

Decision of the National Commission sitting in restricted formation on

the outcome of survey no. [...] conducted with Company A

Deliberation no. 39FR/2021 of October 15, 2021

The National Commission for Data Protection sitting in restricted formation,

composed of Mrs. Tine A. Larsen, president, and Messrs. Thierry Lallemand and Marc

Lemmer, commissioners;

Having regard to 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;

Having regard to the law of August 1, 2018 on the organization of the National Commission for the Protection of data and the general data protection regime, in particular Article 41 thereof;

Having regard to the internal rules of the National Commission for Data Protection

adopted by decision no. 3AD/2020 dated January 22, 2020, in particular its article 10.2;

Having regard to the regulations of the National Commission for Data Protection relating to the procedure investigation adopted by decision No. 4AD/2020 dated January 22, 2020, in particular its article

9;

Considering the following:

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Facts and procedure

1.

Given the impact of the role of the Data Protection Officer (hereinafter: the “DPO”) and

the importance of its integration into the organization, and considering that the guidelines

concerning DPOs have been available since December 2016¹, i.e. 17 months before the entry into

application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data personal data and on the free movement of such data, and repealing Directive 95/46/EC (Regulation general on data protection) (hereinafter: the “GDPR”), the National Commission for the data protection (hereinafter: the “National Commission” or the “CNPD”) has decided to launch a thematic survey campaign on the function of the DPO. Thus, 25 audit procedures were opened in 2018, concerning both the private and public sectors.

2.

In particular, the National Commission decided by deliberation n°[...] of September 14 2018 to open an investigation in the form of a data protection audit with the Company A, established at L- [...], and registered in the trade and companies register under number [...] (hereinafter: the “controlled”) and to appoint Mr. Christophe Buschmann as head of investigation. Said deliberation specifies that the investigation relates to the conformity of the control with the section 4 of chapter 4 of the GDPR.

3.

4.

The corporate purpose of the audit is all activities in the field of health [...].

By letter dated September 17, 2018, the head of investigation sent a questionnaire preliminary to the audit, to which the latter responded by email dated October 15, 2018. A visit on site took place on 21 February 2019 and additional information was received on 6 and June 7, 2019. Following these exchanges, the head of investigation drew up audit report no. [...] (hereinafter: the “audit report”).

1 The DPO Guidelines were adopted by the Article 29 Working Party on 13 December 2016. The revised version (WP 243 rev. 01) was adopted on April 5, 2017.

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5.

It appears from the audit report that in order to verify compliance of the audit with section 4 of chapter 4 of the GDPR, the head of investigation has defined eleven control objectives, namely:

- 1) Ensure that the body subject to the obligation to appoint a DPO has done so;
- 2) Ensure that the organization has published the contact details of its DPO;
- 3) Ensure that the organization has communicated the contact details of its DPO to the CNPD;
- 4) Ensure that the DPO has sufficient expertise and skills to carry out its missions effectively;
- 5) Ensure that the missions and tasks of the DPO do not lead to a conflict of interest;
- 6) Ensure that the DPO has sufficient resources to effectively carry out its his missions ;
- 7) Ensure that the DPO is able to carry out his duties with a sufficient degree autonomy within their organization;
- 8) Ensure that the organization has put in place measures for the DPO to be associated with all questions relating to data protection;
- 9) Ensure that the DPO fulfills his mission of providing information and advice to the controller and employees;
- 10) Ensure that the DPO exercises adequate control over the processing of data within his body;
- 11) Ensure that the DPO assists the controller in carrying out the impact analyzes in the event of new data processing.

6.

By letter dated October 18, 2019 (hereinafter: the "statement of objections"), the head of investigation informed the control of the breaches of the obligations provided for by the RGPD that it

noted during his investigation. The audit report was attached to this letter of October 18, 2019.

7.

In particular, the head of investigation noted in the statement of objections

breaches of:

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the obligation to communicate the contact details of the DPO to the supervisory authority²;

the information and advice mission of the DPO³.

2 Objective 3

3 Goal 9

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8.

By letter dated November 14, 2019, the controller sent the head of investigation his decision
position on the statement of objections. In this letter, the controller presents his
observations relating to each shortcoming raised by the head of investigation in the
statement of objections.

9.

On August 3, 2020, the head of investigation sent an additional letter to the controller to the
statement of objections (hereinafter: the “additional letter to the statement of
grievances”) by which he informs the control of the corrective measures that the head of investigation proposes
to the National Commission sitting in restricted formation (hereinafter: the “restricted formation”)
to adopt.

The president of the restricted formation informed the control by letter of April 12, 2021

10.

that his case would be registered for the session of the Restricted Committee on May 31, 2021 and that he could attend this session.

During the restricted training session of May 31, 2021, the head of investigation presented

11.

his oral observations on the case and answered the questions posed by the Restricted Committee.

The controller was not present at the session.

I.

Place

A. On the failure to communicate the contact details of the DPO to the authority

control

1. On the principles

12.

Article 37.7 of the GDPR provides for the obligation for the organization to communicate the contact details of the DPO to the supervisory authority. Indeed, it follows from Article 39.1 e) of the GDPR that the DPO acts as a point of contact for the supervisory authority so it is important that the latter has the contact details of the DPO.

13.

The DPO Guidelines explain that the communication requirement of the contact details of the DPO to the supervisory authority aims to ensure that “the supervisory authorities

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can easily and directly contact the DPO without having to go to another service of the organization” 4.

It should also be noted that the CNPD published on its website as of May 18, 2018

14.

a form allowing organizations to send it the contact details of their DPO.

2. In this case

15.

It appears from the audit report that, as part of this audit campaign, for the head of investigation considers objective 3 as achieved by the control, the head of investigation expects that the organization communicated the contact details of its DPO to the CNPD on 25 May 2018.

16.

According to the statement of objections, the controller provided the CNPD with the contact details of the DPO who was in office at the time of the investigation by letter dated 11 September 2018.

In its position paper of November 14, 2019, the auditee explains that it communicated

17.

a first time to the CNPD the contact details of its DPO and that these have been received by the CNPD on April 23, 2015. This DPO retired in October 2018 and was replaced June 2018 by the DPO in office at the time of the investigation. The appointment of this new DPO has been notified to the CNPD on September 11, 2018, i.e. one month before the departure of the former DPD.

The Restricted Committee notes that the GDPR has been applicable since May 25, 2018 from

18.

so that the obligation to communicate the contact details of the DPO to the supervisory authority exists since that date.

The Restricted Committee also finds that the CNPD has effectively rendered a

19.

deliberation dated April 23, 2015 following the request for approval as responsible for the data protection introduced for the audited body.

However, even if the data protection officer as provided for by the repealed law

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of 2 August 2002 on the protection of individuals with regard to the processing of personal data
personal character can be called a precursor to DPD insofar as there are

4 WP 243 v.01, version revised and adopted on April 5, 2017, p.15

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similarities between the two functions, the fact remains that there are differences,
particularly at the level of designation and old and new legislation. Thus, the loaded
of data protection designated under the repealed law of August 2, 2002 did not take
automatically the function of DPO and the bodies that had voluntarily appointed such a
charged under the old law still had to comply with Articles 37 to 39 of the GDPR,
and in particular communicate the contact details of the DPO to the CNPD.

In view of the foregoing, the Restricted Committee concludes that Article 37.7 of the GDPR has no

21.

not respected by the controller.

B. On the breach relating to the mission of information and advice of the DPO

1. On the principles

22.

According to Article 39.1 a) of the GDPR, one of the tasks of the DPO is to "inform and
advise the controller or processor as well as the employees who carry out
processing on their obligations under this Regulation and other
provisions of Union law or the law of the Member States relating to the protection of
data".

23.

In addition, pursuant to Article 39.1 b) of the GDPR, the DPO also has the task of monitor compliance with the GDPR by the controller, “including with regard to (...) the awareness and training of personnel involved in processing operations”.

Although the term “employees” has been used in Article 39.1 a) of the GDPR, reading 24.

the whole of the GDPR, in particular Article 39.1 b), shows that this term should not be read and interpreted strictly. Indeed, the use of the terms “staff participating in operations of processing” of article 39.1 b) as well as the general state of mind of the GDPR demonstrate the will of the European legislator to take into account all persons processing personal data personal nature within an organization responsible for the processing and who act to carry out the latter's missions.

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2. In this case

25.

It appears from the audit report that, for the head of investigation to consider objective 9 as completed by the audited as part of this audit campaign, he expects that "the organization has formal reporting of the DPO's activities to the Management Committee on the basis of a defined frequency. Regarding information to employees, it is expected that the organization has put put in place an adequate staff training system in terms of data protection”.

26.

Regarding staff training, according to the Statement of Objections, page 3, “[i]t emerges from the survey that the doctors having a "collaboration contract" with the controlled no obligation for training and/or compliance with the establishment's procedures concerning

GDPR issues, unlike salaried staff (paramedical, administrative and others). The controller has not been able to demonstrate that the DPO exercises its missions of information and advice, concerning this type of personnel in direct contact with patient data (data necessary for the care of said patients) while the employee training plan includes mandatory GDPR E-learning. »

In its position paper of November 14, 2019, the controller maintains that doctors

27.

working within the audited body are not employees under the definition of this term given by the Larousse online, namely "an employee who works in an office, an administration, a store, or at a private individual's. According to the auditee, "[t]he doctors indeed practice under liberal status by virtue of an approval granted by [the organization]. The statute physicians within [the organization] differs from that of other physicians practicing in other hospitals in Luxembourg. Moreover, the acts carried out in the hospital do not represent often only part of their activity which is also exercised within their medical office in out-of-hospital consultations. Physicians are therefore not subject to a link of subordination with [the body] and cannot be so without distorting the status of liberal profession which is theirs. »

28.

The controller also adds in its statement that it informed in October 2018 medical advice on data protection guidelines in the same way than employees of the control. In addition, physicians were invited to participate in meetings

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of GDPR training by the DPO. Finally, on May 13, 2019, as part of continuing education,

the controller organized a conference with the theme [...] as an introduction.

The Restricted Committee finds that the breach noted by the head of investigation does not

29.

concerns only the mission of information and advice of the DPO with regard to employees, and not the DPO's mission to inform and advise the controller.

Restricted training includes that physicians practicing within the organization

30.

controlled have self-employed status [...].

However, although doctors are subject to the liberal statute, they have the obligation,

31.

as part of their practice of medicine within the controlled body, to use the computer system and equipment made available to them by the controller. Furthermore, during their presence in the premises of the controlled, the doctors process the personal data patients in order to carry out the missions and the purposes defined by the controlled person.

Doctors must therefore comply with the control procedures concerning compliance with the GDPR.

32.

The Restricted Committee is therefore of the opinion that physicians are people who treat personal data of patients in the context of the performance of the missions of the responsible for the treatment, so that these doctors participate in the treatment operations of the controller, while processing and using the personal data of the controlled, as well as the latter's IT system, resources and infrastructure. DPO therefore has the mission of informing and advising both the employees of the control and the doctors exercising their activity within the controlled under a status of self-employed workers.

33.

However, the restricted training understands that the e-learning training in the GDPR is not mandatory only for controlled employees, while this training is only optional and on the basis of the

volunteering for doctors.

34.

The Restricted Committee also notes that, according to the information at its disposal, the conference [...] organized by the controller as part of continuing education, of which it is made mentioned in point 28 of this Decision, had as its main theme [...]. The theme of data protection has only been addressed in this conference as an introduction under

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the title [...].⁵ The Restricted Committee is therefore of the opinion that, with regard to the titles of the themes addressed during this conference, the latter was mainly intended [for a category of medical specialists], so that a large majority of doctors practicing within the inspected body have not been involved in said training. In fact, according to the website of the audit on the day of this decision, [...] doctors [...] practice within the organization, for a total of more than [...] physicians. In addition, it was noted in the report of the visit on site of February 21, 2019 that doctors participate little in training relating to the GDPR and return little to the DPO, while they participate in the processing operations of the controlled.

35.

In view of the foregoing, the Restricted Committee concludes that Article 39.1 a) of the GDPR has not been respected by the controller.

II.

On corrective measures

A. Principles

36.

In accordance with article 12 of the law of August 1, 2018 on the organization of the

National Commission for Data Protection and the general data protection regime

data, the National Commission has the powers provided for in Article 58.2 of the GDPR:

- (a) notify a controller or processor of the fact that the operations of envisaged processing are likely to violate the provisions of this Regulation;
- b) call to order a data controller or a processor when the operations of processing have resulted in a breach of the provisions of this Regulation;
- (c) order the controller or processor to comply with requests submitted by the data subject with a view to exercising their rights under this Regulation;

5 Appendix 3 to the audit position statement of November 14, 2019.

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- d) order the controller or the processor to put the operations of processing in accordance with the provisions of this Regulation, where applicable, of specific manner and within a specified time;
- (e) order the controller to communicate to the data subject a personal data breach;
- f) impose a temporary or permanent restriction, including prohibition, of processing;
- g) order the rectification or erasure of personal data or the restriction of the processing pursuant to Articles 16, 17 and 18 and the notification of these measures to the recipients to whom the personal data has been disclosed in application of Article 17(2) and Article 19;
- (h) withdraw a certification or direct the certification body to withdraw a certification

issued pursuant to Articles 42 and 43, or order the certification body to

not to issue a certification if the requirements applicable to the certification are not

or more satisfied;

i)

impose an administrative fine pursuant to Article 83, in addition to or in addition to

place the measures referred to in this paragraph, depending on the characteristics

specific to each case;

j) order the suspension of data flows addressed to a recipient located in a

third country or an international organisation. »

37.

The Restricted Committee would like to point out that the facts taken into account in the context of the

this Decision are those found at the start of the investigation. Nevertheless, the procedures

performed by the controller to comply with the GDPR during the procedure

of investigation or to remedy the shortcomings noted by the head of investigation in the

statement of objections are taken into account by the Restricted Committee within the framework of the

any corrective measures to be taken.

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B. In the instant case

38.

In his supplementary letter to the statement of objections of 3 August 2020, the head

of investigation proposes that the Restricted Committee take the following corrective action:

“Order the implementation of measures ensuring that all persons

acting under the exclusive or partial responsibility of the controller in

concerning the processing of personal data undergo regular training,

at least annually, in this regard. »

39.

The Restricted Committee does not have the documentation that would make it possible to verify whether the controller has implemented measures to ensure that doctors practicing in the within the inspected body undergo regular training in the protection of personal data. The Restricted Committee therefore considers that there is reason to pronounce the corrective measure proposed by the head of investigation.

In view of the foregoing developments, the National Commission sitting in restricted formation and deliberating unanimously decides:

- to retain the breaches of Articles 37.7 and 39.1 a) of the GDPR;
- issue against Company A an injunction to comply with the

Article 39.1 a) of the GDPR within four months of notification of the decision

restricted training, in particular:

ensure that all persons involved in data processing activities

controlled, whether these people are employees or doctors practicing under the

of self-employed workers [...] undergo regular training in the field of

protection of personal data.

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Thus decided in Belvaux on October 15, 2021

The National Commission for Data Protection sitting in restricted formation

Tine A. Larsen Thierry Lallemand

President

Commissioner

Marc Lemmer

Commissioner

Indication of remedies

This administrative decision may be subject to an appeal for review within three months following its notification. This appeal is to be brought before the administrative court and must be introduced through a lawyer at the Court of one of the Bar Associations.

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