

Decision of the National Commission sitting in restricted formation

on the outcome of investigation no.[...] conducted with the administration

municipality of [...]

Deliberation No. 13FR/2021 of April 21, 2021

The National Commission for Data Protection sitting in restricted formation

composed of Ms. 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 April 27, 2016

on the protection of individuals with regard to the processing of personal data

personal character and on the free movement of such data, and repealing Directive

95/46/EC;

Considering the law of August 1, 2018 on the organization of the National Commission for the

data protection and the general data protection regime, in particular

its article 41;

Having regard to the internal regulations of the National Commission for the Protection of

data 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

inquiry procedure adopted by decision No. 4AD/2020 dated January 22, 2020,

in particular its article 9;

Considering the following:

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I. Facts and procedure

1. During its deliberation session on 16 January 2019, the National Commission for data protection sitting in plenary session (hereafter: "Formation Plenary") had decided to open an investigation with the municipal administration of [...] (hereinafter: "the controlled") on the basis of article 37 of the law of August 1, 2018 on organization of the National Commission for Data Protection and the regime General on Data Protection (hereinafter "Law of 1 August 2018") and to appoint Mr. Christophe Buschmann as head of investigation.

2. According to the decision of the Plenary Formation, the investigation carried out by the National Commission for Data Protection (hereinafter: "CNPD") had as purpose of verifying compliance with the provisions of the regulations relating to the protection of natural persons with regard to the processing of personal data and to the free movement of such data, and repealing Directive 95/46/EC (hereinafter "GDPR") and the law of August 1, 2018, in particular by setting up systems for video surveillance and geolocation if necessary installed by the controlled.

3. On January 24, 2019, CNPD agents carried out a visit to the premises of the control at the following address: [...]1 The decision of the National Commission for data protection sitting in restricted formation on the outcome of the investigation (hereinafter: "Restricted Training") will be limited to processing controlled by the agents of the CNPD.

4. During the said visit, the representatives of the audit2 confirmed to the agents of the CNPD that a geolocation system is installed in [...] vehicles fitted with a

1 See Minutes no. [...] relating to the on-site fact-finding mission carried out on January 24, 2019 with the municipal administration of [...].

2 See Minutes no. [...] relating to the on-site fact-finding mission carried out on January 24, 2019 with the municipal administration of [...].

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device for clearing snow or salting the road, but that the controller does not use a CCTV system.³

5. According to the explanations provided to CNPD officials, the persons concerned by geolocation are the members of the municipal staff (employees and civil servants councils) having expressed their wish to take part in the winter service.

6. In addition, the CNPD agents noted that the software of the device of geolocation of the controlled is hosted online by the supplier "[...]", specializing in cleaning and snow removal and that said supplier is to be considered as processor within the meaning of Article 4, point 8 of the GDPR.

7. In his response letter of February 14, 2019 to the minutes drawn up by the CNPD agents, the controller specified that the data collected by the boxes of the geolocation device are not transmitted to the servers of the provider of the program via wifi connection ([...]), but using mobile phone cards.

8. At the end of his investigation, the head of investigation notified the person inspected on 8 August 2019 a statement of objections detailing the failure he considered constituted in this case, and more specifically non-compliance with the requirements prescribed by Article 13 of the GDPR with regard to employees.

9. On September 17, 2019, the auditee produced written observations on the statement of objections.

10. A supplementary letter to the statement of objections was sent to the checked on August 3, 2020. In this letter, the head of investigation proposed to the Restricted formation to adopt two different corrective measures.

11. By letter dated August 24, 2020, the auditee produced written observations on

the additional letter to the statement of objections.

3 See Minutes no. [...] relating to the on-site fact-finding mission carried out on January 24, 2019 with the municipal administration of [...]. See also the audit's response of February 14, 2019 where this the latter clarified that it is not a question of [...], but only of [...] vehicles equipped with a system of geolocation.

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12. The president of the Restricted Formation informed the controller by mail of 9 October 2020 that his case would be registered for the session of the Restricted Panel on 17 November 2020. The controller confirmed his presence at the said meeting dated 3 November 2020.

13. During the Restricted Training session of November 17, 2020, the leader of investigation and control presented their oral observations in support of their written observations and answered the questions posed by the Restricted Panel. The president consented to the control's request to be able to send to the Formation Restricted additional photos from the geolocation system and to provide by writes the necessary explanations within a week. The controller had the floor last.

14. By e-mail of November 18, 2020, the control sent four photos to the Restricted Training of the geolocation system in place with additional explanations.

II. Place

II. 1. As to the reasons for the decision

A. On the breach of the obligation to inform the persons concerned

1. On the principles

15. According to paragraph 1 of Article 12 of the GDPR, the “controller take appropriate measures to provide any information referred to in Articles 13 and 14 as well as to carry out any communication under Articles 15 to 22 and Article 34 with regard to the treatment to the data subject in a concise manner, transparent, understandable easily accessible, in clear and simple terms [...]. The information is provided in writing or by other means including, when it is appropriate, electronically. When the data subject so requests, the information may be provided orally, provided that the identity of the person concerned is demonstrated by other means. »

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16. Article 13 of the GDPR provides the following:

“1. Where personal data relating to a data subject is collected from this person, the data controller provides him, at the time where the data in question is obtained, all of the following information:

- a) the identity and contact details of the controller and, where applicable, of the representative of the controller;
- b) where applicable, the contact details of the data protection officer;
- c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing;
- d) where the processing is based on Article 6(1)(f), the legitimate interests sued by the controller or by a third party;
- e) the recipients or categories of recipients of the personal data,

if they exist; and

(f) where applicable, the fact that the controller intends to carry out a

transfer of personal data to a third country or to an organization

international community, and the existence or absence of an adequacy decision issued by the

Commission or, in the case of transfers referred to in Article 46 or 47, or Article 49,

paragraph 1, second subparagraph, the reference to the appropriate or suitable safeguards and the

means of obtaining a copy or where they have been made available;

2. In addition to the information referred to in paragraph 1, the controller shall provide

to the data subject, at the time the personal data is

obtained, the following additional information which is necessary to guarantee

fair and transparent treatment:

a) the retention period of the personal data or, where this is not

possible, the criteria used to determine this duration;

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b) the existence of the right to request from the controller access to the data to

personal character, the rectification or erasure of these, or a limitation of the

processing relating to the data subject, or the right to oppose the processing and

right to data portability;

c) where the processing is based on point (a) of Article 6(1) or on Article 9,

paragraph 2(a), the existence of the right to withdraw consent at any time,

without affecting the lawfulness of the processing based on the consent made before the

withdrawal thereof;

d) the right to lodge a complaint with a supervisory authority;

(e) information on whether the requirement to provide data to personal nature has a regulatory or contractual nature or if it conditions the conclusion of a contract and whether the data subject is obliged to provide the data to personal character, as well as on the possible consequences of the non-provision of those data;

f) the existence of automated decision-making, including profiling, referred to in Article 22, paragraphs 1 and 4, and, at least in such cases, useful information concerning the underlying logic, as well as the significance and intended consequences of such processing for the person concerned.

3. When he intends to carry out further processing of personal data personal data for a purpose other than that for which the personal data have been collected, the data controller provides the data subject beforehand concerned information about this other purpose and any other information relevant referred to in paragraph 2.

4. Paragraphs 1, 2 and 3 do not apply where and to the extent that the person concerned already has this information. »

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17. The communication to data subjects of information relating to the processing of their data is an essential element in the context of compliance with general transparency obligations within the meaning of the GDPR.⁴ Said obligations have been explained by the Article 29 Working Party in its guidelines on the transparency within the meaning of Regulation (EU) 2016/679, the revised version of which has been adopted April 11, 2018 (hereinafter: “WP 260 rev.01”).

18. It should be noted that the European Data Protection Board (hereinafter: “EDPS”), which has replaced the Article 29 Working Party since 25 May 2018, took over and reapproved the documents adopted by the said Group between May 25, 2016 and May 25 2018, such as the aforementioned guidelines on transparency⁵.

2. In this case

19. In the Statement of Objections, the Head of Investigation referred to a letter from February 14, 2019 of the audit, in which the latter attached a document entitled “[...]”

”. In the said letter, the controller also specified that “everything is done to also transmit the information in writing to the agents concerned. Thus, a personalized information letter for the attention of the agents making up the teams of the winter service has been prepared [...]”.

20. Nevertheless, the head of investigation found that the non-compliance with article 13 of the GDPR was acquired on the day of the on-site visit, because the documentation submitted to it by the aforementioned letter did not contain any evidence against this non-compliance with this precise date. The head of the investigation added that “the observation that the employees had been informed orally, without however presenting evidence in support of this claim, is not likely to irritate this observation. (see statement of objections, page 2, Ad.A.1.).

4 See in particular Articles 5.1.a) and 12 of the GDPR, see also recital (39) of the GDPR.

5 See EDPS Endorsement decision 1/2018 of 25 May 2018, available https://edpb.europa.eu/sites/edpb/files/files/news/endorsement_of_wp29_documents_en_0.pdf.
under :

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21. In his letter of August 24, 2020, the auditee on his side referred to his remarks contained in his letter of September 17, 2019 which already mentioned the steps taken by the control, following the visit of the CNPD agents, in order to comply with the provisions of Article 13 of the GDPR. The control stated that in accordance with Article L-261-1 of the Labor Code, collective information relating to the implementation of the geolocation system for civil servant delegations and municipal employees, as well as employees took place by letter dated August 13, 2019, from a part, and that all the agents concerned would be informed individually before the 1st November 2019, on the other hand. Furthermore, the controller specified that the information also been placed on the intranet site of [...] and that the instruction was given to the services to display information in the premises of the services concerned. Copies of information notices intended for the delegations, as well as for the employees were annexed to the letter of 17 September 2019.

22. In addition, the controller explained in the aforementioned letter of September 17, 2019 that on this date the number of intervention vehicles equipped with a geolocation amounted in all to [...]6 and that for November 1, 2019, vignettes signs would be installed in the said vehicles with the following content: "... to inform you that this vehicle is equipped with a geolocation system. For more information, you can inquire at the following address: ... »

23. Finally, during the Restricted Training session of November 17, 2020, as well as in his email of November 18, 2020, the control confirmed that the information notice communicated to the CNPD by the aforementioned letter of 19 September 2019 has been forwarded and individually countersigned by all service agents winter of [...].

24. The Restricted Committee would first like to point out that Article 13 of the GDPR refers to the obligation imposed on the data controller to "provide" all the

information mentioned therein. The word "provide" is crucial here and it "means that the data controller must take concrete measures to provide the information in question to the person concerned or to actively direct the person

6 [...] vehicles in the Hygiene department and [...] vehicles in the Roads department.

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concerned to the location of said information (for example by means of a link direct, a QR code, etc.). (WP260 rev. 01, paragraph 33).

25. Furthermore, it would like to point out that Article 12 of the GDPR does not de facto exclude that the information provided for in Articles 13 and 14 may be provided orally by the controller to the data subject. On the other hand, the WP260 rev. 01 (paragraph 21) insists that in this case, the data controller should take care "to keep a written record, and ensure that he is able to prove it (for the purposes of the compliance with the responsibility requirement), of: i) requesting information orally, (ii) the method by which the identity of the data subject was verified (if applicable, see point 20 above), and (iii) the fact that the information was transmitted to the person concerned. »

26. During the on-site visit by CNPD officials, the controller precisely mentioned that the persons concerned were only informed orally about the presence of the geolocation device in the vehicles in question as part of the work instructions provided.

27. Nevertheless, the Restricted Panel finds that no documentation submitted by the auditee does not contain proof that the employees of the auditee have

been duly informed, before the on-site visit by CNPD agents, orally

in accordance with Article 13 of the GDPR.

28. In view of the foregoing, the Restricted Panel concludes that at the time of the on-site visit by CNPD agents, article 13 of the GDPR was not respected by the control.

II. 2. On corrective measures

1. Principles

29. In accordance with article 12 of the law of 1 August 2018, the CNPD has the power to adopt all the corrective measures provided for in Article 58.2 of the GDPR:

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"(a) notify a controller or processor of the fact that the operations of the envisaged processing are likely to violate the provisions of this regulation;

(b) call a controller or processor to order when the processing operations 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 these regulations;

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 limitation of processing pursuant to Articles 16, 17 and 18 and the notification of these measures to the recipients to whom the personal data have been disclosed pursuant to Article 17, paragraph 2, and Article 19;

(h) withdraw a certification or order the certification body to withdraw a certification issued pursuant to Articles 42 and 43, or order the body to certification not to issue certification if the requirements applicable to the certification are not or no longer satisfied;

(i) impose an administrative penalty under section 83, in addition to or in addition to instead of the measures referred to in this paragraph, depending on the characteristics specific to each case;

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j) order the suspension of data flows addressed to a recipient located in a third country or an international organisation. »

30. These measures also include the power to “impose a fine administrative procedure pursuant to Article 83 [...]”. However, article 48.1 of the law of 1 August 2018 on the organization of the National Commission for Data Protection and of the general data protection regime specifies that “[t]he CNPD may impose administrative fines as provided for in Article 83 of the [GDPR], except against of the state or the municipalities. ”.

31. Furthermore, the Restricted Committee would like to point out that the facts taken into account in the context of this decision are those found at the start of the investigation. The any changes relating to the processing of data under investigation

occurred subsequently, even if they make it possible to establish entirely or partial compliance, do not allow a breach to be reversed retroactively found.

32. Nevertheless, the steps taken by the controller to put themselves in compliance with the GDPR during the investigation process or to remedy the shortcomings noted by the head of investigation in the statement of objections, are taken taken into account by the Restricted Training in the context of any corrective measures to pronounce.

2. In this case

33. The adoption of the following corrective measures was proposed by Chief investigation to the Restricted Training in its additional letter to the communication grievances of August 3, 2020:

“a) Order the controller to complete the information measures intended for persons concerned by geolocation, in accordance with the provisions of Article 13, paragraphs (1) and (2) of the GDPR by providing in particular the identity of the controller, the purposes of the processing and its legal basis, the categories of data processed, the legitimate interests pursued

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by the controller, the recipients, the retention period of the data as well as the indication of the rights of the person and the manner of exercising them.

b) To issue a call to order against the data controller for cause of violation of the provisions of the GDPR. »

34. The Restricted Training takes into account the steps taken by the

checked, following a visit by CNPD officials, in order to comply with the provisions of Article 13 of the GDPR, as detailed in his letter of August 24, 2020. More in particular, it takes note of the following facts, which have been confirmed by the audited during the Restricted Training session of November 17, 2020, as well as in its email of November 18, 2020:

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The information notice on the geolocation of intervention vehicles, communicated to the CNPD by letter dated September 19, 2019, was transmitted and countersigned individually by all the agents of the Hygiene Service and the Roads Department providing winter service to [...].

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Identification stickers have been installed in the intervention vehicles with the following content: "... would like to inform you that this vehicle is equipped with a geolocation system. For more information, you you can inquire at the following address: ... »

35. Under Article 58.2.b) of the GDPR, the CNPD may call to order a controller or a processor when the processing operations have resulted in a violation of the provisions of the GDPR.

36. Given the fact that at the time of the site visit by CNPD officials, no documentation submitted by the auditee contained evidence that the employees of the audit have been validly informed in violation of article 13 of the GDPR, the Restricted Formation considers that it is justified to issue a call to order to against the control.

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

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to pronounce against the municipal administration of [...] a call to order
for violating Article 13 of the GDPR.

Thus decided in Belvaux on April 21, 2021.

For the National Data Protection Commission sitting in formation
restraint

Tine A. Larsen

Thierry Lallemand

Marc Lemmer

President

Commissioner

Commissioner

Indication of remedies

This administrative decision may be the subject of an appeal for review in the
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 Orders of
lawyers.

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