

Unofficial Translation by: Future of Privacy Forum

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Thank you to Bénédicte Dambrine, CIPP/US, Privacy Counsel, OneTrust

Council of State

N ° 393714

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Mentioned in the tables of the Digest of Decisions (Recueil Lebon)

Mr. Jacques Reiller, Rapporteur
Ms Aurélie Bretonneau, Public Rapporteur
SCP GATINEAU, FATTACCINI, Lawyers

Reading of Wednesday, February 8, 2017

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

In light of the following procedure:

By a summary application, a supplementary memorandum and three response memoranda, registered on 23 September and 16 December 2015, 21 October and 8 December 2016 and 12 January 2017 to the Litigation Department of the Council of State, JCDecaux France requested the Council of State:

(1) to annul, for excess of power (or authority), Decision No 2015-255 of 16 July 2015 by which the National Commission for Information Technology and Civil Liberties [CNIL] denied the company authorization to implement an automated processing of personal data for the purpose of testing a methodology for measuring pedestrian traffic on La Défense Plaza;

(2) to grant the authorization requested, or, alternatively, to require the National Commission on Informatics and Civil Liberties to issue such authorization;

(3) and to impose on the State the sum of 4 500 euros under Article L. 761-1 of the Code of Administrative Justice.

Considering the other documents in the file;

Considering:

- Directive 95/46 EC of the European Parliament and of the Council of 24 October 1995;

- the Environment Code;
- Law No 78-17 of 6 January 1978;
- the Code of Administrative Justice;

After hearing in open session:

- the report of Mr Jacques Reiller, State Councilor,
- the conclusions of Mrs Aurélie Bretonneau, Public Rapporteur;

After SCP Gatineau, Fattaccini, lawyer for JCDecaux France have been given the opportunity to speak, before and after the conclusions;

Considering the following:

1. According to the documents before the Court, on 4 February 2015, JCDecaux France filed an application for authorization for the automatic processing of personal data with the CNIL for the purpose of testing for four weeks a methodology for the quantitative estimation of pedestrian flows on the La Défense Plaza as well as their routes [pedestrian traffic patterns] within this perimeter. The project consists of the installation of six WiFi counting boxes on JCDecaux France's advertising street furniture, in order to detect MAC addresses, network identifiers of mobile devices with WiFi enabled, within a radius of 25 meters, and calculate their geographical positions. In a decision from 16 July 2015, which JCDecaux France asked for annulment for excess of power, the CNIL denied the company the authorization to implement this automated data processing.
2. According to the fourth paragraph of Article L.581-9 of the Environment Code: "Any system for the automatic measurement of the audience for advertising or for analyzing the typology or behavior of persons passing close to an advertising device is subject to authorization of the National Commission of Informatics and Liberties." According to the second paragraph of Article 2 of the Law of 6 January 1978: "Personal data shall mean any information relating to a natural person who has been identified or can be identified, directly or indirectly, by reference to an identification number or to one or more elements particular to such person. In order to determine whether a person is identifiable, it is necessary to consider all the means to enable his identification which is available to the data controller or to any other person." According to Article 7 of the same law: "Processing of personal data requires the consent of the data subject or shall satisfy one of the following conditions: (...) 5. Legitimate interest pursued by the data controller or the recipient, provided that the interest or fundamental rights and freedoms of the data subject are not disregarded." Finally, under Article 32 of the Law: "I. The person from whom personal data are collected shall be informed, unless he/she had already been informed previously of the same, by the data controller or his representative of: (1) the identity of the data controller and, where applicable, the identity of its representative; (2) the purpose of the processing activity (...) / III. Where the personal data have not been collected from the data subject, the data controller or his representative must provide to the data subject the information listed in I as soon as the data are recorded or, if sharing of personal data with a third party is considered, at the latest when personal data is first shared. (...) IV. If the personal data collected are going to be shortly thereafter anonymized under a process previously recognized as valid in accordance with the provisions of this Law by the National Commission for Data Processing and Freedom, the information given by the data controller to the data subject may be limited to those mentioned in 1 ° and 2 ° of I."

On the external legality:

3. First, in stating in the contested decision that “it is not envisaged that the rights of opposition, access and correction will apply, taking into account the purpose of the processing and its methods of implementation,” the CNIL has noted with respect to JCDecaux France’s project, the absence of provisions relating to rights of opposition, access and correction, and reported this defect to the design of the processing which assumes that these provisions can not relate to the data collected because of their anonymization. In describing the logical consequences of contested premises, the CNIL has clearly stated its own reasoning. The plea alleging an insufficient argument in support of its decision can therefore only be rejected.
4. Secondly, since it was for JCDecaux France to provide the CNIL with all the information necessary to assess the scope of the data collection it intended to undertake, it cannot criticize the Commission for not informing it of the importance of the question of compliance with the obligation to inform data subjects whose data are to be collected. The plea alleging that the CNIL would have misled the company in the course of the procedure for examining its application must therefore be rejected.

On the internal legality:

With regard to the means relating to the direct or indirect nature of the data collection envisaged by the company JCDecaux France:

5. It appears from the documents in the file that JCDecaux France intends to collect the MAC addresses of the mobile devices of persons passing by its billboards. Even though this collection does not require any intervention by the persons concerned, it nevertheless has the character of a direct collection of personal data. The CNIL therefore did not err in law by applying the provisions of paragraph 1 of Article 32 of the Law of 6 January 1978 relating to direct collections and not of its paragraph III governing indirect collections.

With regard to the means relating to the qualification of the method of data processing envisaged by the company JCDecaux France:

6. First, while the CNIL took into account, during the investigation of the case, the opinion of 10 April 2014 by which the [Article 29 Working Party] analyzed the effectiveness and limitations of anonymization techniques, it is clear from the very terms of its decision, which does not refer to or cite this opinion, that it did not consider itself bound by the recommendations of that working group which are devoid of normative value. The plaintiff company cannot therefore blame the CNIL for not adopting the distinction made by the so-called “Article 29” group between so-called “anonymization” and “pseudonymisation” techniques, or for having ignored its recommendations aiming at assessing the risk of identification in the light of the factors specific to each case.
7. Secondly, it is clear from the definition of personal data given in the provisions cited in paragraph 2 above of Article 2 of the Law of 6 January 1978 that such data can only be regarded as anonymous when the identification of the concerned person, directly or indirectly, becomes impossible by the data controller or by a third party. This is not the case where it is still possible to individualize a person or to link data between two records that concern him or her.
8. It appears from the documents in the file that in order to render the data collected anonymous, JCDecaux France intends to truncate the MAC addresses of their last half-byte before completing them with a series of characters in application of the technique known as “salting,” and to apply a method known as “key hashing” by transforming one piece of data. The company maintains that

these operations make the risk of identifying the persons concerned negligible, especially as the data collection takes place in the context of an experimentation limited in time and aims to improve the value of its billboards, which makes the identification of the persons concerned irrelevant to the company. However, on the one hand, the “hash” and “salting” processes, if they seek to prevent third party access to the data, leave the data controller in a position to identify the persons concerned and do not prohibit the correlation of records relating to the same individual or of inferring information about him. On the other hand, the processing designed by JCDecaux not only counts the number of mobile devices, equipped with an active WiFi connection, detected in the vicinity of the advertising street furniture, but also measures the repetition of their passages and to determine the journeys/routes made from one piece of furniture to another. This processing thus aims to identify the routes of persons and their frequency on the pedestrian plaza of La Défense, throughout the duration of the experiment. The CNIL, which, contrary to the plaintiff company's assertion, took into account, without factual error, both the context of the processing and its objectives as well as all the technical data relating to the number of persons passing through the plaza of La Defense and the “collision rate” resulting from the truncation of part of the MAC address, therefore, did not vitiate its decision either by error of law or by error of assessment in light of all the possible means to identify the person whose data is being collected, as required by Article 2 of the Law of 6 January 1978, that the objectives of the data collection by JCDecaux France were incompatible with anonymization of the information gathered.

As regards the ground relating to the information of persons:

9. The plaintiff company maintains(asserts/argues) that it can avail itself of the provisions referred to in point 2 of the IV of Article 32 of the Law of 6 January 1978 which limit the information obligations of the persons concerned by the collection of data “To be subjected to an anonymization process shortly after collection.” However, the CNIL, insofar as it considered that the proposed measures did not have the effect of anonymizing the data, rightly found that the proposed processing fell within the scope of the rules on information of the persons concerned. The plea alleging that the CNIL erred in law by holding that the information as part of the plaintiff company’s project was insufficient, can therefore only be rejected.
10. It follows from all the foregoing that JCDecaux France is not justified in seeking the annulment of the deliberation it is attacking. Consequently, it is not entitled to request that the CNIL be ordered to issue the requested authorization.

The conclusions submitted under the provisions of Article L. 761-1 of the Code of Administrative Justice:

11. The provisions of Article L. 761-1 of the Code of Administrative Justice preclude an amount to be paid as such by the State which is not, in the present proceedings, the losing party.

DECIDES:

Article 1: The application (petition) by JCDecaux France is dismissed.

Article 2: This decision shall be notified to JCDecaux France and to the National Commission on Informatics and Civil Liberties.