2023-103C of 19 April 2023 of the President of the National Commission for Informatics and Freedoms to instruct the Secretary-General to carry out or have carried out a verification mission of the processing operations relating to tracers read and deposited on the terminal of persons connected to a Google account when browsing with any body likely to be concerned by their implementation;

Having regard to the decision of the President of the Commission nationale de l'informatique et des libertés of 30 April 2024 appointing a rapporteur to the restricted committee;

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Having regard to the report of Ms Anne DEBET, Commissioner-Rapporteur, served on GOOGLE LLC and GOOGLE IRELAND LIMITED on 25 July 2024;

Having regard to the written observations submitted by the Council of the companies GOOGLE LLC and GOOGLE IRELAND LIMITED on 4 October 2024;

Having regard to the rapporteur's reply to those observations, notified to the companies on 25 November 2024;

Having regard to the written observations submitted by the Council of the companies GOOGLE LLC and GOOGLE IRELAND LIMITED on 29 January 2025 and 28 April 2025;

Having regard to the closure of the investigation, served on GOOGLE LLC and GOOGLE IRELAND LIMITED on 26 May 2025;

Having regard to the oral observations made during the restricted committee session of 26 June 2025;

Having regard to the other documents in the file;

The following were present at the restricted committee session on 26 June 2025:

- Ms Anne DEBET, Commissioner, after hearing her report;

As representatives of GOOGLE LLC and GOOGLE IRELAND LIMITED:

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The companies GOOGLE LLC and GOOGLE IRELAND LIMITED having been informed, as a precautionary measure and in the light of the still uncertain implications of the case-law of the Constitutional Council in this regard, of their right to remain silent on the facts alleged against them, and the latter having had the floor last;

The restricted committee adopted the following decision:

I. FACTS AND PROCEDURE

1. GOOGLE LLC is a limited liability company headquartered in California, USA. Since its creation in 1998, it has developed numerous services for individuals and businesses, such as the *Google Search* search engine, *Gmail* email, the *Google Maps* mapping service and the *YouTube* video platform. It has more than 70 offices in around 50 countries and employed more than [...] people in 2024. Since August 2015, it has been a wholly-owned subsidiary of ALPHABET Inc., the parent company of the GOOGLE group.

2. In the context of this Decision, the GOOGLE Group is understood to be formed by the company GOOGLE LLC and all its subsidiaries, including the company GOOGLE IRELAND LIMITED ('GIL'), which operates as an entity in charge of the management of *Google* products in the European Economic Area ('EEA') and in Switzerland, and the company GOOGLE France, a French establishment of the group and whose head office is located in Paris (France).

3. In 2024, ALPHABET Inc. had a turnover of $350 billion and a profit of over $100 billion. In 2023, its turnover was more than USD 307 billion and that of GOOGLE LLC more than USD 305 billion.

4. GOOGLE IRELAND LIMITED had a turnover of more than €72.6 billion in 2022 and more than €64.8 billion in 2021.

5. GOOGLE France achieved in 2023 a turnover of more than [...] and more than [...] in 2022.

6. Created in 2004, *Gmail* is a free service whose use requires the creation of a *Google* account beforehand. Creating a *Google* account provides access to many Google products, such as *Gmail*, *Google Ads*, *Youtube*, etc. Between 1April 2021 and 26 October 2023, [...] Google accounts were created by users residing in France at the time of their registration.

7. On 24 August 2022, the Commission nationale de l'informatique et des libertés ('the CNIL' or 'the Commission') received a complaint from the organisation None Of Your Business ('NOYB'), mandated on behalf of three complainants to receive advertising emails in the 'Promotions' tab of their *Gmail* email without consent.

8. The GOOGLE group has been the subject of two separate control procedures, aimed at verifying compliance with the provisions of Law No 78-17 of 6 January 1978 on information technology, files and freedoms ('the Data Protection Act' or 'the law of 6 January 1978 as amended') and the other provisions relating to the protection of personal data laid down in legislative and regulatory texts, European Union law and France's international commitments.

9. **On the one hand,** pursuant to Decision No 2022-175C of 29 September 2022 of the President of the CNIL, several checks were carried out in order to verify the compliance of the processing of personal data relating to the implementation and use of the *Gmail* email service and any processing, including advertising, related.

10. First of all, on 20 October 2022, a delegation carried out an online monitoring mission, which ended on 4 November 2022.

11. Subsequently, on 29 November and 6 December 2022, two on site inspection were carried out at the premises of GOOGLE France. Additional elements were sent to the Delegation by the Board of Companies on 9 and 16 December 2022 and on 18 January, 11 April and 22 May 2023.

12. Finally, the Delegation carried out a new on site inspection on 5 September 2023 at the premises of GOOGLE France. On 26 September 2023, the Board of Companies sent additional elements to the Delegation.

13. **On the other hand,** pursuant to Decision No 2023-103C of 19 April 2023 of the Chair of the CNIL, the delegation carried out an online check on 20 April 2023 of the processing operations relating to tracers read and deposited on the terminal of persons connected to a *Google* account from the google.fr website, while browsing *YouTube, Google Maps* and *Google Search.*

14. On 14 November 2023, the Board of Companies sent additional evidence in response to the questionnaire sent to it by the Delegation, concerning *Google Search*, *YouTube*, *Google Maps* as well as the account creation path and the personalisation of ads.

15. For the purposes of examining those matters, on 30 April 2024 the President of the Commission appointed Ms Anne DEBET as rapporteur on the basis of Article 22 of the amended Law of 6 January 1978.

16. On 25 July 2024, at the end of her investigation, the rapporteur had GOOGLE LLC and GIL (together 'the companies') served with a report detailing the infringements of Article 82 of the Loi Informatique et Libertés and L. 34-5 du Code des Postes et des Communications Electroniques ('the CPCE') which she considered constituted in the present case. That report proposed that the restricted formation should impose an administrative fine on the companies and an injunction to bring its practices into line with the abovementioned provisions, together with a penalty payment. He also proposed that this decision should be made public but that it would no longer be possible to identify companies by name after the expiry of a period of two years from its publication.

17. On 4 October 2024, the companies submitted comments in replythe penalty report.

18. The rapporteur replied to these comments on 25 November 2024.

19. On 17 January 2025, the companies requested that a stay be orderedto be decided pending the decision of the Constitutional Council on the priority issue of constitutionality relating to the first paragraph of article L.621-12 of the Monetary and Financial Code, referred back by the Conseil d'État on 27 December 2024 and concerning the need to notify the right to remain silent during a home visit conducted by the investigators of the Autorité des marchés financiers. By letter of 30 January 2025, the Chair of the restricted committee indicated in reply that he did not

grant that request.

20. On 29 January 2025 and 28 April 2025, the companies submitted new observations in response to those of the Rapporteur.

21. On 26 May 2025, pursuant to Article 40-III of Decree No 2019-536 of 29 May 2019 implementing the Data Protection Act (‘the Decree of 29 May 2019’), the rapporteur informed the companies that the investigation had been closed.

22. On 6 June 2025, the companies were informed that the file was on the agenda of the restricted formation of 26 June 2025.

23. The rapporteur and the companies presented oral comments at the restricted session.

II. REASONS FOR DECISION

A. The jurisdiction of the CNIL

1. The material jurisdiction of the CNIL and the applicability of the 'one-stop shop' mechanism provided for by the GDPR

24. Article 5(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ('the *ePrivacy* Directive'), relating to the storage of or access to information already stored in the terminal equipment of a subscriber or user, was transposed into national law in Article 82 of the Data Protection Act, within Chapter IV *'Rights and obligations specific to processing in the electronic communications sector'* of that law.

25. Article 13(1) of that directive, relating to electronic prospecting, was transposed into national law in Article L. 34-5 of the Postal and Electronic Communications Code ('CPCE'), which provides in paragraph 6 that *'the Commission nationale de l'informatique et des libertés shall ensure, as regards direct prospecting using the contact details of a subscriber or a natural person, compliance with the provisions of this article by using the powers conferred on it by Law No 78-17 of 6 January 1978 referred to above'.*

26. According to Article 16 of the Data Protection Act, *'restricted committee shall take measures and impose penalties on controllers or processors who fail to comply with the obligations arising ... from this Act'.* Under Article 20(IV) of that law, *'where the controller or his processor does not comply with the obligations arising ... from this law, the President of the Commission nationale de l'informatique et des libertés may ... refer the matter to the restricted committee ...'.*

27. **The rapporteur considers** that the CNIL is materially competent under these provisions to control and, where appropriate, sanction the electronic prospecting operations and the operations of access or registration of information implemented by the companies GOOGLE LLC and GIL which fall under the aforementioned provisions.

28. **In defence, the companies** GOOGLE LLC and GIL consider that the creation of a *Google* account is a cross-border processing of personal data, which falls within the scope of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of personal data and on the free movement of such data ('the GDPR') and for which the lead supervisory authority – under Article 56 of the GDPR – competent to implement the mechanism for cooperation between supervisory authorities provided for in Chapter VII of that regulation, is the Irish data protection authority, the *Data Protection Commission* ('the *DPC').* […]

29. **In the first place, the restricted committee** recalls that since the processing operations subject to control are carried out in the context of the provision of publicly available electronic communications services through a public electronic communications network offered within the European Union, they fall within the material scope of the *ePrivacy Directive.*

30. It observes that it is apparent from the abovementioned provisions that the French legislature instructed the CNIL to ensure compliance by data controllers with the provisions of the *ePrivacy* Directive transposed into Article 82 of the Loi Informatique et Libertés and Article L 34-5 of the CPCE, in particular by entrusting it with the power to penalise any infringement of those articles.

31. The restricted committee then recalls that the Conseil d'État (Council of State), in its decision *of 28 January 2022, Société GOOGLE LLC and Société GOOGLE IRELAND LIMITED*, confirmed that the control of access or registration of information in the terminals of users in France of an electronic communications service, even if it is processed cross-border, falls within the competence of the CNIL and that the one-stop-shop system provided for by the GDPR is not applicable: "the so-called *'one-stop-shop' mechanism for cross-border processing, defined in Article 56 of that regulation, has not been provided for in respect of measures for the implementation and supervision of Directive 2002/58/EC of 12 July 2002, which fall within the competence of the national supervisory authorities pursuant to Article 15a of that directive. It follows that, as regards the control of the operations of access to and registration of information in the terminals of users in France of an electronic communications service, even if carried out by cross-border processing, the measures to monitor the application of the provisions which have transposed the objectives of Directive 2002/58/EC fall within the competence conferred on the CNIL by the Law of 6 January 1978...*' (EC, 28 January 2022, 10th and 9th Chambers together, *GOOGLE LLC and GOOGLE IRELAND LIMITED*, No 449209, to the ECR). The Council of State reaffirmed that position in a judgment of 27 June 2022 (EC, 10th and 9th Chambers meeting, 27 June 2022, *AMAZON EUROPE CORE*, No 451423, at the tables)

32. The restricted committee observes that the position of the Conseil d'État as regards the absence of a one-stop-shop mechanism concerns all the measures for the implementation and control of the *ePrivacy Directive*, which therefore includes – in addition to Article 5(3) of that directive – the obligations relating to electronic prospecting arising from Article 13(1) of that directive.

33. **In the second place,** the Restricted Chamber recalls that the principle *ne bis in idem*, guaranteed in particular by Article 50 of the Charter of Fundamental Rights of the European Union, is intended to apply where a person has already been convicted or acquitted by a final judgment, for acts falling within the same offence (CJEU, 7 January 2004, *Aalborg Portland and Others v Commission*, Case C 204/00 P, § 338).

34. It observes that the companies have set up an interface – *Google* account creation paths – from which multiple processing operations of personal data can be carried out, in the present case, data processing operations governed by the GDPR and processing operations governed by the *ePrivacy* Directive.

35. However, although this *Google* account creation process constitutes the same gateway for several processing operations, they are quite distinct because they have very different purposes (registration of information on the user terminal – hereinafter 'cookies' – registration of *web* searches or YouTube history) and they are framed by different texts and separate rules of jurisdiction which make it possible to prevent companies from being punished several times for identical acts falling within the same material and territorial jurisdiction.

36. As recalled in paragraphs 29 to 32, the restricted formation notes, first, that the CNIL has exclusive competence to penalise companies for non-compliance with the provisions of Article 82 of the Loi Informatique et Libertés and Article L-34-5 of the CPCE as regards users located in France and, secondly, that it has no competence to penalise possible breaches of companies' obligations under the GDPR which concern cross-border data processing.

37. […]Moreover, it is not apparent from the evidence provided that the companies GOOGLE LLC and GIL have already been definitively convicted or acquitted by any national supervisory authority or court, by a final decision or judgment, in respect of the infringements referred to in these proceedings. Consequently, the restricted panel considers that the principle *of ne bis in idem* is not infringed.

38. It follows from the foregoing that the one-stop-shop mechanism provided for by the GDPR is not applicable to the present proceedings and that the CNIL is competent to monitor and penalise the processing operations carried out by companies falling within the scope of the *ePrivacy Directive*, in so far as they relate to its territorial jurisdiction.

2. The territorial jurisdiction of the CNIL

39. The territorial application rule of the requirements set out in Articles 82 of the Data Protection Act and L. 34-5 of the CPCE is laid down in Article 3(1) of the Data Protection Act, which provides *that 'without prejudice, as regards the processing operations falling within the scope of Regulation (EU) 2016/679 of 27 April 2016, the criteria laid down in Article 3 of that regulation, all the provisions of this law shall apply to the processing of personal data carried out in the context of the activities of an establishment of a controller ... on French territory, whether or not the processing takes place in France'.*

40. **The rapporteur considers** that the CNIL has territorial jurisdiction under those provisions since the processing operations which are the subject of the present proceedings, consisting of electronic prospecting operations and operations of accessing or registering information in the terminal of users residing in France when using Google services, in particular for advertising purposes, are carried out in the *context of the 'activities'* of the company GOOGLE France, which constitutes *the 'establishment' on* French territory of the GOOGLE group, which is responsible for the promotion and marketing of *Google* products and their advertising solutions in France.

41. **In** the first place, **as regards the existence of an 'establishment of the controller on French territory', the restricted committee** recalls that the Court of Justice of the European Union ('the CJEU') has consistently held that the concept of establishment must be assessed in a flexible manner and that, to that end, it was necessary to assess both the degree of stability of the installation and the reality of the exercise of activities in a Member State, taking into account the specific nature of the economic activities and the provision of services in question. The Court clarified that 'the *concept of 'establishment', within the meaning of Directive 95/46, extends to any real and effective activity, even a minimal one, carried out by means of a stable installation',* the criterion of the stability of the installation being examined in the light of the presence of 'human *and technical resources necessary for the provision of the specific services in question'*

(CJEU, 1October 2015, *Weltimmo*, C-230/14, paragraphs 30 and 31).

42. In the present case, the restricted formation states, first of all, that GOOGLE France, registered in France since 14 August 2002, is the seat of the French subsidiary of GOOGLE LLC. It has premises located at 8 rue de Londres in Paris (75009) and employs approximately [...]. The restricted committee notes that the company's *articles of association 'updated following the amendment of Article 2 with effect from 1November 2022 (following Decisions of the Sole Partner of 28 October 2022)', state* that its object is in France and/or abroad, in particular *'the provision of all services and/or advice relating to software, the internet network, telematics or online networks, and in particular the provision of services and/or advice relating to software, the internet network, telematics or online networks, in particular intermediation in relation to the sale of online advertising, the promotion in all its forms of online advertising, the direct promotion of products and services and the implementation of technical infrastructures; the purchase and sale of advertising space, as well as any other product or service, as a reseller or by any other means;'* The restricted committee then notes that, in its decision *of 28 January 2022, Société GOOGLE LLC and Société GOOGLE IRELAND LIMITED,* the Conseil d'État confirmed that GOOGLE FRANCE constituted an establishment of GOOGLE LLC and GIL within the meaning of Article 3 of the Loi Informatique et Libertés.

43. **In the second place,** as regards the existence of processing operations carried out 'in the context of the activities' of that establishment, the restricted committee notes that, as regards the processing relating to the operations of accessing and/or registering information in the terminal of users located in France when using *Google's* services, it demonstrated in Decision No SAN-2020-012 of 7 December 2020 that the companies GOOGLE LLC and GIL have an 'establishment' in French territory and that the operations of accessing or registering information at issue in its decision were indeed carried out 'in *the context of the activities'* of that establishment, since those operations pursue advertising purposes in the context of which, inter alia, GOOGLE France, an establishment located in France, is responsible for the promotion and marketing of *Google* products and their advertising solutions in France. The Restricted committee notes that its analysis was not challenged by the companies in the present proceedings or previously before the Conseil d'État (Council of State), which moreover confirmed in every respect the decision given by the CNIL (EC, 28 January 2022, 10th and 9th Chambers together, *GOOGLE LLC and GOOGLE IRELAND LIMITED,* No 449209, in the ECR).

44. **In the third place,** as regards the processing relating to electronic prospecting on the *Gmail*service, the restricted committee notes that it is apparent from the control operations that GOOGLE France accompanies, in particular, *small and medium-sized enterprises in France 'through the development of collaboration tools, advertising solutions or to give them the keys to understanding their markets and consumers'.* The restricted committee notes that it is also apparent from the minutes of the on site inspection carried out on 29 November 2022 that 'GOOGLE *FRANCE is engaged in consultancy and marketing activities under a service agreement concluded with GOOGLE IRELAND LIMITED'* and 'promotes *'Google' products and services in France and is responsible for relations with the French public authorities'.* However, the restricted committee notes that it is explicitly apparent from *Google's 'Privacy rules and terms of use'* that *Gmail* messaging is part of the 'Google services': "A *Google account gives you*

access to a range of Google services, such as Gmail and Google Drive. ". . . In addition, within the company GOOGLE France, an 'Ads' team is responsible for supporting French companies in the implementation of their advertising campaigns *via* 'Google *Ads',* which is the platform for creating and managing advertising campaigns on *Google* services such as *Gmail, Discover* or *Youtube.* The restricted committee notes that if an advertiser encounters a problem with the display of his advertisements, he can refer the problem to a contact point within the company GOOGLE France, which is responsible for communicating it to the company GIL. The 'Ads' team within the company GOOGLE France is divided according to the sectors of activity of advertisers and is composed of [...] persons working and residing in France.

45. Therefore, the restricted committee notes that the processing operations at issue – consisting of access to or registration of information in the terminal of users of *Google's* services residing in France, in particular for advertising purposes and relating to electronic prospecting on the *Gmail service* – are carried out in the context of the company's activities.

GOOGLE FRANCE in France, which is responsible for the promotion and marketing of Google products and services and their advertising solutions.

46. It follows from the foregoing that French law is applicable and that the CNIL is materially and territorially competent to exercise its powers, including that of taking a penalty measure concerning the processing operations at issue which fall within the scope of the *ePrivacy Directive.*

B. The complaints alleging an irregularity in the procedure

1. The regularity of the collection of information

47. **The companies** first consider that the CNIL committed an abuse of law by exceeding its territorial competence during the on site inspectionon site inspection carried out at the premises of GOOGLE France on 6 December 2022 and 5 September 2023, during which hearings by videoconference of GIL's employees based in Ireland were conducted. The companies consider that such hearings exceeded the territorial jurisdiction of the CNIL. Next, the companies consider that, by hearing the employees of GIL based in Ireland, the CNIL did not comply with the guarantees and forms laid down in the IT and Freedoms Enforcement Decree – that is to say, the prior summons of 8 days before the hearing of the body and the communication of the information that the body has the right to be assisted by counsel.

48. **In the first place, the restricted committee** notes that it has demonstrated in paragraphs 24 to 46 of this decision that the CNIL is competent to monitor the compliance, by the companies GOOGLE LLC and GIL, with the requirements laid down in Article 82 of the Loi Informatique et Libertés and Article L. 34-5 of the CPCE in the context of the processing operations at issue, even if those companies are not located on French territory. It notes that neither the Data Protection Act nor the *ePrivacy* Directive limit the possibility for the CNIL to conduct investigations only at the establishments of data controllers located on French territory.

49. It observes that the CJEU confirmed the power of a supervisory authority to exercise its powers directly against the institution with decision-making power even if it were not located in the territory of the authority, in its decision in *Facebook Ireland and Others* (CJEU, Grand Chamber, 15 June 2021, Facebook Ireland and Others, C-645/19, p. 96). Although that decision was given in the context of the interpretation of provisions relating to the GDPR, the Restricted committee considers that, in view of the links between the two texts, the principles set out are valid with regard to the *ePrivacy Directive.* Restricted committee recalls in that regard that Article 1(2) of the *ePrivacy* Directive states that its objective is to clarify and supplement the provisions of Directive 95/46/EC, now replaced by the GDPR.

50. Lastly, the restricted committee notes that Article 19 of the Data Protection Act, which lays down the conditions under which on site inspectionon site inspection are carried out by the delegation, empowers it to verify the compliance of processing operations and to collect any useful information and justification, without limitation to French territory.

51. Thus, the restricted formation considers that the delegation of control did not exceed its territorial competence by hearing GIL's employees during the checks which it carried out and, therefore, that the abuse of rights is not characterised.

52. **In the second place,** the restricted committee notes that the companies dispute the manner in which the information was collected during the on site inspection of 6 December 2022 and 5 September 2023.

53. Contrary to what the companies claim, the Restricted committee considers, first of all, that the regime applicable to summons hearings laid down by Article 34 of Decree No 2019536 of 29 May 2019 adopted for the application of the Data Protection Act is not applicable to the inspection of 6 December 2022, which constitutes an on site inspection, in accordance with Article 31 of that decree, and not an inspection on hearing.

54. In the present case, the restricted committee notes that, during the first on site inspection carried out at the premises of the company GOOGLE France on 29 November 2022, the employees of the company GOOGLE France informed the Delegation, in response to certain questions put to them, that only the employees of the company GIL could answer those questions relating to compliance with the French legislation on the protection of personal data as regards the *Gmail* service, the *Discovery* service and the display of advertising on the *Gmail* service. Since the employees of GIL could not be contacted by telephone on 29 November 2022 to answer those questions, the delegation of control then informed the employees of GOOGLE France, and the board of companies, that it would return to the premises on 6 December 2022 in order to continue its investigations and findings, in particular with employees of GIL, and that they did not object. It considers that the mere fact that the Delegation returned to the premises of GOOGLE France on 6 December 2022 is not sufficient to consider that this was a review on hearing.

55. In view of the above, the Restricted committee notes that the Delegation acted in the context of an on site inspection, in accordance with the provisions of Article 19 of the Data Protection Act giving it competence to collect any useful information and justifications, without limitation to

French territory. It points out that the Data Protection Act and the abovementioned implementing decree do not provide that the body, and by extension that the persons who will be questioned during the on site inspection, must be informed in advance. The inspections of 6 December 2022 were therefore carried out in compliance with the applicable provisions.

56. Next, as regards the inspection of 5 September 2023 carried out at the premises of the company GOOGLE France, the restricted committee notes that by letter of 31 July 2023, the CNIL delegation had regularly invited the company GIL to an inspection on hearing, pursuant to Article 34 of the abovementioned decree, at the CNIL's headquarters and that it was the board of the company GIL which requested, by email of 22 August 2023, that that hearing take place exceptionally at the premises of GOOGLE France, which the CNIL delegation accepted. The CNIL cannot therefore be criticised for not having complied with the guarantees and forms laid down by the decree implementing the Data Protection Act, even though the company GIL was summoned for that inspection on hearing in accordance with the applicable provisions and the place of inspection was changed at the company's request.

57. Finally, the restricted committee notes that during the two inspections during which GIL's employees were heard by the delegation of inspections, on 6 December 2022 and 5 September 2023, interpreters and the company council were present.

58. In the light of all those factors, the restricted committee considers that the collection of information was carried out in compliance with the legal and regulatory provisions.

2. Respect for the right to a fair trial

a. The principles of legitimate expectations and fairness in the proceedings

59. **The companies** note that the online control carried out by the Delegation on 20 October 2022 was interrupted on 20 October 2022 and resumed on 4 November 2022 without justification. They consider that the interruption of the online check deprived them of the right to benefit from conditions guaranteeing the authenticity and integrity of the evidence collected during the check, as provided for in the Charter of Controls.

60. **The restricted committee** notes, first of all, that the Charter of inspections, published on the CNIL *website*, sets out the most common practical arrangements for carrying out inspections. It considers that, although that Charter makes it possible to offer greater predictability of the methods used by CNIL inspectors to the bodies audited, it is not, however, of a normative nature and cannot replace the legal provisions. It also notes that, under Article 19-III of the Data Protection Act and Article 33 of the decree adopted for its application, authorised agents may carry out any online operation necessary for their mission under a borrowed identity in order to control online communication services to the public.

61. It then observes that Article 33 of the abovementioned decree, which provides for the possibility for the CNIL delegation to carry out online checks, does not limit the period during which those operations must take place. It also notes that minutes No 2022-175/1 indicate that the findings

made during the online check which started on 20 October 2022 at 9:56 a.m. were suspended at 17:08 and resumed on 4 November at 16:38. It appears that the Delegation, after having created an account on the *Gmail service*, allowed the time needed to establish the prospecting operations on the *Gmail* email account email box , which can only be carried out after several hours or days. In those circumstances, the restricted group considers that the suspension of control was intended precisely to reproduce what happens to an internet user who logs into his *Google* account several days after creating it. It notes in any event that the companies do not dispute the materiality of the facts revealed by the online check, namely, the deposit of *cookies* on the terminal of users residing in France and the display of advertisements in the electronic mailbox of *Gmail* users.

62. In the light of those factors, the restricted committee considers that the information collected during the online check was collected fairly, in compliance with the provisions laid down by the applicable legislation.

b. The rights not to self-incriminate and to remain silent

63. **The companies** claim that the CNIL disregarded their right to remain silent during the investigation phase. They consider that the CNIL took advantage of the on site inspection at GOOGLE France's premises, the obligation to cooperate and the criminal penalties incurred in the event of obstruction, in order to obtain the setting up of videoconferences with Irish employees of GIL. They maintain that the employees felt obliged to answer the CNIL's questions and thus provided evidence on the role of GIL and the operation of Gmail ads.

64. **The restricted committee** recalls that Article 19 of the Data Protection Act defines the rules applicable to the control procedures carried out by CNIL officials. It observes that that investigation phase, prior to the initiation of a penalty procedure, involves various methods of investigation, which may consist of remote analysis operations, online checks or on-the-spot inspections. The primary objective of this step is the systematic collection of factual and tangible elements relating to the practices in question. It considers that verbal or written interactions with the parties concerned are intended exclusively to obtain clarification of the facts established, without seeking to establish any guilt or to classify the facts legally at this stage. It also notes that Article 18 of the Loi Informatique et Liberté establishes an obligation of cooperation, intended to enable the CNIL to gather the information necessary to establish and, where appropriate, punish breaches of the Loi Informatique et Libertés. It considers that, under the abovementioned provisions, the purpose of the monitoring phase – and the penalty procedure carried out by the CNIL – is to ensure the effectiveness of the fundamental right of natural persons to the protection of their personal data, recognised by Article 8(1) of the Charter of Fundamental Rights of the European Union.

65. It then observes that the Conseil d'État recently considered, in the context of the examination of a request for referral of a priority question of constitutionality, that the provisions of Article 19 of the Loi Informatique et Libertés *'do not have as their object the collection, by CNIL investigators, of explanations from a person concerning facts in respect of which he or she would be called into question in proceedings for the adoption of punitive measures against him or her. They do not therefore in themselves imply that the persons requested are notified of their right to*

remain silent' (EC, 10th and 9th Chambers, meeting, 18 April 2025, No 482872).

66. It follows from that decision that the CNIL's delegation of control was not required to inform the companies of their right to remain silent during the monitoring missions which it carried out.

67. In any event, it also notes that the Conseil d'État (Council of State) considered that annulment was incurred, if the right to remain silent was not notified, only if the decision at issue was decisively based on the statements made by the respondent (EC, Section, 19 December 2024, No 490157). In the present case, the Restricted committee considers that the infringements alleged against the companies are based solely on the findings made in the course of the checks and on the documentation provided in the course of the procedure.

68. The restricted committee further notes that the information provided in that context by the companies contained exclusively objective facts, describing the technical architecture of its processing operations relating to the deposit and reading of *cookies* on the terminal of users located in France and creating a *Google* account as well as those relating to the display of ads in Gmail inbox. Thus, the CNIL's delegation of control confined itself to gathering purely factual evidence in order to ensure that it had a sufficient understanding of the processing operations carried out by the companies, in compliance with the powers conferred on it by Articles 8(2), (g) and 19 of the Loi Informatique et Libertés. The limited training notes that the characterisation of the shortcomings proposed by the rapporteur is based on the findings of the online checks carried out by the CNIL delegation.

69. Lastly, the Restricted committee notes that in its decision No 2025-1154 QPC of 8 August 2025 on the penalty procedure followed before the Restricted committee, the Constitutional Council took the view that, by failing to provide that a person accused before the Restricted committee be informed of his or her right to remain silent, the provisions of Article 22 of the aforementioned Law of 6 January 1978 had to be declared contrary to the Constitution.

70. It nevertheless observes that the Constitutional Council decided, on the one hand, to postpone the effect of that unconstitutionality to 1October 2026 and stated, on the other hand, that 'the *measures taken before the publication of this decision cannot be challenged on the basis of that unconstitutionality',*

71. It follows from the foregoing that the Restricted committee considers that the complaint alleging failure to notify the right to remain silent must be rejected.

c. The complaints alleging infringement of the rights of the defence

72. **The companies** consider that the late joining of the two control procedures limited the time available to prepare their defence. They consider that this time would have been longer if the two procedures had remained separate. They also state that the CNIL breached its duty of loyalty by failing to inform them, during the inspection procedure, of the nature of the charges and alleged breaches. They maintain that the CNIL infringed the principle of fair evidence by using evidence collected during the on site inspection relating to the processing of prospecting by electronic

means in the part of the present proceedings relating to *cookies.*

73. **The restricted committee** notes, first of all, that the first control procedure, which was intended to ensure the compliance of the processing operations relating to prospecting by electronic means in *Gmail* messaging, revealed a user journey deployed by the companies for that purpose, which was common to the user journey implemented by the companies in relation to *cookies.* The formalisation of these findings therefore justified a second control procedure dedicated to this theme for which the CNIL is also competent. The Restricted committee considers that the joinder of proceedings, which is not prohibited by the texts and was carried out without stratagem, appears all the more appropriate since a single user journey marks the entry into the *ecosystem of Google* services. It considers, therefore, that the delegation of control did not infringe the principle of fair evidence, since all the evidence was collected in compliance with the applicable legislation.

74. Furthermore, as regards the right to have the time necessary to prepare its defence, the restricted committee recalls that that right is one of the components of the right to a fair trial contained in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and which must, in accordance with the case-law of the European Court of Human Rights, be analysed in the light of its function in the general context of the proceedings (ECHR, 20 January 2005, Mayzit v. Russia No. 63378/00).

75. In that regard, the restricted committee recalls, first of all, as stated above, that there was no obligation on the CNIL to conduct two separate penalty procedures and that, as regards time limits, the implementation of the adversarial principle provides, pursuant to Article 40 of Decree No 2019-536 of 29 May 2019, that the controller to whom a penalty report is notified has a period of one month within which to submit its observations in response. The Restricted committee then recalls that the Council of State has already had the opportunity to dismiss the plea of illegality concerning that one-month period provided for in Article 75 of the Decree of 20 October 2005 (now Article 40 of Decree No 2019-536 of 29 May 2019) (EC, 19 June 2020, No 430810 pt 13). In that case, the Conseil d'État (Council of State) considered that the company had been able to prepare and present its defence effectively since it had one month in which to reply to the rapporteur's report. Lastly, the restricted committee notes that, in addition to that one-month period, the companies in the present case were given two additional periods during the adversarial procedure to reply to the rapporteur's observations and that they were given the opportunity to speak again before the restricted committee. The Restricted committee therefore considers that the rights of defence of the companies have not been infringed, with the result that the complaint relating to the limitation of the time to prepare their defence will be rejected.

76. In the light of all those factors, the restricted committee considers that the joinder of the procedures, motivated by a logic of consistency, did not infringe the right to a fair trial or infringe the rights of the defence.

C. The determination of the controller

77. Under Article 4(7) of the GDPR, the controller is *'the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of*

the processing'. Under Article 26(1) of the GDPR, *'where two or more controllers jointly determine the purposes and means of the processing, they shall be joint controllers'.*

78. The CJEU ruled on the concept of joint responsibility for processing in its judgment *in Jehovah's Witnesses,* in which it held that, according to the provisions of Article 2(d) of Directive 95/46 on the protection of personal data, 'the *concept of 'controller' refers to the natural or legal person who, 'alone or jointly with others', determines the purposes and means of the processing of personal data. That concept does not therefore necessarily refer to a single natural or legal person and may concern several actors involved in that processing, each of whom must then be subject to the applicable provisions on data protection... Since the objective of that provision is to ensure, by means of a broad definition of the concept of 'controller', effective and complete protection of data subjects, the existence of joint responsibility does not necessarily translate into equivalent responsibility, for the same processing of personal data, of the various actors. On the contrary, those actors may be involved at different stages of that processing and in different degrees, so that the level of responsibility of each of them must be assessed taking into account all the relevant circumstances of the particular case'* (CJEU, 10 July 2018, C-25/17, paragraphs 65 and 66).

79. **The rapporteur considers** that the companies GIL and GOOGLE LLC are jointly responsible for the processing operations at issue pursuant to those provisions, since the companies both determine the purposes and means of the processing operations consisting in access to or registration of information in the terminal of users of *Google's* services residing in France, and relating to electronic prospecting on the *Gmail service.*

80. **In defence,** the companies consider that only GIL is responsible for the processing operations in question. They state in the adversarial part that *'Google LLC is a third-party developer acting on behalf of GIL and following GIL's instructions as part of its contribution to the development of a product. These relationships are documented in a data processing agreement between GIL and Google LLC.* They also note that operational changes have taken place since the judgments of the Conseil d'État (Council of State) in which the joint liability of the companies GOOGLE LLC and GIL had not been contested (EC, 28 January 2022, 10th and 9th chambers combined, *company GOOGLE LLC and company GOOGLE IRELAND LIMITED,* No 449209, in the ECR and EC, 19 June 2020, 10th and 9th chambers combined, *company GOOGLE LLC, No 430810, in the ECR).* Among these changes, they mention in particular the creation [...]. They add that [...] play a central role in the governance of personal data protection and supervise the launch

products.

1. The liability of GIL

81. **In the first place, the restricted committee** notes that, as regards specifically the processing operations relating to the access to or registration of information in the terminal of users residing in France when using *Google* services, the liability of the company GIL has already been established twice (SAN-2020-012 of 7 December 2020 and SAN-2021-023 of 31 December 2021) and that that analysis has not been challenged before the Conseil d'État (EC, 28 January

2022, 10th and 9th Chambers together, *company GOOGLE LLC and company GOOGLE IRELAND LIMITED,* No 449209, in the ECR and EC, 19 June 2020, 10th and 9th Chambers together, *company GOOGLE LLC, No 430810,* in the ECR), or even in the context of the present proceedings.

82. **In** the second place, **as regards specifically the processing operations relating to electronic prospecting,** the restricted committee notes that it is apparent from the documentation provided during the checks carried out by the delegation and from the contradictory exchanges which took place during the penalty procedure that GIL is identified as the controller for users of *the Google* services based in the European Economic Area or in Switzerland, which include the processing operations linked to the implementation of *Gmail* and the display of advertisements within *Google's services.*

83. It follows that GIL is, at least in part, responsible for the controlled processing operations consisting in access to or registration of information in the terminal of users residing in France when using *Google* services and those relating to electronic prospecting on the *Gmail service.*

2. The liability of the company GOOGLE LLC

84. **The restricted committee** notes, first of all, that it has, on two occasions, held GOOGLE LLC jointly liable (CNIL, restricted group, 7 December 2020, Sanction No SAN-2020-012 and CNIL, restricted group, 31 December 2021, No SAN-2021-023 published in Tables IL) for the processing relating to access and/or registration of information in the user terminal located in France when using *Google* services, in the light of the fact that it designs and builds *Google product technology,* the fundamental role played by the company in the entire decision-making process relating to the processing, and in the light of its actual involvement described in the subcontract of 11 December 2018, binding it to GIL. It points out that that analysis has not been challenged before the Conseil d'État (EC, 28 January 2022, 10th and 9th chambers combined, *GOOGLE LLC and GOOGLE IRELAND LIMITED,* No 449209, in the ECR and CE, 19 June 2020, 10th and 9th[chambers] combined, *GOOGLE LLC, No 430810,* in the ECR).

85. The restricted formation then notes that the companies' representatives confirmed in their written pleadings that GOOGLE LLC is still involved in the development of *Google products.*

86. As regards the *Gmail* service, the restricted committee notes that only users located in the European Economic Area ('the EEA') are offered the option of activating the *so-called 'smart'* functionalities – which make it possible, inter alia, to separate the email inbox into three separate 'Main', 'Promotion' and 'Social *networks'* tabs – and which are disabled by default, unlike users in the rest of the world for whom those functionalities are enabled by default. It notes, however, that the advertisements displayed in the *Gmail* service are implemented uniformly throughout the world via Google *Ads' Discovery* service. The Restricted committeecommittee considers that the default disabling of *'smart features' concerning* EEA users is merely a difference in performance that does not call into question the overall advertising purpose of the *Gmail* service and does not, as such, illustrate GIL's full decision-making autonomy over all the essential characteristics of the means and purposes of the processing at issue.

87. In addition, the restricted committee notes that [...], the [...] is responsible for approving the internal privacy policies with which all products, services or features launched by Google in the EEA and Switzerland must comply. [...].

88. It notes, however, that within the decision-making organisation chart existing within the GOOGLE group, other bodies are directly involved in the processing operations at issue. Indeed, it is apparent from the documentation provided during the investigations that [...].

89. However, the restricted committee notes that it is apparent from the documents in the file that [...] is an entity attached to Google LLC responsible for taking decisions on all data processing operations carried out in the context of the provision of *Google* products and services and that it acts as an arbitration body where a data protection issue arises.

90. It is also apparent from the documents in the file that the [...] is composed, at least in part, of [...].

91. The Restricted committee considers that if, when a question concerning EEA users is transmitted ... necessarily leads to the conclusion that the EEA user is involved in decision-making regarding the products and services deployed in the European Economic Area and the data protection issues they may raise.

92. Thus, the restricted committee notes that, despite the participation of the company GIL in the various stages and bodies linked to the definition of the methods of implementation of the processing relating to *the cookies* deposited when using the *Google* services and to electronic prospecting on *Gmail*, the matrix organization described by the companies has shown that the company GOOGLE LLC is also represented in the bodies adopting the decisions relating to the deployment of products within the EEA and in Switzerland and to the processing of personal data of users residing there and that it exercises significant influence there.

93. Similarly, the restricted committee notes that the data protection officer appointed by GIL is [...]. It considers that this is further evidence of the significant involvement of

GOOGLE LLC on data processing in the EEA.

94. Lastly, the restricted committee notes that the subcontract between the companies has not changed since Sanction Decision No[SAN-2021-023] of 31 December 2021. Therefore, the restricted committee considers that the analysis carried out in the context of that previous procedure is still relevant with regard to the processing linked to *cookies* and that it is also relevant with regard to the processing relating to electronic prospecting on the *Gmail service*, in so far as the contract in question also specifically refers to that service.

95. It follows from the foregoing that the companies GOOGLE LLC and GIL jointly determine the purposes and means of the processing operations consisting in access and/or registration of information in the terminal of users residing in France when using the Google services and relating to the electronic prospecting carried out on the *Gmail* service for the electronic mail of

users residing in France.

D. Failure to inform data subjects and obtain their consent before entering information (cookies)on their electronic communications terminal

96. **In law,** Article 82 of the Loi Informatique et Libertés, transposing into French law Article 5(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002, provides that any *'subscriber or user of an electronic communications service must be informed in a clear and complete manner ... of the means at his disposal to oppose it'* and that, except in the case of *cookies* strictly necessary for the provision of the service requested by the user or *cookies* whose exclusive purpose is to enable or facilitate communication by electronic means, an operation to access and/or register information may take place only if the user has expressed his consent.

97. To be valid, the user's consent must meet the characteristics required by the GDPR, since the aforementioned directive refers to the definition of consent as provided for, to date, by the GDPR. In that regard, the restricted committee observes that Resolution No 2020-091 of 17 September 2020 adopting guidelines on 'cookies and other tracers' expressly recalls that the consent required by Article 82 of the Data Protection Act refers to the definition and conditions laid down in Articles 4(11) and 7 of the GDPR (paragraphs 5 and 6).

98. Under Article 4(11) GDPR, consent is to be understood as any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, consents to the processing of personal data relating to him or her.

99. Recital 32 GDPR also provides that "Consent *should be given by a clear affirmative act whereby the data subject freely, specifically, informedly and unequivocally expresses his or her consent to the processing of personal data concerning him or her.*

[...]. ". . .

100. The restricted committee emphasises that the work carried out by the Commission on *cookie* practices in relation to consent banners can usefully be used to assess more generally the conditions for collecting free, unambiguous, specific and informed consent.

101. As regards the free nature of consent, the Commission recommends that the solutions made available to the user to refuse the use of *cookies* should have the same degree of simplicity as those intended to accept their use. The CNIL recalled the legal obligations in this area and made recommendations for their application in the guidelines and a recommendation on tracers (deliberations No. 2020-091 and 2020092 of 17 September 2020). In particular, it states that: "In *order not to mislead users, the Commission recommends that site publishers ensure that the presentation of choice-collection interfaces does not incorporate potentially misleading practices that visually highlight one choice rather than another"* (§34 of Resolution 2020-092 cited above). More specifically, the abovementioned recommendation provides that 'the *controller must offer users both the possibility of accepting and refusing reading and/or writing operations with the same degree of simplicity'* (paragraph 30 of Resolution No 2020-092, cited

above). In addition, the Commission recommends that 'the *mechanism for expressing a refusal to consent to reading and/or writing operations be accessible ... with the same ease as the mechanism for consent'* so that the choice of the user who wishes to be able to view the site or use the application quickly is valid (paragraph 31 of Resolution No 2020-092 cited above). For example, it is recommended to use buttons and a font of the same size, with the same ease of reading, and highlighted in the same way (paragraph 34 of Resolution No 2020-092 cited above). It is apparent from Opinion No 08/2024 on the validity of consent in the context of the 'consent or pay' models set up by large online platforms adopted on 17 April 2024 by the European Data Protection Board ('EDPB'), that, in order for consent *to be 'free', 'controllers must ensure that data subjects enjoy real freedom of choice when asked to consent to the processing of their personal data, and they cannot limit the autonomy of data subjects by making refusal more difficult than consent'* (paragraph 68).

102. In its Meta decision *(C-252/21,* 4 July 2023), the CJEU sheds light on the conditions under which the consent given by the user of a service can be considered free. Thus, in paragraph 150 of its decision, the Court states that *'users must have the freedom to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations not necessary for the performance of the contract without, however, being required to renounce in full the use of the service offered by the operator of the online social network, which means that those users are offered, where appropriate for appropriate remuneration, an equivalent alternative not accompanied by such operations' data processing*(emphasis added)..

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103. With regard to the alternatives referred to by the CJEU, the EDPS considers in the above-mentioned Opinion that "Providing *a (single) alternative option to the service which is paid for and which includes processing for behavioural advertising purposes should not be the default way forward for controllers. On the contrary, when designing the alternative option to the version of the service with behavioural advertising, controllers should consider offering data subjects an 'equivalent alternative option' that does not involve the payment of remuneration, such as the free alternative option without behavioural advertising [...]. This alternative should not include processing for behavioural advertising purposes and may, for example, be a version of the service accompanied by another form of advertising involving the processing of a reduced (or no) number of personal data, for example contextual or general advertising or advertising based on themes that the data subject has selected from a list of subjects of interest."*(§73 and §75) (emphasis added). It is also stated that "whether *or not a free alternative option without behavioural advertising is offered is a particularly important factor to be taken into account when assessing whether data subjects can exercise a real choice and, therefore, whether consent is valid.* (§77) (emphasis added) and "Although *there is no obligation for large online platforms to always offer free services, making this additional option available to data subjects increases their freedom of choice. This makes it easier for controllers to demonstrate that consent is freely given.* (§76) (emphasis added). Finally, the Opinion states that "the *EDPS considers, in particular, that when assessing the validity of consent and determining whether the data subject is able to exercise a genuine choice, it is relevant to know whether a user is offered, in addition to a service based on tracking technology and a paid service, another type of service, such as a*

service with a less intrusive form of advertising" (§77). (emphasis added).

104. As regards the informed nature of consent, recital 42 of the GDPR provides that *'in order for consent to be informed, the data subject should know at least the identity of the controller and the purposes of the processing for which the personal data are intended.'*

105. Guidelines 5/2020 on consent within the meaning of Regulation (EU) 2016/679 of the EDPS of 4 May 2020 state that "controllers *should develop clear consent mechanisms for data subjects. They must avoid any ambiguity and ensure that the act by which consent is granted can be distinguished from any other act."* (emphasis added).

106. By way of clarification, the Guidelines specify that "the data *controller should accompany each separate consent request with specific information concerning the data processed for each purpose so that data subjects are aware of the impact of their choice. Data subjects will thus be able to give their specific consent'* (§56 to §61), and that 'providing *information to data subjects before obtaining their consent is essential in order to enable them to take informed decisions, to understand what [they] consent to and, for example, to exercise their right to withdraw their consent. If the controller does not provide accessible information, user control becomes illusory and consent will not constitute a valid basis for processing"* (§ 62).

107. Furthermore, the above-mentioned EDPS Opinion states that *"it is the responsibility of controllers, in accordance with the principle of responsibility, to develop and document an information process enabling data subjects to have a complete and clear understanding of the value, scope and consequences of the different choices available to them.* (§145). The EDPS adds that *"Large online platforms should ensure that data subjects have a clear understanding of processing activities and any changes affecting them, for example when such a platform switches to a 'consent or pay' model"* (§147). Finally, in the context of behavioural advertising, the EDPB adds that *"it is important to provide sufficiently detailed information so that data subjects can understand which aspects of the service they consent to, while retaining the possibility of not consenting to others"* (§148).

108. The EDPS further clarifies that when different options are presented to users, controllers must ensure that users fully understand what each option entails in terms of data processing and the consequences of each of these options. *"The clarity of the different options available should also be taken into account when designing the interface, as any form of misleading or manipulative design should be avoided in accordance with the principle of loyalty"* (§81).

109. As regards the consequences of behavioural or personalized advertising, it is apparent from Opinion No 08/2024, concerning the validity of consent in the context of the 'consent or pay' models put in place by the large online platforms adopted by the EDPS, that it 'is *based on data collected by observing users' activity over time (for example, from the pages they visit, the time they spend on a page displaying a given product, the number of reconnections to a page, the 'likes' mentions, or their location). In these cases, user tracking is carried out using cookies or other similar tracking technologies (e.g. social modules or pixels). Users can be tracked on different websites by different actors (e.g. platforms or data brokers). The collected data, which*

can in some cases be aggregated with data actively provided by the user (e.g. when creating an online account or when logging in to a website), or with offline data, allows companies to infer information about users and draw conclusions about their preferences, tastes and interests. Several processing activities take place when controllers process personal data for behavioural advertising purposes. These include monitoring the behaviour of data subjects, collecting and analysing personal data for the purpose of creating and creating user profiles, sharing personal data with third parties in connection with the creation and compilation of user profiles or connecting advertisers with publishers, offering personalised advertisements to data subjects on the basis of the profile thus drawn up, or analysing users' interaction with advertisements displayed on the basis of their profile.' (§20).

110. ***'Therefore,** behavioural advertising is considered to be a form of advertising*
This is particularly intrusive, as it can provide controllers with a very detailed view of users' personal lives. Moreover, as recalled by the EDPS in his Guidelines 8/2020 on targeting social media users, it poses significant risks to the fundamental rights and freedoms of data subjects, including the possibility of discrimination and exclusion and possible manipulation of users. (§21).

111. **In the present case, the Rapporteur notes** that it is apparent from the findings made by the Delegation during the control operations on the *google.fr* website that when creating a *Google account*, two routes are presented to the user – entitled 'Express *personalisation (1 step)'* and 'Manual *personalisation (5 steps)'* – at the end of which *cookies* are placed that feed two advertising models – generic or personalized.

112. It observes that, during the first check, the consent-gathering mechanism put in place when creating a *Google* account did not allow users to refuse the deposit and/or reading of *cookies* linked to the personalization of advertising as easily as to accept them and opt for *cookies* feeding into generic advertising when the user chose *'express personalization (1 step)'.* It considers that the consent thus given could not be classified as free.

113. It points out that that consent-gathering mechanism, put in place by the companies since 15 December 2020, was amended in October 2023, now allowing users to refuse the deposit and/or reading of *cookies* linked to the personalization of advertising as easily as to accept them from the 'express *personalisation (1 stage)'* route, now entitled *'express selection (1 stage)'.* It nevertheless considers that the user is still not sufficiently informed that the registration of certain *cookies,* whatever their purpose, is inseparable from the provision of *Google* services, so that the consent given, which is not informed, is not valid.

114. **In defence,** the companies <u>first support validly collecting users'</u> consent for the deposit and/or reading of advertising *cookies* on their terminal, thanks to the last stage of the *Google* account creation journey from which users are invited to consent to the use of *cookies* for the purposes presented to them. <u>Next,</u> they maintain that the *Google* account creation journey was set up in accordance with Opinion No 08/2024 of the EDPS of 17 April 2024 on the validity of consent in the context of *'consent or pay'* models, which advocates the use of models that are less intrusive to users' privacy than *paywalls* and provides for the example of an equivalent

alternative that does not involve the payment of remuneration, namely a free version but containing generic advertisements. Lastly, they point out that there is no legal basis for requiring users to provide information establishing an express link between the free provision of the service and the acceptance of advertising *cookies* and that, in any event, that link is obvious since the user cannot create an account without accepting *cookies.*

115. In addition, they state that they have disabled certain advertising *cookies* since September 2024.

1. On the course of creating a *Google* account

116. **The restricted committee** considers it necessary to recall the various paths of creating a *Google* account and the information provided to users in order to assess the validity of users' consent to the deposit and reading of advertising *cookies* and the scope of the changes made by the companies in October 2023.

a. The account creation path until October 2023

117. The Restricted committee notes that in the context of the online checks of 20 October 2022 and 20 April 2023, the Delegation studied the user journey when creating a *Google* account upon its arrival on the *google.fr* URL. When the user clicks directly on the *'Sign in'* button on the *cookie* banner displayed on the page when he or she arrives, he or she can create an account by clicking on *'Create an account'.* The user must then choose between a 'personalisation' carried out in a single step — entitled *'express personalisation (1 step)', which* is stated to involve the receipt of personalised ads, and a 'manual *personalisation'* requiring five steps — entitled *'manual personalisation (5 steps)',* which is stated to enable the personalisation of ads to be deactivated.

118. The user who chooses 'express *personalisation (1 step)'* then accesses a page entitled '*confirm personalisation settings and cookies',* mentioning that *cookies* are used to *'collect data for: providing and managing services, such as monitoring unavailability and protecting against spam, fraud and abuse; [...] If you agree, we will also use cookies to collect data to: [...] offer personalised or generic advertisements, depending on your settings, on Google and on the web* [...]'. The user can either click on 'Confirm' to accept personalization settings, including the use of *cookies* for receiving personalized ads, or click on a 'Return' button to return to the previous step.

119. Users who choose 'manual *personalisation* (5 steps)' must choose their personalisation options through five successive screens: the first step relates to the personalisation of the user's activity on the *web* and apps, the second step allows the personalisation of the *Youtube* homepage and the fourth step proposes to receive occasional reminders regarding data privacy. The third step – entitled 'Activate *the 'Customise ads' parameter to see more suitable ads'* – requires the user to choose between displaying personalised or generic ads to continue browsing.

120. Then in the fifth step the user is informed that *cookies* are used to *"collect data for: providing and managing services, such as monitoring unavailability and protecting against spam, fraud and abuse; [...] If you agree, we will also use cookies to collect data to: [...] offer personalised or*

generic advertisements, depending on your settings, on Google and on the web [...]'. He is invited to confirm his choices, via a *"Confirm"* button or to go back, via a *"Return" button.*

b. The user journey as of October 2023

121. The Restricted committee notes that from October 2023, the companies changed the *"Express personalisation (1 step)"* route to *"Express selection (1 step)"* by inserting the *buttons "reject everything"* and *"accept everything".* After clicking on one or other of the above buttons, the user accesses a settings confirmation screen, allowing him to either confirm his choice – by clicking on the *'Confirm'* button – or to change his choice – by clicking on the *'Return'* button which returns him to the previous step – and informing him that *cookies* are used to *'collect data for: providing and managing services, such as monitoring unavailability and protecting against spam, fraud and abuse; [...] If you agree, we will also use cookies to collect data to: [...] offer personalised or generic advertisements, depending on your settings, on Google and on the web* [...]'.

122. It notes that the companies have also changed the course of *'manual customisation'* to *'manual selection (4 steps)'.* It always allows the user to choose their personalisation options through five successive screens. The restricted committee notes that the changes made do not relate to the content of pages 3 and 5, which are those related to the advertisements.

123. Thus, the third step of the *'manual selection (4 steps)'* entitled *'Activate the 'Personalisation of ads' parameter to see more suitable ads' always asks* the user to choose between displaying personalised or generic ads. It is always specified that ads are either tailored to the user's specific activities or other data or generic – i.e. they are based on general factors, such as the user's position or the content of the page visited by the user.

124. At the fifth stage, the user is always asked to confirm their choices via a *'Confirm'* button or to go back, via a *'Return' button.* It is always only at this stage that they are informed that *cookies* are used to *"offer services and make sure they work properly, for example by tracking service interruptions and protecting you from spam, fraud and abuse; [...] If you accept, we will also use cookies to [...] improve the quality of the service and develop new ones [...] offer personalized content according to your settings; offer personalised or generic advertisements, depending on your settings, on Google and on the web* [...]'.

2. Characterisation of the infringement of Article 82 of the Loi Informatique et Libertés

125. **As a preliminary point,** the restricted committee notes that the user journeys described above – both before and after October 2023 – do not allow the user to refuse the deposit of *cookies* linked to the display of advertisements. The user can only choose between the deposit of *cookies* allowing either the display of personalised advertisements or the display of generic advertisements. It points out that *cookies* linked to the display of advertisements are not part of *the cookies* exempted from consent under Article 82 of the Data Protection Act in so far as they do not have the exclusive purpose of enabling or facilitating communication by electronic means, nor are they strictly necessary for the provision of an online communication service at

the express request of the user.

126. By decision of 19 June 2020, the Conseil d'État (Council of State) held that the requirement of free consent could not justify a general prohibition of the practice of 'tracer walls', since the freedom of consent of individuals must be assessed on a case-by-case *basis, taking into account, in particular, the existence of a real and satisfactory alternative proposed in the event of refusal of cookies (EC, 10th and 9th Chambers, Association des agencies-conseils en communication,* 19 June 2020, No 434684).

127. The restricted committeecommittee notes that while linking the use of a service to the registration of *cookies* not strictly necessary for the provision of the service provided, a practice which can be assimilated to a wall of tracers (cookie*wall),* is not in itself unlawful, it is on condition that consent is free – which implies that both the refusal of consent and its withdrawal do not cause harm to the user. From that perspective, the freedom of consent must be assessed by taking into account, in particular, the existence of real and satisfactory alternatives.

128. It thus observes that, as early as 2020, the concept of an equivalent alternative was raised in the context of the abovementioned case before the Conseil d'État (Council of State) *concerning tracer walls (cookie wall).* The Public Rapporteur thus stated that *'the key seems to me to lie in the nature of the need which the user seeks to satisfy and, above all,* ***in the existence, availability and accessibility of reasonable alternatives enabling an equivalent result to be achieved'.*** *". . .* The Public Rapporteur also stated that this concept of an alternative reflected the position of the EDPS in his Opinion No 1/2017 (WP 247) of 4 April 2017 on the proposal for an ePrivacy Regulation. Indeed, the EDPS stated that *"The existence of a free choice for data subjects could also be assessed on the basis of the existence of alternatives. In the context of "free services", the Working Group has already recognised that "as long as these other services are not available, it is more difficult to claim that a valid consent*

(given freely) was obtained. What is considered an alternative in this context could depend, inter alia, on the supplier's position on the market or the genuine existence of equivalent choices for the person concerned" (§60).

129. The restricted committee considers that bodies deciding to use a *cookie wall must* demonstrate that it is justified in so far as its objective is to preserve an economic balance between offering a service and its cost.

130. In the present case, the restricted group notes that it is apparent from the documents in the file that the *Gmail* service is an email service provided without financial consideration to *the holders of a Google* account and its maintenance and development are financed by the GOOGLE group's advertising revenue, which is therefore intrinsically linked to the deposit of *cookies.*

131. In those circumstances, it considers that it is not unlawful for companies to make access to the *Gmail* service conditional on the deposit of *cookies,* provided that the conditions for the validity of the consent set out above are complied with.

132. **In the present case,** the restricted committee notes that the Google account creation pathways *offer* users the deposit of *cookies* relating to two advertising models with very different impacts on the processing of personal data of data subjects. As set out in paragraphs 109 and 110 of this resolution, given that personalised advertising is much more intrusive in terms of the collection of personal data and profiling than so-called generic or contextual advertising, it is necessary, in particular, to verify that the user's choice is not biased in favour of personalised advertising in order to ensure that the consent given by the user is free.

The free nature of consent

133. **In the first place,** as regards the free nature of consent, the restricted committee observes that, before the changes made in October 2023, by clicking on the *'express personalisation (1 step)'* route and then on the *'Confirm' button, two* clicks were sufficient for the user creating a *Google* account to accept the deposit and/or writing of *cookies* enabling the display of personalised advertising on his terminal. However, in the event that the user wished to refuse the personalisation of ads via those *cookies*, he had to make six clicks to opt for generic advertising, switching to the 'manual personalisation' route, consisting of five steps (described in § 112).

134. The restricted committee considers that making the mechanism of refusal of *cookies* related to the personalization of ads more complex than that of accepting them is actually to discourage users from refusing these *cookies* and to encourage them to privilege the ease of the "Confirm" *button.* The fact that you have to click on 'manual *personalisation'* and understand how the five-step path to reject *cookies* linked to the personalization of ads is constructed is likely to discourage the user who nevertheless wishes to refuse the deposit of those *cookies* but who will choose the option enabling him to access the service as quickly as possible. It is not disputed that, in the present case, the companies offered a choice between accepting or refusing *cookies* linked to the personalization of ads, but the restricted committee considers that the manner in which that refusal could be expressed in the context of the creation of a *Google* account distorted the expression of choice by favoring consent to the deposit of *cookies* enabling personalised advertising, thereby altering the freedom of choice.

135. The restricted committee notes that in its sanction n°SAN-2021-023 of 31 December 2021 mentioned above concerning the two companies, it had already recalled the principle that when a controller offers users two different options with consequences for the processing of personal data, the modalities of expression of his choice, in particular in terms of the number of actions to be carried out for each of the options, must be equivalent.

136. **In the second place,** the Restricted committee notes that, from October 2023, the companies changed the user journey and that it is now possible to refuse the personalisation of ads as easily as to accept it thanks to the insertion of the *'refuse everything'* and *'accept everything'* buttons on the *'express personalisation (1 step)'* journey, now entitled *'express selection (1 step)'.* It considers that the free nature of consent has not been lacking since that date.

137. In the light of the foregoing, the restricted committee considers that a breach of the provisions of Article 82 of the Data Protection Act, interpreted in the light of the GDPR, is constituted, in so

far as consent was not free until October 2023, since the user did not have the possibility to refuse the deposit and/or reading of *cookies* linked to the personalisation of ads with the same degree of simplicity as he had to accept them.

The informed nature of consent

138. The restricted committee notes that the entire user journey put in place by companies before or after October 2023 is incompatible with the characteristics of valid consent, as it is not informed. She noted that, with the exception of some stage headings and a few reformulated sentences, the content of the information transmitted to the user remained unchanged.

139. As recalled in the above-mentioned EDPS Opinion, data subjects must have a complete and clear understanding of the value, scope and consequences of the different choices available to them, and any form of misleading or manipulative design should be avoided in accordance with the principle of loyalty.

140. On this point, the restricted committee notes that the courses have several major shortcomings.

141. First of all, whatever the period and the route studied, it observes that at no time do the companies explicitly indicate to users that the creation of a Google account necessarily involves the deposit of cookies for advertising purposes. Thus, as regards the *'express personalisation (1 step)'* route, although the two pages displayed successively to the user contain mentions linked to the characteristics of each of the forms of advertising displayed through *cookies*, such as the categories of data collected for that purpose, they do not contain any information on the fact that access to the service is conditional on the deposit of *cookies.* The finding is similar with regard to the pages displayed as part of the manual route, whether before or after October 2023.

142. The fact that the data subject knows that it is impossible to access *Google* services without *cookies* being placed on his or her device is fundamental information that must be brought to his or her knowledge clearly so that he or she can decide, in full knowledge of the facts, whether or not to finalise the creation of his or her account. In the absence of a complete and clear understanding of the treatments implemented, their scope and, consequently, the consequences of the various choices available to it, the restricted committee considers that the consent given is not informed and, therefore, not valid.

143. In the context of *the 'manual customisation (5 steps)' and 'manual selection (4 steps)'* courses, the restricted committee considers that it is only largely implicit that companies present the use of cookies as being consubstantial with the *Gmail service,* whereas no global refusal of *cookies* is possible. The restricted committee observes that the information capable of making the user understand that the service is conditional on the acceptance of cookies is divided into two distinct stages and that it is for the user to establish the link between those two stages in order to understand that he has no choice but to accept *cookies* when he creates a *Google account.* It is only by reaching step 5, which is presented as a step of recapitulation and confirmation of choices, that the companies refer to the link between the use of *cookies* and the display of advertisements, whether personalised or generic. This information is therefore provided

belatedly to the user since he or she will already have necessarily expressed his or her choice between displaying generic or personalised advertisements in step 3 entitled *'Personalisation of ads',* without being able to understand the implications of that choice for the cookies that he or she will have to accept. In that regard, the restricted committee notes that it is never clearly indicated to the user that he is in the presence of a wall of tracers (cookie*wall).*

144. The restricted committee considers that although the multiplicity of parameters offered to the user when he creates a *Google* account may justify a presentation of the journey in several stages, that fact cannot in any way justify the lack of intelligibility of the information provided and of the scope of the choices available to it.

145. It points out that the lack of clarity surrounding the use of cookies is reinforced by the choice of terms used in that process. Indeed, step 5 states "[...] *If you agree, we will also use cookies to collect data for: [...] offer personalised or generic advertisements, depending on your settings, on Google and on the web* [...]'. However, the use of the words *'If you agree'* at the beginning of the sentence should logically imply that it is possible to refuse all *advertising-related cookies.* However, as demonstrated before, companies do not offer the possibility to refuse all *cookies.*

146. The Restricted committee considers that a clearer presentation of the two options proposed, using unambiguous terms, would have been in line with the requirements and consistent with the user journey put in place by the companies. For example, companies could have displayed a stage with two options within their journeys, such as:

- create an account free of charge by accepting the deposit and / or reading of *cookies* in order to offer you personalized advertising and content,

- create an account free of charge by accepting the deposit and / or reading of *cookies* allowing only the display of generic advertisements.

147. Rather than opting for a *cookie wall,* which is unambiguous for data subjects, allowing them to give informed consent to the deposit of *cookies* for advertising purposes and to choose between two clear alternatives – personalised or generic advertising – the companies opted for a complex and ambiguous route.

148. Next, the restricted committee notes that the information provided incentivises the user to choose personalized advertising at the expense of generic advertising.

149. For example, in the course 'Manual *selection (1 step)'* after the October 2023 changes, the restricted committee observes that within the page entitled 'Select *your settings',* a very large place is devoted to the presentation of the personalisation of Google services, including personalised ads, and the benefits it represents. Indeed, companies highlight the fact that ads will be more relevant and that users will be able to control the information used for this purpose. Conversely, the Restricted committee notes that this page does not contain any information on generic advertising. However, it is at the end of that stage that the user is invited to express his choice, which will necessarily be made in the light of the information which has just been

provided to him. It also notes that on the next page, entitled 'Confirm *your settings',* the generic advertisement is presented in a sentence explaining what data is used for that purpose. Thus, in view of the clear imbalance in the presentation of the two types of advertisements, the restricted committee considers that the consent obtained cannot be classified as enlightened.

150. Similarly, in the course *'Manual customisation (5 steps)'* which became after October 2023 *'Manual selection (4 steps)', the* step dedicated to choosing the type of advertisement was entitled before October 2023 'Activate *the parameter 'Customisation of ads' to see more suitable ads'* and then became 'Activate *customisation of ads to see more suitable ads'.* In this way, the choice of personalisation of ads is not presented in a neutral way since the use of the verb

"Activate" in its mandatory form, clearly recommends the user to opt for the personalisation of ads. The restricted committee also notes that under the title of those pages there is another title entitled 'Indicate *whether you want to enable the 'personalisation of ads' parameter'* before October 2023 and then 'Indicate *whether you want to enable the personalisation of ads'* since that date. Again, it observes that companies present personalised advertising to users as the only viable choice, which is obvious to them.

151. Conversely, much less space is given to the presentation of non-personalised advertising. Indeed, the restricted committee notes that during these steps, all the information provided below the two customised/generic ad options is exclusively dedicated to personalised advertising. It is only at the very last stage that generic advertising is succinctly presented in a single sentence.

152. The Restricted committee acknowledges that given that personalised advertising is fuelled by a large amount of varied data, its description may require more information to be provided than for generic advertising, but considers that this difference does not justify such an imbalance, as found in the present case, which is further associated with vocabulary and formulations inciting to choose the option of personalised advertising, as stated above.

153. Therefore, the restricted committee considers that, because of the use of implicit and ambiguous formulations at different stages of the user journey and by encouraging the user to opt for personalised advertising without presenting the various options available to him in a balanced manner, the consent given by the user was not informed and, therefore, not valid.

154. In the light of all the foregoing, the restricted committee considers that the arrangements for obtaining consent to the deposit and/or reading of advertising *cookies* implemented by companies do not comply with the provisions of Article 82 of the Data Protection Act, as clarified by Article 4(1) of the GDPR.

E. Breach of the obligation to obtain the consent of the persons concerned for the implementation of commercial prospecting by electronic means pursuant to Article L. 34-5 of the Postal and Electronic Communications Code

155. **As** a matter of law,**Article L. 34-5 of the CPCE provides that** *'direct marketing by means of an automated electronic communications system within the meaning of point 6 of Article L. 32 [of*

that code],a fax machine or electronic mail using the contact details of a natural person, subscriber or user, who has not previously expressed his consent to receive direct marketing by that means shall be prohibited.

For the purposes of this Article, consent means any freely given, specific and informed expression of will by which a person accepts that data

personal data concerning them are used for the purpose of direct marketing.

The sending of any message intended to promote, directly or indirectly, goods, services or the image of a person selling goods or providing services constitutes direct marketing. For the purposes of this Article, calls and messages intended to induce the user or subscriber to call a premium-rated number or send a premium-rated text message shall also be considered direct marketing.

*However, direct marketing by e-mail is allowed if the addressee'scontact details have been collected from him, in compliance with the provisions of Law No.*HYPERLINK "https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000886460&categorieLien=cid" *78-17 of 6 January 1978 on information technology, files and freedoms, in connection with a sale or provision of services, if the direct marketing concerns similar products or services provided by the same natural or legal person, and if the addressee is offered, in an express and unambiguous manner, the possibility of objecting, free of charge, except those related to the transmission of the refusal, and in a simple manner, to the use of his contact details at the time they are collected and each time a direct marketing e-mail is sent to him in case he has not refused such exploitation from the outset.*

156. Those provisions transpose into French law the rules governing the use of automated calling and communication systems without human intervention (automatic calling machines), fax machines or electronic mail for direct marketing purposes laid down by the *ePrivacy Directive, as amended by Directive 2009/136/EC of 25 November 2009, and more specifically Article 13 thereof dealing with 'unsolicited communications', paragraph 1 of which provides that 'the use of automated calling and communication systems without human intervention (automatic calling machines), fax machines or electronic mail for direct marketing purposes may be authorised only if it concerns subscribers or users who have given their prior consent'.*

157. By a judgment of 25 November 2021, the CJEU stated that 'Article *13(1) of Directive 2002/58 must be interpreted as meaning that the display in the inbox of the user of an email service of advertising messages in a form similar to that of a genuine email and in the same location as the user constitutes 'use of email for direct marketing purposes', within the meaning of that provision, without the random determination of the recipients of those messages or the determination of the degree of intensity of the burden imposed on that user having any bearing in that regard, such use being authorised only if that user has been informed clearly and precisely of the arrangements for the dissemination of such advertising, in particular within the list of private emails received, and has expressed his consent specifically and with full knowledge of the facts to receive such advertising messages'* (paragraph 63) (CJEU, Third Chamber, 25

November 2021, StWL Städtische Werke Lauf a.d. Pegnitz Gmbh, C-102/20, 'the judgment of 25 November 2021').

158. **The Rapporteur notes,** first of all, that in order to obtain a *Gmail* email address, it is necessary to create a *Google* account, following in particular the account creation user journeys previously set out and in which it is necessary to choose between receiving personalised ads and receiving generic ads on *Google* services. It then notes that it is apparent from the online check carried out between 20 October and 4 November 2022, during which the Delegation found that when the user chooses to receive generic ads when creating his *Google* account, he is then offered the possibility to enable or disable *'smart features' when* he goes to his *Gmail email.* After clicking on "Continue *with Smart Features"* and then on the "Next" button, the delegation found that its inbox was organized into three tabs in which emails are sorted into three categories entitled "Main", "Promotions" and "Social *Networks".*

159. It observes that it is apparent from the delegation's *findings that, when connecting to their Gmail mailbox - on the mobile and web versions, users of that service who have activated the 'smart features' are* shown, between the emails received in the *'Promotions'* and *'Social networks' tabs and* without their consent, advertisements which, according to the rapporteur, characterise the use of email for direct marketing purposes within the meaning of Article L. 34-5 of the CPCE.

160. It considers that the changes made by the companies in April 2023 to the format of the announcements are not such as to call into question its analysis.

161. It therefore considers that, by failing to obtain the consent of the persons concerned to the display of such advertisements in their *Gmail* mailbox, the companies have infringed the abovementioned provisions. The rapporteur relies in particular, in support of her demonstration, on the above-mentioned CJEU judgment.

162. **In defence, the companies submit,** first of all, that in view of the nature and severity of the penalty proposed by the rapporteur, the present proceedings fall within the scope of criminal matters, which are subject to the principle of strict interpretation of criminal law. They consider that the CJEU's judgment of 25 November 2021 enshrines a broad interpretation of the concept of email – on which the rapporteur relied – and note that that judgment was delivered in civil and commercial matters. They therefore consider that its transposition in criminal matters is questionable since reasoning by analogy is prohibited there, *a fortiori* where it is unfavourable to the respondent, which is the case here. Next, the companies consider that the advertisements displayed on *Gmail* – both before and after the April 2023 amendments – are not emails: they do not meet the legal definition or the technical criteria of an e-mail. They consider that the CJEU judgment of 25 November 2021 should be analysed as distinguishing between personal - or private - emails and commercial emails. They also note that the rapporteur's interpretation of the material scope of Article L. 34-5 of the CPCE is not sufficiently clear since she considers that banners displayed in mailboxes do not qualify as e-mail. In the light of those factors, they consider that it is unfounded to apply the repressive regime laid down against emails for prospecting purposes to *Gmail ads*, unless the principle of strict interpretation of criminal law is infringed.

163. The companies also point out that the display of unsolicited ads in *Gmail* was restricted solely to the *'Promotions' and 'Social networks' tabs* in order to preserve a qualitative user experience.

164. Finally, if the application of the CJEU judgment of 25 November 2021 were upheld, the companies submit that the likelihood of confusion for users between emails and *Gmail* ads is almost non-existent. They consider that the 'placement' criterion set out in the judgment of 25 November 2021 is not satisfied in the present case since the advertisements are placed only in the tab provided for commercial emails which does not contain any private email and which is accessible by the user only if he clicks on it. They further note that the appearance criterion is also not fulfilled since 76% of respondents on the format of the advertisements submitted by the companies on *Gmail* since April 2023 consider that it is not difficult to distinguish them from emails, according to a study conducted by the IPSOS Institute at the request of the companies, which was sent as part of the written adversarial procedure.

165. In addition, the companies submit that the visual changes made to the ads in April 2023 clearly show that there is no likelihood of confusion with emails. In particular, they claim that the ads do not have a tracking icon – a star to the left of the emails – and that when the user hovers his mouse over an email, four command buttons appear – archive, delete, mark as read/unread and put on hold, whereas the same action on an ad only shows the deletion option. They add that the subject matter and text of the advertisements are clearly out of step with those of the emails and that the advertiser's logo is clearly visible next to the advertiser's name.

166. In any event, the companies state that they collect users' prior consent to receive personalised advertisements when creating a *Google* account.

1. The legal framework applicable to advertisements inserted between emails

a. *The relationship between the case-law of the Court of Justice of the European Union and Articles L. 34-5 of the CPCE and 13 of the ePrivacy Directive*

167. The Restricted committee recalls that, in accordance with Article 288 of the Treaty on the Functioning of the European Union ('TFEU'), European directives *'shall be binding on each Member State to which they are addressed as to the result to be achieved, while leaving to the national authorities the power as to form and methods'.* Thus, if the national authorities determine the form and methods which they use to incorporate those directives into their national law, those measures must achieve the objective defined by those directives.

The restricted committee also points out that these directives set minimum standards, with the possibility for States to lay down more protective rules.

168. Moreover, the CJEU has, on several occasions, recalled that *'it follows from the requirements both of the uniform application of EU law and of the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States in order to determine its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union. Furthermore, when interpreting a provision of*

EU law, account must be taken not only of its wording and the objectives which it pursues, but also of its context and of all the provisions of EU law. The origins of a provision of EU law may also be relevant to its interpretation' (CJEU, Grand Chamber, 26 March 2019, SM, C-129/18; CJEU, Grand Chamber, 1October 2019, Planet49 GmbH, C- 673/17).

169. Moreover, the Restricted committee notes that the European Court of Human Rights has often recalled that "as *clear as the wording of a legal provision may be, in any legal system, including criminal law, there is inevitably an element of judicial interpretation. Doubtful issues will always need to be clarified and adapted to changing circumstances. Moreover, it is well established in the legal tradition of the States parties to the Convention that case-law, as a source of law, necessarily contributes to the progressive development of criminal law"* (ECHR, 22 Nov. 1995, *S.W. and C.R. v. the United Kingdom;* See also ECtHR, ch. gr., 22 March 2001, *Streletz, Kessler and Krenz v. Germany*, Joined Cases 34044/96, 35532/97 and 44801/98, ECR 2001-II; ECtHR, ch. gr., 22 March 2001, *K.-H.W. v. Germany*, req. no. 37201/97; ECHR, 5th sect., 12 July. 2007, *Jorgic v. Germany*, Case No. 74613/01; ECtHR, ch. gr., 19 Sept. 2008, *Korbely v. Hungary*, req. no. 9174/02; ECtHR, ch. gr., 17 May 2010, *Kononov v. Latvia*, no. 36376/04.

170. **In the present case,** the provisions of Article 13 of the *ePrivacy* Directive were transposed into French law in Article L. 34-5 of the CPCE, cited *above.* The restricted committee notes that, pursuant to Article 288 TFEU and the case-law of the CJEU, the national legislature and courts must ensure, as far as possible, that those provisions provide the persons concerned with protection in accordance with that guaranteed by the European Directive. Therefore, this text should be read in the light not only of Article 13 of the *ePrivacy* Directive, but also in the light of the case-law of the CJEU, whose role is to ensure that EU legislation is interpreted and applied in a harmonised manner in all Member States taking into account technological developments related to electronic prospecting operations.

171. While, when drafting the text, the concept of commercial prospecting by electronic means traditionally envisaged the sending of a message by a recipient to another recipient using either his telephone number, his fax number or his e-mail address as such, the development of technology and the deployment of new methods of prospecting, different from the traditional technical models in force at the time when the text was adopted by the legislature, must lead to a functional approach to the concepts at issue.

172. That is the position adopted by the CJEU to interpret Article 13 of the *ePrivacy Directive*, the judgment of 25 November 2021 recalling the objectives of that text, namely to ensure an equal level of protection for users irrespective of *the technologies used, 'which confirms that it is necessary to adopt a broad and evolving technological conception of the type of communications covered by that directive'* (paragraph 39). The Court thus considers that 'if *advertising entries of any kind appear in the inbox of internet mail, namely in the section in which all the emails addressed to the user are displayed, it must be held that that inbox constitutes the means by which the advertising messages concerned are communicated to that user, which implies the use of his email for the purposes of direct marketing, within the meaning of Article 13(1) of Directive 2002/58'* (paragraph 44).

173. The restricted committee considers that there is no need to adopt a different interpretation with regard to Article L. 34-5 of the CPCE, since the concept of 'use *of contact details'* must be interpreted as the means of reaching the user – in the present case, by means of his e-mail, which he accesses after authenticating himself – irrespective of the processing of the e-mail address as such. Thus, the use of the subscriber's electronic mailbox to display the prospecting message is sufficient to bring this operation within the scope of Article L. 34-5 of the CPCE. Furthermore, the Restricted committee considers that, as held by the CJEU, regardless of the fact that the advertisements at issue do not constitute, from a technical point of view, emails per se, their mere display in a space normally specifically reserved for private emails - in one or more normally private spaces where the user expects to receive emails - is sufficient to consider that those messages are communicated by means of the email mailbox of the persons concerned, and therefore their email, within the meaning of Article L. 34-5 of the CPCE. Similarly, giving advertising messages the appearance of genuine emails and, thus, using the interest and trust that users of an email service have in their inbox to highlight those messages, requires that those messages follow the same legal regime as that applicable to emails.

174. Finally, the restricted committee notes that the judgment referred to *above* refers to 'advertising *entries of any kind'.* It points out that that type of advertising – because it is displayed in a space specifically reserved for private emails and takes on the appearance of those emails – is different from advertising banners which appear on the sidelines and separately from the list of emails, which are not concerned by the application of Article L. 34-5 of the CPCE. The restricted committee notes that this position is the one adopted in its deliberation No SAN-2024-019 of 14 November 2024. In that case, it noted that the controller had changed the display of its ads, since those ads no longer appeared between the emails received but within a separate and fixed banner appearing at the foot of the users' inbox, on the margins of the list of emails and separately from them. It therefore considered in its deliberations that that display format made it possible to clearly distinguish those advertisements from other emails received and that, therefore, the practice at issue could no longer be classified as the use of email for direct marketing purposes within the meaning of Article L. 34-5 of the CPCE.

175. Similarly, the restricted group considers that there is no reason to consider, as the companies do, that the entirety of electronic prospecting messages cannot under any circumstances be equated with private mail. It notes that the distinction proposed by the companies is not apparent from the above-mentioned CJEU decision. It also notes that the Court refers to private mail as that received in the user's mailbox, which the user accesses after authenticating himself. As regards electronic prospecting messages, the restricted committee recalls that the only relevant distinction to be made is that between, on the one hand, prospecting messages which satisfy the conditions laid down in Article L. 34-5 of the CPCE and which are legitimate, either because the consent of the person has been obtained for the sending of such messages, or because the prospecting concerns a similar product or service, and, on the other hand, prospecting messages do not satisfy the conditions laid down in that article.

176. In other words, even if it is commercial in nature, a marketing message which satisfies the conditions laid down in Article L. 34-5 of the CPCE must be regarded as an email falling within

the category of private mail, in the same way as a message of a more personal nature, such as private correspondence between two persons.

177. The Restricted committee observes, moreover, that the Court took the view of the recipient of the advertising message, for whom the latter is displayed in his inbox – a space normally reserved for private emails, which creates a likelihood of confusion for the user between private emails and advertising messages. In that regard, the Court refers to repeated and undesired requests. The restricted committee therefore states that those emails are not requested by the email user who has not consented to their receipt.

b. Predictability of the applicable legal framework and compliance with the principle of legality of offences and penalties

178. **The Restricted committee** notes that the principle of strict interpretation of criminal law stems from the principle of the legality of offences and penalties, which requires that obligations, breaches and the various possible penalties have been defined in advance. It points out that, as regards administrative penalties, the Constitutional Council has required compliance with fundamental principles, including the principle of the legality of offences and penalties (No 88-248 DC, 17 January 1989).

179. The Conseil d'État has clarified the scope of that principle, which means that the constituent elements of offences must be defined precisely and comprehensively (EC, 9 October 1996, *Société Prigest,* No 170363, T.; EC, Section, 12 October 2009, *M.P.*, No 311641, ECR.). As regards administrative penalties, the case-law considers that *'the requirement of a definition of the offences penalised is satisfied ... where the applicable legislation refers to the obligations to which the persons concerned are subject by reason of the activity they pursue, the profession to which they belong, the institution to which they belong or their capacity'* and a penalty may be imposed if it is 'reasonably *foreseeable by the persons concerned, and taking into account their capacity and responsibilities, that the conduct at issue constitutes a failure to fulfil those obligations'* (EC, 3 October 2018, SFCM, No 411050, ECR).

180. **In the present case,** the restricted formation points out that the fact of obtaining the consent of the persons concerned to carry out commercial prospecting operations by electronic means has been clearly required by both national and European legislation for many years, and the *ePrivacy* Directive was thus transposed into French law in 2004. This requirement has also been reiterated by the CNIL on several occasions, both through the publications on its website and by the numerous decisions rendered by its limited training in the matter.

181. In addition, the Restricted committee notes that the judgment at issue was published almost a year before the control operations and that it is extremely clear: the display in the user's inbox of an e-mail service of advertising messages in a form similar to that of genuine e-mail and in the same location as that e-mail constitutes 'use... *of e-mail for the purpose of direct marketing'* and is authorised only if that user has been informed clearly and precisely of the arrangements for the dissemination of such advertising and has expressed his consent specifically and in full knowledge of the facts to receive such advertising messages (paragraph 63 of the decision).

182. The Restricted committee notes that the CJEU judgment of 25 November 2021 was the subject of a press release. It notes that the title of that notice was particularly clear as to the scope of the judgment: *'Inbox advertising: the display in the electronic inbox of advertising messages in a form similar to that of genuine e-mail constitutes the use of e-mail for the purposes of direct marketing within the meaning of Directive 2002/58.'* In the light of those factors, it cannot therefore be held that the applicable rules were not foreseeable for companies.

183. It was therefore for companies, which had the material, human and technical resources to ensure compliance, to adapt their practices where necessary.

184. Lastly, it observes that the principle of legality does not prohibit 'the *gradual clarification of the rules of criminal liability by judicial interpretation ...'* (ECHR, 22 November 1995, *S.W. and C.R. v. the United Kingdom,* Application No 20166/92) and that *'In an area covered by written law, the 'law' is the text in force as interpreted by the competent courts having regard, where necessary, to new technical data'* (ECHR, 24 April 1990, *Kruslin v. France,* Application No11801/85).

185. It therefore appears that the constituent elements of the infringement alleged against the companies are defined precisely and comprehensively and that it cannot, in those circumstances, be maintained that the imposition of a penalty infringes the principle of the legality of offences and penalties.

2. Characterisation of the infringement of Article L. 34-5 of the CPCE

186. **The restricted committee** notes that, in the present case, the findings made by the delegation of control between 20 October 2022 and 4 November 2022 made it possible to highlight the display on the mobile and web versions, in the inbox of the email account of users of the *Gmail* service who chose to activate the *'smart features',* of advertising messages whose appearance resembles real emails. It notes that it is apparent from the conflicting findings and exchanges that, on 11 December 2022, then on 13 May 2023, and finally on 10 September 2024 and on the basis of the 28 days preceding those dates, the volume of accounts having activated those functionalities represents, in France, approximately [...]% of the accounts active at least once over the periods.

187. Between the emails received in the *'Promotions' and 'Social networks' tabs of* the mailbox, entries of exactly the same size as the other emails were inserted, distinguishing themselves, for the *web* version of the *Gmail* account, only by the absence of a date — replaced by the 'most' icon — of a checkbox traditionally allowing an email to be selected and by a green 'advertisement' affixed between the name of the sender and the subject line of the email. The restricted committee notes that on the mobile version, the advertising messages were distinguished from the other messages by a green 'advertisement' affixed under the name of the sender and by the presence of an 'i' icon on the side of the message.

188. The restricted committee notes that, on the mobile and *web versions,* the name of the sender appeared in the same forms as those of the actual emails and that the subject matter of the messages was also similar to those of the other emails. Clicking on these entries led to the

opening of the full advertisement in the form of an email.

189. In order to determine whether the display of the advertisements at issue constitutes use of email for direct marketing purposes within the meaning of Article L. 34-5 of the CPCE, read in the light of Article 13 of the *ePrivacy* Directive as interpreted by the CJEU, the Restricted committee considers that it is necessary to verify, as the Court did in its judgment of 25 November 2021, *'in the first place, whether the type of communication used for direct marketing purposes is among those covered by that provision; in the second place, whether the purpose of such a communication is direct marketing, and, in the third place, whether the requirement to obtain prior consent from the user has been complied with'* (paragraph 37).

a. <u>The means of communication used</u>

190. It is apparent from the abovementioned judgment that the messages on which the CJEU ruled were presented as 'entries *which were visually distinguishable from the list of other emails of the account user only by the fact that the date was replaced by the following:*

'Anzeige' (advertisement), that no sender was mentioned and that the text appeared on a grey background. The 'Subject matter' section corresponding to that entry in the list contained a text intended to promote advantageous prices for electricity and gas services' (paragraph 21 of the decision).

191. The Court thus held that 'if *advertising entries of any kind appear in the inbox of internet mail ... it must be held that that inbox constitutes the means by which the advertising messages concerned are communicated to that user, which implies the use of his email for the purposes of direct marketing, within the meaning of Article 13(1) of Directive 2002/58'* (paragraph 44 of the decision).

192. It is emphasised by that judgment that 'from the point *of view of the recipient, that advertising message is displayed in the email user's inbox, namely in a space normally reserved for private emails. The user can only free up this space to get an overview of his exclusively private emails after checking the content of the same advertisement and only after actively deleting it. If the user clicks on an advertising message such as that at issue in the main proceedings, he is redirected to a website containing the advertisement in question, instead of continuing to read his private emails* (paragraph 41). *Thus, unlike advertising banners or pop-up windows, which appear on the margins of the list of private messages or separately from them, the appearance of the advertising messages at issue in the main proceedings in the list of the user's private emails hinders access to those emails in a manner similar to that used for unsolicited emails (also called 'spam'), in so far as such an approach requires the same decision-making on the part of the subscriber as regards the processing of those messages* (paragraph 42). *Furthermore, ... in so far as the advertising messages occupy lines in the inbox which are normally reserved for private emails and because of their resemblance to those emails, there is a likelihood of confusion between those two categories of messages which may lead the user who clicks on the line corresponding to the advertising message to be redirected against his will to a website presenting the advertisement in question, instead of continuing to consult his private emails'*

(paragraph 43 of the decision).

193. **In the first place,** the restricted committee notes that, in the present case, the characteristics of the advertising messages at issue in the present proceedings are very similar to those of the messages examined by the CJEU in its judgment. In both cases, they are advertisements inserted between the private emails received by the user, the date is replaced by the word 'advertisement', there is a text intended to promote a product in the 'subject' section, and there is a likelihood of confusion given the location of the messages and their resemblance to genuine emails. If there are slight differences between the messages examined by the Court and those displayed in the *inbox of users of the Gmail service*, the restricted committee considers that they are not such as to call into question the analysis which must be made of them. Thus, as regards the display of the advertisement concerned by the advertisement, when the user clicked on the line corresponding to the advertisement examined by the CJEU he was directly redirected to a website presenting the advertisement in question, whereas in the present case the user sees the complete advertisement appear in the form of an email. The restricted committee notes, however, that the CJEU pointed out in that regard that the appearance of such messages hindered access to the user's private emails, in so far as deleting them required, as in the case of spam, a decision *to be taken* by the person concerned. Moreover, the Restricted committee notes that certain distinctions show that *Gmail* advertising messages are closer to standard emails than those referred to in the CJEU case: thus, the text of the advertisements examined by the CJEU appeared on a greyed-out background, distinguishing itself from other emails, whereas the advertising messages in the present case appear on a white background, in the same way as other emails.

194. **In the second place,** the restricted committee notes that the companies maintain that the advertisements do not meet the legal definition of an email – since they are not stored in the storage space of users' emails, they do not remain in the users' inbox because they are renewed at regular intervals and change over the use sessions, they are not exchanged between 'two identifiable persons' and do not constitute 'correspondence'. The companies state that they also do not meet the technical criteria of an email - they appear in the user's visual interface but are not stored in the user's inbox or in the email storage space, they cannot be searched, they do not contain information such as the sender's *email* address or other metadata associated with an email, they cannot be organised or moved, users cannot respond to them, they are dynamic since they can vary depending on whether the user uses *Gmail* on *Android, iOS* or a computer and they evolve between each use of *Gmail* since their display is allocated according to an auction system.

195. As noted in this deliberation, the Restricted committee considers that it follows from the CJEU judgment that it is immaterial that the announcements at issue do not constitute, from a technical point of view, genuine emails. Since the advertisements at issue are placed in a space normally specifically reserved for private emails – messages addressed directly and individually to users in that they appear in their email inbox to which they obtain access only after they have authenticated themselves using their username and password – the Court considers that they characterise the use of email for prospecting purposes.

196. **In the third place,** the restricted committee notes that the companies' argument that the display

of unsolicited ads in *Gmail* was restricted solely to the *'Promotions'* and *'Social networks'* tabs in order to preserve a qualitative user experience has no bearing on the scope of the obligation at issue.

197. Indeed, it is apparent from the CJEU judgment that *"These advertisements appeared in the inbox of the private mailboxes of those users, namely in the section in which the emails received appear in the form of a list, being inserted between the emails received"* (paragraph 20 of the Decision).

198. The Restricted committee notes that when choosing to enable *"smart features"* in *Gmail*, the user only accepts that their emails are categorized into three separate tabs. That choice does not affect the fact that the emails grouped in those three tabs remain private emails which may have been requested by the user, such as the *newsletters* to which the user is subscribed or, as demonstrated by the control operations, alerts from the *Seloger* website to which the delegation had subscribed. Restricted committee refers here to the concept of private e-mails developed previously.

199. In addition, the restricted committee notes that the ranking of private emails, carried out when the *'smart features'* are activated, is operated directly by the companies and at their discretion, so that the user has no control over the sorting carried out and the orientation of his private emails in any of the tabs. The user therefore remains obliged to consult the three existing tabs to read all his private emails. By way of example, the restricted committee notes that unsolicited advertisements displayed in the *'Social networks'* tab are inserted between emails sent by the social networks to which the user subscribes and which inform him that content that may be of interest to him can be consulted. Thus, if the user wishes to consult the emails from the networks to which he is subscribed in order to be informed of the content that might be of interest to him, he will have to go to the *'Social networks' tab, in* which unsolicited ads are also displayed. Similar to junk mail (or *'spam'),*the display of unsolicited ads in the *'Promotions' and 'Social networks' tabs* necessarily disturbs the user in the reading of his private emails.

200. Thus, the restricted committee considers that, despite their headings *'Promotions'* and *'Social networks',* those tabs do indeed constitute a private messaging space in the same way as the tab entitled *'Main'.* It thus observes that the unsolicited advertisements which are displayed by the companies in the *'Promotions'* and *'Social networks'* tabs of the electronic mailboxes of users of the *Gmail* service are well inserted in the inbox and in the list enabling emails to be viewed – in a space intended to receive private emails.

201. <u>In the light of all those factors,</u> the restricted committee considers that the messages in question were indeed disseminated to users of the *Gmail* service by means of their inbox, which implies the use of their email.

b. <u>The purpose of the communications referred to</u>

202. In order to determine whether the messages at issue do in fact have the purpose of direct marketing, the Court stated that it was necessary to ascertain whether such communications pursue a commercial aim.

and are addressed directly and individually to the consumer (paragraph 47 of the Decision).

203. **In the present case,** the restricted committee notes that, like the case examined by the CJEU, the messages displayed in the inbox of users of the *Gmail service*, in so far as they are intended to promote products or services offered by third-party advertisers, do indeed pursue a commercial aim, which the companies do not dispute. The delegation noted that in the messaging system created during the inspection, messages were displayed for commercial purposes, including the promotion of banking products.

204. In addition, those messages are addressed directly and individually to users, in that they appear in their email inbox, to which they obtain access only after having authenticated themselves using their username and password. This was also the case for the messages examined by the CJEU.

205. In those circumstances, the restricted committee considers that the advertisements inserted between the emails received characterise the use of email for prospecting purposes.

c. The failure to obtain consent

206. The restricted committee recalls that the organisation wishing to carry out such prospecting operations is required to obtain the free, specific and informed consent of the persons concerned, pursuant to Article L. 34-5 of the CPCE.

207. The Panel notes that the companies' argument that, as regards personalised advertisements, such consent was indeed obtained prior to the creation of a *Google* account cannot succeed. Indeed, the Restricted committee recalls that it has demonstrated *above* that, when creating a *Google* account - regardless of the account creation path used, the user is not informed that he will receive advertising within his *Gmail* mailbox, with companies merely explaining that ads will be displayed on *Google services*, without further details. In those circumstances, it considers that no consent to receive commercial prospecting in the *Gmail* electronic mailbox is obtained by the companies.

208. Similarly, the restricted committee considers that the window offering users to activate the *'smart features'* appearing when the *Gmail* email box was first used does not constitute a valid collection of consent, since the activation of that option is not accompanied by any information on the display of advertisements within *the Gmail* email inboxes.

209. The restricted committee recalls that it does not matter that the advertisements at issue do not constitute, from a technical point of view, emails per se. The mere display of 'advertising *entries of any kind'* in a space normally specifically reserved for private emails is sufficient to consider that those messages are communicated by means of the electronic mailbox of the persons concerned, and therefore their email, within the meaning of Article L. 34-5 of the CPCE.

210. In the light of those factors, it is apparent from the findings made by the Delegation that the user's consent to the display of advertisements in his email inbox was not collected at any time — neither at the time of the creation of the account, nor at the time of the connection to that account,

for example through a checkbox or a push button — and that, moreover, the settings of the email account did not make it possible to oppose that display.

211. Consequently, by displaying, in the inbox of the users of its *Gmail email service*, advertising messages inserted between the emails received, without obtaining the prior consent of those users, the companies infringed Article L. 34-5 of the CPCE.

3. Changes to the display of advertisements made in April 2023

212. **The Restricted committee** notes that on 11 April 2023, during the control procedure, the companies indicated that they had changed the display of ads on *the mobile version of Gmail* in France and the EEA and that similar computer-based changes would be gradually rolled out in France and the EEA. The companies produced a survey as part of the procedure demonstrating, since these changes, the low likelihood of confusion for users between e-mails and unsolicited ads on *Gmail*.

213. The restricted committee notes that visual changes have indeed been made by the companies since 11 April 2023: on the mobile and *web* versions, the words 'advertisement' are now black (and not green as before), an image is presented, *Gmail* ads display a square icon with an arrow to the right (instead of the time on other emails) and when the user hovers over an ad he sees the deletion option appear (while on an email, four command buttons appear), the subject and text of the ads are offset from those of the emails and finally the advertiser's logo appears. On the *web* version only, the electronic lines corresponding to unsolicited announcements are wider than the other messages and on the mobile version the announcement is now presented in a box, in the middle of the list of other messages.

214. The restricted committee notes that it is apparent from paragraphs 44 to 46 and 63 of the judgment of the CJEU cited above that it does not matter whether the advertisements in question differ from the emails themselves – whether they are visual or technical, their mere display in a space normally specifically reserved for private emails is sufficient to consider that those messages, if they have the purpose of direct marketing, are subject to the provisions of the article.

L. 34-5 of the CPCE.

215. Restricted committee notes that ads are always displayed in the user inbox ("Promotions" and "Social Networks" tab), at the beginning and middle of the list of private messages. It observes that the user can release that space in order to obtain an overview of his private emails only after having read the title of those advertising messages and only after having actively deleted them. Advertisements therefore continue to hinder access to such letters in a manner similar to that used for unsolicited emails referred to by the CJEU.

216. Consequently, the restricted committee considers that the changes made on 11 April 2023 to the unsolicited advertisements displayed in the *'Promotions'* and *'Social networks'* tabs in the *Gmail* service's inbox are not such as to call into question the legal regime applicable to the display of

those messages. In view of the reasons set out above, the analysis of restricted committee remains the same for advertisements displayed after that date as for those checked. The restricted committee also states that the user path used to create a *Google* account — a prerequisite for having a *Gmail* email service — has not been modified in order to obtain users' consent to the receipt of advertisements in their email inbox.

217. In the light of all those factors, the restricted committee considers that, by displaying advertisements in the 'Promotions' and 'Social *networks'* tabs of the inbox of the user of an email account and inserting them between the emails received, without obtaining the prior consent of users, the companies committed a breach of the provisions of Article L. 34-5 of the CPCE.

111. ON CORRECTRIC MEASURES AND THEIR PUBLICITY

218. Under Article 20-IV of Law No 78-17 of 6 January 1978, as amended, 'where *the controller or his processor does not comply with the obligations resulting from Regulation (EU) 2016/679 of 27 April 2016 or from this Law, the President of the Commission nationale de l'informatique et des libertés may [...] refer the matter to the restricted committee of the committee for the adoption, after adversarial proceedings, of one or more of the following measures: [...]*

(2) An injunction to bring the processing into conformity with the obligations resulting from Regulation (EU) 2016/679 of 27 April 2016 or from this law or to comply with requests submitted by the data subject in order to exercise his or her rights, which may be accompanied, except in cases where the processing is carried out by the State, by a periodic penalty payment the amount of which may not exceed EUR 100 000 per day of delay from the date fixed by the restricted committee;

7 ° With the exception of cases where the treatment is implemented by the State, an administrative fine not exceeding 10 million euros or, in the case of an enterprise, 2% of the total annual worldwide turnover of the preceding financial year, the highest amount being retained. In the cases referred to in Article 83(5) and (6) of Regulation (EU) 2016/679 of 27 April 2016, those ceilings shall be increased to EUR 20 million and 4% respectively of that turnover. Restricted formation shall take into account, in determining the amount of the fine, the criteria specified in the same Article 83.'

219. Article 83 of the GDPR further provides that 'each *supervisory authority shall ensure that administrative fines imposed pursuant to this Article for infringements of this Regulation referred to in paragraphs 4, 5 and 6 are, in each case, effective, proportionate and dissuasive',* before specifying the elements to be taken into account when deciding whether to impose an administrative fine and when deciding on the amount of that fine.

220. Article 22(2) of the Loi Informatique et Libertés then provides that 'restricted committee *may make public the measures it takes'.*

221. Recital 150 of the GDPR provides that "Where *administrative fines are imposed on an*

undertaking, that term must, for that purpose, be understood as an undertaking in accordance with Articles 101 and 102 of the Treaty on the Functioning of the European Union".

222. The Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679 specify that the concept of undertaking must be understood as *'an economic unit which can be formed by the parent company and all the subsidiaries concerned. In accordance with EU law and case-law, 'undertaking' means the economic unit engaged in commercial or economic activities, irrespective of the legal person involved.'*

223. In a judgment of 5 December 2023 (CJEU, Grand Chamber, C-807/21), the CUJE held, as regards the concept of 'undertaking', that *'as the Advocate General observed in point 45 of his Opinion, it is in that specific context of the calculation of administrative fines imposed for infringements referred to in Article 83(4) to (6) of the GDPR that the reference, made in recital 150 of that regulation, to the concept of 'undertaking', within the meaning of Articles 101 and 102 TFEU, must be understood. In that regard, it should be noted that, for the purposes of the application of the competition rules, referred to in Articles 101 and 102 TFEU, that concept includes any entity engaged in an economic activity, irrespective of the legal status of that entity and the way in which it is financed. It thus designates an economic unit even if, from a legal point of view, that economic unit consists of several natural or legal persons. That economic unit consists of a unitary organisation of personal, tangible and intangible elements pursuing a specific economic aim on a lasting basis (judgment of 6 October 2021, Sumal, C-882/19; EU:C:2021:800, paragraph 41 and*

case-law cited). Thus, it is apparent from Article 83(4) to (6) of the GDPR, which concerns the calculation of administrative fines for the infringements listed in those paragraphs, that, where the addressee of the administrative fine is or is part of an undertaking, within the meaning of Articles 101 and 102 TFEU, the maximum amount of the administrative fine is to be calculated on the basis of a percentage of the total annual worldwide turnover in the preceding business year of the undertaking concerned. In short, as the Advocate General observed in point 47 of his Opinion, only an administrative fine the amount of which is determined by reference to the actual or material economic capacity of its addressee, and therefore imposed by the supervisory authority on the basis, as regards the amount of that fine, of the concept of economic unit within the meaning of the case-law cited in paragraph 56 above, is capable of meeting the three conditions set out in Article 83(1) of the GDPR, namely being effective, proportionate and dissuasive at the same time. Therefore, where a supervisory authority decides, by virtue of its powers under Article 58(2) of the GDPR, to impose an administrative fine on a controller, who is or is part of an undertaking, within the meaning of Articles 101 and 102 TFEU, pursuant to Article 83 of that regulation, that authority is required to rely, under the latter provision, read in the light of recital 150 of that regulation, when calculating the administrative fines for the infringements referred to in paragraphs 4 to 6 of that article 83, on the concept of 'undertaking', within the meaning of Articles 101 and 102 TFEU' (paragraphs 55 to 59).

224. This position was confirmed by the Court in its judgment of 13 February 2025 (CJEU, Fifth Chamber, C-383/23.

A. The imposition of an administrative fine and its amount

225. **The rapporteur proposes** that the restricted committee impose an administrative fine on companies for failure to comply with Article 82 of the Data Protection Act and Article L. 34-5 of the CPCE. It also considers that the issue of a periodic penalty payment order is necessary in order to ensure that the companies comply with the two infringements referred to above. Finally, it proposes that the deliberations on restricted committee be made public.

226. **In defence, the companies** submit, first of all, **that the rapporteur's** lack of transparency as regards her method of calculating fines constitutes a breach of the principles of legal certainty and predictability. To that end, they produce an economic analysis on the determination of the proposed penalty, which concludes that the rapporteur misapplied the obligations laid down by the GDPR to determine the quantum of the penalty.

227. They then submit that the amount of the fine proposed by the rapporteur appears disproportionate, arbitrary and discriminatory. They insist, on the one hand, that users are not required to create a *Google* account in order to access *Google's most important and used services - Google Search, Google Maps, You Tube,* and, on the other hand, that they offer in any event an alternative by offering users the possibility to create a free account with advertising made from generic ads instead of personalized ads, in accordance with the EDPB's recommendations. They point out that they have taken steps to improve their processing, first proactively and then following the checks carried out by the CNIL delegation. They therefore consider that they were not negligent and that the rapporteur did not take into account the degree of cooperation which they demonstrated throughout the procedure.

228. Finally, they consider that the fine proposed by the rapporteur does not take into account the absence of harm suffered by the persons concerned since, first, as regards Article 82 of the Data Protection Act, the persons concerned have not suffered any harm in so far as users can access *Google's* main products and services without having a *Google* account. As regards, on the other hand, the infringement of Article L. 34-5 of the CPCE, they note that a significant proportion of *Gmail* users do not see any announcement subject to the procedure – either because they have not activated the *'Smart Features' or* because they have disabled the *'Promotions' and 'Social Networks' tabs.* In particular, they consider that all *regular Gmail* email accounts created before the judgment of 25 November 2021 cannot be regarded as subject to the stricter rules laid down on that occasion.

229. The companies add that the rapporteur did not take into account the major mitigating circumstances resulting in particular from the placement of the ads in tabs separate from the main tab and in evocative titles.

230. In addition, they consider that the rapporteur confused the GOOGLE group's turnover with the financial benefits derived from the practices at issue. They thus note that the rapporteur took into account ALPHABET's worldwide advertising revenues in order to assess the financial benefits derived from the practices at issue. They maintain that a very large part of that income does not come from that generated by the practices at issue implemented by GIL at European

level. In addition, they consider the concept of income inappropriate for determining financial gains since it does not take into account the expenses that must be deducted.

231. **As a preliminary point,** the restricted committee recalls that the requirement to state reasons for an administrative penalty does not require either the restricted committee or the rapporteur to rule on all the criteria laid down in Article 83 of the GDPR, nor does it mean that the figures relating to the method of determining the amount of the penalty proposed or imposed must be indicated (EC, 10th/9th, 19 June 2020, No 430810; EC, 10th/9th, 14 May 2024, No 472221).

232. The Restricted committee considers that, in the present case, the Rapporteur has disclosed in a clear and detailed manner the factors which enabled it to assess the proven seriousness of the infringements found and to enable the companies to defend themselves in the light of those factors. Therefore, there is no breach of the principles of legal certainty and predictability.

233. That said, the Restricted committee considers that, in the present case, it is necessary to examine the relevant criteria of Article 83 of the GDPR in order to decide whether a fine should be imposed.

administrative to companies and, where appropriate, to determine its amount.

1. The imposition of the fine

234. **In the first place,** the restricted committee considers that, pursuant to Article 83(2)(a) of the GDPR, account should be taken of the nature, gravity and duration of the infringements, taking into account the nature, scope or purpose of the processing operations concerned, as well as the number of data subjects affected.

235. As regards, first of all, the infringement of Article 82 of the Loi Informatique et Libertés (Computing and Liberties Law), the restricted committee notes that until October 2023, the path of users creating a *Google* account was biased in favour of accepting targeted advertising, thus depriving users of their freedom of choice. It then observes that the lack of valid consent of users located in France to the deposit and/or reading of advertising *cookies* on their terminal persists to date when a user wishes to create a *Google* account from the *google.fr website*, in so far as that consent is still not collected in a consistent manner. Restricted committee considers that by not complying with the requirements of the aforementioned Article, companies do not allow users to understand the consequences and scope of their choices in relation to the processing of their personal data.

236. It points out that the GOOGLE companies make the bulk of their profits in the two main segments of the online advertising market, targeted advertising and contextual advertising, in which *cookies* play an undeniable, albeit different, role.

237. First of all, in the segment of targeted advertising, the purpose of which is to display content in a specific area of a website and in which *cookies* and tracers are used to identify users during their navigation in order to offer them the most personalized content, it is established that the

GOOGLE group offers products at all levels of the value chain of that segment and that its products are systematically dominant on those various levels. Thus, it was recently established that the group held 91% of the overall market for publishers and 87% of the overall market for advertisers for open internet displays, markets relevant for online advertising (US District Court for the Eastern District of Virginia, *Google Ad Tech,*Case No. 1:23-cv-108 (LMB/JFA), Judgment, 17 April 2025 and US DoJ, *Google Ad Tech,*Press release, 17 April 2025). The GOOGLE Group also states on one of its websites that it offers an ecosystem for advertising accessible from its tools and services capable of reaching more than 2 million websites, videos and applications and more than 90% of Internet users worldwide. Next, the contextual advertising segment, the purpose of which is to display sponsored results according to the keywords typed by users, also requires the use of *cookies* in its practical implementation, for example in order to be able to determine the geographical location of users and, therefore, to adapt the advertisements offered according to that location. In that regard, it is apparent from ALPHABET's annual report for 2023 that that segment alone constitutes, through, inter alia, the *Google Ads service* – formerly *AdWords* – 77.4% of the turnover of the

GOOGLE Group.

238. She then notes that the EDPS recalled in his Guidelines 8/2020 on targeting social media users that behavioural advertising – or targeted advertising – poses significant risks to the fundamental rights and freedoms of data subjects, including the possibility of discrimination and exclusion and possible manipulation of users.

239. Restricted committee considers the treatment to be of a massive nature. It notes to that effect that the companies indicated that more than [...] standard *Google* accounts were created by users residing in France between 15 December 2020 and 26 October 2023, and more than [...] between 1April 2021 – entry into force of the aforementioned guidelines and recommendation 'Cookies and other CNIL tracers' – and 26 October 2023. It also notes by way of illustration that for the period from January to June 2023, the monthly average of active users connected to a *Google* account in France was more than [...] on the *Google Search service,* and more than [...] on the *YouTube service.* The restricted committee notes that these figures do not necessarily correspond to the number of unique persons concerned. However, even if a single person is likely to correspond to several different identifiers due to the use of multiple terminals and browsers, that volume reflects the central place occupied by *Google* accounts in the daily lives of people residing in France.

240. Next, as regards the infringement of Article L. 34-5 of the CPCE, the restricted committee wishes to point out that it is of proven seriousness, in particular in the light of the intrusive nature of the practice in question. It should therefore be borne in mind that the rules laid down by the *ePrivacy* Directive on commercial prospecting by electronic means, transposed into Article L. 34-5 of the CPCE, are intended to protect the privacy of users or subscribers with regard to unsolicited communications. The restricted committee notes that, although the companies have set up various tabs in the inbox of the user who activates *the 'smart features' and* that no unsolicited advertisements appear in the tab entitled *'Main',* the fact remains that no consent is obtained from him to receive that commercial prospecting, with the result that he is forced to receive

advertising messages in the middle of his private emails in the tabs entitled *'Promotions'* and *'Social networks'* in his inbox. Such a practice, which consists in using the subscriber's trust in the service used, corresponds very precisely to an intrusive practice.

241. The restricted committee also notes that that failure concerns a significant number of persons since it is apparent from the findings of the checks that, on 11 December 2022, and on the basis of the 28 days preceding that date, there were in France more than [...] consumer *Gmail* accounts active at least once during that period, for which the display of the *Gmail* service contained the 'Promotions' or 'Social *networks'* tabs in which the unsolicited ads were displayed. The restricted committee notes that this number was increased to more than [...] on 13 May 2023 and to [...] on 10 September 2024, based on the 28 days prior to that date. Even if these figures do not necessarily correspond to the number of unique persons concerned (a person who may have several e-mail accounts), the restricted committee notes that this volume remains considerable since it represents approximately [...]% of the accounts active at least once during the periods given in France, on the basis of the 28 days preceding the reference date.

242. Finally, as has already been pointed out, the restricted committee points out that the rules on commercial prospecting by electronic means have been defined for many years by both national and European legislation, the 2002 *ePrivacy* Directive having been transposed into French law in 2004. The requirement to obtain the consent of the persons concerned to carry out commercial prospecting operations by electronic means is thus clearly required under that legislation. It has also been recalled by the CNIL on several occasions, both through the publications on its website and by the numerous decisions rendered in this area. In addition, the CJEU judgment of 25 November 2021, delivered almost a year before the control operations, is drafted in perfectly clear terms: the display in the user's inbox of an email service of advertising messages in a form similar to that of genuine email and in the same location as that email constitutes 'use... *of email for the purpose of direct marketing'* and is authorised only if that user has been informed clearly and precisely of the arrangements for the dissemination of such advertising and has expressed his consent specifically and in full knowledge of the facts to receive such advertising messages (paragraph 63). The companies should therefore, having regard in particular to their position on the market and the means at their disposal, have been particularly vigilant with regard to the rules applicable to electronic prospecting. Thus, by freeing itself from compliance with those rules, the restricted formation considers that the companies have been, at the very least, highly negligent.

243. **In the second place,** the restricted committee considers that account should be taken of the criterion laid down in Article 83(2)(b) and (e) of the GDPR, relating to the fact that the infringement was committed intentionally or negligently and that it follows on from a relevant infringement previously committed by the controller. It considers that those criteria are linked in the present case because the companies proved to be negligent in the light, in particular, of the fact that they had previously been penalised.

244. It thus points out that, in the present case, the companies have already been the subject of a penalty No SAN-2021- 023 on 31 December 2021 relating to a failure to comply with Article 82 of the Loi Informatique et Libertés in so far as, on the websites *'google.fr'* and *'youtube.com',*

they did not make available to users located in France a means of refusing to read and/or write information in their terminal with the same degree of simplicity as that intended to accept its use. The Restricted committee therefore considers that the companies were in a position to know that the other consent-gathering mechanisms they were putting in place identically - in a connected environment this time around.

did not comply with Article 82 of the Data Protection Act.

245. It considers that the companies – which are among the most important global players in the internet, whose operations of reading or writing information to users' terminals are at the heart of their business model, in particular advertising and which manage some of the most visited sites – were at the very least negligent in not putting in place an easy system for refusing *cookies* when creating a *Google* account, even though they had already been the subject of a previous penalty relating to a related subject.

246. Moreover, as has already been pointed out, the restricted committee points out that the rules on commercial prospecting by electronic means have been laid down for many years and that the CJEU judgment, the terms of which are particularly clear, was delivered almost a year before the control operations. The companies should therefore, having regard in particular to their position on the market and the means at their disposal, have been particularly vigilant in that regard. Thus, by avoiding compliance with those rules, the restricted formation considers that the companies were negligent as regards the infringement of the provisions of Article L. 34-5 of the CPCE.

247. **In the third place,** the restricted committee considers that the criterion relating to the measures taken by

the controller to mitigate the damage suffered by data subjects must also be taken into account, pursuant to Article 83(2)(c) GDPR.

248. It appears that after the referral to the CNIL by the NOYB association of 24 August 2022 publicly denouncing the companies' practices, they took measures to bring part of their practices into compliance with the provisions of Article 82 of the Data Protection Act, by modifying the process of creating a *Google* account in order to allow users to refuse the deposit of *cookies* linked to the personalisation of ads on the express route as from October 2023.

249. The restricted committee also notes that the companies also took measures during the sanctioning procedure – deactivating several *cookies* related to personalised advertising and changing the visual format of ads in *Gmail* to reduce the risk of confusion with emails, without allowing full compliance.

250. **Fourth,** the Restricted committee intends to take into account certain other circumstances applicable to the facts of the case, pursuant to Article 83(2)(k) GDPR.

251. In particular, the restricted formation considers that the companies have derived a certain financial advantage from the violations committed. Thus, as regards the infringement of Article

82 of the Loi Informatique et Libertés, although not all of the companies' revenues are directly linked to *cookies,* online advertising is essentially based on the targeting of internet users, in which the *cookie* and the personalisation of ads directly participate by making it possible to single out and reach the identified user with a view to displaying him advertising content corresponding to his interests and profile. As regards the infringement of Article L. 34-5 of the CPCE, the restricted committee recalls that companies are remunerated by advertisers for using the space between emails to insert advertisements.

252. The restricted committee notes in this regard that advertising *via* GOOGLE Group services generated close to USD [...] in 2022 and more than USD [...] in 2023.

253. The Restricted committee considers that the financial advantage derived from the infringements committed must therefore be taken into account, as an aggravating circumstance, although it was not quantified during the proceedings. It points out that Article 83(2)(k) of the GDPR is only one of the many criteria taken into account in determining the amount of the fine and that that amount does not as such result from the application of a percentage to the turnover of the undertaking or its profits.

254. Moreover, more generally, the restricted group considers that, given the companies' position on the market – the GOOGLE group has a central position on the online advertising market and its *Gmail* application is the second largest messaging service in the world – and the human, technical and financial resources at their disposal, they must show particular rigour in terms of the protection of personal data.

255. In the light of all those factors, the restricted formation considers that the imposition of a fine appears justified.

2. The amount of the fine

256. **The restricted committee** notes that, pursuant to the provisions of Article 20-IV-7° of the Data Protection Act, the restricted committee may impose an 'administrative *fine not exceeding EUR 10 million or, in the case of an undertaking, 2% of the total annual worldwide turnover of the preceding financial year, whichever is greater' on a controller who has committed the infringements found.* It then recalls that administrative fines must be dissuasive and proportionate, within the meaning of Article 83(1) of the GDPR.

257. It considers that recourse should be had to the concept of undertaking in competition law, by virtue of the direct and explicit reference made by recital 150 of the GDPR and the Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679, which consider that it is an economic unit which may be formed by the parent company and all the subsidiaries concerned and an economic unit engaged in commercial or economic activities, irrespective of the legal person involved.

258. The restricted committee considers that, by referring to the GDPR in Article 20 of the Loi Informatique et Libertés, the French legislature chose to harmonise the rules relating to the

determination of the amount of fines for the protection of personal data, regardless of whether the fine is intended to penalize a breach under the GDPR or the Loi Informatique et Libertés.

259. However, in judgments under the GDPR, the CJEU confirmed that the concept of *'undertaking' contained* in Article 83 of the GDPR must be understood in the light of competition law, which is governed by Articles 101 and 102 TFEU (CJEU, Grand Chamber, 5 December 2023, C-807/21 and CJEU, Fifth Chamber, 13 February 2025, C-383/23).

260. The Restricted committee considers that, in view of the proximity between the GDPR and the *ePrivacy Directive*, it is consistent that the rules governing the imposition of fines on bodies should be uniform, whether it is a breach arising from the GDPR or the *ePrivacy Directive.*

261. Next, as regards what is covered by the concept of 'undertaking', the restricted formation notes that, in its abovementioned judgment of 5 December 2023, the CJEU held that an undertaking is an economic unit, even if, from a legal point of view, that economic unit consists of several legal persons. The CJEU states that, like competition law (Court of Cassation, c. com., 7 June 2023, Appeal No 22-10.545; Competition Authority, Decisions No 21-D-10 of 3 May 2021 and No 21-D-28 of 9 December 2021), where a subsidiary is wholly owned directly or indirectly by its parent company, there is a rebuttable presumption that the parent company exercises decisive influence over the conduct of the company. In order to determine the amount of the fine envisaged, and whether it corresponds to the actual economic capacity of its addressee, it is then necessary, according to the two judgments cited above, if the two companies can materially be regarded as belonging to the same economic unit, to take into account the turnover of the parent company in order for the fine to be effective, proportionate and dissuasive.

262. The Restricted committee recalls that ALPHABET Inc. owns 100% of GOOGLE LLC and GIL and thus considers, like competition law, that there is a rebuttable presumption that ALPHABET Inc. exercises decisive influence over the conduct of GOOGLE LLC and GIL on the market (CJEU, Grand Chamber, 5 December 2023, C-807/21; also JUE, Third Chamber, 10 September 2009, Akzo C-97/08 P, paragraphs 58 to 61). See also, for the application of the presumption of decisive influence in the case of chain ownership: CJEU, *Eni v Commission,* 8 May 2013 (C-508/11 P, § 48). Therefore, ALPHABET Inc., GOOGLE LLC and GIL constitute a single economic entity and thus form a single undertaking within the meaning of Article 101 TFEU.

263. In the light of the foregoing, the restricted group considers that the turnover of the undertaking within the meaning of 'economic unit', namely that of the parent company of the group, should be taken into account. She recalled that in 2024, ALPHABET Inc. had a turnover of more than USD 350 billion in 2024 – around EUR 312 billion according to the EUR/USD exchange rate of 16 May 2025.

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264. <u>As regards the amount of the fine, which must be proportionate and dissuasive,</u> in the light of the companies' liability, their financial capacity and the relevant criteria of Article 83 of the GDPR, the formation considers that it appears to be deterrent and proportionate: the imposition

on GOOGLE LLC of **an administrative fine in the amount of EUR 200 000 000 in respect of** infringements of Article 82 of Law No 78-17 of 6 January 1978 on information technology, files and civil liberties and of Article L. 34-5 of the Postal and Electronic Communications Code.

265. Similarly, the restricted committee considers that the imposition of **an administrative fine of EUR 125 000 000 on GOOGLE IRELAND LIMITED appears to be dissuasive and proportionate in the light of** the infringements of Article 82 of Law No 78-17 of 6 January 1978 on information technology, files and freedoms and of Article L. 34-5 of the Postal and Electronic Communications Code.

8. The issue of an injunction on periodic penalty payments

266. **The rapporteur considers** that, in view of the seriousness of the infringements, an injunction is necessary in order to ensure that companies comply.

267. **The companies** maintain that the injunction appears devoid of purpose as regards the infringement of Article 82 of the Loi Informatique et Libertés in view of their compliance. In any event, if an injunction were to be issued, they request that they be granted a period of at least six months, in view of the fact that changes to the underlying infrastructure of the *Google* account creation journey require significant work and a gradual roll-out in order to detect and correct any technical problems. As regards the infringement of Article L. 34-5 of the CPCE, they also request that they be granted a period of six months because of changes in the display of ads in *Gmail* or in the process of collecting consent for those ads which require compliance with a rigorous process including many steps and internal approvals.

268. **The restricted committee** notes that, on the day of the meeting, the companies did not justify the development of their practices, with the result that it considers that, in order to ensure that they comply with the infringements referred to in Article 82 of the Data Protection Act and Article L. 34-5 of the CPCE, it appears necessary to issue an injunction.

269. As regards the infringement of Article 82 of Law No 78-17 of 6 January 1978 on information technology, files and freedoms, the restricted group considers that companies must provide sufficient information to enable users located in France to understand that *cookies* intended for advertising purposes will necessarily be deposited when creating a *Google* account.

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270. As regards the infringement of Article L. 34-5 of the Postal and Electronic Communications Code, the restricted committee considers that companies must obtain the prior consent of users located in France, before any electronic prospecting operation on their *Gmail* account taking the form of advertisements inserted between emails;

271. Furthermore, in order to ensure compliance with that injunction, the Restricted committee considers that, in the light of the turnover of the companies and the financial, human and technical resources available to them to remedy the deficiencies found, a daily penalty payment

of EUR 100 000 per day of delay, payable after a period of six (6) months from notification of the decision, should be imposed.

C. Publicity of the penalty

272. **The rapporteur proposes** that the deliberation of the restricted committee be made public in order to alert French users of *Google* services, in particular *Gmail, Google Search* and *Youtube*, to the characterisation of infringements of Article 82 of the Data Protection Act and Article L. 34-5 of the CPCE.

273. **The companies** request that the request for publication of the Decision be rejected, as this measure does not appear strictly necessary, and therefore disproportionate having regard to the amount of the fine suggested.

274. **The restricted committee** considers that such a measure is justified in the light of the proven seriousness of the infringements in question, the position of the companies on the market and the number of persons concerned, who must be informed.

275. It also considers that that measure appears proportionate since the decision will no longer identify the companies by name after a period of two years from its publication.

BY THESE REASONS

The restricted formation of the CNIL, after deliberation, decides to:

- order **GOOGLE LLC** to pay an administrative fine of **EUR 200 000 000** for failure to comply with Article 82 of Law No 78-17 of 6 January 1978 on information technology, files and freedoms and Article L. 34-5 of the Postal and Electronic Communications Code;

- order **GOOGLE IRELAND LIMITED** to pay an administrative fine **of EUR 125 000 000 in respect of** infringements of Article 82 of Law No 78-17 of 6 January 1978 on information technology, files and civil liberties and Article L. 34-5 of the Postal and Electronic Communications Code;

- **order both companies to** bring the processing into line with the provisions of Article 82 of Law No 78-17 of 6 January 1978 on information technology, files and civil liberties and Article L. 34-5 of the Postal and Electronic Communications Code, and in particular:

    - **as regards the failure to comply with Article 82 of Law No 78-17 of 6 January 1978 on information technology, files and freedoms, to** provide sufficient information to enable users located in France to understand that *cookies* for advertising purposes will necessarily be deposited when a *Google* account is created;
    - **as regards the infringement of Article L. 34-5 of the Postal and Electronic Communications Code,** to obtain the prior consent of users located in France, before any electronic prospecting operation on their *Gmail* account taking the form of advertisements inserted between emails;

- **Order a penalty payment of one hundred thousand (100 000) euros** per day of delay at the end of a **period of six (6)** months following notification of the deliberation of the restricted formation;

- **make public, on the CNIL website and on the Légifrance website, its deliberation,** which will no longer allow companies to be identified by name after a period of two years from its publication.

The President

Philippe - Pierre CABOURDIN

That decision may be appealed to the Conseil d'État (Council of State) within four months of its notification.