Deliberation of the Restricted Committee n° SAN-2020-012 of 7 December 2020 concerning GOOGLE LLC and GOOGLE IRELAND LIMITED

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The Commission nationale de l'Informatique et des Libertés (CNIL - French Data Protection Agency), met in its Restricted Committee consisting of Alexandre LINDEN, Chair, Philippe-Pierre CABOURDIN, Vice-Chair, and Dominique CASTERA, Anne DEBET and Christine MAUGÜE, members;

Having regard to Council of Europe Convention No. 108 of 28 January 1981 for the Protection of Individuals with regard to the Automatic Processing of Personal Data;

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 amended French Data Protection Act no. 78-17 of 6 January 1978, in particular articles 20 *et seq.*;

Having regard to Order No. 2014-1329 of 6 November 2014 on the remote deliberations of administrative bodies of a collegial nature;

Having regard to decree no. 2019-536 of 29 May 2019 implementing law no. 78-17 of 6 January 1978 on data protection;

Having regard to deliberation no. 2013-175 of 4 July 2013 adopting the rules of procedure of the CNIL (French Data Protection Agency);

Having regard to Decision No. 2020-072C of 15 March 2020 of the Chair of CNIL to instruct the Secretary-General to carry out, or have carried out, an audit of the processing accessible from the domain "google.fr" or concerning personal data collected from the latter;

Having regard to the decision of CNIL's Chair appointing a rapporteur before the Restricted Committee of 8 June 2020;

Having regard to the hearing of GOOGLE LLC and GOOGLE IRELAND LIMITED in the premises of the CNIL, on 22 July 2020;

Having regard to the report of Mr Bertrand du MARAIS, rapporteur, notified to GOOGLE LLC and GOOGLE IRELAND LIMITED on 12 August 2020;

Having regard to the written observations made by the counsel of GOOGLE LLC and GOOGLE IRELAND LIMITED on 25 September 2020;

Having regard to the rapporteur's response to these observations notified on 9 October 2020 to the companies' counsel;

Having regard to the written observations made by the counsel of GOOGLE LLC and GOOGLE IRELAND LIMITED received on 26 October 2020;

Having regard to the oral observations made at the Restricted Committee session;

Having regard to the memo of 2 December 2020 sent by the counsel of GOOGLE LLC and GOOGLE IRELAND LIMITED to the Chair of the Restricted Committee;

Having regard to the other documents in the file;

The following were present at the Restricted Committee session on 12 November 2020:

- François PELLEGRINI, commissioner, heard in his report;

As representatives of GOOGLE LLC and GOOGLE IRELAND LIMITED:

- [...]

As interpreters of GOOGLE LLC and GOOGLE IRELAND LIMITED:

- [...]

GOOGLE LLC and GOOGLE IRELAND LIMITED having last spoken;

The Restricted Committee has adopted the following decision:

I. Facts and proceedings

1. GOOGLE LLC is a limited liability company with its registered office in California (United States). Since its creation in 1998, it has developed many services for individuals and businesses, such as the *Google Search* search engine, the *Gmail* email service, the *Google Maps* mapping service and the *YouTube* video platform. It has more than 70 offices in about fifty countries and employed more than 110,000 people worldwide in 2019. Since August 2015, it has been a 100% owned subsidiary of ALPHABET Inc., the parent company of the GOOGLE group.

2. In 2019, ALPHABET Inc. achieved a turnover of more than $161 billion, while GOOGLE LLC achieved a turnover of more than $160 billion. [...]

3. GOOGLE IRELAND LIMITED (hereinafter "GIL") presents itself as the headquarters of the GOOGLE Group for its activities in the European Economic Area (hereinafter "EEA") and Switzerland. Established in Dublin, Ireland, it employs around 9,000 people. In 2018, it achieved a turnover of more than €38 billion.

4. GOOGLE FRANCE SARL is the French establishment of the GOOGLE Group. A 100% owned subsidiary of GOOGLE LLC, its registered office is located in Paris (France). In 2018, it employed approximately 1,400 staff and had a turnover of more than 400 million euros.

5. Pursuant to Decision No. 2020-072C of 15 March 2020 of the Chair of the Commission, the CNIL services carried out an online investigation, on 16 March 2020, on the website "google.fr".

6. The purpose of this mission was to verify compliance by GOOGLE LLC and GIL (hereinafter the "Companies") with all the provisions of Law No. 78-17 of 6 January 1978 as amended on data processing, files and freedoms (hereinafter "the French Data Protection Act") and in particular Article 82 thereof.

7. As part of the online investigation, the delegation was able to see that when a user visits the "google.fr" page, several cookies are automatically deposited on his/her terminal, without action on his/her part, as soon as he/she arrives on the site. On 16 March 2020, the delegation notified the companies of the report drawn up as part of the online investigation, asking them, in particular, to specify the purposes of the different cookies whose deposit had been recorded.

8. By letter dated 30 April 2020, GIL responded on its own behalf to this latter request while considering that the CNIL did not have the competence to investigate the "google.fr" website.

9. In order to examine these issues, the Chair of the Agency appointed Bertrand du MARAIS as rapporteur, on 8 June 2020, on the basis of Article 22 of the French Data Protection Act..

10. By letter of 29 June 2020, the companies were convened to a hearing on 15 July, pursuant to Article 39 of Decree No. 2019-536 of 29 May 2019. At the request of the companies, the rapporteur accepted, by letter of 9 July, a postponement of the hearing to 22 July 2020.

11. During the hearing of 22 July 2020, which gave rise to a report signed by all of the parties present, the companies in particular provided answers to the rapporteur's questions relating to the determination of the data controller for processing consisting of information access or write operations on the terminals of users residing in France when using the *Google Search* search engine.

12. By letter of 29 July 2020, GIL responded to several of the additional requests made by the rapporteur at the end of the hearing of 22 July 2020, providing, in particular, the subcontracting agreement of 11 December 2018 concluded with GOOGLE LLC. They did not, however, produce the income of GIL from the activity of "google.fr" and GOOGLE FRANCE in respect of its business provider commission, although this was requested by the rapporteur.

13. At the end of his investigation, on 12 August 2020, the rapporteur had personally handed to the company's counsel, and sent by e-mail to their representatives, a report detailing the breach of the French Data Protection Act which he considered constituted in the present case.

14. This report proposed that the Commission's Restricted Committee impose an injunction to bring the processing into line with the provisions of Article 82 of the French Data Protection Act, accompanied by a periodic penalty, as well as an administrative fine against both companies. He also proposed that this decision be made public and that the companies should no longer be identifiable by name upon expiry of a period of two years following its publication.

15. On 18 August 2020, through their counsel, the companies made a request that the meeting in front of the Restricted Committee be held in camera, which was rejected by the Chair of the Restricted Committee by letter dated 23 September 2020.

16. On 25 September 2020, the company submitted observations in response to the sanction report.

17. The rapporteur responded to the comments of the companies on 9 October 2020.

18. By email of 15 October 2020, the companies requested an extension of the fifteen-day period provided for by Article 40 of Decree No. 2019-536 of 29 May 2019 to produce observations in rejoinder, which was rejected by the Chair of the Restricted Committee by letter of 16 October 2020.

19. On 26 October 2020, the company submitted further observations in response to those of the rapporteur.

20. The company and the rapporteur presented oral observations at the Restricted Committee meeting.

21. By email of 2 December 2020, the companies sent a post-hearing submission to the Chair of the Restricted Committee.

II. Reasons for the decision

A. On the competence of the CNIL

1. On the material competence of the CNIL and the applicability of the "one-stop-shop" mechanism provided by the GDPR

22. The provisions 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 (hereinafter referred to as the ePrivacy Directive) relating to the storage or access to information already stored in the terminal equipment of a subscriber or user have been transposed into national law in Article 82 of the French Data Protection Act, in Chapter IV "*Processing rights and obligations specific to the electronic communications sector*" of this Act.

23. Under Article 16 of the "French Data Protection Act", "*the Restricted Committee shall take measures and impose sanctions against data controllers or data processors who do not comply with the obligations arising [...] from this law*". According to Article 20(III) of the same Law, "*where the data controller or its processor fails to comply with the obligations arising [...] from this Law, the Chair of the CNIL [...] may refer the matter to the Restricted Committee".*

24. The rapporteur considers that the CNIL is materially competent pursuant to these provisions to monitor and sanction the information access or write operations implemented by companies in the terminals of *Google Search* search engine users residing in France.

25. The companies acknowledge that the facts of this procedure are materially covered by the ePrivacy Directive but consider that the procedural framework provided for in Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (hereinafter referred to as "the Regulation" or "the GDPR") should be applied, that is to say the mechanism for cooperation between supervisory authorities, known

as the 'one-stop-shop' mechanism, provided for in Chapter VII of the Regulation. In application of this mechanism, the supervisory authority competent to know the facts in question would not be the CNIL but the Irish data protection authority, the *Data Protection Commissioner (*hereinafter the "DPC"), which should act as the lead authority with regard to the deployment of cookies by GOOGLE IRELAND LIMITED, this being competent according to the companies both under the GDPR and the ePrivacy Directive.

26. In support of this, the companies invoke, in particular, the *specialia generalibus derogant*, by virtue of which, according to them, the absence of specific rules relating to the determination of the competence of the supervisory authority in case of cross-border processing in the ePrivacy Directive should be replaced by the application of the procedural framework provided for by the GDPR. They argue that a teleological reading of the GDPR's preparatory work and its recitals is in full agreement with this. They add that the exclusion of the 'one-stop-shop' mechanism in the present case would contribute to the fragmentation of European regulations on personal data relating to cookies, fragmentation which can allegedly already be verified in the fact that several supervisory authorities (the French, UK and Spanish authorities) have adopted guidelines or even divergent sanctions policies with regard to these systems.

27. The Restricted Committee notes, first of all, that it emerges from the above provisions that the French legislator has instructed the CNIL to ensure compliance by the data controllers with the provisions of the ePrivacy Directive transposed to Article 82 of the French Data Protection Act, by entrusting it in particular with the power to sanction any breach of this article. It stresses that this competence was recognized by the Conseil d'Etat in its *Association of Communication Consulting Agencies* decision of 19 June 2020 concerning the deliberation of the CNIL No. 2019-093 adopting guidelines on the application of Article 82 of the Law of 6 January 1978 as amended dealing with read or write operations in a user's terminal, once the latter noted that "*Article 20 of this law confers on its Chair [CNIL] the power to take corrective measures in the event of non-compliance with the obligations resulting from Regulation (EU) 2016/279 or its own provisions, as well as the possibility of referring the matter to the Restricted Committee with a view to the imposition of sanctions liable for imposition*" (EC, 19 June 2020, req. 434684, pt. 3).

28. It then notes that where processing falls within both the substantive scope of the ePrivacy Directive and the material scope of the GDPR, reference should be made to the relevant provisions of the two texts which provide for their articulation. Thus, Article 1 (2) of the ePrivacy Directive specifies that "*the provisions of this Directive specify and complement Directive 95/46/EC*" of the European Parliament and of the Council of 24 October 1995 on the protection of personal data (hereinafter referred to as the "Personal Data Protection Directive 95/46/EC"), it being recalled that since the entry into force of the Regulation, references to this latter Directive must be understood as being made to the GDPR, in accordance with Article 94 of the GDPR. Similarly, it follows from recital 173 of the GDPR that this text explicitly anticipates not being applicable to the processing of personal data *"subject to specific obligations having the same objective [of protection of fundamental rights and freedoms] laid down in Directive 2002/58/EC of the European Parliament and of the Council, including the obligations of the controller and the rights of natural persons"*. This articulation was confirmed by the Court of Justice of the European Union (hereinafter CJEU) in its *Planet49* decision of 1 October 2019 (CJEU, 1 October 2019 , C-673 /17, pt. 42).

29. In this respect, the Restricted Committee notes that, contrary to what the companies argue, the ePrivacy Directive provides, for its specific obligations, its own mechanism for implementing and monitoring its application in Article 15a. Thus, the first paragraph of that Article leaves to the Member States the competence to determine *"the regime of sanctions, including criminal penalties, if applicable, applicable to violations of national provisions adopted pursuant to this Directive and to take all necessary measures to ensure their implementation. The penalties provided for must be effective, proportionate and dissuasive and may be applied to cover the duration of the infringement, even if it has subsequently been corrected"*. However, the rule laid down in (3) of Article 5 of the ePrivacy Directive, according to which the reading and writing operations must systematically be subject to the user's prior agreement, after information is provided to them, constitutes a special rule with regard to the GDPR since it prohibits the use of the legal bases mentioned in Article 6 which do not require agreement from the user in order to lawfully proceed with these reading and writing operations on the terminal. The monitoring of this rule is therefore a special monitoring and sanction mechanism provided for by the ePrivacy Directive and not the data protection authorities and the EDPB in application of the GDPR. It is by their own choice that legislators in France have entrusted this task to the CNIL.

30. In addition, the second paragraph of the same Article requires Member States to ensure that *"the competent national authority and, where appropriate, other national bodies have the power to order the cessation of the offences referred to in paragraph 1*".

31. The Restricted Committee considers that these latter provisions exclude as such the application of the "one-stop-shop" mechanism provided by the GDPR to facts under the ePrivacy Directive.

32. It adds, moreover, that this exclusion is corroborated by the fact that Member States, which are free to determine the competent national authority for determining violations of national provisions adopted pursuant to the ePrivacy Directive, may have assigned this competence to an authority other than their national data protection authority established by the GDPR, in this case to their telecommunications regulatory authority. Therefore, to the extent that these latter authorities are not part of the European Data Protection Board (hereinafter referred to as 'the EDPB'), while this committee plays an essential role in the consistency monitoring mechanism implemented in Chapter VII of the GDPR, it is in fact impossible to apply the 'one-stop-shop' to practices likely to be sanctioned by national supervisory authorities not sitting in this Board.

33. It stresses that the EDPB also shares the same interpretation, having specified, in particular, in its opinion No. 5/2019 of 12 March 2019 on the interactions between the Directive on Privacy and Electronic Communications and the GDPR, that "*the GDPR mechanisms do not apply to monitoring the application of the provisions of the Directive on Privacy and Electronic Communications as such*" (pt. 80, unofficial translation).

34. Finally, the Restricted Committee notes that the possible application of the one-stop-shop mechanism to processing governed by the ePrivacy Directive is currently the subject of numerous discussions in the preparation of the draft ePrivacy Regulation which has been under negotiation for three years at European level. It notes that the very existence of these debates confirms that the one-stop-shop mechanism provided by the GDPR is not applicable to matters governed by the current ePrivacy Directive.

It stresses that the EDPB's opinion of 19 November 2020, invoked by the companies in their memo of 2 December 2020, corroborates this analysis since in this opinion the EDPB merely expresses the wish that the "one-stop-shop" apply to the future regulation, proof that, in the state of positive law, this mechanism does not apply to the cookie provisions of the ePrivacy Directive in force.

35. It follows from the above that the "one-stop-shop" mechanism provided for by the GDPR is not applicable to this procedure and that the CNIL is competent to monitor and sanction the processing carried out by companies falling within the scope of the ePrivacy Directive, provided that they relate to its territorial jurisdiction.

2. On the territorial jurisdiction of the CNIL

36. The rule of territorial application of the requirements laid down in Article 82 of the French Data Protection Act is set out in Article 3 (I) of the French Data Protection Act, which states: "*without prejudice, with regard to processing 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 data controller (...) on French territory, regardless of whether or not the processing takes place in France".*

37. The rapporteur considers that the CNIL is territorially competent in application of these provisions when the processing that is the object of this procedure, consisting of operations to access or write information in the terminals of users residing in France when using the *Google Search* search engine, in particular for advertising purposes, is carried out in the "*context of the activities*" of GOOGLE FRANCE, which constitutes "*the establishment*" on French territory of the GOOGLE Group.

38. The companies argue that to the extent that the rules of jurisdiction and the cooperation procedures defined in the GDPR should be applied, the CNIL would not have territorial jurisdiction to hear this case since the "real headquarters" of the GOOGLE Group in Europe, which is the place of its central administration within the meaning of Article 56 of the GDPR, is located in Ireland.

39. The Restricted Committee again holds that since the facts in question are materially covered by the ePrivacy Directive and not the GDPR, the one-stop-shop mechanism provided by the GDPR is not applicable in the present case. It deduces from this that reference should be made to the provisions of Article 3 (I) of the French Data Protection Act, which determines the scope of the territorial jurisdiction of the CNIL.

40. In this regard, the Restricted Committee points out that the ePrivacy Directive, adopted in 2002 and amended in 2006 and subsequently amended in 2009, does not itself explicitly lay down the rule of territorial application of the various transposition laws adopted by each Member State. However, this Directive states that it "*clarifies and supplements Directive 95/46.EC",* which at the time anticipated in its Article 4 that "*Each Member State shall apply the national provisions it adopts under this Directive to the processing of personal data where: (a) the processing is carried out in the context of the activities of an establishment of the data controller in the territory of the Member State; if the same controller is established on the territory of several Member States, it must take the necessary measures to ensure that each of its establishments complies with the obligations laid down in the applicable national law."* This rule of determining the national law applicable within the Union is no longer

necessary for the application of the rules of the GPDR, which replaced Directive 95/46/EC on the protection of personal data and applies uniformly throughout the territory of the Union, but it is logical that the French legislator has maintained the criterion of territorial application for the specific rules of French law, in particular those transposing the ePrivacy Directive. Therefore, the case law of the CJEU on the application of Article 4 of the former Directive 95/46/EC on the protection of personal data remains relevant, insofar as the French legislator has used the same criteria to define the territorial jurisdiction of the CNIL.

41. Thus, as regards, firstly, the existence of an "*establishment of the data controller on French territory*", the CJEU consistently considered that the concept of establishment should be assessed extensively and that for this purpose it was appropriate to assess both the degree of stability of the installation and the reality of the exercise of the activities in another Member State, taking account of the specific nature of the economic activities and services in question, (see, for example, CJEU, *Weltimmo*, 1 Oct. 2015, C-230/14, pts. 30 and 31). The CJEU also considers that a company, an autonomous legal entity, from the same group as the data controller, may constitute an establishment of the data controller within the meaning of these provisions (CJEU, 13 May 2014, *Google Spain*, C-131/12, pt 48).

42. In the present case, the Restricted Committee notes, first of all, that GOOGLE FRANCE is the registered office of the French subsidiary of GOOGLE LLC, that it has premises located in Paris, that it employs approximately 1,400 people and that, according to its articles of association filed with the registry of the Commercial Court of Paris, its purpose is, in particular, "*the provision of services and/or advice relating to software, the Internet, telematics or online networks, including intermediation in 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 information processing centres*." The Restricted Committee then notes that it emerges from the hearing of 22 July 2020 that GOOGLE FRANCE is responsible for promoting online advertising on behalf of GIL, which is co-contractor of the advertising contracts concluded with French companies or French subsidiaries of foreign companies. Finally, it notes that GOOGLE FRANCE effectively participates in the promotion of products and services designed and developed by GOOGLE LLC, such as *Google Search*, in France, as well as in the advertising activities managed by GIL.

43. As regards, secondly, the existence of processing carried out "*in the context of the activities"* of this establishment, the Restricted Committee notes that the CJEU, in its *Google Spain* judgment of 13 May 2014, considered that the *Google Search* search engine processing was carried out "*in the context of the activities*" of GOOGLE SPAIN, the establishment of GOOGLE INC - which has since become GOOGLE LLC - insofar as GOOGLE SPAIN is intended to promote and sell the advertising spaces offered by this search engine in Spain, which serve to make the service offered by this search engine profitable. If, in the *Google Spain* judgment, the establishment of the data controller was established outside the European Union, the Court subsequently, in its *Facebook Ireland Ltd* judgment of 5 June 2018, applied the same extensive interpretation of the processing "*in the context of the activities*" of a national establishment to a situation where the processing was partly under the responsibility of another institution present within the European Union (CJEU, 5 June 2018, C-210/16, pts 53 et seq). Finally, it should be noted that the interpretation of the concept of processing "*in the context of the activities*" of a national establishment of the data

controller does not affect the fact that the obligations are still owed by the data controller and, where appropriate, its data processor.

44. In this particular case, the Restricted Committee notes, first of all, that it emerges from the communications from GOOGLE FRANCE posted on its website that the latter has the mission of supporting small and medium-sized enterprises in France "*through the development of collaboration tools, advertising solutions or giving them the keys to understanding their markets and their consumers*." It then notes that in its letter of 30 April 2020 GIL stated that "*Google France has a sales team dedicated to the promotion and sale of GIL's services to advertisers and publishers based in France, such as Google Ads."* Finally, it considers that the GOOGLE group states on its website ads.google.com *that "Google Ads allows French companies to highlight their products or services on the search engine and on a large advertising network."*

45. Therefore, the processing consisting of operations involving access or writing of information in the terminals of *Google Search* search engine users residing in France, particularly for advertising purposes, is carried out in the context of the activities of GOOGLE FRANCE on French territory, which is in charge of promoting and marketing GOOGLE products and their advertising solutions in France. The Restricted Committee notes that the two criteria provided for in Article 3 I of the French Data Protection Act are therefore met and that the processing is sufficiently "territorialised" in France to be subject to French law. The application of French law only concerns the reading and writing operations carried out on French territory (Article 4 of Directive 95/46/EC on the protection of personal data stipulated that the law of the Member State only applied to the activities of the establishment "in *the territory of the Member State*"), which corresponds to the data read on the terminals in France or written to these terminals in France. Finally, the Restricted Committee emphasises that this has been a constant position on its part since the emergence of *Google Spain* case law in 2014 (see in particular the CNIL decision, Restricted Committee, 27 April 2017, SAN-2017-006; CNIL, Restricted Committee, 19 December 2018, SAN-2018-011).

46. It follows from the foregoing that French law is applicable and that the CNIL is physically and territorially competent to exercise its powers, including that of taking a sanction measure concerning the processing in question which falls within the scope of the ePrivacy Directive.

B. On the determination of the data controller

47. According to Article 4(7) of the GDPR, the data controller is *"the natural or legal person, public authority, service or other body which, alone or jointly with others, determines the purposes and means of processing*". According to Article 26(1) of the GDPR, "*where two or more data controllers jointly determine the purposes and means of processing, they are joint controllers."*

48. The rapporteur considers that the companies GIL and GOOGLE LLC are jointly responsible for the processing in question pursuant to these provisions when both companies determine the purposes and means of processing consisting of information access or writing operations in the terminals of *Google Search* users residing in France.

49. The companies replied that GIL would be solely responsible for the processing in question. [...] *GIL would be the data controller for most of the Google services and products processing the personal data of users residing in the EEA and Switzerland, including cookies, while GOOGLE LLC is only a subcontractor of the first*. They also

highlight GIL's participation in the various stages and instances of the decision-making process put in place by the group to define the characteristics of cookies deposited on *Google Search* and point out that a series of differences specifically concerning cookies placed on the devices of European users using the *Google Search* engine(different retention periods, compliance with the obligations relating to minors within the meaning of the GDPR, etc.) attests to GIL's decision-making autonomy in this matter.

50. The Restricted Committee notes, first of all, that Articles 4(7) and 26(1) of the GDPR are applicable to this procedure because of the use of the concept of "data controller" in Article 82 of the French Data Protection Act, which is justified by the reference made by Article 2 of the ePrivacy Directive to Directive 95/46/EC on the protection of personal data which the GDPR has replaced.

51. The Restricted Committee then recalls that the CJEU has repeatedly ruled on the concept of joint liability for processing, particularly in its *Jehovah's Witnesses* judgment under which it considered that according to the provisions of Article 2(d), of Directive 95/46 on the protection of personal data, "*the concept of 'data controller' refers to a natural or legal person who, 'either alone or jointly with others', determines the purposes and means of the processing of personal data. This concept does not therefore necessarily refer to a single natural or legal person and may concern several actors involved in this processing, each of which must then be subject to the applicable data protection provisions (...). The objective of this provision being to ensure, by a broad definition of the concept of "controller", effective and comprehensive protection of the data subjects, the existence of joint liability does not necessarily result in an equivalent responsibility, for the same processing of personal data, of the various actors. On the contrary, these actors can be involved at different stages of this processing and according to different degrees, so that the level of responsibility of each of them must be assessed taking into account all the relevant circumstances of the case*" (CJEU, 10 July 2018, C-25 /17, pts. 65 and 66).

52. The Restricted Committee therefore considers that these developments make it useful to clarify the notion of joint processing liability invoked by the rapporteur in respect of the companies GOOGLE LLC and GIL involved in the processing in question.

1. On the liability of GIL

53. The companies argue that GIL acts as the data controller in question, which the rapporteur also acknowledges.

54. The Restricted Committee shares this analysis.

55. Firstly, it notes that during the hearing of 22 July 2020, the representatives of the companies stated that GIL "*participates in the development and supervision of internal policies that guide the products and their design, the implementation of parameters, the determination of confidentiality rules and all the investigations carried out before the launch of the products, in application of the principle of privacy by design*".

56. Secondly, it points out that, in particular with regard to cookies, representatives stated at the hearing that "*GIL applies, for example, shorter cookie retention periods*" compared to other regions of the world and that it "*limits the scope of processing related to the personalisation of advertising in Europe compared to the rest of the world. For example, GIL does not use certain categories of data to make personalised advertising such as the resources of the assumed home. GIL does not set up*

personalised advertising for children whom it assumes are minors within the meaning of the GDPR."

57. It emerges from this that GIL is, at least partly, responsible for the controlled processing consisting of information access or writing operations in the terminals of users residing in France when using the *Google Search* search engine.

2. On the responsibility of GOOGLE LLC

58. The companies contest the rapporteur's analysis that GOOGLE LLC shares responsibility for the processing in question with GIL.

59. The Restricted Committee reveals, firstly, that at the hearing of 22 July 2020, the companies claimed that it is GOOGLE LLC which designs and builds the technology of Google products and that with regard to cookies deposited and read when using the *Google Search* search engine*,* there is no difference in technologies between cookies deposited from the different versions of the search engine.

60. Similarly, the companies, in the information they offer to French users in the rules of use accessible from "google.fr," do not make any distinction in their presentation of cookies used by the GOOGLE group since they indicate using *"different types of cookies for products associated with Google websites and ads."*

61. Second, the Restricted Committee notes that despite GIL's indisputable participation in the various stages and proceedings related to the definition of how cookies are implemented on *Google Search*, the matrix organisation described by the companies at the hearing of 22 July 2020 revealed that GOOGLE LLC is also represented in the bodies adopting decisions on the deployment of products within the EEA and Switzerland and on the processing of personal data of users residing therein and that it has a significant influence within it. [...]

62. Similarly, the Restricted Committee notes that the data protection officer appointed by GIL (hereinafter "DPO") and his/her deputy DPOs are based in California as employees of GOOGLE LLC. In this respect, it emerges from the statements of the representatives of the companies themselves made at the hearing of 22 July 2020 that the GOOGLE Group made this choice so that the DPO of GIL is "*as close as possible to the decision-makers of the company*."

63. Thirdly, the Restricted Committee considers that the differences that the companies highlight between cookies deposited on European users' terminals and those intended for other users (different retention periods, compliance with obligations relating to minors within the meaning of the GDPR, etc.) are only implementation differences that do not call into question the overall advertising purpose for which they are used, this purpose being determined in particular by GOOGLE LLC. Although these differences are mainly intended to ensure the compliance with European law of the cookies deposited on European users' terminals, they do not show, as such, GIL's decision-making autonomy over all the essential characteristics of the means and purposes of the processing in question.

64. Fourthly, the Restricted Committee notes that although under a formal reading of the subcontracting agreement of 11 December 2018, GOOGLE LLC would act as a subcontractor of GIL in processing the data of European users collected via cookies, the actual involvement of GOOGLE LLC in the processing in question goes well beyond

that of a subcontractor that merely carries out processing operations on behalf of GIL and on its sole instructions.

65. The Restricted Committee considers that these latter developments show that, despite the entry into force of the subcontracting agreement on 22 January 2019, GOOGLE LLC continues to play a fundamental role in the whole decision-making process relating to the processing in question. It also determines the means of processing since, as mentioned above, it is it that designs and builds the cookie technology deposited on European users' terminals. Therefore, the Restricted Committee is of the opinion that it should also be ascribed the status of data controller.

66. It emerges from all of the foregoing that GOOGLE LLC and GIL jointly determine the purposes and means of processing consisting of information access or writing in the terminals of users residing in France when using the *Google Search* search engine.

C. On the breach of cookie obligations

67. According to Article 82 of the French Data Protection Act (formerly Article 32, paragraph II of the same Act) "*any subscriber or user of an electronic communications service must be informed in a clear and complete manner, unless it has been previously informed by the data controller or its representative about: 1) the purpose of any action aimed at electronically accessing information already stored in his or her electronic communications terminal equipment, or writing information to this equipment; 2° The means available to him or her to object to it.*

Such access or writing may only take place provided that, after receiving such information, the subscriber or user has expressed his or her consent which may result from the appropriate parameters of his/her connection device or any other device under his or her control.

These provisions shall not apply if access to the information stored in the user's terminal equipment or the writing of information to the user's terminal equipment: 1° Is for the exclusive purpose of allowing or facilitating communication by electronic means; 2° Or is strictly necessary for the provision of an online communication service at the express request of the user".

68. In the present case, the members of the delegation found within the framework of the online investigation of 16 March 2020 that, upon arrival on the "google.fr" website, seven cookies were placed on their terminal equipment, before any action by them. In its letter of 30 April 2020, GIL indicated that four of these seven cookies have an advertising purpose.

1. On the lack of information provided to persons

69. The rapporteur argues that the information provided to users residing in France on the information access or write operations on their terminals when using the *Google Search* search engine was insufficient and unclear, in breach of the requirements of Article 82 of the French Data Protection Act.

70. GIL, which is solely responsible for the processing in question, replied that no legal provision prescribes specific practical terms and conditions for the data controller to inform its users, when they are actually informed, and argues that they have opted for level-based information, as recommended by the Article 29 Group (now the EDPB

since the entry into force of the GDPR) in its guidelines on transparency within the meaning of the Regulation, adopted in their revised version on 11 April 2018.

71. It thus argues that its first level of information complied with the requirements of transparency and accessibility of information as it redirected users to the rest of the information, particularly the part relating to cookies. It argues that it provided specific information on the processing of cookies in the context of the second level, namely their purposes and the means available to the user to object to them.

72. **Firstly**, the Restricted Committee recalls that, pursuant to Article 82 of the French Data Protection Act, access to or writing of cookies in a user's terminal can only take place on condition that the user has consented to it "*after having received" "clear and complete"* information on the purposes of the cookies deposited and the means available to him/her to oppose them.

73. The Restricted Committee considers that, for the purposes of interpreting these provisions, it is relevant to refer to recital 25 of the ePrivacy Directive, which states that "*the methods used to provide information, offer a right of refusal or seek consent should be as user-friendly as possible*".

74. The Restricted Committee also stresses that the CNIL has adopted several flexible legal instruments detailing the obligations of data controllers in terms of trackers, including, in particular, a recommendation of 5 December 2013 and the guidelines of 4 July 2019, in force on the date of online monitoring. Although of no binding value, these instruments offer useful clarification to data controllers on the implementation of concrete measures to ensure compliance with the provisions of the French Data Protection Act relating to trackers in order either to implement these measures or to implement measures having equivalent effect.

75. In this regard, in Article 2 of its 2013 recommendation, the Commission noted in particular that the information should be "*prior"* to obtaining consent, but also "*visible, highlighted and complete*". Accordingly, the Commission recommended that data controllers implement a two-stage consent mechanism:

- first step: "*the user who visits a publisher's website (home page or secondary page of the site) must be informed by the appearance of a banner: about the precise purposes of the cookies used; the possibility of objecting to these cookies and changing the settings by clicking on a link in the banner*";
- second step: "*people must be informed in a simple and intelligible manner of the solutions made available to them to accept or refuse all or part of the Cookies requiring consent: for all the technologies referred to in the aforementioned Article 32-II; by categories of purposes: in particular advertising, social media buttons and audience measurement."*

76. Such recommendations were included in the guidelines of 4 July 2019, in equivalent terms.

77. In the present case, the Restricted Committee notes, firstly, that it emerges from the online investigation of 16 March 2020 that when a user arrived on the "google.fr" page, an information banner was displayed at the foot of the page, including the following wording "*Reminder of Google's privacy rules"* in front of which appeared two buttons entitled "*Remind me later*" or "*View now"*.

78. The Restricted Committee thus states that no information relating to the deposit of cookies on terminal equipment was provided on the banner at this stage to the data subjects, even though cookies for advertising purposes had already been placed on their terminal upon arrival on the "google.fr" page. It adds that the mere reference *"to the privacy rules"* was far from being explicit enough at this stage to allow people reading this banner to know that information relating to cookies was available further in the navigation route, to meet their expectations in this regard and to meet the requirements of Article 82 of the law on data processing and freedoms.

79. The Restricted Committee points out, second, that it emerges from the findings made during the on-line investigation that the confidentiality rules which opened in pop-up windows when people clicked on the "*View Now*" button still did not contain any greater detail on the use of cookies and other trackers, despite general information about personal data processed by Google services.

80. In addition, individuals were still not informed at this stage that they could refuse cookies on their terminal equipment, as they were only advised that they could "*manage search results based on the search activity in this browser*" or "*manage the types of Google ads that appear*."

81. Finally, the information provided in this pop-up window did not, again, contain any explicit reference to the privacy rules applicable to cookies. Although the companies ensure that the latter are properly provided to the user, the Restricted Committee reveals that the information architecture put in place by the companies was such that in order to reach it users had to understand by themselves that they had to scroll through the content of the entire pop-up window, without clicking on one of the five hypertext links contained in this content ("*Our regulations", "Learn more", "Change search parameters", "Change ad settings", "Change Youtube settings"),* and finally click on the *"Other Options"* button at the bottom of the window.

82. Therefore, the Restricted Committee notes that the information provided by the companies, both within the framework of the banner and in the pop-up window, did not allow users residing in France, when they arrive on the *Google Search search engine,* to be clearly informed beforehand about the existence of information access and writing operations in their terminals or, therefore, the purpose of these and the means available to them to refuse them.

83. **Secondly**, the Restricted Committee notes that since the initiation of the sanction procedure, companies have made a series of changes to how they use cookies.

84. The first update was first made available to users of the search engine not connected to a Google account as of 17 August 2020 and fully deployed for all users on 10 September 2020. [...]

85. GIL has highlighted that [...], the new information provided to users meets the requirements of Article 82 of the French Data Protection Act.

86. The Restricted Committee indicates that people who go to the site "google.fr" now see, in the middle of their screen, before being able to access the search engine, a pop-up window titled "*Before continuing*" that contains the following detail: *Google uses cookies and other data to provide, manage and improve its services and ads. If you accept, we will customize the content and ads you see based on your activity on Google services such as search, Maps and YouTube. Some of our partners also assess how our services are used. Click on "more information" to discover the options*

available to you or visit the g.co/privacytools page at any time," the terms "*cookies*", "*partners*" and "*g.co/privacytools"* being clickable links. At the bottom of this pop-up window, there are two buttons entitled "*More information*" and "*I accept*".

87. The Restricted Committee notes that the companies now provide prior information on cookies in that users visiting the "google.fr" page are now openly and directly informed of the fact that the companies use cookies, which is an undeniable step forward in relation to previous information banners.

88. However, the Restricted Committee considers that the information provided is still not "*clear and complete*" within the meaning of Article 82 of the French Data Protection Act, insofar as this information does not inform the user about all the purposes of the cookies deposited and the means available to him or her to oppose it.

89. Thus, the presentation of the different purposes mentioned in this banner remains too general for the users to easily and clearly be able to understand for what specific uses cookies are deposited on their terminals.

90. In particular, the user is unable to understand the type of content and ads that may be personalised according to his/her behaviour - for example, in the case of geolocalised advertising - the exact nature of the Google services that use customization or the fact that this customization works between these different services.

91. The Restricted Committee also considers that the information provided is incomplete since users are still not informed about their ability to refuse these cookies, nor on the means available to them for this. Indeed, the terms *"*options" *or "More information*" are not explicit enough to enable users to directly understand the extent of their rights in relation to cookies placed on their terminals.

92. [...]

93. With regard to all of the above, the Restricted Committee considers that a breach of the provisions relating to the provision of information to persons in Article 82 of the French Data Protection Act is constituted.

94. The Restricted Committee notes that this failure persists on the date of the termination of the investigation, as the changes made by the companies since the initiation of the sanction procedure did not enable this information to comply with the requirements of Article 82 of the French Data Protection Act.

2. On the failure to obtain consent from individuals prior to depositing cookies on their terminal and the impossibility for people of refusing the deposit of all cookies

a. On the failure to obtain consent from individuals prior to the deposit of cookies on their terminals

95. The rapporteur argues that the companies violated the provisions of Article 82 of the French Data Protection Act relating to the consent of persons insofar as, at the time of the on-line investigation of 16 March 2020, it was found that upon arrival of the user on the "google.fr" page, several cookies pursuing an advertising purpose were deposited on his/her terminal before any action by him or her.

96. GIL does not dispute this aspect of the breach.

97. The Restricted Committee notes that according to Article 82 of the French Data Protection Act, "*access or writing of [cookies] can only take place provided that the subscriber or user has expressed his or her consent, after receiving this information, which may result from the appropriate settings of his/her connection device or any other device under his/her control*". Only cookies whose exclusive purpose is to enable or facilitate electronic communication, or those strictly necessary for the provision of an online communication service at the express request of the user are exempt from this obligation.

98. In the present case, the Restricted Committee emphasises that the online investigation of 16 March 2020 found that upon arrival on the page "google.fr" seven cookies were automatically deposited on the delegation's terminal, before any action on its part.

99. The Restricted Committee notes that GIL indicated in its letter of 30 April 2020 that four of the seven cookies deposited, namely the cookies "NID", "IDE", "ANID" and "1P_JAR", have an advertising purpose.

100. Since these four cookies do not have the exclusive purpose of allowing or facilitating electronic communication nor are strictly necessary for the provision of an online communication service at the express request of the user, the Restricted Committee considers that the companies should have obtained prior consent from the users before filing them on the user's terminal.

101. In view of the above, the Restricted Committee considers that a breach of the obligation provided for in Article 82 of the French Data Protection Act to obtain prior consent from individuals before submitting cookies on their terminal is constituted.

102. It nevertheless points out that during the sanction procedure the companies made changes to the "google.fr" page, which, since 10 September 2020, has stopped the automatic deposit of these four cookies upon the user's arrival on the page.

b. On the partially deficient nature of Google's "objection" mechanism.

103. The rapporteur argues that, in addition to the fact that consent, when necessary, was not obtained, the system put in place by the companies to object to the advertising cookies placed on the user's terminal also proved to be partially deficient, in breach of the requirements of Article 82 of the French Data Protection Act.

104. GIL disputes this assessment and replied that it "*took account, and continues to take account, of the user's choice to withdraw consent*" through a mechanism allowing users to "*personalize ads*" on Google search and on the web.

105. In the present case, the Restricted Committee states first of all that since the companies deposit these cookies for advertising purposes even before having obtained the consent of users (no "*opt-in"*), the use of the phrase *"withdraw consent*" by GIL is particularly abusive. Therefore, the companies could at most highlight the fact that they have put in place a mechanism to oppose these cookies (*"opt-out"*).

106. Moreover, the Restricted Committee reveals that it emerges from the online investigation of 16 March 2020 that when people clicked on the *"View Now"* button on the information banner at the foot of the "google.fr" page, a window appeared in which they could click on the *"Change Ad Settings"* button, then disable *"Ad Personalisation on Google Search"* and *"Personalisation of ads on the web"* with sliding buttons. When

people disabled ad personalisation through this sliding button, a new window was displayed asking them to confirm their choice and telling them that ads would continue to display but would no longer be personalised.

107. The Restricted Committee notes that after deactivating ad personalisation on Google search, the delegation found, by continuing to browse the site, that several of these advertising cookies remained stored on its terminal equipment. It points out, in this respect, that at least one of these cookies did not belong to the category of so-called objection cookies, which remain stored on the user's terminal with the "*opt-out*" value to indicate to the server of the domain to which they are linked that the user has expressed his/her rejection of future deposits of identical cookies from this same domain.

108. As GIL itself acknowledged, in its letter of 30 April 2020, that the cookie in question is for an exclusively advertising purpose, the Restricted Committee concludes that the "objection" mechanism put in place by the companies was partially defective. Indeed, since this cookie remained deposited on the user's terminal without being assigned the "*opt-out*" value, the information it contained continued to be systematically read by the server of the domain to which the cookie is linked (for example "google.com" or "google.fr") during each new interaction with the domain concerned.

109. In view of the above, the Restricted Committee considers that the companies have breached the obligation laid down in Article 82 of the French Data Protection Act to put in place an effective mechanism allowing users to reject or no longer read cookies requiring their consent.

III. On corrective measures and publicity

110. According to Article 20, paragraph III of the French Data Protection Act:

"*When the data controller or its data processor fails to comply with the obligations resulting from (...) this law, the Chair of the CNIL may also, if applicable, after sending the warning provided for in point I of this article or, where applicable, in addition to a formal notice provided for in II, contact the Restricted Committee of the agency with a view to the imposition, after adversarial procedure, of one or more of the following measures: [...] 2° an injunction to bring the processing into compliance with the obligations arising from (...) this law or to comply with the requests made by the data subject for the exercise of his/her rights, which may be accompanied, except in cases where the processing is carried out by the State, by a periodic penalty, the amount of which may not exceed €100,000 per day of delay from the date set by the Restricted Committee; [...] 7° With the exception of cases where the processing is implemented by the State, an administrative fine not exceeding 10 million euros or, in the case of a company, 2% of the total worldwide annual turnover of the previous financial year, the highest amount being used. In the cases mentioned in 5 and 6 of Article 83 of Regulation (EU) 2016/679 of 27 April 2016, these upper limits shall be increased, respectively, to 20 million euros and 4 % of the said turnover. In determining the amount of the fine, the Restricted Committee shall take into account the criteria specified in the same Article 83.*"

111. Article 83 of the GDPR, as referred to in Article 20, paragraph III of the French Data Protection Act, states:

"*1. Each supervisory authority shall ensure that the administrative fines imposed under this Article for infringements of this Regulation referred to in paragraphs 4, 5 and 6 are, in each case, effective, proportionate and dissuasive.*
2. Depending on the specific characteristics of each case, administrative fines shall be imposed in addition to or instead of the measures referred to in Article 58(2), sections (a) to (h), and (j). In deciding whether to impose an administrative fine and on the amount of the administrative fine, the following shall be taken into account in each case:
a) the nature, seriousness and duration of the breach, taking into account the nature, scope or purpose of the processing concerned, the number of data subjects affected and the level of damage they have suffered;
b) whether the breach was committed deliberately or due to negligence;
c) any action taken by the data controller or processor to mitigate the damage suffered by the data subjects;
d) the degree of responsibility of the data controller or processor, taking into account the technical and organisational measures they have implemented pursuant to Articles 25 and 32;
e) any relevant breach previously committed by the data controller or processor;
f) the degree of cooperation established with the supervisory authority to remedy the breach and mitigate any of its adverse effects;
g) the categories of personal data involved in the breach;
h) how the supervisory authority became aware of the breach, in particular whether, and to what extent, the controller or processor provided notification of the breach;
i) where measures referred to in Article 58(2) have previously been ordered against the data controller or processor concerned for the same purpose, compliance with those measures;
j) the application of codes of conduct approved under section 40 or certification mechanisms approved pursuant to section 42; and
k) any other aggravating or mitigating circumstances applicable to the circumstances of the case, such as financial benefits obtained or losses avoided, directly or indirectly, as a result of the breach." "

A. On the legality of these sanction proceedings

112. The companies argue, first of all, that there is nothing to justify the CNIL directly initiating a sanction procedure against them without prior formal notice being sent to them.

113. They argue, then, that in view of the instability of the legal framework relating to cookies, the imposition of a financial penalty for the facts in question would violate the principle of legality of offences and penalties, guaranteed in Article 8 of the Declaration of Human and Citizen's Rights. In particular, they argue that the characterisation of breaches is based on the application of guidelines whose meaning was not mandatory at the time of the on-line investigation of 16 March 2020, the CNIL having granted, in July 2019, an adjustment period of twelve months from the publication of the guidelines on 4 July 2019 so that the data controllers could comply with them.

114. The Restricted Committee recalled, **first of all**, that in accordance with Article 20 of the French Data Protection Act, the Chair of the CNIL is not required to send a formal notice to the organisation before initiating sanction proceedings against it. It adds that the possibility of directly initiating a sanction procedure was confirmed by the Council of State (see, in particular, EC, 4 Nov. 2020, req. No. 433311, pt. 3).

115. **Secondly**, the Restricted Committee recalls, first of all, that the various aspects of the breach of which the companies stand accused have as their sole legal basis the provisions of Article 82 of the French Data Protection Act which transposed the provisions on cookies and tracers of the ePrivacy Directive. It states that although these prescriptions were previously specified in Article 32, paragraph II, of the same law, before the text was recast as a whole by Order No. 2018-1125 of 12 December 2018, their content has remained unchanged since 2011.

116. The Restricted Committee then notes that on the basis of these provisions, it has already adopted several sanction decisions, sometimes concerning identical practices, some of which were moreover made public (see, in this sense, deliberation no. SAN-2016-204 of 7 July 2016 and deliberation no. SAN-2017-006 of 27 April 2017).

117. Finally, the Restricted Committee emphasises that although the CNIL communications relating to cookies and trackers recently experienced certain changes, the practices at the root of the different aspects of the breach of which the two companies stand accused in this case have been continually considered non-compliant by the CNIL, whether by the first recommendation of 5 December 2013 or by the guidelines of 4 July 2019, in force on the date of the findings made by the CNIL delegation. It notes, for information purposes, that the second recommendation and the latest version of the guidelines, dated 17 September 2020 and published on 1 October 2020, also form part of this continuity. In any event, as recalled above, the non-compliant practices identified in this procedure are assessed in the light of the French Data Protection Act and not the guidelines or recommendations of the CNIL.

118. With regard in particular to the deadline for adaptation from the publication of the guidelines of 4 July 2019 invoked by the companies, the Restricted Committee notes that, in this case, it is inoperative, since the practices in question relate precisely to the obligations which the CNIL had taken care, in its press release published on its website on 18 July 2019, to specify remained enforceable against data controllers, informing them that "*this period of adaptation [will not] prevent it from fully monitoring compliance with other obligations that have not been subject to any change and, where appropriate, adopting corrective measures to protect the privacy of Internet users. In particular, operators must respect the prior consent to the deposit of trackers [...] and must provide a device for withdrawing consent that is easy to access and use*."

119. Due to the permanence of the legal basis and the provisions in respect of which the breach is constituted and the consistency of the position of the CNIL with regard to the practices which are the subject of these proceedings, the Restricted Committee considers that the imposition of an administrative fine against each of the companies without prior formal notice would not contravene the principle of legality of offences and penalties.

B. On the issue of administrative fines and their amount

120. The companies argue that the amount of the fine proposed by the rapporteur is disproportionate and considered on a discretionary basis since, contrary to other French or European administrative authorities with a power of sanction, the CNIL has not provided guidelines for the calculation of its fines.

121. They add that this amount should be significantly reduced in particular pursuant to paragraph (f) of Article 83(2) of the Regulation in order to take into account their

strong cooperation with the CNIL since the start of the procedure in order to end the breach and mitigate any negative effects.

122. The Restricted Committee recalls, on a general basis, that Article 20(III) of the French Data Protection Act gives it authority to impose various penalties, including administrative fines, the maximum amount of which may be equal to 2% of the data controller's total worldwide annual turnover in the previous financial year. It adds that the determination of the amount of these fines is assessed in light of the criteria specified in Article 83 of the GDPR.

123. **First,** the Restricted Committee emphasises that, in the present case, it is appropriate to apply the criterion set out in paragraph (a) of section 83 (2) of the Regulations relating to the seriousness of the breach given the nature and scope of the processing.

124. Thus, the Restricted Committee notes that the *Google Search* search engine, from which the cookies in question are deposited, has considerable reach in France, the Autorité de la concurrence [Competition Authority] noted that it dominated the online search market with a market share of more than 90% (ADLC, 19 Dec. 2019, Dec. 19-D-26, pt. 313).

125. It points out that the *Google Search* search engine having at least 47 million users in France, which corresponds to 70% of the French population, the number of people involved in the processing is extremely large.

126. In view of the structuring of this market, the Restricted Committee considers that the seriousness of the breach is characterised by the fact that in failing to comply with several of the requirements of Article 82 of the French Data Protection Act, the companies deprive *Google Search* users residing in France of the possibility of choosing between search methods that further protect the confidentiality of their data and methods for better customization of the service, thus reducing people's choice and information autonomy.

127. Finally, the Restricted Committee notes that the breach is all the more serious with regard to the role played by search engines in access to information, *a fortiori* through the one developed by the companies. In this respect, the power of this dominant position gives an unmatched value to the cookies deposited by companies from their search engine because they guarantee third-party websites reach the maximum number of users and, in the case of tracking cookies, being able to monitor them with the greatest effectiveness.

128. **Second,** the Restricted Committee considers that the criterion set out in paragraph (k) of section 83(2) of the Regulation related to financial benefits should be applied as a result of the breach.

129. Thus, it points out that the GOOGLE Group makes most of its profits in the two main segments of the online advertising market, which consist of display advertising (*Display Advertising)* and contextual advertising (*Search Advertising*), in which cookies play an undeniable, but different role.

130. First of all, in the display advertising segment, the purpose of which is to display content in a specific area of a website and in which cookies and trackers are used to identify users during their browsing to offer them the most personalized content, it is established that the GOOGLE group offers products at all levels of the value chain of this segment and that its products are systematically dominant on these different levels. In this regard, the GOOGLE Group indicates, on one of its websites, that it offers

an advertising ecosystem accessible from its tools and services capable of touching more than 2 million sites, videos and applications and more than 90% of Internet users worldwide.

131. Second, the contextual advertising segment, whose purpose is to display sponsored results based on the key words typed by users in a search engine, also requires the use of cookies in its practical implementation, for example in order to determine the geographical location of users and, therefore, adapt the ads offered according to that location. In this respect, it emerges from the annual report of ALPHABET for 2019 that this segment in itself makes up, through the *Google Ads service in particular* - formerly *Adwords* - 61% of the GOOGLE Group's turnover.

132. The Restricted Committee is not aware of the amount of profit earned by the GOOGLE Group from the collection and use of cookies on the French market via the income generated by advertising targeted at French Internet users, since the companies in question did not provide this information although they were invited to do so within the framework of the investigation of the case. As an order of magnitude, and in order to assess the proportionality of the penalty amount proposed by the rapporteur, it notes that a proportional approximation based on publicly available figures would lead to an estimate that France contributed between 680 and 755 million dollars to the annual net profits of ALPHABET, the parent company of the GOOGLE Group, which, at the current exchange rate, is between €580 million and €640 million.

133. **Thirdly**, with regard to the criterion set out in Article 83(2)(f) of the Regulation invoked by the companies in support of a reduction in the fine proposed against them by the rapporteur, the Restricted Committee notes that it follows from Article 18 of the French Data Protection Act that data controllers "*cannot object to the Commission's action"* and that they must take *"all appropriate measures to facilitate its task*". Cooperation with the supervisory authority is thus first of all a legal obligation.

134. In order for such cooperation to potentially become a mitigating circumstance to characterise the breach and, therefore, to contribute to the reduction of the fine initially envisaged, the Restricted Committee emphasises that the controller must not only have fulfilled its obligation under the aforementioned Article 18 but also have particularly diligently satisfied the requests of the supervisory authority during the investigation phase and implemented any measure in its power to minimise the impact of the breach on the data subjects.

135. In the present case, the Restricted Committee notes that the companies never communicated to the Commission the advertising revenues of GOOGLE LLC and GIL generated in France, financial information which however was repeatedly requested by the rapporteur, in advance of and following the hearing of 22 July 2020. Consequently, the cooperation they have demonstrated should have no impact on the amount of their fine since it is barely compliant with what the CNIL is entitled to expect from a data controller.

136. **In conclusion,** the Restricted Committee recalls that the breach of Article 82 of the French Data Protection Act is in this case triply characterised, since by automatically depositing the cookies in question on the terminals of users residing in France when they arrived on the "google.fr" page, the companies did not meet the requirement for the prior provision of clear and complete information to users, or the mandatory collection of their consent and that, in addition, the mechanism for objecting to these cookies proved to be partially deficient.

137. It points out that due to the reach of the *Google Search* search engine in France these practices have affected almost fifty million users residing in France and that the companies have made considerable profits from the advertising revenues indirectly generated by the data collected by these cookies.

138. Pursuant to the provisions of Article 20, paragraph III of the French Data Protection Act, the companies incur a financial penalty of up to 2% of their turnover, which was €38 billion in 2018 for GIL and $160 billion in 2019 for GOOGLE LLC.

139. Therefore, in view of the respective responsibilities of the companies, their financial capacity and the relevant criteria of Article 83(2) of the Regulation referred to above, the Restricted Committee considers that a fine of €60,000,000 against GOOGLE LLC and a fine of €40,000,000 against GIL appears to be effective, proportionate and dissuasive, in accordance with the requirements of Article 83(1) of that Regulation.

C. On the issue of an injunction

140. The companies argue that the requests made under the injunction proposed by the rapporteur relating in particular to the provision of information to individuals and the prior filing of cookies subject to consent have become irrelevant [...]

141. They also challenge the amount of the periodic penalty proposed in addition to the injunctions since the rapporteur does not demonstrate the need for this penalty or the proportionality of its amount, which is the maximum amount provided for by the French Data Protection Act.

142. **Firstly**, the Restricted Committee reveals that, in the current state of the information provided to users, the companies still do not inform users residing in France, in a clear and complete manner, of the purposes of all cookies subject to consent and of the means available to them to refuse them, [...]. It therefore considers it necessary to issue an injunction so that the companies comply with the relevant obligations.

143. **Secondly**, the Restricted Committee points out that a periodic penalty is a financial penalty per day of delay to be paid by the data controller in the event of non-compliance with the injunction at the end of the stipulated time limit. Its imposition may therefore sometimes be necessary to ensure compliance of the data controller within a certain period of time.

144. The Restricted Committee adds that for the purpose of preserving its comminatory function, its amount must be both proportionate to the seriousness of the alleged breaches but also adapted to the financial capacity of the data controller. It further notes that in certain cases, such as the present case, this amount must be all the higher in that the breach to which the injunction relates indirectly plays a role in the profits generated by the data controller.

145. In the light of these two elements, the Restricted Committee considers it proportionate that a penalty amounting to 100,000 euros per day of delay and payable at the end of a three-month period has been imposed. The time limit for execution is also reasonable given the technical means available to the companies and the adaptability they cite.

D. On publicity

146. The Restricted Committee considers that the publication of this Decision is justified in view of the seriousness of the breach in question, the scope of the processing and the number of data subjects.

147. The Restricted Committee considers that this measure will alert French users of the *Google Search* search engine of the characterization of the breach of Article 82 of the French Data Protection Act in its various aspects and inform them of the persistence of the breach on the day of this deliberation and the injunction against the companies to remedy it. It adds that this measure is made all the more necessary since the disputed cookies were deposited without the users' knowledge, so that only publication of this decision will allow them to learn about the practices in question.

148. Finally, the measure is not disproportionate since the decision will no longer identify the companies by name upon expiry of a period of two years following its publication.

FOR THESE REASONS

The CNIL's Restricted Committee, after having deliberated, decides to:

- **impose an administrative fine of €60,000,000 (sixty million euros) on GOOGLE LLC for breach of Article 82 of the French Data Protection Act;**

- **impose an administrative fine on GOOGLE IRELAND LIMITED amounting to €40,000,000 (forty million euros) for breach of Article 82 of the French Data Protection Act;**

- **issue an injunction against GOOGLE LLC and GOOGLE IRELAND LIMITED to bring the processing into compliance with the obligations arising from Article 82 of the French Data Protection Act, in particular:**
  - **Informing the data subjects in advance and in a clear and complete manner, for example on the information banner on the homepage of the "google.fr" website:**
    - **of the purposes of all cookies subject to consent,**
    - **of the means available to them to refuse them;**

- **associate the injunction with a periodic penalty payment of €100,000 (one hundred thousand euros) per day of delay at the end of a period of three months following notification of this decision, with proof of compliance to be sent to the Restricted Committee within this period;**

- **send this decision to GOOGLE FRANCE SARL with a view to execution of this decision;**

- **make its deliberation public, on the CNIL website and on the Légifrance website, the deliberation no longer identifying the companies by name upon expiry of a period of two years following its publication.**

The Chair

Alexandre LINDEN

This decision may be appealed to the French Council of State within four months of its notification.