Opinion of the National Commission for Data Protection relating to the

Bill no. 7632 transposing Directive (EU) 2018/1972

of the European Parliament and of the Council of 11 December 2018 establishing the

European Electronic Communications Code and amending

of the amended law of 30 May 2005 on: 1) organization of the Institute

Luxembourg Regulation; 2) modification of the amended law of 22

June 1963 fixing the system of salaries of civil servants of the State.

Deliberation n°7/AV6/2021 of March 3, 2021

In accordance with article 57, paragraph 1, letter (c) of regulation n° 2016/679 of 27 April

2016 on the protection of natural persons with regard to the processing of personal data

personal character and on the free movement of such data, and repealing Directive 95/46/EC

(General Data Protection Regulation) (hereinafter “the GDPR”), to which refers

article 7 of the law of 1 August 2018 on the organization of the National Commission for the

data protection and the general data protection regime, the Commission

National Commission for Data Protection (hereinafter referred to as "the National Commission" or

"the CNPD") "advises, in accordance with the law of the Member State, the national parliament, the

government and other institutions and organizations regarding legislative measures and

administrative procedures relating to the protection of the rights and freedoms of natural persons

with regard to treatment”.

By letter dated July 6, 2020, the Minister of Communications and the Media invited the

National Commission to decide on the subject of draft law n° 7632 transposing

of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018

establishing the European Electronic Communications Code and amending the

amended law of 30 May 2005 on: 1) organization of the Luxembourg Institute of

Regulation; 2) modification of the amended law of 22 June 1963 establishing the salary regime

state officials.

Said Directive (EU) 2018/1972 is supposed to replace four directives currently in force.
vigor. Among the directives to be replaced is not Parliament Directive 2002/58/EC
European Parliament and of the Council of 12 July 2002 concerning the processing of personal data
personnel and the protection of privacy in the electronic communications sector
(directive known as privacy and electronic communications or “ePrivacy directive”)
transposed in Luxembourg by the amended law of 30 May 2005 concerning the protection of
privacy in the electronic communications sector. If a settlement proposal
European Union to succeed the said directive is being drafted, the amended law of 30 May
2005 concerning the protection of privacy in the communications sector
emails will remain in effect for the time being.

Opinion of the National Commission for Data Protection on the draft
Law No. 7632 transposing Directive (EU) 2018/1972 of the Parliament
European Parliament and of the Council of 11 December 2018 establishing the code of
European electronic communications and amending the amended law
of 30 May 2005 on: 1) organization of the Luxembourg Regulatory Institute;
2) modification of the amended law of 22 June 1963 establishing the salary regime
state officials.

In this context, the CNPD would like to share its observations with regard to certain articles
of the bill presenting aspects relating to the protection of personal data
personnel, as well as concerning the interactions between the bill under object, the aforementioned law
of May 30, 2005 and, where applicable, the draft “ePrivacy” Regulation1.
Unlike its predecessor texts, Directive (EU) 2018/1972 and the draft law
under notice include so-called “over the top” or “OTT” service providers in their
scope. In fact, not only "traditional" services based on

on numbering but also interpersonal communications services not

based on numbering.

Article 2

As mentioned in the introduction to this opinion, the notion of service

electronic communications is extended to include “over the top players”

providing number-independent interpersonal communications services.

However, unlike what is provided for in the bill under notice2, the new

definition of electronic communications service should apply not only to the

future law on electronic communications networks and services, but also to

the amended law of 30 May 2005 concerning the protection of privacy in the sector of

electronic communications.

Indeed, the third paragraph of Article 125 of Directive (EU) 2018/1972 to be transposed provides that

which follows: “References made to the repealed Directives shall be construed as made at the

this Directive and are to be read according to the correspondence table in Annex XIII. »

According to the table in Annex XIII, any reference to Article 2(c) of Directive

2002/21/EC (which defines electronic communications services) will henceforth mean

as made in Article 2, point 4) of Directive (EU) 2018/1972 (repeated by Article 2

subsection (4) of the bill).

However, Article 2 of the ePrivacy Directive (2002/58/EC) refers precisely – without mentioning it

explicitly - in Article 2, point c) of Directive 2002/21/EC by the following terms:

“Unless otherwise provided, the definitions in Directive 95/46/EC and in

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a framework

common regulatory framework for electronic communications networks and services

(Framework Directive)(8) apply for the purposes of this Directive. »

Currently, the amended law of 30 May 2005 concerning the protection of privacy in

the electronic communications sector which transposes the ePrivacy directive is based on

its article 2 letter (j) on the former definition of article 2, point c) of Directive 2002/21/EC.

The bill under opinion should therefore include an amending provision of the amended law

of 30 May 2005 on this subject.

1 Proposal for a Regulation of the European Parliament and of the Council on the respect for private life and the

protection of personal data in electronic communications and repealing the

directive 2002/58/EC (“privacy and electronic communications” regulation)

2 And the CNPD is not aware that a separate bill has been tabled to modify the amended law of 30

May 2005 concerning the protection of privacy in the electronic communications sector

---

Opinion of the National Commission for Data Protection on the draft

Law No. 7632 transposing Directive (EU) 2018/1972 of the Parliament

European Parliament and of the Council of 11 December 2018 establishing the code of

European electronic communications and amending the amended law

of 30 May 2005 on: 1) organization of the Luxembourg Regulatory Institute;

2) modification of the amended law of 22 June 1963 establishing the salary regime

state officials.

Similarly, compliance with the other definitions of article 2 of the amended law of 30 May 2005

in Article 2 of Directive 2018/1972 should be verified and amendments should be made

if necessary be made.

Furthermore, the CNPD notes, like the Council of State, that point 37 of article 2 of the

bill refers to the concept of “competent authorities”. In the following text,

various articles of the bill refer to these “competent authorities” without, however,

provide details in this regard.

However, the National Commission is likely to be one of the competent authorities, to which

certain provisions of the bill would apply to it, such as articles 3, 9 and

13. In accordance with the principle of legal certainty, it considers it necessary that the authors of the project of law clarify which competent authorities are concerned and specify the competences and respective tasks. The CNPD will return to this point in its developments relating to section 8 of the bill.

Article 5

Article 5 paragraph (2) provides that “operators and undertakings offering services of electronic communications make automatically and free of charge available to the authorities competent in the matter the technical data and the equipment enabling them to carrying out their legal duties of monitoring communications”. The CNPD supposes that by "legal communications surveillance missions", it is necessary to understand the measures that can be ordered on the basis of articles 67-1 and 88-1 to 88-4 of the code of criminal procedure as well as article 7, paragraphs (1) and (2) of the law of 5 July 2016 amended reorganizing the State Intelligence Service.

According to the case law of the European Court of Human Rights, any interference in the right to respect for private life requires a law which must be "accessible to persons concerned and foreseeable as to its repercussions”3. A rule is foreseeable "if it is formulated with sufficient precision to allow any person – benefiting possibly with appropriate assistance – to adapt their behavior”4. "The degree of precision required of the “law” in this regard will depend on the subject in question. »5.

To improve the predictability and precision of the above provision, the CNPD suggests to make an explicit reference to the legal texts providing for surveillance measures in question.

It is necessary to avoid that a legal provision that does not explicitly provide for the surveillance of communications can be used for this purpose (for example the provisions of the Code of Criminal Procedure relating to searches, various legal provisions granting investigative powers to administrative authorities or Article 3 of the law

3 CouEDH, Amann c. Switzerland [GC], no. 27798/95, 16 February 2000, para. 50; see also CouEDH, Kopp c. Swiss, no. 23224/94, March 25, 1998, para. 55 and CouEDH, Iordachi and others v. Moldova, No. 25198/02, February 10, 2009, para. 50.

4 CouEDH, Amann c. Switzerland [GC], no. 27798/95, 16 February 2000, para. 56; see also CouEDH, Malone v. 8691/79, 26 April 1985, para. 66; CouEDH, Silver and others v. United Kingdom, n° 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, March 25, 1983, para. 88.

5 ECtHR, The Sunday Times v. 6538/74, 26 April 1979, para. 49; see also CouEHD, Silver et al v. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 25 March 1983, para. 88.

---

amended on 5 July 2016 reorganizing the State Intelligence Service which defines the missions of the Intelligence Service). Indeed, the specific provisions, in addition to to meet the requirement of foreseeability of the case law of the European Court of Rights human beings, must contain conditions limiting surveillance measures to a minimum.

For example, in criminal proceedings, judicial access to connection data (article 67-1 of the Code of Criminal Procedure) or the content of electronic communications (articles 88-1 et seq.) is only possible in the context of acts which carry a penalty

criminal or correctional sentence, the maximum of which is equal to or greater than one year imprisonment (article 67-1) respectively two years of imprisonment (article 88-2), while the search and seizure provisions do not include such terms. Moreover, surveillance measures require the intervention of a judge. instruction, even in the event of a crime or flagrant misdemeanour6.

However, in order to take account of the appearance of new forms of electronic communication (offered by the “over the top players” mentioned above in introduction), covered by the extended definition of Article 2 paragraph (4) of the draft law, the National Commission wonders whether the current provisions of the Code of criminal procedure (articles 67-1 and 88-1 to 88-4) relating to the control of communications are sufficient or whether, on the other hand, it would be necessary to introduce provisions in the Code of Criminal Procedure, or even modify the existing provisions. The CNPD also notes that the terms used to designate the companies to be cooperating with the authorities are not standardized in the Code of Criminal Procedure (“telecommunications operator” and “telecommunications service provider” to article 67-17, “post and telecommunications operator” in article 88-4) and in article 5 paragraph (2) of the draft law (“operators and companies offering electronic communication”).

Article 5 paragraph (2) further specifies that "regulations of the Institute specify, if necessary, the format and terms of provision of technical data and equipment”.

The CNPD understands that this provision regulates technical measures prerequisites allowing the interception of data by service providers or operators. In contrast, the transmission of the data thus obtained by the suppliers of service or operators to the judicial authorities and the State Intelligence Service falls under article 3 paragraph (2) of bill n°7424 creating a platform common secure electronic transmission and modification: 1. of the code of procedure

2. the amended law of 5 July 2016 reorganizing the Service de

state intelligence. This article provides as follows: “The format and methods of execution

according to which the data collected within the meaning of articles 43-1, 67-1 of the code of

criminal procedure and article 7, paragraph 2, of the amended law of 5 July 2016 on

reorganization of the State Intelligence Service are to be sent, respectively to the

judicial authorities and the State Intelligence Service, are defined by Grand-

ducal. ". The said bill was the subject of opinion 40/2019 of June 5, 2019 of the CNPD8.

6 For article 67-1 of the Code of Criminal Procedure, cf. a judgment of the Court of Appeal, Fifth Chamber,

February 26, 2008, judgment 106/08 V

7 Article 7 paragraph (2) of the amended law of 5 July 2016 reorganizing the Intelligence Service

State uses the same terms.

8

secure-electronics.pdf.

---

https://cnpd.public.lu/content/dam/cnpd/fr/decisions-avis/2019/40-plateforme-unique-de-transmission-

Opinion of the National Commission for Data Protection on the draft

Law No. 7632 transposing Directive (EU) 2018/1972 of the Parliament

European Parliament and of the Council of 11 December 2018 establishing the code of

European electronic communications and amending the amended law

of 30 May 2005 on: 1) organization of the Luxembourg Regulatory Institute;

2) modification of the amended law of 22 June 1963 establishing the salary regime

state officials.

Article 8

Article 8 paragraph (2) letter d) provides that the Institut Luxembourgeois de Régulation (hereinafter

after: “the ILR”) is responsible for “contributing to the protection of the rights of end users

in the electronic communications sector in coordination, where appropriate, with
other competent authorities".

The CNPD wonders whether it is one of the competent authorities in question. She notes
also that the aforementioned "coordination" is regulated only by the provisions
summaries of subsections (3) and (4) of section 8. For reasons of legal predictability
and in order to ensure effective coordination between competent authorities, the Commission
National Authority considers it necessary, on the one hand, to name in the draft law the authorities
authorities in the matter and to clarify their respective competences and tasks, and
on the other hand, to specify the modalities of such coordination.

Article 19

Article 19 lists the obligations attached to the general authorisation, obligations to be
charge of companies that provide a communications network or service
electronic communications with the exception of non-data-based interpersonal communications services
numbering.

Article 19 paragraph (1) 4° provides for "the facilitation of lawful interception by the authorities
competent national authorities, in accordance with Regulation (EU) 2016/679 of the European Parliament
and of the Council of April 27, 2016 on the protection of individuals with regard to the
processing of personal data and the free movement of such data, and
repealing Directive 95/46/EC (General Data Protection Regulation) and the law
amended of 30 May 2005 concerning the protection of privacy in the sector of
electronic communication".

As previously mentioned with regard to Article 5, the CNPD considers that it would be
preferable that Article 19 paragraph (1) 4° refers to specific provisions of the Code of
criminal procedure and the amended law of 5 July 2016 reorganizing the Service de
State intelligence, in order to improve the predictability of the law within the meaning of the
case law of the European Court of Human Rights.

The CNPD also notes that Article 19 paragraph (1) 4° does not apply to interpersonal communications not based on numbering while Article 5 paragraph (2) also dealing with business cooperation in surveillance measures ordered by the authorities is of general application. She wonders if this difference in treatment is desired.

Opinion of the National Commission for Data Protection on the draft Law No. 7632 transposing Directive (EU) 2018/1972 of the Parliament European Parliament and of the Council of 11 December 2018 establishing the code of European electronic communications and amending the amended law of 30 May 2005 on: 1) organization of the Luxembourg Regulatory Institute; 2) modification of the amended law of 22 June 1963 establishing the salary regime state officials.

Article 33

Article 33 provides for the sanctions that the ILR can impose on companies that do not respect certain provisions of the bill.

The CNPD wonders if this article 33 could not create in practice a risk of parallel administrative proceedings that may lead to sanctions before the ILR and the CNPD for the same facts.

One can think of facts constituting both a violation of section 42 of the bill and of article 32 of the GDPR, articles placing security obligations on companies.

Similarly, a fact constituting a violation of the secrecy of correspondence also violates article 19 paragraph (1) point 2 of the draft law than article 4 of the amended law of 30 May 2005 concerning the protection of privacy in the communications sector electronics. Indeed, under article 12 of the amended law of 30 May 2005, the Commission

national authority for data protection is responsible for ensuring the application of the provisions of the said law of 30 May 2005 and its implementing regulations. One can also think of certain violations of article 10 bis of the amended law of 30 May 2005. Indeed, article 33 paragraph (4) of the draft under opinion expressly mentions the said article 10 bis among the legal provisions, the violation of which may give rise to an administrative fine by the ILR. However, in under the aforementioned article 12 of the amended law of 30 May 2005, the CNPD is responsible for ensuring the application of said Article 10a.

Several questions arise in this regard.

Would it be appropriate for an authority to suspend a procedure that could lead to a sanction when it is aware of the parallel proceedings before the other authority?

In the absence of a precisely regulated information exchange procedure, it is also raises the question of how one of the two authorities will know that a proceedings are pending before the other authority.

Should the authority which is or has seized first inform the other authority?

If it is accepted that the same fact can give rise to these proceedings before both authorities, is it what the same fact can then also give rise to administrative sanctions at the same time by the ILR or the CNPD, or on the other hand, should such a double administrative sanction be automatically excluded, like the non bis in idem principle existing in criminal law? The CNPD considers it is therefore necessary to clarify this issue in the bill.

Article 43

Article 43 paragraph (5) provides for cooperation between the ILR and the CNPD in the field the security of networks and services in the following terms:

“Depending on the needs and in accordance with national law, the Institute consults the authorities competent courts, the Financial Sector Supervisory Commission, and the Commission national authority for data protection and cooperates with them. »

The CNPD wonders what forms the cooperation provided for in this article could take.
Is it only a question of coordinating the positions of the two authorities on questions of
principle relating to the security of communications and processing? Or can there be a
cooperation on matters referred to one of the authorities, for example within the framework of
Article 33 sanction procedures mentioned above. Such cooperation
would involve an exchange of information on files between the ILR and the CNPD, information
which are protected by professional secrecy.

Article 112

Article 112 takes up Article 100 of Directive (EU) 2018/1972 which requires compliance with
fundamental rights in the electronic communications sector.

The CNPD wishes to draw attention to the fact that this provision of the directive must not only
be included in an article of the transposition law, but that, moreover, the provisions
applicable national laws and practice should respect the principles set out in the
directive and not conflict with said law.

This applies in particular to the secrecy of communications protected in particular by Article 7
of the Charter of Fundamental Rights of the European Union.

At present, the secrecy of communications in electronic communications
is notably protected at national level by the amended law of 30 May 2005 concerning the

protection of privacy in the electronic communications sector and in particular

by article 4 of this law.

However, currently, the definition of “electronic communications service” in

article 2 letter (j) of the amended law of 30 May 2005 mentioned above is narrower than that of article

2 paragraph (4) of the bill which also includes “over the top players”. As he has

been explained above in the commentary to section 2 of the draft law, and in accordance with

in the third paragraph of Article 125 of Directive (EU) 2018/1972, the definitions of the amended law

of 30 May 2005 on the protection of privacy in the communications sector

electronic devices should be adapted to comply with Article 2 of Directive (EU)

2018/1972.

Otherwise, there would be a risk that certain new forms of electronic communications

are not covered by the provisions relating to the secrecy of correspondence of the law

amended on May 30, 2005, at least as long as the future “ePrivacy” Regulation is not

not adopted and in force.

Article 124

Article 124 paragraph (5) aims to ensure rapid location of the originator of a call

emergency.

The CNPD notes that at present, the question of the location of emergency calls is

dealt with by article 7 paragraph (5) of the amended law of 30 May 2005 concerning the protection

of privacy in the electronic communications sector.

Opinion of the National Commission for Data Protection on the draft

Law No. 7632 transposing Directive (EU) 2018/1972 of the Parliament

European Parliament and of the Council of 11 December 2018 establishing the code of

European electronic communications and amending the amended law

of 30 May 2005 on: 1) organization of the Luxembourg Regulatory Institute;

2) modification of the amended law of 22 June 1963 establishing the salary regime

state officials.

7/9

Moreover, a modification of said article 7 is in the process of being carried out by bill no.

7526 amending the amended law of 30 May 2005 relating to the provisions

specific protection of the person with regard to the processing of personal data

personnel in the electronic communications sector and amending the

articles 88-2 and 88-4 of the Code of Criminal Procedure. The said bill was the subject of the opinion

11/2020 of April 24, 2020 of the CNPD9. This modification tends to allow the localization of

calls via information obtained from the caller's mobile device (i.e. by

particular via location information by the global navigation system by

satellite (GNSS) or via a Wi-Fi network).

The CNPD understands that the proposed Article 124 paragraph (5) supplements the aforementioned Article 7 of the

amended law of 30 May 2005 which remains in force after the entry into force of the proposed law

under notice. It considers it necessary to specify in the bill how this provision

articulates with the amendment made by bill no. 7526.

Article 131

Section 131 of the bill governs detailed invoices.

With regard to free calls, paragraph (2) paragraph 4 provides the following: "Calls

that are free to the calling end user, including calls to helplines,

do not have to be shown on the detailed end-user invoice

caller". This paragraph leaves a choice – apparently for the benefit of the service provider

and not to the customer – to include or not to include these calls in the detailed invoices.

This contradicts the current article 6 paragraph (2) of the amended law of 30 May 2005 concerning the

protection of privacy in the electronic communications sector, paragraph which

remains in force and which provides the following: "Free calls including those to lines

assistance are not indicated on the itemized invoice regardless of its degree of

detail. A clarification is therefore needed in the bill.

Article 132

Article 132 paragraphs (1) and (2) govern the identification of the call line.

The CNPD understands that the draft article 132 paragraphs (1) and (2) complete the paragraphs

(1) to (4) of article 7 of the amended law of 30 May 2005 concerning the protection of privacy

in the electronic communications sector, paragraphs which will remain in force

after the entry into force of the law proposed under notice. The authors of the bill should

therefore clarify the articulation of the draft law under opinion with the provisions of the amended law of

May 30, 2005 concerning the protection of privacy in the communications sector

electronics.

9 https://cnpd.public.lu/content/dam/cnpd/fr/decisions-avis/2020/11-communication-electroniques-PL7526.pdf

---

Thus decided in Belvaux on March 3, 2021.

The National Data Protection Commission

Tine A. Larsen

President

Christopher Buschman

Commissioner

Marc Lemmer

Commissioner

Opinion of the National Commission for Data Protection on the draft

Law No. 7632 transposing Directive (EU) 2018/1972 of the Parliament

European Parliament and of the Council of 11 December 2018 establishing the code of

European electronic communications and amending the amended law

of 30 May 2005 on: 1) organization of the Luxembourg Regulatory Institute;

2) modification of the amended law of 22 June 1963 establishing the salary regime

state officials.