

## France

# Consent and Cookies: Has Orange Crossed the Line? An Analysis of CNIL Decision SAN-2024-019

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## I. Introduction

Recent findings by the Commission nationale de l'informatique et des libertés (CNIL), the French data protection supervisory authority, highlight the ongoing significance of consent in protecting personal data. The deliberation focused on two key aspects: the requirement for data subjects' informed consent when their personal data is processed, and the controversial practice of deploying cookies, specifically the practice of continuing to use cookies despite users' opt-out preferences. Thus, on 14 November 2024, the CNIL issued its 'Deliberation SAN-2024-019' concerning cookie use in a telecommunications context.<sup>1</sup>

The CNIL's investigation revealed that the telecommunications service provider Orange,<sup>2</sup> through its email service 'Mail Orange', displayed ad-

vertisements between the emails of its users without their consent. Moreover, despite requiring user consent, cookies continued to be placed by Orange's website<sup>3</sup> through requests to the domains associated with the cookies - in other words, cookies continued to be recorded and stored even after the users had withdrawn their consent.<sup>4</sup> According to the CNIL, this situation violates both Article L. 34-5 of the Post and Electronic Communications Code (CPCE)<sup>5</sup> and Article 82 of the Data Protection Law<sup>6</sup>, respectively transposing Articles 13 and 5(3) of the ePrivacy Directive<sup>7</sup>.

The CNIL sanctioned Orange with an administrative fine of €50 million and an injunction to implement measures to ensure that users' consent to read and/or write information on their terminal equipment is effectively withdrawn. The injunction imposes a penalty of €100,000 per day of delay, after a period of three months following the notification of the decision.<sup>8</sup> More importantly, the CNIL exercised the power granted by Article 22 of the French Data Protection Law to make its decision public and explicitly identify Orange.

## II. The Prohibition of Non-consensual Direct Marketing by Email

The first issue addressed by CNIL concerned the direct marketing practices employed by Orange. CNIL's investigation showed that the users of Orange were receiving unsolicited advertisements, directly in their email inboxes, without their consent. However, according to Article L. 34-5 of the CPCE, Orange needs users' freely given, specific and informed consent for marketing emails.

Pursuant to Article L. 34-5 of the CPCE and Article 13 of the ePrivacy Directive, direct marketing by email is prohibited unless the user has given consent before receiving the ads via electronic means. The

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1 Commission Nationale de l'Informatique et des Libertés, 'Délibération de La Formation Restreinte n°SAN-2024-019 Du 14 Novembre 2024 Concernant La Société ORANGE SA' (2024) SAN-2024-019 <<https://www.legifrance.gouv.fr/cnil/id/CNILTEXT000050760620>> accessed 2 April 2025.

2 ORANGE SA is one of the world's leading telecommunications operators and the incumbent telecommunications operator in France. On 31 December 2022, it employed about 136,000 people, including 75,000 in France.

3 The relevant website is <[orange.fr](https://orange.fr)>.

4 Commission Nationale de l'Informatique et des Libertés (n 2) para 83.

5 Code des postes et des communications électroniques.

6 Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés, Légifrance.

7 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201/37.

8 Commission Nationale de l'Informatique et des Libertés (n 2) para 141.

concept of consent is defined in Article 4(11) of the General Data Protection Regulation (GDPR)<sup>9</sup> as any freely given, specific, informed and unambiguous indication of the data subject's wishes by which a person, in form of a statement or clear affirmative action, accepts the processing of their personal data. The CNIL notes that consent was never obtained by Orange and that the account settings did not permit opting out from this type of email display which made clear that it was not even possible to express that a user wanted to decline giving consent.

The CNIL addresses a key issue in electronic commercial advertisement: the legal status of advertising messages that are not emails but imitate the appearance of emails.<sup>10</sup> Based on the Court of Justice of the European Union's (CJEU) case law<sup>11</sup> on the concept of 'use of electronic mail for the purposes of direct marketing', the CNIL considers that the advertising messages in question should be subject to the same legal regime as unsolicited emails, because these messages exploit users' trust in their email inboxes. The CNIL distinguishes between advertising messages that imitate emails and advertising banners that are displayed alongside the list of emails. The display, in the inbox of an email service user, of advertising messages in a form similar to that of real emails, and placed in the same position as those emails, is subject to the legal regime governing direct marketing via email, which means that the aforementioned consent needs to be acquired.<sup>12</sup> The method of targeting or the level of intrusion is irrelevant.

The ads in question were slightly grey, labelled as 'announcements', and had a 'delete button' instead of a selection box. They appeared to come from usual senders and had subject lines similar to real emails. Clicking on them opened an advertiser's website. According to the CNIL, there is a risk of confusion between the two categories of emails, as these ads did not appear as separate banners or pop-ups. They were instead mixed directly into the email inbox, making them look like real messages. This forced users to treat them like spam when deciding whether to delete them. The intrusive nature of these advertisements is undeniable. Email inboxes are typically regarded as private areas where users handle their personal and professional correspondence. Inserting advertising into this space without the user's consent infringes upon the reasonable expectation of privacy. A key difference is that, unlike advertisements on

websites or in free applications, emails are content that users anticipate and frequently deem important. Therefore, Orange's practice of inserting advertisements without consent obscured the distinction between the content users want and commercial intrusion.

The CNIL considered that, regardless of the fact that the advertisements in question were not, from a technical point of view, genuine emails, ie messages sent by one user to another using their email address, their mere display in a space normally reserved for private emails was sufficient to consider that these messages were communicated by means of electronic mail.

Moreover, the CNIL notes that the email provider must be considered responsible for compliance with Article L. 34-5 of the CPCE from the moment it markets to advertisers dedicated space, which the provider determines at its own discretion and which he controls the display of, within the users' email inboxes. Thus, by being the only one in direct contact with the recipients of the messages, the provider is the only one able to obtain the (required) user's consent.<sup>13</sup>

This decision confirms the CNIL's determination to ensure strict compliance with data protection regulations. It also sends a strong signal to economic players about the importance of complying with these rules. Indeed, the CNIL highlights the need for an evolving interpretation of legal texts to ensure that they remain relevant and effective in the face of new technologies and new advertising methods. It advocates a functional approach, focusing on the purpose of the law rather than the technical details.<sup>14</sup> While an evolving interpretation is necessary, it must be framed to guarantee legal certainty and render economic players able to anticipate the legal consequences of their actions.

9 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

10 Commission Nationale de l'Informatique et des Libertés (n 2) para 37.

11 Case C-102/20 *StWL Städtische Werke Lauf ad Pegnitz GmbH v primo GmbH* [2021] ECLI:EU:C:2021:954.

12 Ibid, para 63.

13 Commission Nationale de l'Informatique et des Libertés (n 2) para 49.

14 Ibid, 34.

The CNIL, as a regulatory authority, has a crucial role to play in providing clear and predictable guidelines on the interpretation of legal texts. The functional approach employed in this case of commercial advertising, therefore consists in determining whether a given communication has the effect of commercially soliciting an individual irrespective of the technical means used.

### III. The Use of Cookies After Withdrawal of Consent

The second issue addressed by the CNIL concerned the use of cookies on Orange's website after users had withdrawn their consent. According to Article 82 of the French Data Protection Law and Article 5(3) of the ePrivacy Directive, any subscriber or user of an electronic communications service must be clearly and fully informed about the processing of personal data by the data controller or its representative. Moreover, they must be clearly and fully informed of the means available to them to opt-out from the processing.<sup>15</sup>

It must be noted that when the user visits the Orange's website and cookies are used, the information from these cookies does not remain solely on the user's computer. This information is also sent to Orange's servers and those of its partners. This means that neither the user nor Orange has full control over what happens to this information, especially once the information is acquired by Orange's partners. Even if the user has refused to allow the use of cookies, their information may still be sent to said servers.

Continuing to process cookies after the user opts out is not in line with Article 82 French Data Protection Law. Indeed, the situation in question is not subject to one of the two exceptions of Article 82; oper-

ations to access or record information on a user's terminal can only be carried out after the users have expressed their consent.<sup>16</sup>

The clarity of the legal texts is evident, and the CNIL has previously addressed comparable situations. This decision imposing sanctions on Orange is in line with the earlier CNIL decision of 29 December 2023,<sup>17</sup> where it clarified that, while Article 82 requires the subscriber's or user's consent before cookies can be placed, it also offers the subscriber or user the correlative right to withdraw their consent, thereby reversing their decision to accept cookies placed on their terminal.

Even though Orange has provided an interface for users to withdraw their consent, related cookies, such as advertising or statistical cookies, continue to be read even after the withdrawal. Such a reading operation, which consists in accessing data stored in a user's terminal, is explicitly prohibited by Article 82.

The core of the decision regarding cookies is that the mere act of reading cookies is subject to the consent of the person concerned, without consent (irrespective of whether this consent has never been given or has been withdrawn), the prohibition set out in Article 82 of the Data Protection Law applies. Moreover, whether the company actually uses the information collected subsequently is irrelevant to establish a breach of Article 82.

The CNIL also recalls a decision of 17 September 2020,<sup>18</sup> where it already explained technical measures to ensure effective consent withdrawal. Advice was given therein on how to ensure that cookies are deleted when a user opts out from the use of cookies. Special solutions need to be put in place to ensure that cookies are no longer used, for example by making them expire immediately or by deleting them directly from the user's computer. Thus, Orange could not use the argument that they did not know how to properly comply with Article 82.

Interestingly, cookies are not only tied to the 'orange.fr' domain but also originate from external third-party sources. Regarding the first situation, the CNIL notes that Orange has full control over cookies linked to its website and that it cannot hide behind technical problems or the lack of solutions from its partners to justify that cookies are still used after a refusal. Regarding the second issue, the CNIL interestingly states that, even if the cookies on the Orange website are from partners, Orange is also considered responsible to check that its partners comply with

15 Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés.

16 Commission Nationale de l'Informatique et des Libertés (n 2).

17 Commission Nationale de l'Informatique et des Libertés, 'Délibération de La Formation Restreinte n°SAN-2023-024 Du 29 Décembre 2023 Concernant La Société YAHOO EMEA LIMITED' (2023) n°SAN-2023-024.

18 Légifrance, 'Délibération N° 2020-091 Du 17 Septembre 2020 Portant Adoption de Lignes Directrices Relatives à l'application de l'article 82 de La Loi Du 6 Janvier 1978 Modifiée Aux Opérations de Lecture et Écriture Dans Le Terminal d'un Utilisateur (Notamment Aux «cookies et Autres Traceurs») et Abrogeant La Délibération N° 2019-093 Du 4 Juillet 2019' (2020) Texte n° 85 CNIL2026187X

cookie rules and take action if there are any problems.<sup>19</sup> CNIL recalled a ruling by the Conseil d'État which clarified that the site publisher's obligations include ensuring that its partners do not use its site to place cookies that are non-compliant with French law, and taking all necessary steps to address such non-compliance.<sup>20</sup> Thus, even if Orange was unable to delete third-party cookies directly, it remained responsible for conducting a compliance assessment and taking appropriate measures with its partners to address the breach.

#### IV. The Sanction Including the Publicity of the Decision

According to Article 22 of the French Data Protection Law, decisions taken by the authority can be made public. Noteworthy is that Orange did not oppose to the publicity of the decision.<sup>21</sup> In order to ensure that the monetary fine was effective, proportionate and dissuasive, the fine was calculated based on Orange's global revenue (instead of solely the French revenue) in accordance with Article 83 GDPR and the respective case law of the CJEU.<sup>22</sup> To impose a fine, the nature, duration, impact and gravity of the violation must be analysed. The breaches were considered particularly serious because of their intrusive nature, reaches and for displaying ignorance for the user's will.

It must be noted that Orange's activities, concerned 7.89 million users, because all those accessing the 'Mail Orange' service from a browser or the Orange application were necessarily confronted with the ads in question. Given its market position and the resources at its disposal, Orange should have been particularly vigilant in this respect. Thus, by disregarding these rules, the '*formation restreinte*' (CNIL's body which can impose various sanctions) considered that the company was, at the very least, grossly negligent.

Emphasis was put on the fact that the average user lacks the basic understanding of the collection of any data, its uses, how the technology works, and more importantly, how and where to opt-out.<sup>23</sup> The breach of Article 82 of the French Data Protection Law was particularly serious insofar as, by continuing to read cookies on the user's terminal, and thus enabling the tracing of their browsing even though the user had opted out, the company was ignorant towards choices expressed by the users, who could legitimately be-

lieve that their choice would be respected and could not therefore assume that the company and its partners would continue to access information stored on their terminals.

#### V. Conclusion

This decision by the French supervisory authority has the potential to shape advertising practices by large telecom operators. The advertising market is highly competitive, and as a result, platform providers are constantly searching for new techniques to sell advertising space, in France as well as elsewhere in Europe. The CNIL noted that the ads in question appeared to come from usual senders and had subject lines similar to real emails, and clicking on them opened an advertiser's website. Such solutions are sought after because they allow to measure performance and prove the effectiveness of an ad space to the advertiser. The decision highlights that advertisements imitating real email messages may not only mislead consumers and contravene consumer protection laws, but can also be considered as unsolicited communications for purposes of direct marketing and, thus, require consent under the ePrivacy Directive and its national transpositions. Regulatory bodies competent for the sector will likely increase their scrutiny of how companies, especially those providing communication services like emails, implement their advertising policies. The focus will be on ensuring compliance with data protection laws, particularly regarding consent for direct marketing.

Finally, the decision shows that data protection law through its strict consent regime also serves the objective of consumer protection, protecting individuals from dark patterns and commercial activities that they may not realise as such and that occur without their knowledge or consent.

19 Commission Nationale de l'Informatique et des Libertés (n 2) para 99.

20 *Conseil d'État, 10ème - 9ème chambres réunies*, [2018] Conseil d'État 412589.

21 Commission Nationale de l'Informatique et des Libertés (n 2) para 112.

22 Case C-807/21 *Deutsche Wohnen SE v Staatsanwaltschaft Berlin* [2023] ECLI:EU:C:2023:950.

23 Article 29 Data Protection Working Party, 'Opinion 2/2010 on Online Behavioural Advertising' (2010) 00909/10/EN WP 171, 15.