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FRANCE

Vienna, 24.08.2022

noyb Case-No: C-059

Complainant 1:

[REDACTED]

Complainant 2:

[REDACTED]

Complainant 3:

[REDACTED]

represented under Article 80(1) of the GDPR by:

noyb - European Center for Digital Rights  
Goldschlagstraße 172/4/3/2  
1140 Vienna  
Austria

Respondent:

**Google Ireland**  
Gordon House Barrow Street Dublin 4  
D04E5W5  
Ireland

**Google LLC**

1600 Amphitheatre Parkway.  
Mountain View  
94043-1351 California, USA

And any other person identified in the course of the  
procedure.

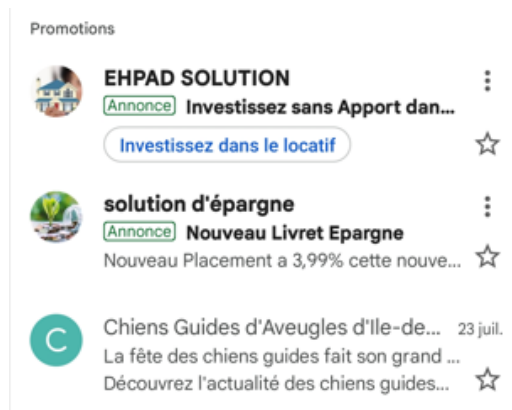
# COMPLAINT

## 1. REPRESENTATION

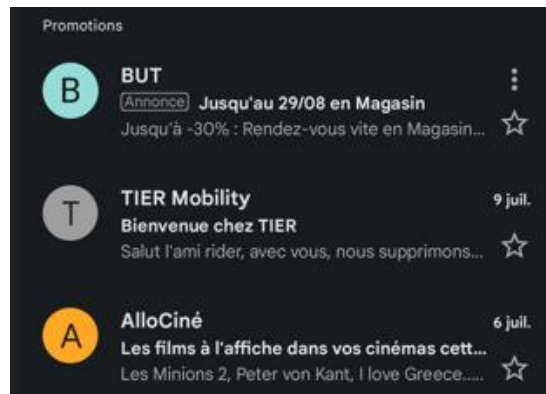
1. *noyb* - European Centre for Digital Rights - is a not-for-profit organisation active in the field of the protection of data subjects' rights and freedoms with its registered office in Goldschlagstraße 172/4/2, 1140 Vienna, Austria, registry number ZVR: 1354838270 (hereinafter: "*noyb*") (**Attachment 1**)
2. *noyb* is representing the Complainants under Article 80(1) of the GDPR (**Attachments 2, 3, 4**).

## 2. FACTS PERTAINING TO THE CASE

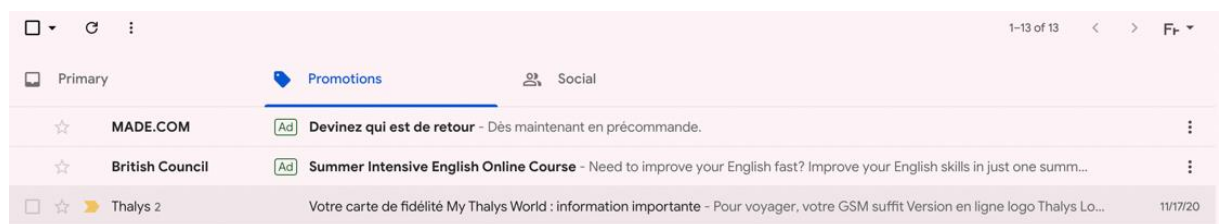
3. The Complainants are users of Google's email service Gmail.
4. In the "Promotions" tab of their mailbox (both in the mobile version of Gmail and in the web version for Complainant 3), the Complainants receive, among other things, advertising emails for which they have given their consent. Among these emails, the Complainants also receive advertising emails of another type ("Gmail advertising emails"). These Gmail advertising emails have only two characteristics that distinguish them from other emails. First, they include the word "Ad" in green letters on the left-hand side, below the subject line of the email. Second, they do not include a date (**Screenshots 1, 2 and 3 and Attachment 5**).



**Screenshot 1 of Complainant 1**



**Screenshot 2 from Complainant 2**



**Screenshot 3 from Complainant 3**

5. The Complainants were not asked to consent to these advertising emails being sent to them when they signed up for Gmail or even afterwards.

### **3. GROUNDS FOR COMPLAINT: LACK OF CONSENT UNDER ARTICLE L34-5 CPCE.**

6. The Directive 2002/58/EC on privacy and electronic communications ("the ePrivacy Directive") has been partially transposed in France by the Code des Postes et des Communications Electroniques ("CPCE"). Article L34-5 of this code transposes Articles 2(f) and 13(1) of the ePrivacy Directive.
7. According to Article 13(1) ePrivacy Directive *"the use [...] of electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent"*. Similarly, Article L34-5 CPCE states that *"Direct marketing by means of an automated electronic communications system [...], a fax machine or electronic mail using the contact details of a natural person, subscriber or user, who has not given his or her prior consent to receive direct marketing by this means, is prohibited."*

#### **3.1. The placement of inbox advertisements constitutes "use of e-mail for the purposes of direct marketing"**

8. Gmail advertising emails constitute "electronic mail" within the meaning of Article 2(h) ePrivacy Directive and Article L34-5 CPCE.

9. In Case C102-20, the CJEU ruled that

*"[...] by contrast with advertising banners or pop-up windows, which are displayed at the edges of, or separately from, the list of private messages, the appearance of the advertising messages at issue in the main proceedings within the list of the user's private emails, impedes access to those emails in a manner similar to that used for unsolicited emails (also known as 'spam') to the extent that such a method requires the same decision to be taken by the subscriber concerning the processing of those messages."*<sup>1</sup>

The Court also added that

*"[...] the question of whether advertising messages such as those at issue in the main proceedings themselves fulfil the criteria to be classified as 'electronic mail', within the meaning of Article 2(h) of that directive, becomes superfluous in so far as those messages are communicated to the users concerned by means of their email inbox and thus their electronic mail."*<sup>2</sup>

10. Gmail advertising emails also constitute a **use of electronic mail for the purposes of direct marketing** within the meaning of Article 13(1) ePrivacy Directive and within the meaning of Article L34-5 CPCE.

10.1. In this regard, the CJEU has ruled that

*"In the present case, the very nature of the advertising messages at issue in the main proceedings, which promote services, and the fact that they are distributed in the form of an email such that they are directly displayed in the inbox of the private email service of the user concerned, allows those messages to be classified as communications for the purposes of direct marketing, within the meaning of Article 13(1) of Directive 2002/58."*<sup>3</sup>

10.2. In addition, Article L34-5 CPCE provides in its paragraph 3 that

*"The sending of any message intended to promote, directly or indirectly, goods, services or the image of a person selling goods or providing services shall constitute direct marketing."*

10.3. Whether the advertisements are targeted or not does not change this conclusion. According to the CJEU,

*"[...] the random or predefined selection of the recipient is not one of the conditions for the application of Article 13(1) of Directive 2002/58. In other words, it is irrelevant whether the advertising at issue is addressed to a predetermined and individually identified recipient or is sent on a mass, random basis to multiple recipients. What matters is that there is a communication for a commercial purpose, which reaches, directly and individually, one or more email service users by being inserted in the inboxes of those users' email accounts."*<sup>4</sup>

11. In this case, the Gmail advertising emails are therefore emails used for the purposes of direct marketing within the meaning of the ePrivacy Directive and Article L34-5 of the CPCE.

12. This conclusion is even more obvious when considering the following elements:

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<sup>1</sup> CJEU, Case C102-20, § 42.

<sup>2</sup> CJEU, Case C102-20, § 46.

<sup>3</sup> CJEU, Case C102-20, § 48.

<sup>4</sup> CJEU, Case C102-20, § 50.

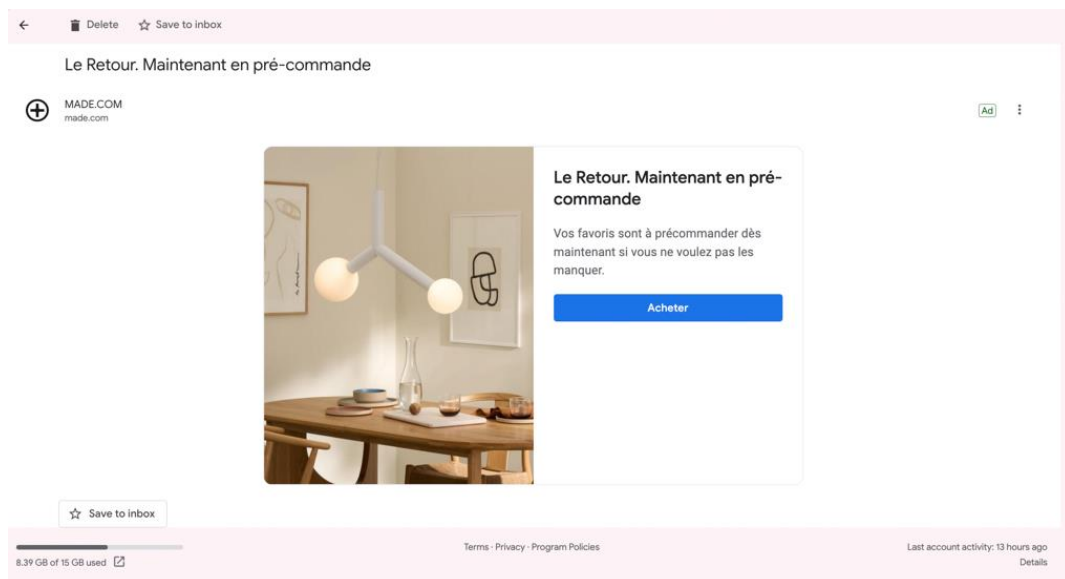
- When the Complainants click on the Gmail advertising emails, they are not redirected to an external website as the user was in Case C102-20: they see the full advertisement in the form of an email (**see Screenshots 4, 5 and 6 below**). Therefore, the Gmail advertising emails are even closer to "traditional" emails than those in the case C102-20.
- In addition, the Gmail advertising emails are displayed in the "Promotions" tab of the Complainants' inbox. This further confuses users: they generally expect to receive advertising emails to which they have subscribed, and will therefore legitimately assume that the Google advertising emails at hand in this complaint are also promotional emails to which they have subscribed - *quod non*.
- Finally, Gmail offers automatic filtering of unsolicited emails where unsolicited direct marketing emails are supposed to be redirected to a "Spam" box. However, Gmail advertising emails, that are also unsolicited - which cannot be ignored by Google - are knowingly directed to the "Promotions" inbox.



**Screenshot 4 of Complainant 1**



**Screenshot 5 from Complainant 2**



**Screenshot 6 from Complainant 3**

**3.2. No consent was obtained to send these direct marketing emails: violation of Article L34-5 paragraph 1 of the CPCE**

13. Neither Google nor any other advertiser has obtained the consent of the recipients required by Article 13 ePrivacy Directive and Article L34-5 CPCE.
14. Furthermore, none of the exceptions provided for in Article 13(2) ePrivacy Directive and the corresponding provision of Article L34-5, paragraph 4 of the CPCE are applicable because the electronic mail is not used for the direct marketing of similar products for which it was previously obtained. Therefore, it is necessary to obtain the consent of Gmail's users before displaying advertisements in their inboxes.

15. According to Article 2(f) ePrivacy Directive, read in conjunction with Article 94(2) GDPR, consent under the ePrivacy Directive must meet the requirements of Article 4(11) GDPR, which requires a *"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"*.
16. The above is confirmed by Article L34-5, paragraph 2 of the CPCE, which states that *"For the application of this article, consent is understood to mean any free, specific and informed expression of will by which a person accepts that personal data concerning him or her may be used for the purpose of direct marketing"*.
17. Such consent was not obtained. It follows that Article L34-5, paragraph 1 of the CPCE is violated by sending the Complainants the emails in question in the absence of their consent.

### **3.3. Lack of transparency: violation of Article L34-5, paragraph 5 of the CPCE**

18. The Gmail advertising emails also violate Article L34-5, paragraph 5 of the CPCE, which in substance transposes Article 6 of Directive 2000/31/EC, and which provides that

*"In all cases, it is forbidden to send, for the purposes of direct prospecting, messages by means of automated electronic communication systems within the meaning of 6° of Article L. 32, fax machines and electronic mail, without indicating valid contact details to which the recipient can usefully send a request to obtain that these communications cease at no cost other than those linked to the transmission of the communication. It is also forbidden to conceal the identity of the person on whose behalf the communication is issued and to mention a purpose unrelated to the service offered."*

19. However, Gmail advertising emails do not mention the identity of the sender of the direct marketing emails, nor do they make it possible to determine who to contact to oppose the receipt of these emails.
20. It must therefore be concluded that there has been a violation of Article L31-5, paragraph 5 of the CPCE.

## **4. APPLICATIONS**

### **4.1. Investigation**

21. The competent supervisory authority is requested to carry out a full and prompt investigation of the complaint, in particular on the basis of Chapter VI of Law No. 78-17 of 6 January 1978 on information technology, files and freedoms.
22. This investigation will need to determine who is sending the Gmail advertising emails, what data is collected and stored by those senders and Google, and how those senders can demonstrate consent from the Complainants.



#### **4.2. Cessation order**

23. It is requested to order the cessation of the sending of advertising emails in violation of Article L34-5 CPCE.

#### **4.3. Imposition of a fine**

24. It is also suggested that an effective, proportionate and dissuasive fine be imposed in accordance with Chapter VII of Law No. 78-17 of 6 January 1978 on information technology, files and freedoms.

### **5. CONTACT**

[REDACTED]

[REDACTED]