

Decision of the National Commission sitting in restricted formation on
the outcome of survey no.[...] conducted with “public establishment A”

Deliberation n° 30FR/2021 of August 4, 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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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 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 14 September 2018 to open an investigation in the form of a data protection audit with “public establishment A” established at [...] and registered in the trade and companies register under the number [...] (hereinafter: [...] the “controlled”) and to designate Mr. Christophe Buschmann as chief investigator. Said deliberation specifies that the investigation relates to the compliance of the [controlled] with section 4 of chapter 4 of the GDPR.

The [controlled] is a [...]. It is a public institution [...], under the supervision of the Ministry

3.

[...]. The [controlled] has the specific mission of [...].

By letter dated September 17, 2018, the head of investigation sent a questionnaire

4.

preliminary to [controlled] to which the latter responded by letter dated September 27, 2018. A on-site visit took place on 31 January 2019 and additional information was received by email dated July 5, 2019. Following these exchanges, the head of investigation drew up the report 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 November 7, 2019 (hereinafter: the "statement of objections"), the head

of investigation informed the [controlled] of the breaches of the obligations provided for by the GDPR that he identified during his investigation. The audit report was attached to this letter of November 7, 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 obligation to provide the necessary resources to the DPO³;

2 Objective 3

3 Objective 6

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the obligation for the DPO to exercise adequate control over the processing of data within

of the controlled body⁴.

8.

By letter dated December 11, 2019, the controller sent the head of investigation his decision

position on the shortcomings listed in the statement of objections. In this

courier, the inspected person affirms on the one hand that a control plan for the year 2020 “is in the process of being

formalization” in order to remedy the third shortcoming and, on the other hand, provides information

complementary to the resources allocated to fulfill the missions related to the protection

Datas.

9.

On August 24, 2020, the head of investigation sent the [controlled] an additional letter 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.

By letter dated September 30, 2020, the [controlled] confirmed the correct receipt of the letter
10.

supplementary to the statement of objections, without raising any additional comments.

The president of the restricted formation informed the control by letter of December 3
11.

2020 that his case would be registered for the restricted committee session of January 15, 2021 and that he could attend this session. The control informed by email dated January 14, 2021 that he would not participate in the said meeting.

During the restricted training session of January 15, 2021, the head of investigation explained
12.

his oral submissions in support of his written submissions and responded to questions posed by restricted formation. The controller was not present during the session.

4 Goal #10

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II.

Place

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

1. On the principles

13.

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.

14.

The DPO Guidelines explain in this regard that this requirement is aimed at to guarantee that “supervisory authorities can easily and directly contact the the DPO without having to go to another department of the organization”⁵.

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

15.

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

2. In this case

16.

It follows from the audit report that the head of investigation expects the organization to have communicated on May 25, 2018 the contact details of its DPO to the CNPD.

17.

It appears from the statement of objections that the taking up of duty of the DPO of [controlled] took place in May 2018. However, the communication of the contact details of the DPO to the CNPD was not made on September 27, 2018.

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.

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In view of the foregoing, the Restricted Committee concludes that Article 37.7 of the GDPR has no 19.

not been complied with by the [controlled].

B. On the failure to provide the necessary resources to the DPO

1. On the principles

20.

Article 38.2 of the GDPR requires the organization to help its DPO “to carry out the tasks referred to in Article 39 by providing the resources necessary to carry out these missions, as well as as access to personal data and processing operations, and allowing it to maintain their specialist knowledge.

21.

It follows from the DPO Guidelines that the following aspects should in particular to be taken into consideration⁶:

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“sufficient time for DPOs to perform their tasks. This aspect is particularly important when an internal DPO is appointed on a part-time basis or when the external DPO is responsible for data protection in addition to other tasks.

Otherwise, conflicting priorities could lead to the DPO's tasks being neglected. It is essential that the DPO can devote sufficient time to his assignments. It is good practice to set a percentage of time devoted to the function of DPD when this function is not full-time. It is also good practical to determine the time required to perform the function and the level of

appropriate priority for the tasks of the DPO, and that the DPO (or the body) establishes a workplan ;

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necessary access to other services, such as human resources, the service legal, IT, security, etc., so that DPOs can receive essential support, input and information from these other services”.

6 WP 243 v.01, version revised and adopted on April 5, 2017, p. 17

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22.

The DPO Guidelines state that “[b]e generally, more the processing operations are complex or sensitive, the more resources granted to the DPO should be important. The function of data protection officer must be effective and provided with adequate resources with regard to the data processing carried out”.

2. In this case

23.

It appears from the audit report that, given the size of the organizations selected in the framework of the audit campaign, so that the head of investigation considers objective 6 as achieved by audited as part of this audit campaign, the head of investigation expects the controlled employs at least one FTE (full-time equivalent) for the team in charge of Data protection. The head of investigation also expects the DPO to have the possibility to rely on other departments, such as the legal department, IT, security, etc.

It follows from the statement of objections that the head of investigation also expects a level resource-intensive given the existence of complex processing operations or

sensitive.

24.

It appears from the investigation report and the Statement of Objections that the DPO of [checked] is assigned to his missions up to 50% of his working time. However, in practice the DPD devoted 75% of his time to his duties between May 2018 and March 2019 and devoted still 70% of his time in June 2019. In addition, the DPO was supported by a consultant external until March 2019.

25.

In its position paper of December 11, 2019, the auditee lists the number of processing of personal data carried out, namely:

- "[...] processing for the purposes of [...],

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[...]

[...] projects for [...]

- As subcontractors: [...] data collection [...]

The controller states that "the processing carried out for the purposes of [...]. "

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26.

The Restricted Committee notes that it appears from the investigation file that the DPO is also [...] of the [controlled] and devotes, in practice, approximately 70% of his working time to his DPO assignments. Even taking into consideration that the DPO spends more time to its DPD missions than the 50% initially planned as well as the support provided by

the temporary intervention, until March 2019, of an external consultant, the restricted training considers that the DPO did not have sufficient time to carry out his tasks, this particularly with regard to the sensitivity, complexity and volume of the data processed by the control.

27.

In view of the foregoing, the Restricted Committee concludes that Article 38.2 of the GDPR has not been respected by the controller.

C. On the breach of the DPO's obligation to exercise adequate control of the processing data within the audited body

1. On the principles

28.

According to Article 39.1 b) of the GDPR, the DPO has, among other things, the mission of “monitoring compliance of this Regulation, other provisions of Union law or the law of the Member States in with regard to the protection of personal data, including with regard to the distribution of responsibilities, sensitization and training of personnel involved in processing operations, and related audits”. Recital (97) clarifies that the DPO should help the organization verify internal compliance with the GDPR.

29.

It follows from the guidelines concerning DPOs⁷ that, within the framework of its mission of control, the DPO may in particular:

collect information to identify processing activities;

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- analyze and verify the compliance of processing activities;

7 WP 243 v.01, version

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inform and advise the controller or processor and formulate

recommendations to him.

2. In this case

30.

It appears from the audit report that, for the head of investigation to consider objective 10 as

achieved by the audited as part of this audit campaign, he expects that "the organization

has a formalized data protection control plan (even if it is not

not yet executed).

31.

According to the statement of objections, page 3, “it appears from the investigation that the [controlled] did not

no formal control plan specific to data protection. The fact that the DPD

reacts in an ad hoc manner to the problematic situations it encounters and its collaboration with

the person responsible [...] for the establishment of a control plan cannot be sufficient to demonstrate

the sufficient fulfillment of the DPO's control tasks".

32.

The Restricted Committee notes that Article 39.1 of the GDPR lists the missions that the

DPD must at least be entrusted with the task of monitoring compliance with the GDPR, without however

require the organization to put in place specific measures to ensure that the DPO can

accomplish its mission of control.

33.

The investigation report also specifies that “the DPO reacts in an ad hoc manner to

problematic situations that it encounters” and that “the DPO also works closely

collaboration with the manager [...]”.

Nevertheless, it was rightly stated on page 2 of the Statement of Objections (under

34.

“preliminary remarks”) that “[t]he GDPR requirements are not always strictly defined. In such a situation, it is up to the supervisory authorities to verify the proportionality of the measures put in place by the data controllers with regard to the sensitivity of the data processed and the risks incurred by the persons concerned”.

However, given the fact that the activities of the controller involve the processing of data

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of a personal nature that potentially affect a large number of people

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concerned, the Restricted Committee considers that the control mission carried out by the DPO with the auditee should be further formalized, for example by a control plan in data protection, in order to be able to demonstrate that the DPO can carry out its mission of control of the respect of the RGPD in an adequate way.

The Restricted Committee notes that, in its letter of 11 December 2019, the

36.

controlled indicates that a control plan is being developed for the year 2020 in order to mitigate to this failure. However, as this decision was taken during the investigation, the panel restricted agrees with the finding of the head of the investigation that the control was not able to demonstrate that the DPO can carry out its tasks of monitoring compliance with the GDPR.

The Restricted Committee finds that it does not have the documentation that

37.

would make it possible to demonstrate that this measure was put in place by the controller.

In view of the foregoing, the Restricted Committee concludes that Article 39.1 b) of the GDPR has no

38.

not respected by the controller.

III.

On corrective measures and fines

A) The principles

39.

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 CNPD 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;

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(c) order the controller or processor to comply with requests

submitted by the data subject with a view to exercising their rights under this

this Regulation;

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. »

40.

In accordance with article 48 of the law of August 1, 2018, the CNPD may impose fines

administrative procedures as provided for in Article 83 of the GDPR, except against the State or

municipalities.

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41.

Article 83 of the GDPR provides that each supervisory authority shall ensure that fines

administrative measures imposed are, in each case, effective, proportionate and dissuasive,
before specifying the elements that must be taken into account in deciding whether to impose
an administrative fine and to decide on the amount of this fine:

“(a) the nature, gravity and duration of the breach, taking into account the nature, scope
or the purpose of the processing concerned, as well as the number of data subjects
affected and the level of damage they suffered;

(b) whether the breach was committed willfully or negligently;

c) any action taken by the controller or processor to mitigate the
damage suffered by the persons concerned;

d) the degree of responsibility of the controller or processor, account
given the technical and organizational measures they have implemented under the
sections 25 and 32;

e) any relevant breach previously committed by the controller or
the subcontractor;

(f) the degree of cooperation established with the supervisory authority with a view to remedying the
breach and to mitigate any adverse effects thereof;

(g) the categories of personal data affected by the breach;

h) the manner in which the supervisory authority became aware of the breach, in particular whether,
and the extent to which the controller or processor notified the
breach;

(i) where measures referred to in Article 58(2) have previously been
ordered against the controller or processor concerned for
the same object, compliance with these measures;

(j) the application of codes of conduct approved pursuant to Article 40 or
certification mechanisms approved under section 42; and

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k) any other aggravating or mitigating circumstance applicable to the circumstances of the species, such as the financial advantages obtained or the losses avoided, directly or indirectly, as a result of the breach”.

42.

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. Possible changes relating to the subject of the investigation that took place subsequently, even if they make it possible to establish full or partial compliance, do not permit the retroactive cancellation of a breach found.

43.

Nevertheless, the steps taken by the controller to comply with the GDPR in the course of the investigation procedure or to remedy the breaches noted by the head of investigation in the statement of objections, are taken into account by the training restricted within the framework of any corrective measures and/or the setting of the amount of a possible administrative fine to be imposed.

B) In this case

1. Regarding the imposition of an administrative fine

44.

In the supplementary letter to the statement of objections of 24 August 2020, the head of investigation proposes to the restricted formation to pronounce against the controlled a fine administrative bearing the amount of 6,600 euros.

45.

In order to decide whether to impose an administrative fine and to decide, if

applicable, of the amount of this fine, the Restricted Committee analyzes the criteria laid down by

GDPR Article 83.2:

- As to the nature of the breach (Article 83.2 a) of the GDPR), the Restricted Committee retains breaches by the controller of articles 37.7, 38.2 and 39.1 b) of the GDPR.

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- As to the seriousness of the breach (Article 83.2 a) of the GDPR), the Restricted Committee falls that with regard to the breach of Articles 38.2 and 39.1 b) of the GDPR, the appointment of a DPO by an organization cannot be efficient and effective, namely to facilitate compliance of the GDPR by the organisation, only in the event that the DPO benefits from the resources and time necessary to carry out its tasks relating to data protection and effectively carries out its missions, including the mission of monitoring compliance with the GDPR.

A breach of Articles 38.2 and 39.1 b) of the GDPR amounts to reducing the interest, or even to emptying of its substance the obligation for an organization to appoint a DPO.

- As for the duration criterion (Article 83.2.a) of the GDPR, the Restricted Committee notes that:

(1) the DPO of [controlled] took office in May 2018 but that the communication of the contact details of the DPO to the CNPD was only made on 27 September 2018. The breach of Article 37.7 of the GDPR therefore lasted four months after the entry into force of the GDPR;

(2) the auditee did not indicate any measure to compensate for the lack of resources allocated to the DPO to enable him to fulfill his missions and the training restricted is not aware of any change in weather work of the DPO, such that the breach of Article 38.2 of the GDPR lasts since May 25, 2018;

(3) the controller indicated in his letter of December 11, 2019 that a plan of control is being developed for the year 2020. Restricted training however, does not have the documentation that would demonstrate that this measure was actually put in place by the controller. the breach of Article 39.1 of the GDPR therefore lasted over time, throughout less between May 25, 2018 and December 2019.

The Restricted Committee recalls here that two years separated the entry into force of the GDPR of its entry into force to allow those responsible for the treatment to comply with their obligations.

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46.

As to the number of data subjects affected by the breach (Article 83.2 a) of the GDPR), the Restricted Committee notes [that] the [controlled] is required to process a large number of personal data relating to a large number of data subjects. As put forward in point 25 of this decision, in its position paper of 11 December 2019, the controlled specifies the number of personal data processing operations carried out by the controlled which would be [...] processing for the purposes of [...], [...] projects for the purposes of [...] and, as as a subcontractor, [...] data collection [...], it being specified that this analysis constitutes a indication as to the extent of the processing activities carried out by the controlled party, and not as to the number of persons whose personal data are actually processed by him. It follows, however, that the number of people affected by the violation is potentially high.

- As to the degree of cooperation established with the supervisory authority (Article 83.2 f) of the GDPR),

the restricted formation takes into account the assertion of the head of investigation that the auditee demonstrated constructive participation throughout the investigation.

- As to the categories of personal data affected by the breach

(article 83.2 g) of the GDPR), the restricted formation takes into account the fact that the controlled can be required to process [...] sensitive data within the meaning of Article 9 of the GDPR.

The Restricted Committee notes that the other criteria of Article 83.2 of the GDPR are not

47.

neither relevant nor likely to influence its decision on the imposition of a fine administrative and its amount.

48.

It notes that if several measures have been decided by the controller in order to remedy in part or in whole to certain shortcomings, these were only decided following the launch of the investigation by CNPD agents on September 17, 2018.

Therefore, the Restricted Committee considers that the pronouncement of an administrative fine

49.

is justified with regard to the criteria laid down by article 83.2 of the GDPR for breach of articles 37.7, 38.2 and 39.1 b) GDPR.

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50.

With regard to the amount of the administrative fine, the Restricted Committee recalls that

Article 83.3 of the GDPR provides that in the event of multiple infringements, as is the case here, the total amount of the fine cannot exceed the amount fixed for the most serious violation. In the extent to which a breach of Articles 37.7, 38.2 and 39.1 b) of the GDPR is attributed to the

checked, the maximum amount of the fine that can be withheld is 10 million euros or

2% of worldwide annual revenue, whichever is higher.

With regard to the relevant criteria of Article 83.2 of the GDPR mentioned above, the training

51.

Restricted considers that the imposition of a fine of 6,600 euros appears to be both effective, proportionate and dissuasive, in accordance with the requirements of Article 83.1 of the GDPR.

2) Regarding the taking of corrective measures

52.

In his supplementary letter to the statement of objections, the head of investigation

proposes to the Restricted Committee to take the following corrective measures:

“a) Order the provision of necessary resources to the DPO in accordance with the requirements of Article 38 paragraph 2 of the GDPR. Although several ways could be envisaged to achieve this result, one possibility would be to relieve the DPO of all or part of his other missions/functions or provide him with a formal and lasting support, internally or externally, for the performance of its missions from DPD.

b) Order the deployment of the DPO monitoring mission, in accordance with Article 39 paragraph 1 b) GDPR. Although several ways can be envisaged to achieve this result, the DPO should document its checks on the application of the rules and internal data protection procedures (second line of defense). This documentation could take the form of a control plan. »

53.

With regard to the breach of Article 38.2 of the GDPR, taking into account that the controlled did not provide any indication to the CNPD as to possible measures taken to mitigate to this breach, the Restricted Committee therefore considers that it is necessary to pronounce the measure correction proposed by the head of investigation and repeated under a) of point 52 above.

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54.

As for the corrective measures proposed by the head of investigation and with reference to point 8 of this decision, the Restricted Committee takes into account the steps taken by the controlled in order to comply with Article 39.1 b) of the GDPR, namely the fact that the controlled has indicated in its letter of December 11, 2019 that it had been decided to draw up a control plan for the year 2020.

55.

However, the Restricted Committee does not have the documentation allowing it to demonstrate the implementation of this compliance measure by the auditee. Training restricted therefore considers that it is appropriate to pronounce the corrective measure proposed by the head inquiry and repeat under b) of point 52 above.

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, 38.2 and 39.1 b) of the GDPR;
- to pronounce against "public establishment A" an administrative fine of one amount of six thousand six hundred euros (6,600 euros) with regard to the violation of articles 37.7, 38.2 and 39.1 b) GDPR;
- issue against "public institution A" an injunction to comply with compliance with Article 38.2 of the GDPR, within four months of notification of the decision of the Restricted Committee, in particular:
ensure that the necessary resources are made available to the DPO so that it has the time needed to complete their tasks;

- issue against “public institution A” an injunction to comply with

compliance with Article 39.1 b) of the GDPR, within four months of the notification of

the decision of the Restricted Committee, in particular:

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ensure that the DPO carries out, in a formal and documented way, his mission of control of

the application of the GDPR with the data controller.

Thus decided in Belvaux on August 4, 2021.

For 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 the subject of 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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