

Second additional opinion of the National Commission for the data protection relating to draft law n° 7498 amending of the amended law of 18 July 2018 on the Grand Ducal Police.

Deliberation n°8/AV7/2021 of March 3, 2021

In accordance with article 46, paragraph 1, letter (c) of directive (EU) n° 2016/680 of 27 April 2016 on the protection of individuals with regard to the processing of personal data personal character by the competent authorities for the purpose of crime prevention criminal proceedings, investigation and prosecution thereof or the execution of criminal penalties, and free movement of such data, and repealing Council Framework Decision 2008/977/JHA (hereinafter referred to as “the directive”), to which article 8 of the law of 1 August 2018 on organization of the National Commission for Data Protection and the general regime on data protection (hereinafter the "Law of 1 August 2018 on the organization of the National Commission for Data Protection and the general data protection regime Data"), the National Commission for Data Protection (hereinafter the "Commission Nationale" or the "CNPDP"), “advises the Chamber of Deputies, the Government and other institutions and bodies on legislative and administrative measures relating to the protection of the rights and freedoms of natural persons with regard to data processing personal”.

On February 28, 2020, the CNPD notified draft law no. 7498 amending the amended law of 18 July 2018 on the Grand Ducal Police (hereinafter the “draft law”)1.

On April 17, 2020, the National Commission issued its additional opinion on the government amendment to the bill, approved by the Government Council in its meeting of March 20, 20202.

On November 19, 2020, the Committee on Homeland Security and Defense adopted a series of amendments relating to the bill (hereinafter the “amendments”).

Insofar as the amendments concern provisions which have been commented on by the

CNPD in its aforementioned opinions of February 28 and April 17, 2020, the latter takes the matter itself to notify them.

1. On the amendments adopted by the Committee on Internal Security and

Defense

- Ad Amendment 1

The purpose of Amendment 1 is to modify paragraph (1) of the new article 43bis of the law

amended on July 18, 2018 on the Grand Ducal Police. This modification consists of the addition of

1 Opinion of the National Commission for Data Protection relating to draft law no. 7498 amending the amended law of 18 July 2018 on the Grand Ducal Police, deliberation n°04/2020 of 28 February 2020.

2 Complementary opinion of the National Commission for Data Protection relating to draft law no. 7498 amending of the amended law of 18 July 2018 on the Grand Ducal Police, deliberation n°10/2020 of 17 April 2020.

Complementary opinion of the National Commission for Data Protection

relating to bill no. 7498 amending the amended law of 18 July

2018 on the Grand Ducal Police.

purposes "as they appear in Article 17, paragraph 1, letter (a) of the amended law of 2

August 2002 on the protection of individuals with regard to the processing of personal data staff" 3.

The National Commission welcomes this addition as it had suggested in its

opinion of February 28, 2020 relating to the bill⁴, following the example of the Council of State in its opinion of February 10 March 2020⁵.

With regard to the replacement of the words "particular risk of commission of crimes or

offenses or attacks on the security of persons or property" by the notion of "particular risk

commission of criminal offences", it should be noted that this amendment takes up

substantially the terms of article 17, paragraph (1) letter d) of the amended law of 2 August 2002

on the protection of individuals with regard to the processing of personal data⁶.

This amendment is guided by the intention of the drafters of the bill not to "limit the

video surveillance to specific categories of offences”⁷. However, these latter

seem to want to exclude contraventions from the scope of the bill under notice.

Indeed, the authors of the bill specify that “[t]he use of the terms “offences

penalties”, which include those qualified as contraventions, does not in any way mean that

the intention is to extend video surveillance to places where offenses are committed”⁸.

If the will of the authors of the bill is not to extend video surveillance to places where

contraventions would be committed, there is reason to question the relevance of the

terminology used. Therefore, should we not take up the proposal of the Council of State in

its opinion of March 10, 2020 in that it proposes to refer to the terms “crimes or misdemeanors”⁹?

Finally, insofar as the change in terminology entails a broadening of the field

application of video surveillance, the CNPD takes the liberty of insisting on the importance of

the impact analysis that should be carried out in particular with regard to the justification of the

necessity of the video surveillance with regard to the criteria defined in paragraph (2) of the article

43bis new and the purposes pursued.

3 Comment of the authors of the bill under “Amendment 1”, parliamentary document n°7498/06, page 1.

4 Opinion of the National Commission for Data Protection relating to draft law no. 7498 amending the amended law

of 18 July 2018 on the Grand Ducal Police, deliberation n°04/2020 of 28 February 2020, page 5.

5 Opinion of the Council of State of March 10, 2020 relating to bill no. 7498 amending the amended law of July 18, 2018 on the

Grand-ducal police, parliamentary document n°7498/01, page 2.

6 Article 17 paragraph (1) letter d) of the amended law of 2 August 2002 on the protection of individuals with regard to the

processing of

personal data provides that “[t]he subject of a Grand-Ducal regulation: the creation and use, for the purposes and

conditions referred to under (a), a security zone video surveillance system. Is to be considered as such any place accessible

to the public which by its nature, location, configuration or frequentation presents an increased risk of committing offenses

criminal. The safety zones are fixed under the conditions provided for by Grand-Ducal regulation”.

7 Comment of the authors of the bill under “Amendment 1”, parliamentary document n°7498/06, page 2.

8 Comment of the authors of the bill under “Amendment 1”, parliamentary document n°7498/06, page 2.

9 Opinion of the Council of State of March 10, 2020 relating to bill no. 7498 amending the amended law of July 18, 2018 on the Grand-ducal police, parliamentary document n°7498/01, page 3.

Complementary opinion of the National Commission for Data Protection

relating to bill no. 7498 amending the amended law of 18 July

2018 on the Grand Ducal Police.

- Ad Amendment 2

With regard to the replacement of the words "crimes or misdemeanors or security breaches

persons or property" by the words "criminal offences", the CNPD refers to its

comments above.

The National Commission welcomes the other modifications but nevertheless wishes

to reiterate its comments made in its additional opinion of April 17, 2020 relating to the

bill¹⁰ in that it suggests, following the example of the Council of State¹¹, the deletion of point 4° of the

paragraph (2) of the new article 43bis of the amended law of July 18, 2018 on the Grand Police

ducal.

- Ad Amendment 3

The National Commission welcomes the fact that the authors of the bill have replaced the term "zone

of security" by "place", as it had suggested in its additional opinion of April 17

2020 relating to the bill¹², like the Council of State¹³.

- Ad Amendment 4

The authors of the bill are to be congratulated on the amendments made to Article 43bis

new, paragraph (5), paragraph 2, in that these provisions provide that "[t]he use of

facial recognition techniques is excluded".

The authors of the bill followed in particular the suggestion made by the CNPD in its opinion

of February 28, 2020 relating to the bill. The National Commission regrets, however, that the text

under notice does not take up its suggestion concerning the exclusion of sound recording¹⁴.

Moreover, the authors of the bill further specify in their commentary on the amendment under the opinion that “[t]he ban on the use of facial recognition techniques is therefore not not to be understood as a general prohibition and does not imply in particular that these techniques cannot be used in the context of criminal prosecution to elucidate criminal offenses according to the rules of criminal procedure”.

In this regard, the attention of the authors of the bill should be drawn to the fact that the use of facial recognition techniques in the law enforcement field, currently under discussion at the

10 Complementary opinion of the National Commission for Data Protection relating to draft law no. 7498 amending of the amended law of 18 July 2018 on the Grand Ducal Police, deliberation n°10/2020 of 17 April 2020, pages 1 and 2.

11 See additional opinion of the Council of State of 12 May 2020 relating to bill no. 7498 amending the amended law of 18 July 2018 on the Grand Ducal Police, parliamentary document n°7498/04, page 2 and second additional opinion of the Council

of February 23, 2021 relating to draft law n° 7498 amending the amended law of July 18, 2018 on the Grand Police ducale, page 3.

12 Complementary opinion of the National Commission for Data Protection relating to draft law no. 7498 amending of the amended law of 18 July 2018 on the Grand Ducal Police, deliberation n°10/2020 of 17 April 2020, pages 2 and 3.

13 Additional opinion of the Council of State of 12 May 2020 relating to draft law no. 7498 amending the amended law of 18 July 2018 on the Grand Ducal Police, parliamentary document n°7498/04, page 2.

14 Opinion of the National Commission for Data Protection relating to draft law no. 7498 amending the amended law of 18 July 2018 on the Grand Ducal Police, deliberation n°04/2020 of 28 February 2020, page 7.

Complementary opinion of the National Commission for Data Protection relating to bill no. 7498 amending the amended law of 18 July 2018 on the Grand Ducal Police.

European level, is still very questionable from a data protection point of view

and privacy.

- Ad Amendment 5

The CNPD welcomes the fact that the authors of the bill have integrated the proposals made in its opinion of February 28, 2020 on the draft law with regard to paragraph (6) of Article 43bis new of the amended law of 18 July 2018 on the Grand Ducal Police.

- Ad Amendment 6

The purpose of this amendment is in particular to delete the reference made to "[t]he Grand-Police ducale, represented by its director general" in his capacity as controller.

This deletion occurs "[in] the light of the work to develop a legal basis specific relating to the processing of personal data carried out by the Police grand-ducal"¹⁵.

Indeed, it should be noted that article 4 of bill n°7741 inserts a new article 43-3 in the amended law of 18 July 2018 on the Grand-Ducal Police, which designates the Grand-Ducal Police ducale as data controller for the processing of personal data that she performs.

- Ad Amendment 7

This amendment supplements paragraph (9) of the new article 43bis in that it provides that the data would not be erased after a period of two months for the cases referred to in the new paragraph (11), introduced by the said amendment.

This new paragraph (11) of the new article 43bis provides that "[t]he processing of data of a personal nature for the purposes of the prevention, research and observation of offenses criminal cases may be used by the Police for the purposes of analysis of the flow of operations, including including the review of incidents with the objective of improving plans and procedures intervention, as well as for internal training purposes".

The National Commission notes the introduction of such a purpose in a legal basis, which is indeed necessary in accordance with Article 8, paragraph (1) of the law of 1 August 2018 relating

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

personnel in criminal matters as well as in matters of national security.

On reading the commentary to the amendment under opinion, the National Commission understands that

the “recorded images” would be used by the Grand Ducal Police to “carry out the analysis

the course of the intervention, as well as for internal training purposes, with the aim of

to improve the plans and procedures for future interventions of the same type”.

15 Comment by the authors of the bill under “Amendment 6”, parliamentary document no. 7498/06, page 5.

Complementary opinion of the National Commission for Data Protection

relating to bill no. 7498 amending the amended law of 18 July

2018 on the Grand Ducal Police.

However, as noted by the Council of State in its second additional opinion of 23

February 2021 “the use of the terms “[t]he processing of personal data for the purposes of

prevention, research and determination of criminal offences” leads one to believe that

all the data used by the Grand Ducal Police for the purposes of prevention,

research and observation of criminal offenses could be used for other purposes

set forth therein. Such a provision, apart from the fact that it does not correspond to the intention of the authors

as explained in the commentary to the amendment, would go beyond the purpose of the draft law”¹⁶.

The CNPD again agrees with the questions raised by the Council of State insofar as it

“asks whether it is necessary to use all the data collected through the

video surveillance or if it would not be enough to target only data relating to interventions

large-scale police forces and of interest in the context of the analysis of the conduct of

intervention and internal training”¹⁷.

Furthermore, in the absence of details as to the technical measures that would be taken (for

technical example of masking or blurring of the faces of the persons concerned) in order to

to use images from video surveillance “for the purpose of analyzing the progress of

operations, including the review of incidents with the objective of improving plans and intervention procedures, as well as for internal training purposes”, the National Commission is not in a position to assess whether the principle of data minimization is respected in the species.

The authors of the bill should therefore specify what data would be consulted for the purposes set out in paragraph (11) of the new article 43bis as well as the technical means that would be taken to reuse images from video surveillance for such purposes.

By way of comparison, it is interesting to note that in Belgium, article 25/7 paragraph (2) of the amended law on the police function of August 5, 1992 provides that “[a]fter anonymization, the personal data and information referred to in paragraph 1 may be used for didactic and pedagogical purposes as part of the training of members of the services from police ”.

It should be noted that the anonymization of personal data has the following consequence that once anonymized, the data are no longer subject to the GDPR and their distribution or reuse has no impact on the privacy of the persons concerned.

If the intention of the authors of the bill is not to provide that the data be anonymized, the National Commission regrets that the retention period of the images for the purposes indicated in paragraph (11) of the new article 43bis have not been specified.

It should be recalled that according to Article 5 paragraph (1) letter e) of the GDPR, the data to be personal character should not be kept longer than necessary for the

16 Second additional opinion of the Council of State of February 23, 2021 relating to draft law no. 7498 amending the law amended on July 18, 2018 on the Grand Ducal Police, parliamentary document no. 7498/08, page 5.

17 Second additional opinion of the Council of State of 23 February 2021 relating to bill no. 7498 amending the law amended on July 18, 2018 on the Grand Ducal Police, parliamentary document no. 7498/08, page 5.

Complementary opinion of the National Commission for Data Protection

relating to bill no. 7498 amending the amended law of 18 July

2018 on the Grand Ducal Police.

fulfillment of the purposes for which they are collected and processed. Beyond that, the data should be deleted or anonymized.

However, in the absence of such details in the bill under opinion, the National Commission is not not in a position to assess whether this principle is respected.

Therefore, the CNPD considers that the retention period should be defined in the draft law.

or that it should at least specify the criteria that would be taken into account in order to determine what is the proportionate retention period for data from video surveillance and processed for the purposes set out in paragraph (11) of new Article 43bis.

2. On the advice of the Union of Luxembourg Towns and Municipalities¹⁸

Reference is made to the developments of the CNPD in its opinion of February 28, 2020 and its opinions of March 15, 2019 relating to the video surveillance of public spaces and places for security purposes public (deliberation No. 36/2019) and of May 10, 2019 relating to the use of video surveillance by the municipalities (deliberation n°39/2019) on the need to introduce a legal framework allowing a municipality wishing to set up, as data controller, a video surveillance device in public spaces for public security purposes, including general safety of people and property.

The National Commission again refers to its opinions of February 28, 2020 and March 15 and May 10 2019 mentioned above with regard to the interactions between the police and the mayors, whereas neither the municipal law of December 13, 1988 nor the amended law of July 18, 2018 on the Grand Police ducale do not specify the competences of the mayors in matters of administrative police.

Finally, it should be noted that the bill under consideration currently provides that only the Director General of the Grand Ducal Police may take the initiative, with the authorization of the Minister, to extend the VISUPOL video surveillance system to other municipal areas than

that of the City of Luxembourg. In the event that this system is extended to other municipal territories, shouldn't we provide a system that would not be based only on the sole initiative of the Director General of the Grand Ducal Police?

The CNPD wonders whether the initiative to place a public place or space under surveillance does not could not also be taken on the initiative of the territorially competent mayor, such as suggested by the Union of Luxembourg Towns and Municipalities in its opinion of 25 January 2021 relating to the bill¹⁹. Nevertheless, the National Commission has reservations about the proposal for reformulation of new article 43bis, paragraph (1), made by SYVICOL in its aforementioned opinion, whereas neither the aforementioned municipal law nor the law on the Grand-Ducal Police mentioned above does not specify the competences of the mayors in matters of administrative police.

The CNPD emphasizes once again that VISUPOL is a video surveillance system operated by the Grand-Ducal Police as the data controller, which will not, a priori, be intended to

18 Opinion of the Syndicate of Luxembourg Towns and Municipalities of 25 January 2021, relating to draft law no. 7498 amending

of the amended law of 18 July 2018 on the Grand Ducal Police, parliamentary document no. 7498/07.

19 Opinion of the Syndicate of Luxembourg Towns and Municipalities of 25 January 2021, relating to draft law no. 7498 amending

of the amended law of 18 July 2018 on the Grand Ducal Police, parliamentary document no. 7498/07, page 2.

Complementary opinion of the National Commission for Data Protection

relating to bill no. 7498 amending the amended law of 18 July 2018 on the Grand Ducal Police.

be extended to other municipal territories than that of the City of Luxembourg and that the issue of the lawfulness of surveillance by video cameras of public spaces or places carried out on the initiative of the Commons is not resolved by the bill under consideration. Of the Therefore, the National Commission can only reiterate its observations made in its opinions of the

March 15, 2019 relating to the video surveillance of public spaces and places for security purposes public (deliberation No. 36/2019) and of May 10, 2019 relating to the use of video surveillance by the municipalities (deliberation n°39/2019).

Thus decided in Belvaux on March 3, 2021.

The National Data Protection Commission

Tine A. Larsen Christophe Buschmann

President

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Complementary opinion of the National Commission for Data Protection

relating to bill no. 7498 amending the amended law of 18 July

2018 on the Grand Ducal Police.