Deliberation of the Restricted Committee n° SAN-2020-013 of 7 December 2020 concerning AMAZON EUROPE CORE

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The Commission Nationale de l'Informatique et des libertés [National Commission for Information Technology and Freedoms], meeting in its Restricted Committee consisting of Mr Alexandre LINDEN, Chair, Philippe-Pierre CABOURDIN, Vice-Chair, and Mr 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 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on the processing of personal data and the protection of privacy in the electronic communications sector;

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. 2019-224C of 29 November 2019 of CNIL's Chair to instruct the general secretary to carry out or have a third party carry out an assignment to verify the processing implemented via the domain "amazon.fr" or related to processing performed from it;

Having regard to decision no. 2020-042C of 27 December 2019 of CNIL's Chair to instruct the general secretary to carry out or have a third party carry out an assignment to verify the processing implemented by the company AMAZON ONLINE France SAS;

Having regard to the decision of CNIL's Chair appointing a rapporteur before the Restricted Committee of 23 March 2020;

Having regard to the report of Éric PÉRÈS, the commissioner rapporteur, notified to AMAZON EUROPE CORE on 17 July 2020;

Having regard to the written observations made by the counsel of AMAZON EUROPE CORE on 15 September 2020;

Having regard to the rapporteur's response to these comments notified to AMAZON EUROPE CORE on 9 October 2020;

Having regard to the new written observations made by the counsel of AMAZON EUROPE CORE, received on 2 November 2020;

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

Having regard to the letter sent by AMAZON EUROPE CORE to the Chair of the Restricted Committee on 17 November 2020;

Having regard to the other documents in the file;

The following were present at the Restricted Committee session on 12 November 2020:
- Mr Éric PÉRÈS, Commissioner, heard in his report;

In the capacity of representatives of AMAZON EUROPE CORE:
- [...]

AMAZON EUROPE CORE having last spoken;

The Restricted Committee has adopted the following decision:

I. Facts and proceedings

1. AMAZON EUROPE CORE (hereinafter "the company" or "AEC") is a company incorporated under Luxembourg law whose registered office is located at 5 rue Plaetis, L 2338 in Luxembourg, forming part of the AMAZON group. Its main activity is the operation of the European "Amazon" websites that enable the online sale of merchant goods. For the purposes of its activities particularly in France, the company operates the Amazon.fr website accessible from the URL https://www.amazon.fr/. In 2019, it had a turnover of approximately 7.7 billion euros.

2. Pursuant to decisions no. 2019-224C of 29 November 2019 and no. 2020-042C of 27 December 2019 of the Chair of the Commission Nationale de l'Informatique et des libertés (hereinafter "the CNIL" or "the Commission"), a delegation of the CNIL carried out the following investigation operations:
   - three online investigations on the Amazon.fr website carried out on 12 December 2019, 6 March 2020 and 19 May 2020;
   - an investigation carried out on 30 January 2020 at the premises of AMAZON ONLINE France SAS, a French establishment of the AMAZON group;
   - [...]

3. The purpose of these missions was to verify compliance by the company with 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" or "Law of 6 January

1978"). In particular, it was to carry out investigations in connection with the processing operations consisting of access or write operations on the terminals of Internet users residing in France during their visit to the Amazon.fr website.

4. During these investigations, several exchanges took place between, on the one hand, AEC and AMAZON ONLINE France SAS and, on the other hand, the investigatory delegation of the CNIL.

5. In order to examine these matters, the Chair of the Agency appointed Éric PÉRÈS as rapporteur, on 23 March 2020, on the basis of Article 22 of the amended law of 6 January 1978.

6. At the end of his investigation, the rapporteur had a bailiff notify AEC, on 17 July 2020, of a report detailing the breaches of the GDPR that he considered were constituted in this case. Also attached to the report was an invitation to the Restricted Committee session of 15 October 2020, indicating to the company that it could submit its observations in response by 8 September 2020.

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

8. By letter dated 19 August 2020, the company requested an additional period of time from the Chair of the training body to submit its observations in response to the rapporteur's report. On 1 September 2020, the Chair of the Restricted Committee granted an additional period of one week to the company.

9. On 15 September 2020, through its counsel, the company made observations in response to the rapporteur's report and made a request that the meeting before the Restricted Committee be held in camera. It renewed its application on 13 October 2020.

10. By email of 24 September 2020, on the basis of Article 40, paragraph 4, of Decree No 2019-536 of 29 May 2019 adopted for the application of the French Data Protection Act (hereinafter "the Decree of 19 May 2019"), the rapporteur asked the Chair of the Restricted Committee for an additional period of nine days to respond to the company's observations, which was granted to him on 28 September 2020. The company was informed of this on the same day.

11. On 1 October 2020, the Secretary-General of the CNIL informed the company that the Restricted Committee session initially scheduled for 15 October was postponed to 12 November 2020.

12. The rapporteur responded to the company's comments on 9 October 2020.

13. On 22 October 2020, the Chair of the Restricted Committee granted the company's request for in camera proceedings on the grounds that [...]

14. On 2 November 2020, the company submitted further observations in response to those of the rapporteur.

15. On 4 November 2020, the company requested the postponement of the Restricted Committee session scheduled for 12 November. By letter of 5 November, the Chair of the Restricted Committee refused to grant this request.

16. The company and the rapporteur presented oral observations at the Restricted Committee meeting, which took place on 12 November 2020.

17. On 17 November 2020, the company, by letter to the Chair of the Restricted Committee, indicated that some of its representatives attending the session through a videoconferencing system had not been able to hear all the exchanges between their counsel and the rapporteur, [...]

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

18. Under Article 16 of the "French Data Protection Act, "*the Restricted Committee shall take measures and impose sanctions against data controllers or processors who do not comply with the obligations arising [...] from this law"*. Under Article 20(III) of the same Law, "*where the 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 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 Regulation (EU) 2016/679 of 27 April 2016 or this Law or to comply with the requests submitted by the data subject for the exercise of his or her rights, which may be accompanied, except in cases where the processing is implemented by the State, with a periodic penalty not exceeding €100,000 per day of delay from the date set by the Restricted Committee; [...] an administrative fine that may not exceed 10 million euros or, for a company, 2% of its total global annual turnover from the previous financial year, the highest amount being used. "*

19. Pursuant to Article 5(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on the processing of personal data and the protection of privacy in the electronic communications sector (hereinafter referred to as the 'ePrivacy Directive') *"Member States shall ensure that the storage of information, or access to information already stored, in the terminal equipment of a subscriber or user, shall only be permitted provided that the subscriber or user has given his or her consent, after having received clear and complete information in accordance with Directive 95/46/EC, inter alia on the purposes of the processing [...]"*

20. These provisions have been transposed into national law in Article 82 of the French Data Protection Act, in Chapter IV of this law, relating to "*rights and obligations specific to processing in the electronic communications sector*". This section provides that *"A subscriber or user of an electronic communications service must be*

informed in a clear and complete manner, unless he or she has been previously informed by the data controller or their representative:
1° Of the purpose of any action aimed at electronically accessing information already stored in their electronic communications terminal equipment, or writing information to this equipment;
2° Of how he or she can object to it.
Such access or writing may only take place provided that the subscriber or user has expressed, after receiving such information, his or her consent which may come 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° Either is for the exclusive purpose of enabling 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."

21. The rapporteur considers that, pursuant to these provisions, the CNIL is materially competent to investigate and initiate a sanction procedure concerning the information access or write operations implemented by the company in the terminals of users of the Amazon.fr website in France.

22. AEC disputes the competence of the CNIL. It considers that only the Luxembourg Data Protection Authority (the National Data Protection Commission, hereinafter "the CNPD") has jurisdiction to initiate a sanction procedure and possibly impose an administrative fine against it in the event of non-compliance with its cookie obligations.

23. It argues first of all that its cookie practices must be examined within the framework of the provisions 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 (hereinafter referred to as 'GDPR') due to the close links between this text and the ePrivacy Directive.

24. In support of its argument, the company asserts the inseparable nature of the writing of cookies to the users' terminals and the subsequent use of the data collected by these cookies for the purposes pursued by the data controller. [...]

25. The company further notes that both the decision of the Chair of the CNIL of 29 November 2019 to open an investigation procedure and the correspondence exchanged with the CNIL within the framework of these investigations expressly state that the purpose of the investigations is in particular to assess the compliance of the company's practices with the GDPR. It also notes that the rapporteur himself, in his sanction report, used the concepts arising from the GDPR when he analyses the consequences of the use of cookies for users. It further notes that the French legislator has chosen to transpose Article 5(3) of the ePrivacy Directive not into a dedicated text, but directly within the French Data Protection Act, thus demonstrating the unity of both matters.

26. The company then considers that even in the event that the investigations of the CNIL relate only to the provisions of Article 82 of the French Data Protection Act, the mechanism of cooperation between the supervisory authorities, known as the "one-

stop-shop" mechanism, provided for in Chapter VII of the Regulation, should apply and therefore the CNIL would not be the competent authority to act as the lead authority. In fact, it considers that to the extent that the ePrivacy Directive does not provide for a rule of jurisdiction when processing covered by it is cross-border in nature, it is appropriate to apply those provided by the GDPR, taking into account, in particular, that, since the entry into force of the GDPR, the references made by the ePrivacy Directive to the repealed Directive 95/46/EC are understood to be made to the GDPR.

27. Furthermore, the company considers that the fact that some Member States of the European Union have chosen to entrust the monitoring of compliance with the ePrivacy Directive to their telecommunications regulatory authority and not to their data protection authority, is not an obstacle to the application of the one-stop-shop mechanism to the extent that cooperation agreements between these different authorities have been signed in several Member States, thus allowing the data protection authorities to participate in the one-stop-shop mechanism established in situations involving provisions arising from the ePrivacy Directive. It considers that any penalty imposed on it by the Restricted Committee based on the lack of knowledge of the provisions of Article 5(3) of the ePrivacy Directive would go against the principle of harmonisation contained in Article 15a of the Directive, which provides that *"The competent national regulatory authorities may adopt measures in order to ensure effective cross-border cooperation in monitoring the national laws adopted in application of this directive and to create harmonised conditions for the provision of services involving cross-border data flows"* and the principle of the free provision of services contained in article 56 of the Treaty on the Functioning of the European Union, according to whose terms *"restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.* "

28. The Restricted Committee first notes that the operations that are the subject of this procedure are carried out within the framework of the provision of publicly available electronic communications services on public communications networks and that they relate exclusively to reading and writing actions on the terminals of users located in France when they visit the Amazon.fr website, operations that occur through depositing and reading cookies.

29. The Restricted Committee recalls that such processing is governed by the provisions of the Directive on privacy and electronic communication, commonly referred to as ePrivacy, and in particular by Article 5(3), which has been transposed into national law in Article 82 of the French Data Protection Act. The Restricted Committee notes, first of all, that it follows from the above provisions that the French legislator has instructed the CNIL to ensure compliance by data controllers with the provisions of the ePrivacy Directive by entrusting it in particular with the power to sanction any breach of this article. It stresses that this competence was recognised by the French Conseil d'Etat in its decision of 19 June 2020 on the CNIL deliberation No 2019-093 on the adoption of guidelines relating to the application of Article 82 of the amended Law of 6 January 1978 to read or write operations on a user's terminal, insofar as 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*

cases to the Restricted Committee with a view to imposing sanctions liable for imposition" (EC, 19 June 2020, req. 434684, pt. 3).

30. 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 data controller and the rights of natural persons*". This articulation was confirmed by the Court of Justice of the European Union (hereinafter referred to as the CJEU) in its Planet49 decision of 1 October 2019 (CJEU, 1 October 2019, C-673 /17, pt. 42).

31. In this respect, the Restricted Committee notes that, contrary to what the company argues, 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 directive leaves the Member States the competence to determine *"the regime of sanctions, including criminal penalties, if appropriate, applicable to violations of national provisions adopted pursuant to this Directive and take all necessary measures to ensure their implementation. The penalties thus provided must be effective, proportionate and dissuasive and may be applied to cover the duration of the infringement, even if the infringement has subsequently been corrected"*. But the rule laid down in (3) of Article 5 of the ePrivacy Directive, according to which reading and writing operations must systematically be subject to prior agreement from the user, after being provided with information, 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 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 French legislators have entrusted this task to the CNIL.

32. The Restricted Committee notes, secondly, that 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*".

33. It considers that these latter provisions exclude as such the application of the "one-stop-shop" mechanism provided by the GDPR to facts falling under the ePrivacy Directive.

34. 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 data protection authority, 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.

35. It emphasises that the cooperation agreements between data protection authorities and telecommunications regulatory authorities in certain States invoked by the company, for example, in the Netherlands, Sweden or Hungary, aim to establish cooperation at national level between the various regulators in order to ensure the consistency of their doctrines when processing is both within the material scope of the GDPR and the ePrivacy Directive, but that they do not aim to have the telecommunications regulatory authorities as such participate in the one-stop-shop mechanism provided for by Chapter VII of the GDPR.

36. Finally, the Restricted Committee emphasises that the EDPB, in its opinion no.5/2019 of 12 March 2019 on interactions between the Directive on Privacy and Electronic Communications and the GDPR, considered that [free translation] "*In accordance with Chapter VII of the GDPR, the mechanisms for cooperation and monitoring consistency available to the data protection authorities under the GDPR concern monitoring of the application of the GDPR provisions. The GDPR mechanisms do not apply to monitoring the application of the provisions of the Directive on Privacy and Electronic Communications as such, and that "the authority or authorities designated as competent within the meaning of the Directive on privacy and electronic communications" by Member States are solely responsible for monitoring the application of national provisions transposing the Directive on privacy and electronic communications which are applicable to this specific processing, including in cases where the processing of personal data falls within the scope of both the GDPR and the Directive on privacy and electronic communications"*

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

38. It is therefore necessary to distinguish on the one hand the reading and writing operations on a terminal, which are governed by the provisions of Article 82 of the French Data Protection Act and for which the French legislator has entrusted the CNIL with a supervisory mission and in particular the power to sanction any breach of this article and on the other hand, the subsequent use of the data collected through cookies, which is governed by the GDPR and may therefore, where applicable, be subject to the "one-stop-shop" system.

39. The Restricted Committee further notes that the company has chosen to use a domain name in ".fr. " which is an extension designating the territorial space of France allowing it to benefit from optimal visibility to French Internet users.

40. Finally, the Restricted Committee notes that the references to the GDPR contained in certain documents communicated by the CNIL during the investigation mission have no impact on the legality of the procedure insofar as the investigation operations are general but the CNIL has only intended to pursue, subsequently, breaches for which it has the competence to impose sanctions, which were clearly indicated in the statement of objections by the rapporteur and on which the company was put in a position to assert its observations under conditions consistent with respect for the rights of the defence.

41. 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 initiate a sanction procedure concerning the reading and writing of cookies implemented by the company that fall within the scope of the ePrivacy Directive, provided that they relate to its territorial jurisdiction.

2. On the territorial jurisdiction of the CNIL

42. The rule of territorial application of the requirements specified in Article 82 of the French Data Protection Act is laid down 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 or data processor in France, whether or not the processing takes place in France*".

43. The rapporteur considers that the CNIL is territorially competent in application of these provisions insofar as 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 Amazon.fr website, is carried out "*in the context of the activities*" of AMAZON ONLINE France SAS, which constitutes "*the establishment*" on French territory of the company AEC, which is specifically responsible for the implementation of the cookies in question in this procedure, something which it moreover has not disputed.

44. In defence, the company considers that the territorial jurisdiction of the CNIL in this case is lacking insofar as one of the conditions allowing the action of the CNIL provided for by Article 3 of the French Data Protection Act, in this case that related to the fact of the processing of personal data having to be performed in the context of the activities of an establishment of a data controller, is not met. It stresses that AMAZON ONLINE France SAS is not involved in depositing cookies on users' terminals and that its activity consists of providing marketing and advice solutions to companies wishing to market their products on the Amazon.fr store as well as on third-party websites. It also states that it is it that places advertisements on third-party sites on behalf of its customers and not AMAZON ONLINE France SAS.

45. It thus considers that there is no inseparable link between, on the one hand, the activities of AMAZON ONLINE France SAS and on the other hand, the depositing of cookies by AMAZON EUROPE CORE from the Amazon.fr website.

46. The Restricted Committee recalls that pursuant to Article 3 of the French Data Protection Act, the CNIL is competent to exercise its powers once the two criteria provided for in this article are met, in this case, the existence of an establishment of the data controller on French territory and the existence of processing carried out in the context of the activities of this establishment.

47. The Restricted Committee recalls 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 specified in Article 4 thereof, 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 data 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 application of the GDPR rules, which replaced Directive 95/46/EC 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 remains relevant, insofar as the French legislator has used the same criteria to define the territorial competence of the CNIL.

48. As regards, firstly, the existence of an establishment of the data controller on French territory, the CJEU, in its Weltimmo judgment of 1 October 2015, specified that "*the concept of 'establishment', within the meaning of Directive 95/46, extends to any actual and effective activity, even minimal, exercised by means of a stable installation",* the stability criterion of the installation is examined with regard to the presence of *"human and technical resources necessary for the provision of specific services in question"*. The CJEU considers that a company, a separate 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).

49. In the present case, the Restricted Committee notes first of all that the "establishment" quality of AMAZON ONLINE France SAS is not disputed by the company. It then notes that this company has stable premises located in France, at 67 boulevard du Général Leclerc in Clichy, in which approximately 120 people work. Consequently, it constitutes an establishment of AEC within the meaning of Article 3 of the aforementioned French Data Protection Act.

50. Secondly, as regards the existence of a form of data processing carried out in the context of the activities of this institution, the Restricted Committee recalls that, in its Google Spain decision of 13 May 2014, the CJEU considered that the processing of the

Google Search search engine was carried out "*in the context of the activities*" of Google Spain, an establishment of Google Inc. to the extent that this company is intended to provide in Spain the promotion and sale of advertising space offered by this search engine, which serves to make the service offered by this engine profitable. It also stated that in order to ensure effective and complete protection of the fundamental rights and freedoms of natural persons, this concept cannot receive a restrictive interpretation. Although in the Google Spain judgment the data processing institution was established outside the European Union, the Court subsequently applied, in its judgment of 5 June 2018, the same extensive interpretation of the processing "in the context of the activities" of a national institution to a situation where the processing was partly under the responsibility of another establishment present within the European Union (CJEU, 5 June 2018, C-210/16, pts 53 sq). 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 entity owing the obligations remains the data controller and, where appropriate, its data processor.

51. The Restricted Committee notes that AMAZON ONLINE France SAS presented itself to the investigatory delegation as offering *"digital marketing solutions to client companies, themselves providing products and services sold or not on the website 'amazon.fr'* to companies wishing to improve the visibility of their products on the web. In this context, it engages in, as indicated by AEC during the investigation, "*the promotion and marketing of advertising tools ("Sponsored Ads" and "Amazon DSP") which are controlled and operated by Amazon Europe Core S.à.r.l., based in Luxembourg*." However, these products developed by AEC work in particular by means of data collected through cookies deposited on Internet users' terminals. The Restricted Committee thus notes that AMAZON ONLINE France SAS carries out an activity enabling the promotion and marketing in France of the tools developed by AEC. 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 concerns only reading and writing operations carried out on French territory (Article 4 of Directive 95/46/EC specified 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 data read on terminals in France or writing on 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).

52. It follows 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. The CNIL's competence is limited to the processing carried out "in the context of the activity" of AMAZON ONLINE France SAS on French territory, namely the reading and writing operations carried out by the data controller on the terminals (computers, smartphones, etc.) located in France.

[...]

C. On the procedure

60. In defence, the company argues that the procedure followed by the CNIL has violated its right to a fair trial as guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

61. In particular, the company complained that it responded to the questions of the investigatory delegation of the CNIL without the latter indicating to it what the purpose and legal basis of the investigations carried out was, so that its right not to incriminate itself had been violated. It also explains that the decision of the Chair of the CNIL to appoint a rapporteur dated 23 March 2020, which constitutes an indictment, was only notified to it by e-mail on 13 May, thus delaying the preparation of its defence.

62. The company then considers that the procedure followed by the CNIL is tainted by irregularity to the extent that the CNIL's agents carried out an online investigation on 19 May 2020 on the basis of the investigation decision of the Chair of the CNIL of 29 November 2019 although a rapporteur had already been appointed. It also explains that the methodology followed by the delegation of the CNIL during this investigation, which was intended to reproduce a user's journey when visiting the Amazon.fr website from an advertising banner present on third-party sites, does not in any way distinguish the cookies deposited by third party websites from those deposited on the Amazon.fr website.

a. Respect for the right to a fair trial.

63. The Restricted Committee recalls that the right not to incriminate itself and the right to have the time and facilities necessary to prepare its defence invoked by the company are components of the right to a fair trial contained in Article 6 of the European 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 their functions in the general context of the proceedings (see, inter alia, Mayzit v. Russia, January 20, 2005).

64. The Restricted Committee notes, first of all, that pursuant to Article 18 of the French Data Protection Act, "*the persons questioned in the context of the investigations carried out by the Commission pursuant to G (2) of Article 8 I are required to provide the information requested by it for the performance of its tasks.*" Thus, the persons interviewed by the CNIL delegation are required to respond to its requests in order to assist it in carrying out its missions.

65. The Restricted Committee then recalls that when the investigatory delegation requests information, including factual information, from a body, no charge is being made against it yet, so that the "adversarial" phase, as understood by the case law of the European Court of Human Rights, has still not begun.

66. With regard to the notification to the body of the Chair's decision to appoint a rapporteur, the Restricted Committee recalls that pursuant to Article 39 of the Decree of 19 May 2019, this appointment may only take place insofar as "*a sanction is likely to be imposed*" under Article 20 III of the French Data Protection Act.

67. It notes that pursuant to Article 39 of the Decree of 19 May 2019, it is precisely the responsibility of the rapporteur to carry out all necessary steps to determine whether or not accusations of breaches may be made against the natural or legal person in question. It is for this reason in particular that, in accordance with Articles 8-2-g and 19 of Law No 78-17 of 6 January 1978, as amended, the rapporteur has the right to carry out further investigations, or have them carried out, before drafting his report.

68. The Restricted Committee thus stresses that the decision to appoint a rapporteur does not include any complaint, so that this appointment is not intended, at this stage, to enable the company to understand what it might be accused of. It recalls that the objections only take form through the sanction report, which constitutes a statement of complaints, since it is this document which contains the breach(es) that the rapporteur considers to be constituted. The two rapporteur's reports explicitly set out the legal basis for the alleged breach. The Restricted Committee also notes that the notification of this decision to the natural or legal person concerned is not governed by any time limit according to the applicable texts.

69. The Restricted Committee notes that in addition, the company is not justified in claiming that it was not able to understand the scope of the CNIL's investigations. It notes in this sense that the investigation reports and their attachments, communicated to the company after carrying out the investigations, clearly established the scope of the investigation conducted by the CNIL. It notes that the attachments sent to the company included screenshots of the site home page containing the cookie information banner, as well as information pages on cookies, but also a list of cookies found to be deposited on the terminal. The Restricted Committee further notes that on the occasion of the notification of the investigation report of 6 March 2020, the company was asked to "*indicate, for each of the 46 cookies mentioned above, their purpose (for example: technical, advertising, social network sharing button, audience measurement, etc.)*"

70. Finally, the Restricted Committee recalls that Article 40 of Decree No. 2019-536 of 29 May 2019 provides that the natural or legal person to whom a report proposing a sanction is notified has a period of one month to submit its observations in response. In the present case, this time limit was respected insofar as the company had an initial period of eight weeks to submit its first observations to the rapporteur's report and this time limit was extended by one week at its request. Therefore, the Restricted Committee considers that the company has been put in a position to properly prepare its defence.

71. The company then had a period of three weeks to respond to the second observations of the rapporteur and finally had the opportunity to make oral observations during the Restricted Committee session on 12 November 2020.

72. In light of these elements, the Restricted Committee considers that the defence rights of AEC have been respected.

b. On the regularity of the online investigation of 19 May 2020

73. The Restricted Committee recalls that pursuant to Articles 8-2-g and 19 of Law No 78-17 of 6 January 1978 as amended, the rapporteur has the option of asking the CNIL's agents to carry out investigations. It points out that in the present case, the rapporteur wanted an online investigation to be carried out which tracks two user journeys that go to the Amazon.fr website after clicking on an advertising link on third-party sites.

74. The Restricted Committee then considers that the fact that the report drawn up within the framework of this investigation refers to the investigation decision no. 2019-224C of 29 November 2019 of the Chair of the CNIL has no impact on its validity insofar as the appointment of a rapporteur by the Chair of the CNIL does not in itself have the effect of terminating the investigation procedure. Indeed, the investigation of 19 May 2020 was carried out in continuation of the investigations prior to the appointment of the rapporteur and therefore in line with the Chair's decision.

75. The Restricted Committee notes that cookies whose presence was observed by the delegation upon arrival at the homepage of the Amazon.fr website during the first two investigations are also among those present at the time of arrival on another page of the site in the event that the user accesses it via a third-party site. Thus, the other cookies identified by the delegation are those saved by the third-party sites in question and which are therefore not part of the scope of the investigations. It therefore considers that the findings made on 19 May 2020, compared to those made on 12 December 2019 and 6 March 2020, clearly show which cookies are, on the one hand, deposited by third party sites displaying an ad for an Amazon product and, on the other hand, those deposited on the Amazon.fr website after clicking on the said ad.

76. In light of these elements, the Restricted Committee considers that the online investigation of 19 May 2020 is not affected by irregularities.

D. On breaches of the provisions of Article 82 of the "Data Protection Act"

77. As mentioned in paragraph 20, Article 82 of the French Data Protection Act constitutes the transposition into national law of Article 5(3) of the ePrivacy Directive.

78. The rapporteur believes that AEC's operations regarding the depositing and reading of cookies exhibit two types of gross negligence relating to:
- the depositing of cookies on the user's terminal prior to any action by the user and without obtaining his/her consent;
- the information provided to the user regarding the access or writing of information on their terminals.

79. The rapporteur considers that by depositing cookies on the terminals of Internet users located in France on the Amazon.fr website before any action by them, the company necessarily prevents them from validly expressing their consent. It recalls that the French Data Protection Act expressly specifies that accessing or writing information on the user's terminal, unless otherwise provided for, may only take place after the latter has expressed his or her consent.

80. The rapporteur then considers that the information provided by the company on the Amazon.fr website homepage by means of the information banner is insufficient in that

it constitutes only a general and approximate description of the purposes of all cookies deposited and that there is also no mention of the means available to the user to object to the filing of cookies. He adds that when the user visits Amazon.fr not through the home page, but from an ad posted on a third-party site, cookies are deposited on the arrival of the internet user on the Amazon.fr website without any information being provided

81. In defence, the company recalls that its cookie practices are subject to compliance with Luxembourg law and not French law. It points out that it launched a large project to recast its cookie policy in 2019 and that these changes have been effective on the Amazon.fr website since 2 September 2020. It argues that in any event, its cookie practices have always complied with the provisions of Luxembourg law.

82. In this respect, although the company does not in itself dispute the fact that before the changes introduced in September 2020, cookies were deposited on the user's terminal upon arrival on the Amazon.fr website, it argues that, insofar as Luxembourg law provides that consent can be expressed through the browser settings, it has always validly obtained user consent.

83. With regard to the information provided to users, the company considers that even if the French Data Protection Act is applicable, the information it provided was, in any event, compliant with the provisions of Article 82 of this law. It argues that by clicking on the "*Find out more*" link of the information banner, the user was redirected to an information page on its cookie policy. It explains that in the case of a user who visits the Amazon.fr website via an ad displayed on a third-party site, most of these advertisements include an "AdChoices" icon that refers to a page where the user can read information about their targeted advertising policy.

84. The company further indicates that the vast majority of users who click on Amazon ads are customers who have already visited or purchased on the site and have therefore already received information about its cookie policy.

85. It further states that its information system is complemented by the presence at the foot of the page of links to its pages dedicated to cookies and targeted advertising.

86. Finally, the company recalls that there is no common doctrine for all European regulators on the use of cookies and that it is therefore difficult for stakeholders to know what is expected of them in this regard. It argues, through a comparative study, that the vast majority of French websites do not comply with the legislation in force. The company further points out that at the time of the initiation of CNIL investigations in November 2019, the recommendation on cookies and other trackers adopted on 5 December 2013 had already been repealed, which contributed to the legal uncertainty in relation to the rules on cookies.

87. Firstly, with regard to obtaining consent, the Restricted Committee underscores that it emerges from the findings made by the delegation on 12 December 2019, 6 March 2020 and 19 May 2020 and from the information transmitted by the company, that regardless of the user's journey, whether he or she goes to Amazon.fr's homepage or visits a product page on the site via an ad, more than 40 cookies were deposited on the user's terminal for advertising purposes.

88. The so-called "advertising" cookies cannot fall within the scope of the exceptions defined in Article 82 of the French Data Protection Act insofar as they are not intended to allow or facilitate electronic communication and are not strictly necessary for the provision of an online communication service at the express request of the user. Therefore, such cookies cannot be deposited or read on the person's terminal until they have provided their consent.

89. The Restricted Committee notes that the information banner, containing the following text: "*By using this site, you agree to our use of cookies to offer and improve our services. Find out more*," did not contain any specific information regarding the means available to users to express their choices regarding the writing of cookies. In any event, the cookies were deposited before any action by the internet user, even simply continuing to browse, which had been accepted as a valid expression of consent in deliberation no. 2013-378 of 5 December 2013 of the CNIL (but which no longer corresponds to the rule of law, as clarified by Decision no. 2020-091 of 17 September 2020 of the CNIL).

90. The Restricted Committee considers that the company should have obtained prior consent from users, before depositing cookies used for advertising purposes on their terminals. It notes that, in any event, even if the browser settings may in some cases constitute a valid mechanism for obtaining consent, this is conditional upon the user having been informed beforehand that he/she has this possibility, which is not the case here.

91. Moreover, the Restricted Committee reminds the company that, as indicated above, it is up to the company to comply with the provisions of Article 82 of the French Data Protection Act when cookies are deposited from the Amazon.fr website on user terminals located on French territory.

92. Secondly, the Restricted Committee considers that the information provided by the company regarding the access or writing of cookies is, as the case may be, either incomplete or non-existent.

93. It recalls that both Article 5-3 of the ePrivacy Directive and Article 82 of the French Data Protection Act expressly specify that the user must be fully informed of the purposes pursued by the depositing and reading of cookies and the means available for him/her to oppose it.

94. However, the Restricted Committee indicates that the above-mentioned information banner displayed on the homepage contained only a general and approximate description of the purposes of all of the cookies deposited. On this point, it considers that the terms "*offer and improve our services*" only inform the user that cookies are written in order to enable the company to ensure the proper functioning of its business and to develop it. Thus, when reading this banner, the user is not able to understand the type of content and ads likely to be personalised according to his/her behaviour

95. In addition, the information banner does not mention the means available to the user to refuse the writing of cookies.

96. The Restricted Committee further notes that the company's failure to provide information to individuals is even more manifest when the user visits Amazon.fr

through an ad posted on a third party site, for example after clicking on a link in the results list in a search engine or an ad on a third-party site promoting a product sold on Amazon.fr.

97. It emerges from the findings made by the CNIL delegation that, in this case, cookies with an advertising purpose were indeed deposited on the terminals of users located on French territory without any information being provided to them. However, the provisions of Article 82 of the French Data Protection Act specify that "*such access or writing may only take place provided that the subscriber or user has expressed his or her consent* ***after receiving this information***" (emphasis added). The Restricted Committee considers this case to be particularly prejudicial to the rights of users located on French territory insofar as the company deposits cookies on their terminal without ever having informed them.

98. The Restricted Committee considers that the observations submitted by the company in its defence do not call into question the existence of this breach.

99. First of all, the company cannot hide behind the fact that certain advertisements displayed on third-party sites contain an "Adchoices" icon which users can click to view a page informing them of its cookies policy. Indeed, beyond the fact that this mechanism only applies to Internet users coming from a third-party site on which an advertisement is displayed with an "Adchoices" icon, the Restricted Committee considers that it cannot be reasonably expected of the user to whom an advertisement is presented that he/she has the reflex to click on a small icon before clicking on the advertisement itself. This icon also does not allow people looking at the advertisement to know that information relating to cookies is available provided that you click on it.

100. In any event, the Restricted Committee notes that the page to which the Adchoices icon refers simply allows the user to tick a box so that Amazon no longer displays advertisements based on his or her interests. This page does not contain information on the purpose of the actions that write information to his/her equipment terminal and the means available to object to it. Finally, no information is provided as to the right of the user to refuse cookies but simply a link to the "*Cookies*" page of the site. Such a mechanism does not meet the requirements of the aforementioned Article 82.

101. The Restricted Committee also recalls 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 as well as the guidelines of 4 July 2019, in force on the date of online monitoring. Although without binding force, these instruments offer useful clarification to data controllers, informing them about 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.

102. 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".*

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

104. Secondly, the Restricted Committee considers that the company's argument that the vast majority of people who click on Amazon advertising have already visited or purchased a product on the Amazon.fr website and that they have already previously received information on the registration of cookies is not valid.

105. The Restricted Committee indicates that before becoming a customer, these people necessarily had to visit the site for the first time, either through the home page or after having clicked on an advertising banner. However, the findings of the CNIL precisely show that during their first visit to the site, users are either insufficiently informed, or are never informed of the writing of cookies and that, regardless of the level of information received, cookies are systematically written to their terminals. Furthermore, the alleged circumstance that the practices of other websites do not comply with the requirements of Article 82 does not affect the obligations of the company.

106. Similarly, the Restricted Committee considers that the "*Cookie*" links located at the foot of the page and which refer to an information page do not constitute a satisfactory method of providing information given that depositing cookies before any action by the user necessarily deprives the information of its prior character, contrary to the provisions of Article 82 of the French Data Protection Act, according to which "*Such access or writing may only take place provided that the subscriber or user has expressed his or her consent <u>after receiving this information</u>*" (emphasis added).

107. Finally, the Restricted Committee recalls that while the recommendations on cookies have changed, the practices for which the company is criticised have been continually considered non-compliant by the CNIL and this was confirmed in the guidelines of 4 July 2019 and that this position remains unchanged in its second recommendation and in its latest version of the guidelines, which does not call this established fact into question.

108. The Restricted Committee also notes that in its press release published on its website on 18 July 2019 providing for a moratorium before the effective application of its second recommendation on cookies, the CNIL had taken care to specify that it would continue to monitor compliance with obligations that were not subject to any change by indicating that "*In particular, operators must respect prior consent to the depositing of trackers [... and] must provide a mechanism for withdrawing consent that is easy to access and use."* Thus, the company cannot validly argue that the

obligations for whose disregard it is criticised in these proceedings were not clearly identified.

109. The Restricted Committee states that, moreover, the alleged breach of the company is not based on the lack of knowledge of the guidelines or recommendations of the CNIL but on the breach of the provisions of Article 82 of the French Data Protection Act, which contain only obligations which were already contained in the previous versions of the said law.

110. The Restricted Committee further 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 respect, deliberation no. SAN-2016-204 of 7 July 2016 and deliberation no. SAN-2017-006 of 27 April 2017).

111. In light of these elements, the Restricted Committee considers that the breach of the provisions of Article 82 of the French Data Protection Act is characterised in that the company deposits cookies on the terminal of users located on French territory before obtaining their consent and without providing them with the information prescribed by this article, under the conditions it defines.

III. On the issue of corrective measures and publicity

112. Article 20 of Law No 78-17 of 6 January 1978 as amended provides that: "*When the data controller or its data processor fails to comply with the obligations resulting from Regulation (EU) 2016/679 of 27 April 2016 or this law, the Chair of the CNIL may [...] 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 resulting from Regulation (EU) 2016/679 of 27 April 2016 or this law or to comply with the requests made by the data subject to exercise his/her rights, which may be accompanied, except in cases where the processing is implemented by the State, with a periodic penalty not exceeding €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 may not exceed 10 million euros or, in the case of a company, 2% of the total annual global turnover of the previous financial year, whichever is the greater. 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. "

113. Article 83 of the GDPR, as referred to in Article 20, paragraph III of the French Data Protection Act, provides:
"*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)(a) to (h) and (j). In deciding whether to impose an administrative fine and to decide 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 data processor to mitigate the damage suffered by the data subjects;
d) the degree of responsibility of the data controller or data 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 data processor;
f) the degree of cooperation established with the supervisory authority to remedy the breach and mitigate any 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, the 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 issue of an administrative fine

114. In defence, the company argues that the amount of the fine proposed by the rapporteur is disproportionate and that the rapporteur did not take into account several criteria laid down in Article 83(2) of the Regulation, in particular, the fact that a user information system was in place, the lack of intention to commit the breach, the measures taken to mitigate the damage or the absence of previous violations. It argues that, in order to determine the amount of the fine, it is not possible to take into account the processing carried out through cookies because these elements are not part of the scope of the CNIL investigations. Finally, it notes that the fine proposed by the rapporteur is disproportionate to the fines imposed by other authorities in relation to cookies.

115. With regard to the elements elaborated above, the Restricted Committee considers that the aforementioned facts, constituting a breach of Article 82 of the French Data Protection Act, justify the imposition of an administrative fine against AEC, the legal entity responsible for the processing. It recalls that the changes made by the company to the Amazon.fr website since September 2020 have had no impact on the imposition of a fine insofar as this is intended to sanction the facts observed during the investigations.

116. 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 an

administrative fine, 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 this fine is assessed in light of the criteria specified in Article 83 of the GDPR.

117. In the present case, the Restricted Committee considers that the breach in question justifies the imposition of an administrative fine against the company on the following grounds.

118. First of all, the Restricted Committee notes that the breach committed is particularly serious in that by writing cookies on the devices of users located in France before any action on their part, without providing them with the necessary information, the company deprives them of the possibility of exercising their choice in accordance with the provisions of the aforementioned Article 82.

119. The Restricted Committee considers that the seriousness of the breach is accentuated in the case of French users who access the Amazon.fr site after clicking on an ad present in a search engine or on a third-party site. Indeed, given that cookies are deposited in this context without any information being provided to the data subjects, it is thus made without their knowledge.

120. The Restricted Committee notes that the seriousness of the breach must also be assessed with regard to the scope of the reading and writing operations and the number of data subjects.

121. With regard to the scope of the reading and writing operations, the Restricted Committee indicates that a user's visit to the Amazon.fr website results in the depositing, by about twenty companies specialising in personalised advertising, of cookies whose aim is to track his/her browsing on the web so that he/she is later shown advertising corresponding to his/her behaviour.

122. It considers that it is appropriate to take into account the extent of the processing that will be carried out thanks to the prior deposit of cookies on the devices of users residing in France and the imperative need for them to keep control of their data. In this sense, users must be put in a position to be sufficiently informed of the scope of the processing carried out.

123. As regards the number of data subjects, it emerges from the information provided by the company that approximately 300 million AMAZON identifiers were allocated in France over a nine-month period. The Restricted Committee notes that although a single person is likely to correspond to several different identifiers due to the use of multiple terminals and browsers, this volume reflects the central place occupied by the Amazon.fr site in the daily lives of persons residing in France. The information that may be collected for the same identifier through these advertising cookies is also extensive, varied, sometimes related to aspects of an individual's private life, and it is not impossible that it reveals information corresponding to sensitive data (religious or political opinions, health, etc. governed by Article 9 of the GDPR).

124. Secondly, the Restricted Committee considers that AEC, which achieved a global turnover of approximately 7.7 billion euros in 2019, has derived a definite financial advantage from the breach. Indeed, as recalled in point 121, the use of cookies allows

the company to present users with personalised advertising promoting its products when they browse other websites. The Restricted Committee notes that although the company's main activity lies in the sale of consumer goods, the personalisation of ads, enabled in particular by cookies, makes it possible to significantly increase the visibility of these goods and increase the likelihood that they will be purchased. However, by not providing information in a *"clear and complete"* manner to users and depositing cookies before people consent, the company eliminates the risk that these cookies will be refused.

125. It follows from all of the above and the criteria duly taken into account by the Restricted Committee, in view of the maximum amount incurred established on the basis of 2% of the turnover, that imposing an administrative fine of €35 million is justified.

B. On the issue of an injunction with a periodic penalty

126. The rapporteur proposes, in addition to the administrative fine, that an injunction be imposed with an accompanying periodic penalty of €100,000 in that the company does not inform users of the exact purposes of writing cookies and the means available to them to object to it.

127. In defence, the company argues that this injunction is not justified insofar as, on the one hand, it has already changed its practices and, on the other hand, the proposed amount is disproportionate. It recalls that cookies are no longer deposited before the user has expressed his/her consent. It further notes that the issuance of an injunction on this point may conflict with the publication by the CNIL of its new guidelines and recommendations on cookies. It stresses that it would be forced to undertake two series of modifications, the first to comply with the injunction and the second to apply the new recommendations of the CNIL.

128. The Restricted Committee reveals that since the receipt of the sanction report, the company has made changes to the Amazon.fr website. First of all, it notes that regardless of the path by which the user visits the site, no cookie is deposited on his/her terminal before he or she has expressed his or her consent.

129. It then notes that upon arrival on the site, regardless of the route followed by the user, the banner displayed contains the following text:
"Choose your cookie preferences. We use cookies and similar tools to facilitate your purchases, provide our services, to understand how customers use our services in order to be able to make improvements, and to present ads. Approved third parties also use these tools as part of our ad display" This banner also contains two "*Accept Cookies*" and "*Personalise Cookies*" buttons.

130. However, the Restricted Committee nonetheless considers that this new system still does not provide "clear and complete" information as specified in Article 82 of the French Data Protection Act.

131. In fact, the Restricted Committee notes that the information provided still does not allow users to understand precisely some of the purposes pursued by the filing of

cookies, in particular the advertising purposes, although the cookies are used in large part to offer them personalised advertising according to their behaviour.

132. Consequently, without disregarding the company's steps to comply with the provisions of Article 82 of the French Data Protection Act, the Restricted Committee considers that it has not demonstrated, on the day of the termination of the investigation, its compliance with the provisions of the aforementioned article and that an injunction should therefore be pronounced on this point.

133. As regards the amount of the periodic penalty payment, the Restricted Committee recalls that this 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.

134. In order for the periodic penalty to retain its comminatory function, the amount must be both proportionate to the seriousness of the alleged breach but also adapted to the financial capacity of the data controller. Account should also be taken of the fact that the breach in question indirectly plays a role in the profits generated by the data controller. In view of these elements, the Restricted Committee takes the view that a penalty payment amounting to €100,000 per day of delay from the notification of this decision appears proportionate.

135. As regards the time limit granted to the company in order to comply with the injunction, the Restricted Committee takes the view that a period of three months from the notification of this decision is sufficient to regularise the situation.

C. Publicity for the sanction

136. [...].

137. The Restricted Committee considers that, in view of what has been stated above, it is justified in imposing an additional sanction of publication. In determining the duration of its publication, account shall also be taken of the dominant position of the company in the field of e-commerce, the seriousness of the breaches and the value this decision has in providing information to the public.

[...]

FOR THESE REASONS

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

- **impose an administrative fine of €35 (thirty-five) million on AMAZON EUROPE CORE;**

- **issue an injunction to bring the processing into compliance, within a period of three months from the notification of this decision, with the provisions of Article 82 of the French Data Protection Act, and in particular:**
- **inform the data subjects in advance and in a clear and complete manner, for example by means of an information banner appearing upon the Internet user's first arrival on the Amazon.fr website, regardless of the first page accessed:**
- **of the precise purposes of all cookies whose writing is subject to consent**
- **as well as the means available to them to refuse them;**

- **associate a periodic penalty of 100,000 (one hundred thousand) euros per day of delay with the injunction, with the proof of compliance having to be sent to the Restricted Committee within this time-limit;**

- **to send this decision to AMAZON ONLINE France SAS with a view to the enforcement of this decision;**

- **make public, on the CNIL website and on the Légifrance website, its deliberation, which will no longer identify the company at the end 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.