

Digital Content Next

Legal and Legislative Committee
December 11, 2018



CNIL's “Vectaury” ruling October 30, 2018

DCN Legal and Legislative Webinar
December 11, 2018

Paul Van den Bulck
Partner, McGuireWoods LLP
Member of the Brussels and Paris Bars

McGUIREWOODS

"Vectaury" ruling: Context

- Two processings:
 - **Software Development Kit (SDK) for Apps editors**
 - Profiles on users' (data subjects) habits
 - Targeted advertising campaigns
 - Assessment of effectiveness of advertising campaigns
 - **Real-time bidding (RTB) system**
 - Advertisers bid for advertising space directly to Vectaury thanks to the personal data collected via the Apps
- Vectaury: **Data Controller**
- Legitimation of the processing: **consent** of data subjects
- How was the consent **collected** ?

"Vectaury" ruling: Context

- How is consent **collected**?

- (i) A short text appears, when the App is launched

*"In order to **improve our application** and to send you **personalized content and/or commercial offers**, our partners **and ourselves** collect your personal data such as your browsing data or your geographical position. **It also allows us to provide you with free access to our service and we are committed to delivering ads with non-intrusive formats.** By accepting, you consent to our partners and ourselves collecting and processing your personal data **for analysis and advertising purposes.** You can change your privacy settings at any time from the application settings."*

- (ii) At the end of this text: a link to privacy policy

- (iii) And then, the user can choose: *"I accept", "I refuse" or "customize my preferences"*

- (iv) If *"customize my preferences"* is selected:

- By default, all check boxes are checked in the sub-menu
 - Possibility, by an additional click, to access the list of all data controllers
 - Then, the user has the possibility to oppose some or all of the data controllers

Lawfulness of processing: legal basis

- Article 6 of the GDPR:

Processing shall be lawful only if and to the extent that at least one of the following applies

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
- (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

- French Data Protection Law provides the same principle in its Article 7

Consent: Definition

- Article 4 (11) of the GDPR defines consent as:

"Any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her "

- CNIL's ruling: Default notification from App asking for the user's permission for geolocation data to be collected did not allow Vectaury to obtain valid consent because **it failed to ensure that:**
 - (i) users were **appropriately informed** of the **identities of companies** that wished to process their data;
 - (ii) consent was given for **specific purposes**; and
 - (iii) consent was expressed by a **clear, affirmative action**.

Elements of valid consent: Informed

- Principle: Information must be given in a **clear and plain language** prior to obtaining the consent in order to:
 - Enable data subjects to **make informed decision**;
 - **Understand what** data subjects are **agreeing**; and
 - Exercise their right to withdraw their consent
- CNIL's ruling: Users need to know **which companies** wish to process their data, and for **what purposes**:
 - Clearly non-compliant : when Vectaury's partners **failed to disclose to their users the fact that Vectaury was one of the third parties seeking consent** to process their personal data
 - Non-compliant: consent is not informed when the information provided is unclear and is **not easily accessible** (particularly the list of third parties receiving the data)

Elements of valid consent: Specific

- Principle: Consent must be given in relation to one or more **specific purposes**:
 - **Purpose** specification
 - **Granularity** in consent
 - A **clear separation of information** related to obtaining consent from information about other matters
- CNIL's ruling: Consent obtained **at the time of the installation** of the application was **not sufficiently specific** because it only gave users the option to consent or to refuse:
 - Not asked to specifically consent to the processing of their geolocation data for targeted marketing purposes
 - General consent "en bloc" = not sufficient

Elements of valid consent: Unambiguous indication

- Principle: the consent must always be given through an **active motion or declaration** → **deliberate action**
- CNIL's ruling: pointed out that the consent obtained through the tool was not based on an affirmative/deliberate action:
 - Users must **scroll through the entire text** to make the link "*customize my preferences*" appear , and then click on the link to access information concerning data processing
 - Moreover, users selecting "*customize my preferences*" were directed to a separate pop-up with **all options pre-checked by default**
 - The users' **action is only required to object** to the processing by clearing each relevant check box

Sanctions

- To **cease processing of** geolocation data for advertising purposes without an appropriate legal basis
- To **delete all data** obtained on the basis of the invalid consent
 - + To **ensure obtaining GDPR-compliant consent** from users of the apps (for SDK and RTB) before processing these users' data
- Vectaury has **3 months** to comply with the decision and to demonstrate compliance to the CNIL
 - If not, it could lead to sanctions, including fines based on art. 45 French Act: 2% worldwide revenue or 10 millions €, whichever is higher
- Possibility to appeal before the French "Conseil d'Etat" (2 months from the decision)

Control v. Transparency

Questions or Comments?

www.mcguirewoods.com

pvandenbulck@mcguirewoods.com

 [@Pbulck](https://twitter.com/Pbulck)

T: +32 629 42 39

M: +32 475 52 84 08