

# Summary Final Decision Art 60

Complaint

EDPBI:FR:OSS:D:2023: 809

Violation identified ; Administrative fine

## Background information

Date of final decision:	15 June 2023
Date of broadcast:	22 June 2023
LSA:	FR
CSAs:	All SAs
Legal Reference(s):	Article 7 (Conditions for consent) , Article 12 (Transparent information, communication and modalities for the exercise of the rights of the data subject), Article 13 (Information to be provided where personal data are collected from the data subject), Article 15 (Right to access by the data subject), Article 17 (Right to erasure ('right to be forgotten')) Article 26 (Joint controllers).
Decision:	Administrative fine, Violation identified.
Key words:	Transparency, Right of access, Data subject rights, Exercise of data subject rights, Consent, Definition of controller, Right to erasure, Advertising, Cookies.

## Summary of the Decision

### Origin of the case

The controller is a company registered in France (“the company”). It specialises in the display of targeted advertising online, including in advertising retargeting. The LSA received two complaints in 2018, following which it carried out online and onsite audits and sent requests for information to the company. The company collects browsing data from Internet users through cookies that are stored on their terminals when they visit one of the controller’s partners’ websites. When an Internet user visits a partner’s website, the company stores a cookie on the device his or her browser is running on. In practice, a unique identifier is assigned to the data subject (i.e. an “ID”), which will enable the company to recognise him/her during subsequent visits to the partner’s other sites. The company acts as an intermediary between advertisers and website publishers and engages in “real-time bidding” (RTB) for displaying an ad on the publisher’s advertising space. If the company wins the bid, an advertiser’s advertising banner is displayed in the ad space available on the publisher’s website.

### Findings

According to the LSA, although the company does not directly hold the identity of the data subjects to which the devices on which cookies are dropped are linked, it is able to re-identify individuals by reasonable means. The company acts as a **controller, jointly with its partners** (advertisers, publishers, online auctions platforms).

The LSA analysed the **legal basis** relied upon for the retargeting processing activity. While the company claimed that it relied on consent, it was unable to provide any proof of user consent. The LSA points out that in the case of joint controllership, Article 26 GDPR requires that joint controllers ensure - through an agreement - that they mutually comply with the GDPR and in particular that they work together to determine the best way to respond to the rights of data subjects, depending on the nature of the processing and their respective responsibility for such processing. It considers that the mere fact that the collection of user consent for the given processing constitutes the partners’ contractual obligation does not exempt the company from its obligation to be able to demonstrate that the data subject has given his/her consent under Article 7 GDPR. This dual-liability regime ensures that at all stages of the processing, each joint data controller complies with the provisions incumbent upon it: for partners, those relating to the storage and reading of the company’s cookie on the user’s device and for the company, those provisions relating to subsequent processing carried out based on the data collected by this cookie. In addition, the LSA’s online audits showed that some of the partners’ websites did not obtain valid user consent.

The LSA notes that the company became compliant with Article 7(1) GDPR progressively over the course of the investigation, including by implementing an audit program to scan the compliance of its partners since 2020, by terminating a contract concluded with a non-compliant partner and by requiring contractually that its partners provide a **proof of user consent**.

In addition, the LSA found that the company was in breach of its **transparency obligations** under Articles 12 and 13 GDPR. More specifically, the LSA concluded that Article 13 GDPR applies to the company, given that when users browse the website of a partner of the company, the cookie requests are sent directly to the company’s servers, without transiting via another data controller. The LSA

considered that before updating the privacy notice over the course of the proceedings, the company's privacy notice did not make it clear what the applicable legal basis was under Article 6 GDPR and included a vague and contradictory description of the processing purposes. Lastly, the privacy notice did not make it clear that personal data was processed for a separate purpose, namely to improve the company's advertising services through machine learning.

Furthermore, the LSA concluded that the company did not comply with the **exercise of the right of access under Articles 12 and 15 GDPR**. The company did not provide data subjects with all the personal data relating to them and did not allow them to fully understand the information provided.

The LSA also considered that the company did not comply with the **exercise of the right to erasure under Articles 7 and 17 GDPR**. In fact, when it responds to a request for erasure, the company does no more than stop the display of personalised advertisements on the device of the individual making the request, without effectively deleting the data relating to that individual.

With respect to joint controllership, the LSA considered that the company breached its obligations under Article 26 GDPR. On the date of the findings, the agreement entered into by the company with its partners did not specify some of the respective obligations of the data controllers with regard to the requirements contained in the GDPR, such as the exercise by the data subjects of their rights, the obligation to notify a data breach to the supervisory authority and to the data subjects or, where applicable, carrying out a data protection impact assessment under Article 35 GDPR.

## Decision

The LSA imposed on the company an administrative fine of **40 million euros for the infringement of Articles 7, 12, 13, 15, 17 and 26 GDPR**. The LSA also decided to publish the final decision on its website and on the Légifrance website for two years, after which the company will not be identifiable anymore. To set the amount of the administrative fine, the LSA took into account the severe character of the infringements found. This stems from the fact that the processing activity is large-scale and intrusive by nature given the large volume of collected browsing data and the very high number of affected data subjects. . The LSA also highlighted the consequences for data subjects, including a loss of control of users over their personal data online and an undermined protection of their personal data. The LSA also noted that the company's core activity consists in enriching the "raw" data. Lastly, as the company's business model relies on displaying targeted advertising, the failure to obtain valid user consent has enabled the company to process more personal data, thereby making more profit.