

Decision of the National Commission sitting in restricted formation on
the outcome of survey no. [...] conducted with the Association without
profit a.

Deliberation no. 43FR/2021 of October 27, 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 relating
the protection of natural persons with regard to the processing of personal data

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
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, point
2;

Having regard to the regulations of the National Commission for Data Protection relating to the
investigation procedure adopted by decision No. 4AD/2020 dated January 22, 2020, in particular
its article 9;

Considering the following:

I.

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

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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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
(General Data Protection Regulation) (hereinafter: the “GDPR”), the Commission
National Commission for 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 sector and the
public sector.

2.

In particular, the National Commission decided by deliberation n°[...] of 14
September 2018 to open an investigation in the form of a data protection audit
with the non-profit association A located at [...], L-[...] and registered in the register of
commerce et des société luxembourgeois under the number[...] (hereinafter: the “controlled”) and of
appoint Mr. Christophe Buschmann as head of investigation. This deliberation specifies that
the investigation concerns the compliance of the control with section 4 of chapter 4 of the GDPR.

3.

4.

According to Article 3 of its statutes, the purpose of the control is [to offer social services].

By letter dated September 17, 2018, the head of investigation sent a questionnaire
preliminary to the control to which the latter replied by email of October 15, 2018.

on-site visits took place on January 28, 2019 and March 13, 2019. Following these discussions, the

head of investigation drew up audit report no.[...] (hereinafter: the “audit report”).

5.

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

- 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 carry out effectively of its missions;
- 7) Ensure that the DPO is able to carry out his duties with a sufficient degree autonomy within their organization;

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- 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 data processing within of 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 28, 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 found during his investigation. The audit report was attached to that letter.

7.

In particular, the head of investigation noted in the statement of objections a breach relating to the control mission of the DPO2.

8.

By letter dated November 18, 2019, the controller sent the head of investigation his decision position on the breach noted in the statement of objections.

9.

On December 3, 2020, the head of investigation sent a letter to the controller supplementary to the statement of objections by which it informs the auditee that, in view given the latter's position of November 18, 2019, "there is reason to withdraw the grievance on compliance with the requirements relating to the tasks of the DPO and in particular to the tasks of control" and that "[i]there is therefore no longer any grievance against you regarding this investigation. »

10.

By email of December 7, 2020, the head of investigation sent the investigation file to the National Commission sitting in restricted formation (hereafter: the "commission restricted"), indicating that he has not accepted any grievance or breach of the control, when the latter had met the expectations set in the context of the investigation or presented mitigation elements that it considers sufficient in relation to the control objectives included in point 5 of this decision. For these reasons, the head of investigation proposed to the formation restricted, in its communication of December 7, 2020, the closure of the file.

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11.

The Restricted Committee examined the case during its meeting of February 5, 2021, in accordance with Article 10.2.a) of the National Commission's internal rules.

12.

During the said session, the Restricted Committee considered that it was not sufficiently enlightened as to whether the controlled, given its structure, within which several member entities are grouped together, and the preponderance of said entities for management and exercise of its activities, is obliged to appoint a delegate to data protection pursuant to Article 37(1) of the General Data Protection Regulation Data protection.

13.

The Restricted Committee therefore asked the Head of Investigation, by letter from March 25, 2021, to proceed, in accordance with Article 10.2.a) of the internal rules of the National Commission, to further investigation on this point.

14.

By email of May 25, 2021, the head of investigation asked the control of him communicate additional information and documents, in particular concerning the activities of the controller and its decision-making structure, in order to be able to inform the training restricted on the point of knowing if the control is in the obligation to designate a delegate to data protection pursuant to Article 37(1) of the General Data Protection Regulation. Data protection.

15.

The controller responded to this request by letter dated June 15, 2021. The controller y indicates in particular that he carried out an analysis which led him to consider that he is in the obligation to appoint a DPO and that this analysis has been updated account given the questions raised by the Restricted Committee in this regard.

16.

Following this exchange, the Head of Investigation informed the Restricted Committee, by email of the June 22, 2021, of its conclusion on the point subject to further investigation, according to which the controller is indeed subject to the obligation to appoint a DPO. The head of investigation has elsewhere again proposed to the Restricted Committee to close the file, considering that it there is no reason to find any breach with regard to the controlled party.

17.

The Restricted Committee again examined the case during its session on October 27 2021, in accordance with Article 10.2.a) of the Commission's internal rules national.

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18.

Taking into account the elements communicated by the controller as part of the additional inquiry, the Restricted Committee finds that it does not share the conclusion of the Chief of investigation according to which the control is indeed subject to the obligation to appoint a delegate for the Data protection.

19.

It should first be noted that the controlled entity is an entity [...] "which brings together the

activities organized for its provider members" and that, as mentioned in point 12 of this decision, these entities have a prominent place for the management and the exercise of its activities.

20.

As for the activities of the control, the Restricted Committee observes that if the head of investigation correctly noted in its email of June 22, 2021 that "[t]he basic activities [of the controlled] are [to provide social services] and that, within the framework of these activities, the controlled deals with data relating to health, the head of the investigation also noted that "[in] the context of its basic activities, [the auditee] does not have collaborators.

All activities are carried out by another entity, member of the network [of the controlled], for the account [of the controlled]. »

21.

In this regard, it should be noted that in its response of June 15, 2021, the audited identified only one "own operational activity", the other activities mentioned being on the one hand "Delegated operational activities" to one of its member entities and on the other hand "Administrative and support activities" delegated to two entities members.

22.

With regard to the decision-making structure, the elements communicated by the audited confirm that its member entities, which sit in its Assembly general, occupy a preponderant place, it being specified that "an activity is recognized as an activity [of the auditee] if it was set up by decision of the board of Directors", this Board of Directors being "composed of [...] members at least and of [...] members at most, taken from among the active members and elected by the general assembly ordinary and annual ruling by a simple majority of the votes of the active members present. »

23.

The audit further indicates that this Board of Directors (hereinafter: CA) “is responsible for the general management [of the controlled] and for the strategy of the network. Since [the

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controlled] has a very limited activity of its own, the CA focuses on agreements between the partners forming the network. It validates common strategies proposed by the partners, determines, where applicable, their financing and the entity or entities responsible for their operationalization. »

24.

Finally, the controller indicates that it is “[i]n summary (...) a confederation bringing together the members actors and drivers of a common idea in order to determine common policies and to organize their implementation at the level of field activities. So any day-to-day management (also that [of the auditee himself]) is entrusted to operational entities, in occurrence to partners. »

25.

In view of the foregoing, the Restricted Committee considers that it has not been established by the further investigation that the auditee, namely Non-Profit Association A was under the obligation to appoint a DPO.

26. Furthermore, given the objectives defined by the CNPD within the framework of the campaign thematic survey on the function of the DPO, and in particular the criteria used for the selection of entities, the Restricted Committee considers that the investigation opened by the deliberation n°[...] of September 14, 2018 should also have covered, given their activities and data processing, on other operational entities, service provider members the non-profit association A.

27.

Under these conditions, the Restricted Committee considers that the matter should be closed,
in accordance with Article 10.2.a) of the National Commission's internal rules.

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

- to close the investigation opened by deliberation n°[...] of September 14, 2018 of the

National Commission for Data Protection at the Non-Profit Association

A located at [...], L-[...] and registered in the Luxembourg Trade and Companies Register
under the number[...]

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Thus decided in Belvaux on October 27, 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
must be introduced through a lawyer at the Court of one of the Bar Associations.

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