

Decision of the National Commission sitting in restricted formation on

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

Deliberation no. 37FR/2021 of October 13, 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

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

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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(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 Company A located at [...], L-[...] and registered in the Trade and

Luxembourg companies 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.

3.

According to Article 3 of its articles of association, the purpose of the control is [to carry out all transactions of insurance and reinsurance of the “Life” branch [...]].

4.

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 8, 2018. A visit

on site took place on February 4, 2019. Following these exchanges, the head of investigation drew up the report

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 24, 2019 (hereinafter: the "statement of objections"), the head of investigation informed the controller 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 breaches of

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

the obligation to ensure that the missions and tasks of the DPO do not lead to conflict of interest ³.

8.

By email of November 27, 2019, the controller took a position on the breach noted by the Head of Investigation regarding the obligation to ensure that the tasks and tasks of the DPO do not involve conflicts of interest.

9.

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

10.

By email of August 5, 2020, the controller sent the head of investigation his

comments on the additional letter to the statement of objections.

The case was on the agenda of the restricted committee meeting of June 16, 2021.

11.

In accordance with Article 10.2. b) the internal regulations of the National Commission,

2 Objective 3

3 Goal 5

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the head of investigation and the control presented oral observations on the case and responded
to the questions posed by the Restricted Committee. The controller spoke last.

II.

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 results from Article 39.1. e) 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 in this respect that this requirement
aims to ensure that “supervisory authorities can easily and directly contact
with the DPO without having to go to another department of the organisation” 4.

14.

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

2018 a form allowing organizations to send it the contact details of their

DPD.

2. In this case

15.

It appears from the audit report that, for the head of investigation to consider objective 3

as filled in by the controller as part of this audit campaign, the head of investigation

expects the organization to have communicated the contact details of its DPO by 25 May 2018

at the CNPD.

16.

According to the statement of objections, page 2, "[i]t appears from the investigation that the

DPO declaration form was sent to the CNPD on September 28, 2018. The

communication was therefore made late. »

17.

The auditee did not return to this breach in its position of 27

November 2019, nor during subsequent exchanges with the CNPD.

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

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18.

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

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

since that date. Thus, the communication of the contact details of the DPO to the CNPD dated

September 28, 2018 was late.

19.

In view of the foregoing, the Restricted Committee concludes that Article 37.7 of the GDPR has not been respected by the controller.

B. On the breach relating to the obligation to ensure that the other missions and tasks of the DPO do not give rise to a conflict of interest

1. On the principles

20.

According to Article 38.6 of the GDPR, "[the DPO] may perform other missions and tasks. the controller responsible for the treatment or the processor ensures that these missions and tasks do not involve a conflict of interest".

21.

The guidelines for DPOs⁵ specify that "the DPO may not practice on the within the organization a function that leads it to determine the purposes and means of the processing of personal data". According to the guidelines, "[i]n good standing general, among the functions likely to give rise to a conflict of interest within organization may include senior management functions (e.g. director general, operational director, director financial, chief medical officer, responsible for marketing department, human resources manager or service manager IT), but also other roles at a lower level of the organizational structure if these functions or roles involve determining the purposes and means of the processing. In addition, there may also be a conflict of interest, for example, if an external DPO is called to represent the data controller or the processor before the courts in cases relating to data protection issues.

Depending on the activities, size and structure of the body, it can be good

practical for data controllers or processors:

- ☐ to identify the functions that would be incompatible with those of DPD;

5 WP 243 v.01, version revised and adopted on April 5, 2017, pp.19-20

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- ☐ establish internal rules to this effect, in order to avoid conflicts of interest;

- ☐ include a more general explanation regarding conflicts of interest;

- ☐ to declare that the DPO has no conflict of interest with regard to his function as

DPD, with the aim of raising awareness of this requirement;

- ☐ to provide guarantees in the organization's internal regulations, and to ensure that

that the vacancy notice for the function of DPD or the service contract is

sufficiently precise and detailed to avoid any conflict of interest. In this context, it

should also be kept in mind that conflicts of interest may take

different forms depending on whether the DPO is recruited internally or externally. »

2. In this case

22.

It appears from the audit report that, for the head of investigation to consider objective 5

as achieved by the auditee as part of this audit campaign, he expects that,

in the event that the DPO performs other functions within the audited body, these functions

do not lead to a conflict of interest, in particular through the exercise of functions that would lead the

DPD to determine the purposes and means of the processing of personal data.

The head of the investigation also expects the person checked to have carried out an analysis as to

the existence of a possible conflict of interest at DPO level.

23.

According to the Statement of Objections, page 3, “[i]t appears from the investigation that the DPO is also Head of Compliance, Money Laundering Reporting Officer. This other function involves a risk of conflict of interest, in particular in the context of AML processing of the compliance department. Indeed, the DPO Guidelines of the Working Party “Article 29” on data protection indicate that the DPO cannot exercise within of the organization a function which leads it to determine the purposes and means of the processing of personal data. [The controller] informed the CNPD that in the event of any conflicts of interest in the AML processing of the Compliance department, the processing concerned would then be countersigned by the hierarchical superior of the DPO. Nevertheless, the DPD remains involved in the implementation of personal data processing as part of his duties as Head of Compliance. During the investigation, the CNPD did not become aware of other elements making it possible to address this risk, such as the appointment of an alternate DPO (outside the AML department) who would be in charge analyze AML processing. »

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24.

By email of November 25, 2019, the control indicated that two alternate delegates have been appointed, namely the “Chief Risk Officer (for the processing of personal data of the Compliance department)” as well as a “Senior Compliance Specialist (for all processing of personal data other than that of the Compliance department)”.

25.

The auditee also transmitted, with its position paper of November 27, 2019,

several internal documents concerning the measures taken following the breach noted by the head of investigation; these documents make it possible in particular to verify the information provided by the auditee, in his email of November 25, 2019, relating to the designation of two alternate delegates.

26.

The CNPD was then informed, on March 19, 2021, of the appointment of a new DPD, as of April 1, 2021, who was previously the alternate delegate “for all processing of personal data other than that of the Compliance department”. During

At the hearing of June 16, 2021, the auditee clarified that, due to this appointment, the risk of conflict of interest that had been identified by the head of investigation no longer exists, the new DPO not exercising the function of “Head of compliance”.

27.

Nevertheless, if measures have been taken by the controller in the direction of implementing compliance, it should be noted that these were decided during the investigation.

28.

Therefore, the Restricted Committee concludes that Article 38.6 of the GDPR has not been complied with by the controlled.

III.

On corrective measures

A. Principles

29. In accordance with article 12 of the law of 1 August 2018 on the organization of the National Commission for Data Protection and the General Data Protection Regime data protection, the National Commission has the powers provided for in Article 58.2 GDPR:

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

(b) call a controller or processor to order when the processing operations have resulted in a breach of the provisions of this settlement;

(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;

d) order the controller or the processor to put the operations of processing in accordance with the provisions of this Regulation, where applicable, specifically 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 limitation, including a ban, on the treatment;

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(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 fine pursuant to Article 83, in addition to or in

instead of 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. »

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30.

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.

B. In the instant case

1. As to the call to order

31.

Pursuant to Article 58.2.b) of the GDPR, the CNPD may call a manager to order

of the processing or a processor when the processing operations have led to a violation

provisions of the GDPR.

32.

Considering that the controlled has violated articles 37.7 and 38.6 of the GDPR, the

Restricted Committee considers that it is justified to issue a call to order against him.

2. Regarding the taking of corrective measures

33.

In its supplementary letter to the statement of objections of 3 August 2020, the head of investigation proposes that the restricted committee take the following corrective measure:

“a) Order the implementation of measures ensuring that the various missions and duties, current or past, of the person performing the function of DPO do not entail no conflicts of interest in accordance with the requirements of article 38 paragraph 6 of the GDPR. Although several ways can be implemented, one of the possibilities would be the involvement of a third party, benefiting from the skills necessary, for the review of processing for which there is a conflict of interest (in occurrence for AML/KYC processing). »

34. As to the corrective measure proposed by the head of investigation under a) of point 33 of the this Decision and with reference to point 30 of this Decision, the training restricted takes into account the steps taken by the audited in order to comply to the provisions of article 38.6 of the GDPR. More specifically, it takes note of the facts following:

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- With regard to the violation of Article 38.6 of the GDPR, the Restricted Committee finds that a new DPO has been appointed, as of 1 April 2021, and that this new DPO does not exercise the function of “Head of compliance”. The Restricted Committee considers as soon as when there is no reason to pronounce the corrective measure proposed by the head of investigation (a) of point 33 of this Decision.

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 38.6 of the GDPR;
- issue a call to order against Company A with regard to the violation of the articles 37.7 and 38.6 of the GDPR.

Thus decided in Belvaux on October 13, 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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