

Regulation of the National Data Protection Commission (CNPD) relating to the investigation procedure

Adopted by Decision No. 4AD/2020 of 22.01.2020, pursuant to article 40 of the Act of 1 August 2018 on the organisation of the National Data Protection Commission and the general data protection framework.

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Chapter 1—Introduction

Art. 1. Scope of application

This Regulation is adopted pursuant to article 40 of the Act of 1 August 2018 on the organisation of the National Data Protection Commission and the general data protection framework (hereinafter the "Act of 1 August 2018 on the general data protection framework"). It determines the procedure for investigations before the National Data Protection Commission (hereinafter referred to as the "National Commission").

The National Commission has powers of inquiry to carry out the tasks assigned to it by European and national data protection legislation, namely Regulation (EU) No 2016/679 of the European Parliament and of the Council of 24 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 (hereinafter 'the GDPR '), by the Act of 1 August 2018 on the general data protection framework, by the Act of 1 August 2018 on the protection of natural persons with regard to the processing of personal data in criminal matters as well as in matters of national security (hereinafter the "Act of 1 August 2018 on data protection in criminal matters and national security") and by the Act of 30 May 2005 on the specific provisions for the protection of persons with regard to the processing of personal data in the field of electronic communications and amending articles 88-2 and 88-4 of the Code of Criminal Procedure, as amended by the Code of Criminal Procedure (hereinafter the "Amended Act of 30 May 2005 on data protection in the electronic communications sector").

Chapter 2 – Initiation of an Investigation

Art. 2. Proposal to open an investigation

The proposal to open an investigation may be requested at any time in writing or orally during a plenary deliberation by a member of the National Commission.

It shall indicate at least the following:

- a) the subject matter of the investigation;
- b) the identification data of the controller or processor to be controlled;
- c) the motivation to conduct an investigation.

Art. 3. Decision on the opening of an investigation

Within a period of one month of the proposal for the opening of an investigation, the National Commission sitting in plenary session shall deliberate on it, and if it decides to follow up on the proposal, shall appoint a member of the college as head of investigation for this purpose.

Chapter 3 – Actors

Art. 4. Head of investigation

The head of investigation shall carry out his investigation as to gather both inculpatory and exculpatory evidence, in accordance with article 39 of the Act of 1 August 2018 on the general data protection framework. He may designate one or more authorised agents to carry out the investigation, under his supervision

Art. 5. Authorised agents

The National Commission establishes and keeps up to date by means of a decision, the list of agents authorised to carry out investigations.

Any agent mandated by a mission order by the head of investigation to conduct an investigation shall inform the latter in writing without undue delay if he or she considers that he or she has a conflict of interest in the proposed investigation. Where appropriate, the head of investigation shall proceed to his replacement.

Art. 6. External experts

When the National Commission call upon external experts in accordance with article 31 of the Act of 1 August 2018 on the general data protection framework, their costs and fees are at the charge of the National Commission. The external expert must sign a declaration of independence to confirm that he/she does not have a conflict of interest in the investigation. The declaration of independence is accompanied by a confidentiality clause. After signing the declaration of independence and the confidentiality clause, a private law contract concluded between the external expert and the National Commission may be signed, which also contains a confidentiality clause and a procedure in the event of a conflict of interest that may arise during the duration of the external expert's mission.

Chapter 4 – Enforcement of the Investigation

Art. 7. Mission order

The designated head of investigation shall draw up a mission order specifying:

- a) the subject matter of the investigation;
- b) the identification data, including places, premises, enclosures, installations or establishments of the controlled, without prejudice to other bodies which are directly or indirectly linked, where appropriate, to the subject-matter of the investigation;
- c) the name(s) of the authorised agent(s) to whom the head of investigation delegates the execution of the investigation.

Art. 8. Conduct of the investigation

1° Information of the controlled

The controller or processor, hereinafter “the controlled”, in respect of whom the National Commission conducts an investigation, shall be informed by the head of investigation by registered letter with acknowledgement of receipt of the decision to open the investigation.

Where the investigation requires an on-the-spot visit prior to the inspection, the authorised agents shall communicate this by letter to the controlled on site against signature of a receipt. In the event of refusal to sign the receipt, a statement shall be included in the minutes and a letter informing the opening of the investigation shall be sent to the controlled by registered letter with acknowledgement of receipt within fifteen calendar days following the visit of the authorised agents.

When authorised agents carry out on-the-spot visits, they shall at the latter’s request present the mission order together with their identification.

2° Investigation measures

The head of investigation shall carry out all necessary diligence with the assistance of the authorised agents and the services of the National Commission. The controlled may be heard if the head of investigation considers it useful. A person heard may be assisted by a legal counsel of their choice. The head of investigation may hear any other person whose hearing appears to be useful to him.

In the event that a complaint is at the origin of the opening of an investigation, the head of investigation and the authorised agents shall take into account the background retroacts of the investigation of the complaint. The information, documents and position statements of the claimant and the controlled are therefore part of the investigation file.

Within the scope of the tasks of Article 7 of the Act of 1 August 2018 on the general data protection framework and the powers conferred to the National Commission pursuant to Article 58 of the GDPR, authorised agents shall have access, for the performance of their duties, to places, premises, enclosures, installations or establishments used for the implementation of the processing of personal data, excluding those parts assigned to the private home. Authorised agents may request and take copies of any document necessary for the conduct of the investigation, regardless of the medium, they may collect, on the spot or on the occasion of a hearing, any information and justification that is useful and necessary for the conduct of the investigation. They can access computer programs and data and request their transcription by any appropriate processing in documents directly usable for the purposes of the investigation. Without prejudice to Article 67 of the Act of 1 August 2018 on the general data protection framework, secrecy cannot be opposed to them.

Within the framework of the Act of 1 August 2018 on data protection in criminal matters and national security and in accordance with article 14 of the Act on the general data protection framework, authorised agents must obtain access from the controlled to all personal data that are processed and to overall information necessary for the performance of their duties.

When documents, data or computer programs consulted on-the-spot could not be transmitted or copied due to justified reasons, the controlled shall be obliged to keep them in the state as consulted, until the exhaustion of remedies relating to the decision on the outcome of the investigation adopted by the National Commission, sitting as restricted committee, in accordance with Article 41 of the law.

Minutes of verifications, on-the-spot visits and hearings following a summons shall be drawn up.

When a visit or hearing has not been able to take place, the minutes shall include the reasons for preventing or impeding its conduct, as well as, where appropriate, the grounds for opposition by the controlled.

The minutes drawn up by the authorised agents shall be notified to the controlled by registered letter with acknowledgement of receipt or any means enabling the National Commission to provide proof of the date of such notification.

All positions and documents provided by the controlled prior to the statement of objections shall be included in the file.

Depending on the complexity or scope of the investigation, the head of investigation may prepare an investigation report that summarises the facts and positions formulated during the investigation. This report is included in the investigation file.

3° Communication of objections

When it comes to facts or operations involving data processing, which may violate the provisions of European, or national legislation on the protection of personal data, the head of investigation shall communicate to the controlled, by registered letter with acknowledgement of receipt, the complaints

raised against him. This statement of objections specifies the nature and legal assessment of the evidence identified, and the infringements noted with regard to the applicable law. It further states that the failures identified are likely to be the subject of a decision by the National Commission sitting in a restricted committee in accordance with Article 41 of the Act of 1 August 2018 on the general data protection framework, hereinafter "restricted committee", and, where appropriate, pronouncing corrective measures and/or sanctions in respect of the control. However, the restricted committee is not bound by the qualification proposed in the statement of objections and may decide in its final decision on overall behaviours which are related by their object or their effects to the facts set out in the statement of objections.

According to the statement of objections, the head of investigation shall set the deadline, which shall not be less than fifteen calendar days, for the controlled to submit his written observations to him/her. The statement of objections also states that the controlled may take notice of the file before the National Commission and it indicates his/her right to be assisted or represented by any counsel of his/her choice. On the basis of justified request, the head of investigation may grant the controlled an extension of the time limit which may not exceed fifteen calendar days.

The head of investigation may take a position on the written observations within fifteen calendar days of their submission. If the head of investigation decides to reply, the controlled shall be allowed in turn to duplicate within fifteen calendar days.

At the end of his/her investigation, the head of investigation considers that there is no grievance against the controlled, he/she may draft a report for the restricted committee in which he/she proposes that the case should be closed.

4° Terms of access to the file

The controlled referred to in the statement of objections shall have access to the file on the basis of the statement of objections addressed to him/her. All the documents composing the file shall be made available to the controlled or his representative in the premises of the National Commission, from the day on which the statement of objections is sent.

By way of derogation from the preceding paragraph, the controlled referred to in the statement of objections shall not have access to:

- a) internal information and documents of the National Commission;
- b) internal information and documents of the European Data Protection Board or other national data protection supervisory authorities;
- c) correspondence and documents exchanged between the head of Investigation, the European Data Protection Board and other national data protection supervisory authorities;
- d) information about the claimant, unless it is essential for the processing of the claim and/or the execution of the investigation;
- e) information and documents, covered by professional secrecy or secrecy of business, collected during an investigation from other controllers or subcontractors and which are part of this same

investigation.

If since the notification of the statement of objections and before the hearing scheduled by the restricted committee, additional documents are added to the file, the controlled shall be informed in writing and may take note of it in accordance with the terms laid down in this Article.

Art. 9. Transmission of investigation file to restricted committee

In case of closure proposal, in the absence of any objections, or after the expiration of the last deadline to reply to the controlled in the statement of objections, the head of investigation shall forward the investigation file to the National Commission sitting in restricted committee with a view to taking a decision on the outcome of the investigation. The restricted committee shall proceed in accordance with the procedure laid down in article 10.2 of the Rules of Procedure of the National Commission.

Thus decided unanimously in Esch-sur-Alzette on 22 January 2020.

The National Data Protection Commission

			
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