

Opinion of the National Commission for Data Protection relating to

Bill no. 7882 introducing specific provisions

for the processing of personal data in the application

"JU-CHA", and modification of the Code of Criminal Procedure

Deliberation n°29/AV13/2022 of 07/01/2022

In accordance with article 8 of the law of 1 August 2018 on the organization of the Commission

national data protection system and the general data protection regime (hereafter

after the "law of 1 August 2018 on the organization of the CNPD"), transposing article 46,

paragraph 1, letter (c) of Directive (EU) n°2016/680 of 27 April 2016 relating to the protection

of natural persons with regard to the processing of personal data by

competent authorities for the purposes of crime prevention, investigation and

prosecution in this regard or the execution of criminal penalties, and to the free movement of such

data, and repealing Council Framework Decision 2008/977/JHA (hereinafter the "Directive") the

National Commission for Data Protection (hereinafter the "National Commission" or

the "CNPD"), "advises the Chamber of Deputies, the Government and other institutions and

organizations on legislative and administrative measures relating to the protection of rights

and freedoms of natural persons with regard to the processing of personal data".

By letter dated August 20, 2021, the Minister of Justice invited the Commission

national government to decide on the draft law introducing specific provisions for

the processing of personal data in the "JU-CHA" application, and modification of the Code of

criminal procedure (hereinafter the "draft law").

It should be recalled that well before the tabling of the bill under opinion, the supervisory authority

(hereinafter the "ACJ"), established by article 40 of the law 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 and within which the CNPD sits

as a member, had already published a notice on the JU-CHA¹ application on July 31, 2020

(hereinafter the “2020 ACJ Notice”).

In this opinion, the ACJ noted in particular that “[s]ince the entry into force of the law of 1 August 2018 in criminal matters as well as in matters of national security, the JUCHA application and the processing of personal data implemented by the law enforcement authorities are governed by this framework law [the law of 1 August 2018 in criminal matters as well as in matters of national security], without containing specific provisions concerning the processing of data implemented by the various competent authorities referred to in the said law”, and that it “there is no doubt that the data processing carried out by the competent authorities in criminal matters as well as matters of national security constitute an interference with the law respect for private life and the right to data protection and that the criminal provisions, 1 Opinion of the judicial control authority created by the law of 1 August 2018 in criminal matters as well as in matters of national security on the JUCHA app.

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in particular the Penal Code and the Code of Criminal Procedure, constitute a legal basis sufficient for the collection of personal data in the execution of the missions essentials of the public ministry and the judicial jurisdictions”.

In its 2020 opinion, the ACJ analyzed “whether the JUCHA application does not constitute processing distinct from, and beyond, procedure-based data processing criminal procedures described above, in that it facilitates the exploitation and linking of information on the basis of separate legal proceedings and allows reconciliation between these different processing of data with related purposes, so that the conditions and methods of this "JUCHA" data processing should be provided for in the law in order to confer a

greater legal certainty for litigants" as well as "if the provisions of the said law are sufficiently precise as to the requirements in particular of Article 11, paragraph 3, read at in light of Article 32, paragraph 3, of the Constitution, Article 8, paragraph 2, of the Convention European Union of Human Rights, Article 52, paragraphs 1 and 2, of the Charter of Human Rights fundamental principles of the European Union and the case-law relating thereto".

The ACJ's analyzes led to the conclusion that "[n]otwithstanding the management of JUCHA rooted in internal procedures, which on the whole meets the requirements of the law of the August 1, 2018 in criminal matters as well as in matters of national security and notwithstanding the fact that the majority of data processing relating to paper files revolves around the main missions of criminal courts, it appears that neither the provisions of the Code of criminal procedure and no other legal provisions explicitly regulate all characteristics of the processing operations covered by the JUCHA application"². As a conclusion, the ACJ still retains that

"[s]ince the JUCHA application combines various purposes by operating at the end of account a reconciliation between these different data processing operations, it could be considered adopting a general provision defining the essential elements of the data processing carried out on the basis of the JUCHA application. Such a step could increase the accessibility and predictability of the law.

Moreover, in order for this approach to take full account of the requirements constitutional and conventional rights arising from the European Convention on Human Rights of Human Rights and the Charter of Fundamental Rights of the European Union and the case law as cited at the beginning of this notice, the terms and conditions of said processing should be defined in a specifically dedicated legal basis"³.

According to the explanatory memorandum, the bill under opinion aims to take into account the concerns raised by the ACJ, in particular in that it provides that

"[a]n interference with the right to respect for private life or the right to protection

data can be justified provided that it 1) is provided for by an accessible law

to the persons concerned and predictable as to its repercussions, i.e. formulated

2 Same.

3 Same.

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with sufficient precision; 2) is necessary in a democratic society, under

subject to the principle of proportionality; 3) respects the essential content of the right to

Data protection ; 4) effectively responds to objectives of general interest or to the

need to protect the rights and freedoms of others.

The bill under the heading therefore intends to meet these obligations and balance

hand, the need to provide the judicial authorities with the tools essential to the proper

functioning of Justice and on the other hand, to guarantee respect for the right to privacy and

more specifically that of the right to the protection of personal data".

In addition, the objective of the bill is to "regulate the processing of personal data

personnel carried out by the judicial authorities using the JU-CHA application, allowing the

management of criminal cases from the first procedural act to the execution of decisions

of justice, in accordance with the provisions of European and international law, the Penal Code, the

Code of Criminal Procedure and other applicable special laws".

Still according to the explanatory memorandum, the bill pursues the objective of providing

"amendments to the Code of Criminal Procedure in order to regulate the transmission of information in

criminal matters, in particular by giving an unequivocal legal basis to the communication by

the Public Ministry of sentencing decisions to the administrations, legal persons of

public law or to the competent professional orders responsible for ensuring its execution. The text introduced again

the Public Ministry to alert people of

public or private law from the risk of committing an offense by one of their subordinates”.

In general, the National Commission welcomes the legislative initiative, aimed at providing a framework for processing carried out by the judicial authorities on the basis of the JU-CHA application, which claims make up for the lack of a specifically dedicated legal basis defining the essential elements of processing carried out by the judicial authorities on the basis of the JU-CHA application.

Taking into account the opinion of the ACJ of 2020 to which the members of the ACJ from the CNPD have actively contributed, the bill nevertheless raises observations and questions that the National Commission wishes to address in this opinion.

the possibility for

I. Regarding the introduction of specific provisions for the processing of data

personal information in the JU-CHA app

1. On the purposes of the processing of personal data

The CNPD notes that the 1st article of the bill intends to set the purposes pursued by the processing of personal data in the JU-CHA application as recommended by the ACJ in its opinion of 2020⁴.

⁴ See ACJ opinion of 2020, p.27.

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It notes that the commentary to the articles describes certain purposes pursued, while noting that it does not claim to be exhaustive. However, the description of the purposes in Article 1 of the draft

law remains more than vague.

The CNPD recalls that Article 3, paragraph 1, letter b) of the law 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, transposing the Directive into law national, requires that personal data be “collected for the purposes determined, explicit and legitimate and are not processed in a manner inconsistent with these purposes”. Thus, the CNPD considers that the bill under opinion must determine these purposes with a degree of detail sufficient to be compatible with the aforementioned provision.

It considers that the current wording of the provision does not specify in sufficient detail the purposes to meet this requirement. In this context, the National Commission points out that the 2020 ACJ opinion had identified four main categories of processing purposes⁵, and were asks whether the bill should at least not contain these broad categories of purposes.

⁵ ACJ Opinion 2020, p. 2 and 3: “The JUCHA app covers the whole process of a criminal case, from the communication of the fact to the prosecution until the final decision on the public action, including registration in the register judicial. It also covers the aspect of the execution of sentences. In addition, the JUCHA application integrates the management of records of the Central Social Assistance Service (hereafter “SCAS”), probation, guardianship, protection of youth, victim support and petitions for pardon.

[...]

Given the interweaving of multiple data processing operations within the JUCHA application, which is largely based party on the same personal data collected, this analysis must be carried out by distinguishing the purposes. Four main categories of purposes have been identified:

A. Management of the criminal trial

has. Ensure the management of repressive files from the first procedural act until the execution of the court decisions,

b. Allow the computer management of criminal cases opened within the public prosecutor's offices,
vs. Allow state prosecutors to assess the appropriateness of prosecution,
d. Allow to trace a case in case of discovery of new elements,
e. Allow management of hearings of a repressive nature,
f. Allow the management of the criminal record with the different extracts,
g. Manage the files of the Central Social Assistance Service (hereinafter "SCAS") (module SCAS).

B. Youth protection

C. International cooperation in criminal and judicial matters

has. Manage and keep track of European arrest warrants and other European instruments of mutual recognition sent to Luxembourg,

b. Manage and keep track of coercive letters rogatory addressed to the Luxembourg org.

D. The other missions of the public prosecutor's offices

has. Allow the return of found objects,

b. Allow state prosecutors to assess a person's morality and honourability,

vs. Keep track of the paper files transmitted to the archives,

d. Interactions outside ongoing legal proceedings by the prosecution with persons physical or moral. »

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The CNPD notes with that the bill as well as the explanations provided by the comments of the articles reflect the current structure of the JU-CHA application. However, she wonders if the project of

law should not already take into account the future development of the JU-CHA, in particular with regard to the dematerialization of files as envisaged by the e-justice project. In concrete terms, the question may be asked whether the terms "processing of procedures" and "including digital" of paragraph 1 of the current provision are sufficient to cover a possible evolution of the JU-CHA application in view of the implementation of the e-justice project. Referring again to what the ACJ had raised in its notice of 20206, the CNPD wonders whether the bill should not be supplemented by a category of purposes covering this aspect.

2. On the designation of the controller

The National Commission notes that Article 2 of the bill designates the State Attorney General as data controller for the processing of personal data carried out in the JU-CHA app.

However, it regrets that the authors of the bill did not justify their choice in the article commentary.

As a reminder, it appears from the 2020 ACJ opinion that despite the diet and the use of the JU-CHA application by many judicial authorities, the General Prosecutor's Office considers that the role of data controller is incumbent on him⁷. In the same opinion, the ACJ nevertheless raised a question in relation to this assertion, by wondering "if the different jurisdictions should not be considered as joint data controllers, less for certain parts of the processing included in the JU-CHA application"⁸.

The CNPD regrets that the authors of the bill did not take the opportunity to respond to the questioning of the ACJ, in particular by providing explanations why the qualification of joint controllers did not seem applicable to them in the present context.

3. On the maximum time limit for accessing data from the 'law enforcement cases' module

According to article 5 of the draft law, access to the data contained in the 'files' module repressive measures' can be carried out "within a maximum period of two years for contraventions,

five years for misdemeanors and ten years for crimes from the last entry in the system ".

6 ACJ Opinion 2020, p. 2: "In addition to the already dematerialized processing included in the JUCHA application, there appears that this is set to evolve, gradually integrating more dematerialized files linked to the implementation of "e-justice". If it is planned to eventually integrate a dematerialized version of the files paper in the JUCHA application, the rules relating to said application must also cover this new reality. »

7 See ACJ opinion of 2020, p.10.

8 Same.

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The CNPD wonders whether it would not be useful to clarify what the trigger for the delay, at know the "last entry", means exactly. Commentary on articles that do not provide no details in this regard either, the National Commission nevertheless considers that this clarification will contribute to transparency vis-à-vis the persons concerned. Furthermore, a explanation would make it possible to determine exactly whether a simple consultation could postpone the deadline.

4. On the reform of youth protection

In order to ensure the consistency of the bills currently in the legislative procedure, it should be noted that the 'youth protection' module should be adapted if necessary depending on the developments to take place when the related bills come to fruition⁹.

5. On the maximum data access time of the 'Central Service' module

social assistance

According to article 9 of the bill, access to the data contained in the 'Central Service' module social assistance' "is no longer possible at the latest five years from the closing of the file".

The CNPD wonders whether it would not be useful to clarify what the trigger for the delay, at know the "closure of file", means exactly. Commentary on articles that do not provide clarification in this regard, she believes that this clarification would contribute to transparency with regard to vis-à-vis the persons concerned.

6. On the 'access control' module

The National Commission notes that the 'access control' module provided for in Article 10 of the draft law "contains the logs of the processing operations carried out by the users of application »10.

In this respect, it is worth recalling article 24 of the law of 1 August 2018 on the protection of natural persons with regard to the processing of personal data with regard to criminal law as well as in terms of national security, transposing the Directive into national law:

"(1) Logs are kept at least for the following processing operations in automated processing systems: the collection, modification, consultation, communication, including transfers, interconnection and erasure. Newspapers consultation and communication operations make it possible to establish the reason, the date and the time of these and the identification of the person who consulted or communicated the personal data, as well as the identity of the recipients of this data to personal character. »

9 Bill no. 7991 introducing criminal law for minors and amending: 1° the Code of penal procedure ; 2° the amended law of 7 March 1980 on the organization of the judiciary; 3° of the amended law of 17 March 2004 on the European arrest warrant and surrender procedures between Member States of the Union European; 4° the law of 20 July 2018 reforming the prison administration and draft law no. 7992 relating to the rights of child victims and witnesses in the context of criminal proceedings and amending: 1° of the Code criminal; 2° the Code of Criminal Procedure; 3° the amended law of 10 August 1991 on the legal profession.

10 See art. 10, paragraph 1, of the bill.

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In addition, it should be noted that the conclusions of the ACJ in its 2020 opinion which, on this subject, note that "the logging mechanism should be updated and provide that the users provide precise information about the reason for a consultation and/or modification"¹¹ and that "there would be recommended that the legislator adopt specific provision(s) specifying: [...] logging and log retention periods"¹².

However, on reading Article 10, paragraph 2, of the bill, the National Commission finds that the newspapers "must provide at least the identity, if necessary through an identifier number, users as well as the nature of the information consulted and the date and time of consultation", and this provision therefore does not explicitly require that newspapers contain a "reason for consultation and/or modification" as recommended by the ACJ in its opinion of 2020 and as required by article 24 of the law of August 1, 2018 relating to the protection natural persons with regard to the processing of personal data relating to criminal law and national security.

The commentary of the articles does not provide explanations on this subject, the CNPD wonders therefore for what reasons they did not follow the recommendation of the ACJ.

It should be remembered that the "logs are used only for the purpose of verifying the lawfulness of processing, self-monitoring, guarantee of the integrity and security of data to personal character and for the purposes of criminal proceedings". In view of the large number of consultations in the JU-CHA application, the question arises as to how the responsible processing can effectively use the logs for self-monitoring purposes in the context

regular log reviews to seek out and detect, if necessary, consultations

illicit in the JU-CHA application. The CNPD considers in this context that it is necessary to

It is mandatory to provide a reason for consultation, in order to make it possible to trace with precision sufficient the reason and the legitimacy of the access to the data. Article 10 should therefore be adapted, paragraph 2, of the bill, in order to provide that a sufficiently precise reason is generated or inserted so that the “logs of consultation and communication operations allow to establish the motive”.

7. On the distinction between different categories of data subjects

The CNPD notes with satisfaction that article 11 of the bill lists the categories of data that can be processed and that the “file must distinguish between different categories of persons, depending on the nature of their intervention in the case concerned”.

If the ACJ had already concluded in its 2020 opinion that “the JUCHA application seems to respect this provision^[13], in that it makes the distinction [...]”, it should nevertheless be recalled that

11 See ACJ opinion of 2020, p.26.

12 See ACJ opinion of 2020, p.27.

13 See art. 5 of the law 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 , which provides that it is necessary establish, as far as possible and where appropriate, a clear distinction between the personal data of different categories of data subjects”.

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the ACJ also considered that “it is necessary to clarify what differences in treatment attach to this distinction, in particular with regard to the possibility of carrying out a search on

said persons and the information displayed according to the different categories of people”¹⁴.

The CNPD therefore regrets that the authors of the bill did not provide any clarifications on this item in the bill under notice.

II. Regarding the amendment of the Code of Criminal Procedure

Article 12 of the bill intends to introduce three new articles in the Code of Procedure aimed at providing a legal basis for the transmission of information by the public prosecutor, in particular to persons governed by public or private law in order to alert them that one of their subordinates are at risk of committing an offence.

The CNPD intends to limit its observations to issues related to data protection and the protection of privacy.

Thus, it wonders about the consequences of transmitting this type of information to employers. Indeed, this bill in no way specifies how the employer must react to this type of information, taking into account the principle of the presumption of innocence, of a possible dismissal of the criminal case or of a decision of acquittal. What guarantees surround the processing of this type of information by the employer (accuracy and updating of data, retention period, etc.)? The bill is silent on this.

It should be noted that the transmission of information from the State Attorney General or/and the State prosecutor to the employer will have the consequence that the legal regime for the protection of applicable data will change. Indeed, the employer is not a competent authority under of the law of 1 August 2018 on the protection of natural persons with regard to the processing personal data in criminal matters as well as in matters of national security.

The GDPR is therefore applicable to the processing of personal data that it carries out, including the processing it performs to store, consult or even destroy such data personal.

In this context, the CNPD wishes to recall that the legal data protection regime

applicable to the competent authorities under the law of 1 August 2018 relating to the protection of natural persons with regard to the processing of personal data in criminal law as well as in terms of national security makes it possible, if necessary, to restrict the extent of the transparency obligations incumbent on the controller as well as the rights of data subjects.

14 See ACJ opinion of 2020, p.13.

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This would no longer be the case if the personal data were transmitted to the employer, who would have to apply the GDPR. The authors of the bill limit themselves to indicating in the commentary the articles that it is unnecessary to provide for a right to additional information of the transmission of his data to the person concerned, given that this information will be notified to him.

However, the question arises whether the rights of the data subject/the data subject should not be limited.

alleged author, on the basis of article 23 of the GDPR and following the guidelines of the Committee

European Data Protection Authority 15. The bill under consideration remains silent on this subject.

Thus, in order not to allow circumvention of the rules normally applicable to a personal data processed during an instruction, an investigation or an ongoing trial, it would be appropriate to provide for restrictions, temporary as the case may be, on the rights of persons concerned (in particular the right to information, the right to erasure and the right of access) in pursuant to Article 23 of the GDPR and taking into account the guidelines of the EDPB in this regard regard.

Thus decided in Belvaux on July 1, 2022.

The National Data Protection Commission

Tine A. Larsen

President

Thierry Lallemand

Commissioner

Marc Lemmer

Commissioner

Alain Hermann

Commissioner

15 See "Guidelines 10/2020 on restrictions under Article 23 GDPR".

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