

Complementary opinion of the National Commission for the Protection

data relating to bill no. 7475 amending the

amended law of 26 July 2002 on the police and on the operation of

Luxembourg airport as well as the construction of a new

terminal; the draft Grand-Ducal regulation relating to the safety of

civil aviation and conditions of access to Luxembourg airport

Deliberation n° 31/AV15/2022 of July 21, 2022

1. In accordance with Article 57, paragraph 1, letter c), of European Regulation 2016/679

of April 27, 2016 on the protection of individuals 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"), as well as in article 46, paragraph 1, letter c), of the directive

(EU) 2016/680 of April 27, 2016 on the protection of individuals with regard to the

processing of personal data by the competent authorities for the purposes of

prevention, investigation and prosecution of criminal offenses or the execution of

criminal penalties, and on the free movement of such data, and repealing the framework decision

2008/977/JHA of the Council (hereinafter "Directive 2016/680"), each supervisory authority has the

mission of advising "in accordance with the law of the Member State, the national parliament, the

government and other institutions and organizations regarding legislative measures and

administrative measures relating to the protection of the rights and freedoms of natural persons with regard to

of treatment".

2. Article 7 of the law of 1 August 2018 on the organization of the National Commission for

data protection and the general data protection regime specifically provides

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

Nationale" or the "CNPD") carries out the missions entrusted to it by virtue of Article 57 of the

GDPR, while article 8, point 3°, of the said law of 1 August 2018 is based on article 46,

paragraph 1, letter c), of the aforementioned Directive 2016/680 by providing that the CNPD "advises

the Chamber of Deputies, the Government and other institutions and bodies regarding the legislative and administrative measures relating to the protection of the rights and freedoms of natural persons with regard to the processing of personal data”.

3. On December 17, 2019, the National Commission notified Bill No. 7475

amending the amended law of 26 July 2002 on the police and on the operation of

Luxembourg airport as well as on the construction of a new terminal (hereinafter the

"draft law"), on the one hand, and the draft Grand-Ducal regulation on aviation security

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

1/28

civil law and the conditions of access to Luxembourg airport (hereinafter the “draft regulation

grand-ducal”), on the other hand<sup>1</sup>.

4. On October 20, 2021, the Council of Government adopted a series

of government amendments relating to the bill and the draft regulation

ducal.

5. Insofar as the amended provisions have been commented on by the Commission

national in its aforementioned opinion and that the latter has not been seized for an opinion, it shall self-seize

to provide comments below.

I. General remarks

1. On the compliance of the legal provisions of the draft Grand-Ducal regulation with the

Constitution

6. If the draft law specifies the data controller, the draft regulation

ducal seems to regulate the modalities of the processing of personal data which

would be implemented through background checks.

The draft Grand-Ducal regulation intends in particular to provide for the elements on which would carry the background check requests as well as the “information considered and decision criteria”<sup>2</sup> relating to said requests.

7. It should be asked whether the normative framework, as provided for by the texts under opinion, is likely to be constitutional. Indeed, it should be noted that

Article 11, paragraph 3, of the Constitution establishes as a matter reserved to the law the exceptions State guarantee of the protection of privacy <sup>3</sup>.

Moreover, article 32, paragraph 3, of the Constitution provides that “[i]n matters reserved to the law by the Constitution, the Grand Duke cannot issue regulations and decrees that by virtue of a specific legal provision which sets the objective of the enforcement measures and where applicable the conditions to which they are subject”.

Since the revision of October 18, 2016 of the said article, “the Constitutional Court considers that in the matters reserved the essential elements are within the domain of the law, while the elements

<sup>1</sup> See deliberation n°59/2019 of 17 December 2019 of the National Commission for Data Protection, doc. speak. No. 7475/01.

<sup>2</sup> New Article 14 of the draft Grand-Ducal regulation.

<sup>3</sup> See in this sense M. Besch, Norms and legislation in Luxembourg public law, Promoculture Larcier, 2019, n°619.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

2/28

less essential can be relegated to regulations and decrees issued by the Grand Duke. She thus adopts the position of the settlor, shared by the Council of State, which consists in ensuring

to the executive power the ability to regulate the details of reserved matters, the principles and essential points remaining in the domain of the law. According to the settlor, simple framework laws fixing a few major principles and abandoning the essential rules of substance and form to x implementing regulations do not meet these constitutional requirements. If elements essential are in the domain of the law, the measures of execution, that is to say elements more techniques and details, may fall within the domain of the Grand-Ducal regulatory power”<sup>4</sup>.

8. Moreover, it follows from judgment no. 114/14 of November 28, 2014, of the Court constitutional, that the essential elements should not appear exclusively in the law national, but may result additionally from a European standard or international.

Nevertheless, the National Commission considers that the provisions of the implementing regulation (EU) 2019/103 of 23 January 2019 amending Regulation (EU) 2015/1998 as regards the clarification, harmonization and simplification as well as the strengthening of certain measures specific aviation security procedures with respect to background checks would not be not precise enough.

Indeed, the aforementioned implementing regulations specify:

- with regard to the ordinary background check that it must at least "(a) establish the identity of the person on the basis of documents; b) take into consideration the criminal record in all states of residence within the last five years; vs) consider jobs, studies and interruptions during the five recent years”<sup>5</sup>;
- as regards enhanced background checks, that these should at least take into consideration the aforementioned elements as well as “take into consideration the information from intelligence services and any other relevant information whose competent national authorities have and believe that they can present a interest in assessing a person's ability to perform a function that requires

enhanced background checks.

9. However, it should be noted that the draft Grand-Ducal regulation intends in particular to provide that data is collected for purposes different from those of origin, and that access, where applicable, to the Grand Ducal Police's own files is provided for as part of background checks.

4 See M. Besch, Norms and legislation in Luxembourg public law, Promoculture Larcier, 2019, n°19.

5 Section 11.1.4. of the implementing regulation (EU) 2019/103 of January 23, 2019.

6 Article 11.1.3., letter d) of Implementing Regulation (EU) 2019/103 of 23 January 2019.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

3/28

Therefore, shouldn't such elements be provided for in a law and not in a grand-ducal regulations?

10. Thus, there is reason to ask whether the draft Grand-Ducal regulation is likely to not be in conformity with the aforementioned constitutional provision. Shouldn't we ensure a application of the principles of normative framework mentioned above with regard to the distinction between what must, in essence, come under the law in the strict sense and what can be the subject of a normative framework by a regulatory text?<sup>7</sup>

2. On the relationship between the provisions of the GDPR and the law of 1 August 2018 relating the protection of natural persons with regard to the processing of personal data personal character in criminal matters as well as in matters of national security

11. It is appropriate to question the articulation of the provisions of the GDPR and those of the law of August 1, 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 while that certain processing of personal data implemented by the texts under notice are likely to be initially subject to the provisions of the aforementioned law of August 1, 2018 then subsequently subject to the provisions of the GDPR.

12. However, this problem does not arise for the processing that would be implemented implemented by the Grand-Ducal Police within the framework of the draft law and the draft Grand-Ducal ducal. Indeed, it follows from article 1, paragraph 2, letter a), of the law of 1 August 2018 on 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, that the processing carried out by the Grand Ducal Police, as part of the background check, fall within the scope of this law.

13. This problem seems to arise for the processing of personal data personnel carried out by the minister as well as by the commission, set up by article 1 of the draft of law.

Indeed, it emerges from the commentary to the articles with regard to the exchange of information between the Grand-Ducal Police and the minister in charge of the Grand-Ducal Police (hereafter the “Minister”) that it is “an exchange of data in police matters with a view to a decision administrative”, therefore, the GDPR would be intended to apply to the Minister for the processing carried out in this context.

7 See in this sense M. Besch, Norms and legislation in Luxembourg public law, Promoculture Larcier, 2019, n°619.

Opinion of the National Commission for Data Protection relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

14. Furthermore, with regard to the commission set up by article 1 of the bill, this one is brought to be seized by the minister so that it issues a "reasoned opinion for the of the Minister" and the latter could "take into consideration any information communicated to the Minister having the Police in his attributions". Thus, the processing carried out in this context would fall within the scope of the GDPR while the conditions referred to in article 1 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 do not seem to find application.

15. Thus, it should be noted that data initially collected for the purposes of prevention, detection, investigation and prosecution of criminal offences, or enforcement of criminal sanctions would subsequently be subject to the GDPR as part of the processing carried out by the Minister and the aforementioned commission.

16. Consequently, in such a context, there is reason to question the articulation of the provisions of the GDPR with those of the law of 1 August 2018 on the protection of persons with regard to the processing of personal data in criminal matters as well as than in terms of national security.

3. On the principle of the lawfulness of the processing of personal data has. On the data processing carried out by the Grand Ducal Police

17. As noted by the CNPD in its aforementioned opinion, it should be noted that "the Directive 2016/680 provides that to be lawful, the processing must be necessary for the execution of a mission of the competent authority, correspond to the purposes for which it was set up, but also and above all, it must be provided for either by Union law or by the law of a State member<sup>8</sup>. In addition, Directive 2016/680 specifies that the national provision regulating said processing must at least specify: the purposes of the processing, the personal data to be processed and the purposes of the processing <sup>9</sup>. It follows from this provision that these three elements constitute the minimum threshold that a national provision regulating a

processing falling within the scope of Directive 2016/680 must comply. The CNPD

would like to refer to its observations made in this regard in its opinion on the central file

of the Grand Ducal Police with regard to data protection legislation issued on 13

September 2019<sup>10</sup> »<sup>11</sup>.

<sup>8</sup> Article 8, paragraph 1, of Directive 2016/680.

<sup>9</sup> Article 8(2) of Directive 2016/680.

<sup>10</sup> Deliberation n°45/2019 of September 13, 2019 of the National Commission for Data Protection, doc. speak.

No. 7741/04.

<sup>11</sup> Deliberation n°59/2019 of December 17, 2019 of the National Commission for Data Protection, doc. speak.

No. 7475/01.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

5/28

18. Furthermore, it should also be noted that the provisions of paragraph 2 of Article

3 of the law of 1 August 2018 on the protection of individuals with regard to the

processing of personal data in criminal matters as well as in security matters

national law, provides that “[t]he processing carried out by the same or by another data controller

processing, for one of the purposes set out in Article 1 other than those for the data

been collected, are authorized if they are necessary and proportionate to this purpose, subject to

compliance with the provisions of this chapter and of Chapters IV and V”.

19. It also follows from the commentary on the articles of bill No. 7168, which became the law of 1

August 2018 cited above, as to the provisions that led to the aforementioned provisions, that the

paragraph 2 of the aforementioned article 3 “provides for the conditions to be met so that a person in charge of the



processing may use personal data for a purpose of Article 1 which is not the purpose of Article 1 for which this data was collected, namely that (a) this processing of personal data is provided for by a national legal provision or European, and (b) such other processing of personal data is necessary and proportionate to that purpose”.

20. Thus, it follows from the foregoing that the provisions under notice should specify the terms of the processing of personal data that would be implemented in the context of requests for background checks by the Grand Ducal Police.

21. However, certain clarifications should be made, particularly with regard to the categories of personal data that would be collected as well as details as to the origin of such data. Therefore, it is essential that legal provisions expressly provide for such details. The CNPD will come back to this below in its opinion.

b. On the data processing carried out by the Minister and the Commission

22. Article 6 of the GDPR defines the different conditions of lawfulness for which a treatment is possible. In other words, the controller must first and for each processing of personal data, determine the lawfulness condition applicable thereto.

On this point, the CNPD takes the liberty of reiterating its observations made in point 1 of its opinion of December 17, 2019 relating to bill n°7475 12.

12 Deliberation n°59/2019 of December 17, 2019 of the National Commission for Data Protection, doc. speak. No. 7475/01.

Opinion of the National Commission for Data Protection relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

vs. On article 8 of the law of 1 August 2018 on the protection of persons

physical with regard to the processing of personal data in

criminal and national security matters

23. Article 8, paragraph 1, of the law of 1 August 2018 on the protection of persons

with regard to the processing of personal data in criminal matters as well as

in terms of national security, provides that "[p]ersonal data collected

by the competent authorities for the purposes set out in Article 1 may only be processed

purposes other than those set out therein, unless such processing is permitted by the law of

European Union or by a provision of Luxembourg law. "

24. The National Commission understands that both the minister and the commission could

have access "to all the information accessible to the Police as part of the verification

antecedents"<sup>13</sup> for the Minister and "any information communicated to the Minister"<sup>14</sup> for

the Commission.

Thus, the minister and the commission could in particular be called upon to process data which

come from the State Intelligence Service (hereinafter the "SRE") and the Cellule de

financial information (hereinafter the "FIU") as well as data from files

detained by the Grand Ducal Police.

25. In accordance with the aforementioned legal provisions, if the authors of the bill

consider that the data processed by the minister and the commission would be subject to

processed for different further purposes then this should be reflected more clearly in

the text under notice. Indeed, such data would then initially be collected by the

aforementioned authorities for the purposes of prevention and detection of criminal offences, investigations

and prosecution in this area or the execution of criminal penalties, then would be within the framework

texts under opinion processed, if necessary, for different subsequent purposes.

d. On the provisions of Chapter 2, section 2, of the law of February 22, 2018

on the exchange of personal data and information in

detective material

26. It is appropriate to draw the attention of the authors of the bill and of the draft regulation ducal on article 8, paragraph 3, of the law of 1 August 2018 on the protection of persons with regard to the processing of personal data in criminal matters as well as only in terms of national security which provides that “[w]here the law of the European Union or a provision of Luxembourg law applicable to the competent authority transmitting the 13 Commentary on the government amendment to the bill.

14 Article 1, paragraph 3, subparagraph 5, of the bill.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

7/28

data subjects their processing to specific conditions, the competent authority which transmits the data informs the recipient of this personal data of these conditions and of the obligation to respect them”.

27. Thus, it should be noted that the transmission of information directly available or directly accessible by the Grand-Ducal Police to the Minister or the commission referred to in paragraph 3, article 1 of the bill, is subject to the conditions set out in Chapter 2, section 2, of the law of 22 February 2018 on the exchange of personal data and police information.

Article 24 of the said law provides in particular that such transmission is subject to the conditions following accumulations:

“1) it must be necessary for the performance of a public service mission whose administration recipient of the transmission is charged under the law;

- 2) the reasons why the transmitted data and information are considered as being necessary for the execution of the mission of the recipient administration must be part of the documentation referred to in Article 25, paragraph 2;
- 3) it may only include data and information that is necessary, relevant and proportionate with regard to the relevant mission of the recipient administration;
- 4) when it comes to data and information that comes from an investigation or an instruction preparatory in progress, the written authorization referred to in Article 20, paragraph 2, is required prior to transmission;
- 5) when it comes to data and information that have been communicated to the persons concerned in Article 18, paragraph 1, beforehand by an entity referred to in Article 1, the written agreement of this entity is required prior to transmission;
- 6) none of the reasons referred to in Article 7, paragraph 1, oppose it".

28. The authors of the bill and the draft Grand-Ducal regulation must therefore ensure that the proper articulation between the provisions under notice and those covered by the law of February 22, 2018 mentioned above, but which predates the law of 1 August 2018 on the protection of persons with regard to the processing of personal data in criminal matters as well as than in terms of national security.

## II. Ad government amendment relating to the bill

29. The purpose of this government amendment is to amend the sole article of the bill.

The authors of the bill specify in the commentary to the amendment that these new provisions are intended in particular to provide clarifications with regard to the verification of background and "particularly with regard to the respective roles of the Minister having the Police in its attributions and of the latter in this context".

## Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

8/28

30. Thus, a new paragraph 3 is introduced in article 1 of the bill. This one treats

"exclusively [of] background checks".

The authors of the bill specify that in this new paragraph 3, "it is proposed

to insert a first paragraph which specifies that the background check is carried out in view of the

European regulatory basis as a preventive measure against threats to the

public security. The government proposes this amendment in view of the opinion of December 17

2019 of the National Commission for Data Protection (CNPDP), which raised the issue

of the data protection regime. This clarifies in particular the purpose of the processing and that the

data processed fall under the scope of the law of 1 August 2018 relating to the

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

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

The authors of the bill are to be commended for providing such clarification.

1. On the personal data processors

31. As raised in its aforementioned opinion of December 17, 2019, the CNPD considered that

clarifications had to be made as to the determination of the controller and

of the possible subcontractor, or even of joint responsibility in the context of the processing

background check requests.

The authors of the bill specify on this subject, in the commentary to the amendments, that

"As regards the questioning of the CNPD on the data controller, it should be noted that

the Minister having the Police in his attributions takes the final decision without having access to the

all of the information accessible to the Police as part of the background check.

Therefore, it becomes clear that there is a separation of responsibility for processing for

respective treatments.

They further specify that paragraph 2 of paragraph 3 of article 1 of the bill “attributes the decision-making power for background checks to the Minister having the Police in his attributions. This decision is based on the opinion of the Police, which may be supplemented by the opinion of the Commission ”.

32. It follows from the foregoing that the Minister would therefore be considered as responsible for the processing of data processing carried out within the framework of the decision final, while the Grand-Ducal Police would be qualified as responsible for the processing of data processing carried out within the framework of the background check itself.

33. However, although the authors of the bill respond in the commentary to the amendment to the questions raised by the CNPD, this is however not reflected Opinion of the National Commission for Data Protection relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

9/28

expressly in the text under notice. Indeed, paragraph 2, paragraph 3, of Article 1 provides that “[t]he Minister having the Police in his attributions takes the decisions relating to the background check on the advice of the Police and on the advice of the commission set up in paragraph 4 in the event of referral”.

Paragraph 3 of the said paragraph provides that “[t]he Police are responsible for the background check. To this end, it issues a reasoned opinion based on an assessment of the reliability of the applicant, which it transmits to the Minister having the Police in his attributions”.

34. The CNPD therefore reiterates its observations made in its opinion of 17 December 2019 cited above, in that it had recommended that the authors of the bill “specify in the body of the text of the bill who has the quality of data controller and, where applicable, of

contractor, with respect to background checks".

35. Furthermore, it should be recalled in this regard that Article 2, paragraph 1, point 8°) 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, provides that "when the purposes and means of this processing are determined by the law of European Union or Luxembourg law, the controller or the criteria applicable to its designation may be provided for by European Union law or Luxembourg law".

## 2. Consultation of the special register

36. Paragraph 3 of paragraph 3 of Article 1 of the draft law provides that "[w]here the applicant is under the age of twenty-three at the time the application is submitted, the Police are authorized to consult the special register provided for in article 15 of the amended law of 10 August 1992 relating to the protection of young people". Access to the special register would be justified, according to the authors of the bill, in order "to best guarantee airport security".

37. Article 15 of the amended law of 10 August 1992 on the protection of young people provides that the decisions and convictions appearing in the special register "may also be brought to the attention of the administrative authorities in cases where this information are essential for the application of a legal or regulatory provision, as well as injured third parties, if they so request".

38. Without prejudging the assessment in concreto that would be made by the Grand-Ducal Police in As part of a background check, it should be remembered that according to the principle of minimization of data, only the personal data necessary for the realization purposes must be processed, taking into account the risk that the processing poses to life privacy of the persons concerned.

## Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

10/28

39. Furthermore, it should be noted that recital 50 of Directive 2016/680 sets out that “[i]t is particularly important that the controller be required to implement appropriate and effective measures and is able to demonstrate that the processing activities comply with this directive. These measures should take into account the nature, scope, the context and purposes of the processing as well as the risk that these present for the rights and freedoms of natural persons. The measures taken by the controller should include the establishment and implementation of specific safeguards for the processing of personal data relating to vulnerable natural persons such as children. Therefore, such safeguards should be implemented when processing of such data by the Grand Ducal Police.

40. Furthermore, the attention of the authors of the draft law should be drawn to the draft law No. 7991 introducing criminal law for minors and amending other laws, which provides in particular for the repeal of the amended law of 10 August 1992 relating to the protection of youth.

Article 60 of the aforementioned bill provides for new provisions regarding the special register. the paragraph 4 of the said article lists the authorities, with the authorization of the State Attorney General, who could take cognizance of the information contained in the special register. But there is  
It should be noted that these new provisions do not provide that the Grand Ducal Police can read the information in the special register.

41. Thus, in order to ensure better consistency between the two texts, it would not be necessary expressly provide for consultation by the Grand-Ducal Police of the special register referred to in Article 60 of Bill N°7991?



3. On the opinion issued by the Grand Ducal Police as part of the verification of background

42. Paragraph 3 of paragraph 3 of Article 1 of the bill provides that within the framework of the background check, the Grand-Ducal Police “issues a reasoned opinion based on a assessment of the applicant's reliability, which it transmits to the Minister having the Police in his attributions”.

43. It emerges from the new article 15 of the draft Grand-Ducal regulation that “the minister having the Grand-Ducal Police in its attributions will have access to [a centralized computer system for the management of requests for background checks] to consult the opinion of the Police Grand Ducal State and on request, to consult the entirety of a file concerned”.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

11/28

the authors of the project

law, in the commentary of

Thus, there is reason to wonder about the articulation of the aforementioned provisions with the details provided by

the amendment

governmental, insofar as the latter specify that “the Minister having the Police in its attributions takes the final decision without having access to all the accessible information to the police as part of the background check.

Therefore, in the absence of details, what would be the elements that would justify the Minister can have access to all the information accessible to the Grand Ducal Police in the

background check?

44. In order to comply with the principle of foreseeability and precision to which any text legal or regulatory<sup>15</sup>, the criteria specifying under what conditions the Minister would have, if where appropriate, access to information accessible by the Grand Ducal Police should be reflected clearly in the provisions of the bill and the draft Grand-Ducal regulation. Likewise, shouldn't it be specified what would be the content of the "reasoned opinion" issued by the Grand-Police? ducale and forwarded to the Minister as part of the background check?

45. In any event, would it not be preferable to provide that the Grand-Ducal Police communicates to the Minister a detailed opinion referring only to the relevant elements to which the Grand-Ducal Police would have access? Such a system would make it possible to avoid duplication data concerning the criminal record of the data subject, in the hands of of the Minister, while allowing the Minister to obtain the necessary and relevant information, to allow him to make a decision.

4. On the creation of a commission set up by article 1 of the bill

46. It emerges from the draft law that in the event of a negative opinion from the Grand-Ducal Police within the framework of the enhanced background check, the Minister will be provided with notice by the commission referred to in paragraph 4 of paragraph 3 of article 1 of the bill.

Paragraph 4 of paragraph 3 of article 1 of the bill provides for the creation of a commission which would be responsible for "issuing an opinion for the Minister having the Police in his attributions in case of referral by the latter. This commission is based on the model of the commission provided in bill n°6961".

Paragraph 5 of paragraph 3 of article 1 of the bill provides that when it is seized by the Minister, the commission could "take into consideration any information communicated to the Minister having the Police in his attributions".

<sup>15</sup> In this sense, V. M. Besch, Norms and legislation in Luxembourg public law, Promoculture Larcier, 2019, n°619;

V. among others CourEDH, Zakharov e. Russia [GCL n°47413/06], § 228-229, 4 December 2015

## Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

12/28

It is specified in the commentary to the amendment that “in view of the sensitive nature of the information discussed, it is proposed that every member of the committee be in possession a security clearance corresponding to at least the level “secret”” and that “[a]s the example of the aforementioned bill no. 6961, paragraph 6 provides for the procedures for accessing the file in the event of a negative decision, in order to allow the applicant to follow the elements that led to the refusal”.

47. The authors of the bill are to be commended for providing that members of this committee are in possession of a security clearance corresponding to at least the secret level. Nevertheless, it is regrettable that the content of the opinion issued by this commission is not detailed in the bill. As indicated above, it is preferable that a detailed opinion be communicated to the Minister.

48. Moreover, in order to comply with the principle of foreseeability and precision to which respond to any legal or regulatory text<sup>16</sup>, the content of such notice should be clearly reflected in the provisions of the bill.

49. Finally, it appears from the commentary to the government amendment that “[t]he paragraph 5 assigns the necessary access rights to the committee, which notably has access to all information communicated to the Minister having the Police in his attributions within the framework of the request. Consequently, any request for authorization addressed to the State Prosecutor in this context includes the indication that said commission is also the recipient of the information concerned”. There is reason to wonder about the authorization of the State Prosecutor referred to in the

commentary to the government amendment, is this the one referred to in article 24

of the law of 22 February 2018 relating to the exchange of personal data and

police information?<sup>17</sup>

16 In this sense, V. M. Besch, Norms and legislation in Luxembourg public law, Promoculture Larcier, 2019, n°619;

V. among others CourEDH, Zakharov e. Russia [GCL n°47413/06], § 228-229, 4 December 2015

17 Article 24 of the law of 22 February 2018 on the exchange of personal data and information in

police matters provides that “[t]he transmission referred to in Article 23, which may take place on request or in a spontaneous, is subject to the following cumulative conditions:

1)

2)

3)

4)

it must be necessary for the performance of a public service mission for which the administration to which the request is addressed

transmission is charged under the law;

the reasons why the data and information transmitted are considered necessary for

the execution of the mission of the recipient administration must be part of the documentation referred to in Article 25, paragraph 2;

it may only include data and information that is necessary, relevant and proportional to

with regard to the relevant mission of the recipient administration;

when it comes to data and information that comes from an investigation or a preparatory investigation in courses, the written authorization referred to in Article 20, paragraph 2, is required prior to transmission;

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

13/28

## 5. Final remarks

50. It should be noted that subparagraph 3 of paragraph 3 of Article 1 of the draft law provides that “[t]he Police are responsible for background checks. To this end, it issues a reasoned opinion based on an assessment of the applicant's reliability, which it forwards to the minister the Police within its powers. The analysis of the applicant's reliability consists of an assessment overall individual situation.

However, the use of the terms “reliability of the applicant” or “overall assessment of the situation individual” are general and imprecise and could be likely to increase the risk of confusion in the mind of the reader about what verification of antecedents. This is all the more so since the articles of the draft Grand-Ducal regulation are intended to purpose of detailing such checks and do not use similar terminologies.

Thus, there is reason to question the consistency and articulation of such provisions with those of the draft Grand-Ducal regulation.

51. Furthermore, the National Commission refers to its considerations developed in paragraphs 17 to 21 of this opinion with regard to the elements that should be included in the bill and in the draft Grand-Ducal regulation.

## III. Government amendments relating to the draft Grand-Ducal regulation

### 1. On the "Day pass"

52. The purpose of amendment 1 of the draft Grand-Ducal regulation is to modify article 6 of the draft Grand-Ducal regulation entitled "The Daily Pass". It is necessary to notice that the provisions relating to the delivery of an identity document remain unchanged 18.

53. Consequently, the CNPD takes the liberty of reiterating its observations made in its opinion of 17 December 2019 mentioned above, in which it had estimated that “in view of the principle of minimization of the data, it seems excessive to keep the document during the time of the presence of the

person involved in the airport area, while lux-Airport is unable to

check whether the identity document is, if necessary, falsified, and that it would be sufficient, after

verification of the identity of the person using the identity document, to add the number of the

5)

in the case of data and information which have been communicated to the persons referred to in Article 18,

paragraph 1, beforehand by an entity referred to in Article 1, the written agreement of this entity is required beforehand

to transmission;

6) none of the reasons referred to in Article 7, paragraph 1, oppose it".

18 Article 6, paragraph (3) of the draft Grand-Ducal regulation, as amended.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

14/28

identity document in the aforementioned directory next to the registration of the permit holder

pass"<sup>19</sup>.

2. On the provisions of Article 7 of the draft Grand-Ducal regulation

54. The purpose of amendment 2 is to modify article 7 of the draft Grand-Ducal regulation

entitled "Visitors and the press". The authors of the draft Grand-Ducal regulation specify

in the comment to the amendment that "[has] seen the comment of the National Commission

for data protection concerning the decision-making criteria of the Grand Ducal Police for

visits and the press referred to in Article 7, the Government proposes to amend Article 7 in order to

clarify the assessment of this decision by the Grand Ducal Police".

Thus, at the end of the paragraph of the aforementioned article, the following terms were added "on the basis of a

assessment of security conditions".

The authors of the draft Grand-Ducal regulation further specify on this subject that "[t]his prior specific authorization from the Grand Ducal Police can only be granted if it does not interfere with airport security. This implies in particular respect for support conditions and consideration of any other security constraints airport".

55. While the clarification efforts of the authors of the draft Grand-ducal, such clarifications do not, however, allow the CNPD's questions to be answered. formulated in its opinion of 17 December 2019.

56. Thus, the National Commission takes the liberty of reiterating its questions that she wondered about the criteria on which the issuance, or not, by the Police would be based Grand Duchy of an authorization and, if applicable, which national files or systems information from the European Union Agency for Law Enforcement Cooperation (Europol) or the International Criminal Police Organization (INTERPOL) would be consulted<sup>20</sup>.

### 3. About the background check request

57. The purpose of amendment 3 is to modify article 13 of the draft Grand-Ducal regulation titled "Request for background check". It should be noted that following the

<sup>19</sup> See comments made under the point "Ad art. 6. The pass", from deliberation n°59/2019 of 17 December 2019 from the National Commission for Data Protection, parliamentary document 7475/01.

<sup>20</sup> See the comments made under the point "Ad art. 7. Visitors and the press", from deliberation n°59/2019 of 17 December 2019 of the National Commission for Data Protection, parliamentary document 7475/01.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

amendments some of the provisions of article 13 have been deleted and have been introduced in a new article 14 entitled "Information considered and decision criteria".

58. Paragraph 2 of paragraph 1 of Article 13 of the draft Grand-Ducal regulation lists in twelve points what elements a background check application must contain as well as the documents to be sent to the Grand Ducal Police in support of this request.

The amendments bring certain precisions with regard to the documents listed in paragraph 1 of paragraph 2 of Article 13 of the draft Grand-Ducal regulation, which must be forwarded to the Grand Ducal Police upon such a request.

a) On Article 13, paragraph 1, point 3°

59. Article 13, paragraph 1, point 3, of the draft Grand-Ducal regulation provides that "the written declaration of the applicant containing the authorization to carry out a verification of the background and to request any information relating to the request available and directly accessible to the competent national authorities, or any equivalent document from the authorities of the countries of residence for the last five years or of which he is a national" (new provisions underlined).

In the present case, there is reason to wonder about the relevance of conditioning such processing of personal data to "authorization to carry out a background check"

of the applicant whereas according to article 7, paragraph 1, 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, provides that "[t]he processing is not lawful only if and insofar as it is necessary for the performance of the authority's tasks competent authority defined in Article 2, paragraph 1, point 7°, for one of the purposes set out in Article 1 and when this mission is carried out pursuant to legislative provisions governing the relevant competent authority".

Thus, the background check should not be based on the prior agreement of the applicant



as appears to be provided for by the aforementioned provisions of the draft Grand-Ducal regulation.

60. In any event, such provisions are formulated too vaguely so as to

that they are not likely to comply with the principle of predictability and precision to which

must comply with any legal or regulatory text<sup>21</sup>. In order to avoid any risk of confusion in the spirit

of the reader, it is recommended that the authors of the draft Grand-Ducal regulation omit the

aforementioned provisions.

<sup>21</sup> In this sense, V. M. Besch, Norms and legislation in Luxembourg public law, Promoculture Larcier, 2019, n°619;

V. among others CourEDH, Zakharov e. Russia [GCL n°47413/06], § 228-229, 4 December 2015.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

16/28

b) On Article 13, paragraph 1, point 5°

61. Article 13, paragraph 1, point 5°, of the draft Grand-Ducal regulation provides that the

request for verification must contain "an extract from the criminal record of the countries listed in point

3, with the exception of Luxembourg, less than three months old".

It emerges from the commentary to the articles that "[t]he point 5 is adapted according to the modification

of point 3. In order to simplify the administrative procedures, it is expected that a criminal record

Luxembourgish is not required".

62. Point 6° of the said article specifies that the request for verification must contain "the agreement of the

requesting that bulletin no. 2 of the criminal record be issued directly to the Grand-Police

ducal".

The authors of the draft Grand-Ducal regulation, in order to simplify the administrative procedures,

therefore intend to provide for the possibility for the Grand Ducal Police to be issued directly

a bulletin N°2 when the applicant (Luxembourg resident) has given his agreement.

63. The introduction of such provisions is to be welcomed when such a possibility does not currently does not appear to be provided for by article 8, paragraph 1, of the amended law of 29 March 2013 relating to the organization of the criminal record which specifies that the bulletin N ° 2 of a person physical is issued on request “to state administrations, municipal administrations and legal persons under public law seized, within the framework of their legal missions, of a request presented by the natural or legal person concerned, who has given his consent in writing or electronically so that bulletin No. 2 is delivered directly to the administration or the legal person under public law. The list of administrations and persons morals of public law and the grounds for an application for issuance are set by general regulation. ducal”. That regulation does not cover such a case.

c) On Article 13, paragraph 1, point 12°

64. It should be noted that the provisions of Article 13, paragraph 1, point 12°, of the draft of Grand-Ducal regulations remain unchanged by the amendments.

It emerges from the commentary to the articles that the authors of the draft Grand-Ducal regulation specify in amendment 3 on this subject that “[h]aving seen the Commission’s comment national authority for data protection concerning the content of the biographical questionnaire, it should be specified that the said questionnaire lists the elements referred to in Articles 13 paragraph 1 and 14 paragraph 3 in relation to the applicant”.

The authors of the draft Grand-Ducal regulation should be commended for having provided such details.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

65. Moreover, it is appropriate to question the relevance of the reference to the elements which would be referred to in paragraph 3 of the new article 14 of the draft Grand-Ducal regulation then that the CNPD understands that such data would be obtained indirectly by the Grand-ducal police and not collected directly from the applicant.

4. On the information considered and the decision criteria within the framework of a background check

66. It appears from the commentary to amendment 4 that “the Government proposes to insert a new article 14 to respond to the request of the National Commission for the Protection data to clarify the decision criteria, the information considered and the authorities competent”. While the Government's efforts in this regard are to be welcomed, it is appropriate however, to regret that some of the considerations expressed by the CNPD in its opinion above have not been taken into account.

a) On paragraph 1 of the new article 14

67. Article 14, paragraph 1, of the draft Grand-Ducal regulation provides that “the Police Grand Ducal consults the foreign police and national judicial authorities. The police Grand Duchy may also consult any employer or any educational institution previous or current in order to verify the authenticity of the information provided. As part of the enhanced background checks, the Grand-Ducal Police also consults the State Intelligence and the Financial Intelligence Unit. ”.

68. While the authors of the bill are to be commended for specifying that the ERS as well as the FIU would be consulted as part of the enhanced background check, it should be to regret that the text under opinion does not specify which judicial authorities foreign and national which would be consulted. Indeed, are they the judicial authorities criminal and/or civil?

69. On this point, the National Commission takes the liberty of reiterating its observations made

in its aforementioned opinion in that it had noted that “[i]t seems essential for the CNPD that the text specifies which entities are referred to by the above-mentioned terms “the authorities competent national authorities”. In fact, there should be no difficulty in identifying the competent authorities in this context. By way of comparison, the German law concerning the air safety (“Luftsicherheitsgesetz”) lists in its section 7 paragraph (3) what national authorities the air transport security administration (“Luftsicherheitsbehörde”)

#### Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

18/28

may contact as part of a background check and insofar as this is necessary for the assessment of the reliability of the person in question 22.

Based on section 2 of the amended law of 22 February 2018 relating to the exchange of data to personal character and information in police matters, the transmission of data to personal nature and information of the Grand Ducal Police to the other administrations of the State is possible, if a law authorizes this transfer and if the other conditions cumulatively provided for in article 24 of the said law are complied with. However, it is not clear from Article 13 paragraph (4) of the draft Grand-Ducal regulation if it effectively targets the transmission of data from the Grand Ducal Police to these competent national authorities, or rather the reverse, i.e. the transfer of data from the said authorities to the Grand Ducal Police. In the government amendments of August 1, 2017, the authors of bill no. 6976, which became the law of February 22, 2018 mentioned above specified that section 2 only covers “transmissions “one-way”, that is to say from the Grand-Ducal Police to the administrations of the State – the transmission of data and information in the other direction is already planned

by article 23, paragraph 2, of the Code of Criminal Procedure. ". However, as the authorities competent authorities will not be aware if a specific person has submitted a request for background check with the Grand Ducal Police, the latter must contact them on its own initiative. Thus, it appears necessary to include in the draft regulation grand-Ducal a list which determines the authorities that the Grand Ducal Police will have to contact systematically when a request for a background check is received"<sup>23</sup>.

70. Furthermore, it is still to be regretted that those provisions do not specify:

- what information would be communicated by the "police authorities"

foreign and national judicial authorities" nor by the SRE or the FIU, is this information

listed in paragraph 3 of new article 14 of the Grand-Ducal regulation? ;

- or in what form said information would be communicated to the Police

ducal? Will the information be transmitted in its entirety, in the form

extract or notice sent to the Grand Ducal Police by the said authorities?

71. For better readability and understanding of the text, it would be preferable to indicate

what information would be communicated by which authority and in what form

would be communicated to the Grand Ducal Police.

22 These are the following authorities: "Polizeivollzugs- und den Verfassungsschutzbehörden der Länder sowie, soweit im Einzelfall erforderlich, dem Bundeskriminalamt, dem Zollkriminalamt, dem Bundesamt für Verfassungsschutz, dem Bundesnachrichtendienst, dem Militärischen Abschirmdienst und der Bundesbeauftragten für die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik".

23 See comments made under the point "Ad. Art. 13 Application for background check", deliberation n°59/2019 of December 17, 2019 of the National Commission for Data Protection, doc. speak. No. 7475/01.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

19/28

72. Furthermore, it is also regrettable that the text does not specify which files

nationals would be accessible by the Grand Ducal Police, if necessary.

On this point, it is appropriate to reiterate the observations made by the National Commission in

its aforementioned opinion in that it had noted that “[i]t is not clear from the draft text

regulatory under notice if the Grand Ducal Police hears in the context of a request for

enhanced background checks access the personal data contained

in its own files or national data processing (numbering 62 24), such as by

example the so-called “central” file,<sup>25</sup> the “narcotics file”<sup>26</sup> the “warnings file”

taxed”<sup>27</sup>, etc., as well as data from European information systems and

international such as the aforementioned Schengen, Europol or INTERPOL information systems. At

given the recent concerns of citizens regarding respect for civil liberties and the protection

of their personal data in the police and judicial field, it is all the more important

that clarifications on access to the aforementioned files and systems can be found at

level of the law in the formal sense, therefore in draft law no. 7475 also under opinion, especially

if we consider the press release of July 22, 2019 from the ministry having the Grand-Ducal Police in

its attributions on the complete overhaul of the national legislation relating to the verification of

history at Luxembourg airport which states the following: “Given the complexity of the file,

many questions arise and must be resolved, particularly in the context of

access to the central file of the Police and the retention of data. »<sup>28</sup>.

In France, articles L. 6342-2 and L. 6342-3 of the Transport Code specify that access

security areas with restricted access to an aerodrome are subject to an authorization which is

the

of the

deputies

## Bedroom

24 As revealed in a news article entitled "62 TYPES OF FILE" published on November 7, 2019 on the site of

:

<https://www.chd.lu/wps/portal/public/Accueil/Actualite/ALaUne/?current=true&urile=wcm%3Apath%3Aactualite.public.chd.lu/ST-www.chd.lu/sa-actualites/3532ef0a-6f63-45c6-9894-186e876dd120> (last consulted on 5 December 2019).

25 According to the joint response of the Minister having the Grand Ducal Police in his attributions François BAUSCH and the Minister of Justice Félix BRAZ to parliamentary question no. 752 of June 4, 2019 on "Central" file contains all the minutes and reports written by the officers and police agents Judicial within the framework of their judicial police mission".

26 Who, according to the answer of the Minister having the Grand-Ducal Police in his attributions to question N°1190 of 10 September 2019 concerning the narcotics file with the Grand Ducal Police contains " information relevant to the fight against illicit drug trafficking which may or may not be data personal".

27 According to the response of the Minister having the Grand Ducal Police in his attributions François BAUSCH to parliamentary question no. 1068 of August 16, 2019, the "file of taxed warnings (AT) was created as part of of the Grand-Ducal regulation of 21 December 2004 authorizing the creation of a file of persons with suffered a tax warning in terms of road traffic and modification of the Grand-Ducal regulation of 7 June 1979 determining the acts, documents and files authorized to use the identity number of natural persons and morals".

28 Press release by the Ministry having the Grand-Ducal Police in its attributions of 22 July 2019 available on the site

government website: [https://gouvernement.lu/fr/actualites/toutes\\_actualites/articles/2019/07-juillet/22-bausch-legislation-aeroport.html](https://gouvernement.lu/fr/actualites/toutes_actualites/articles/2019/07-juillet/22-bausch-legislation-aeroport.html) (last accessed October 17, 2019).

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

20/28

preceded by an administrative inquiry giving rise, where appropriate, to consultation of bulletin no. 2 of the criminal record and automated processing of personal data managed by the national police and gendarmerie services falling under the provisions of article 31 of the Law No. 78-17 of January 6, 1978 relating to data processing, files and freedoms, with the exception identification files. According to said article, the processing of personal data implemented on behalf of the State and which is of interest to State security, defense or public security, or have as their object the prevention, research, observation or prosecution criminal offenses or the execution of criminal sentences or security measures, thus including the processing carried out by the national police and gendarmerie services, must be authorized by order of the competent minister(s), taken after publication of a notice motivated by the National Commission for Computing and Liberties (the French counterpart of the CNPD). Said processing is thus all legally framed, such as the file criminal history 29, the serial analysis file<sup>30</sup> or the file of persons wanted<sup>31</sup> »<sup>32</sup>.

In addition, as regards the files kept by the Grand Ducal Police, the attention of the authorities should be drawn. authors of the draft law on draft law n°7741 modifying 1° the amended law of 18 July 2018 on the Grand Ducal Police, 2° of the amended law of July 5, 2016 on the reorganization of the SRE and 3° of the Penal Code, was tabled on December 30, 2020. The said bill notably for the purpose of supervising the processing of personal data carried out in the files of the Grand Ducal Police, and more precisely in the central file. Therefore, the authors of the bill should ensure good consistency and coordination between the two texts.



73. In any event, the current wording of Article 14, paragraph 1, of the draft

Grand-Ducal regulation is too vague so that the principle of predictability and precision

to which any legal or regulatory text 33 must respond would not be likely to be complied with.

b) On the new Article 14, paragraph 2

74. This article provides that “[a]ll information provided in connection with the application

a background check, as well as all information received from the authorities and

actors provided for in paragraph one or collected during background checks

are taken into account for the final decision on the verification of the

antecedents”.

29 Provided for by articles 230-6 to 11 of the French Code of Criminal Procedure.

30 Provided for by articles 230-12 to 18 of the French Code of Criminal Procedure.

31 Provided for by article 230-19 of the French Code of Criminal Procedure.

32 See comments made under the point “Ad. Art. 13 Application for background check”, deliberation

n°59/2019 of December 17, 2019 of the National Commission for Data Protection, doc. speak. No. 7475/01.

33 In this sense, V. M. Besch, Norms and legislation in Luxembourg public law, Promoculture Larcier, 2019, n°619;

V. among others CourEDH, Zakharov e. Russia [GCL n°47413/06], § 228-229, 4 December 2015

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

21/28

Clarification as to what the notion of "background checks" would cover

prior” should be provided by the authors of the draft Grand-Ducal regulation, then

that it is not clear from reading the said provisions what the authors intend to aim for

of the draft Grand-Ducal regulation by this concept.

c) On the new Article 14, paragraph 3

75. It should be noted that paragraph 3 of the new Article 14 lists the criteria on

on which the Grand-Ducal Police bases itself in order to assess requests for verification of antecedents.

76. It emerges from the commentary to the government amendments that paragraph 1 of

paragraph 3 of the aforementioned new article 14 that it "sets out several exclusion criteria

binding. Thus, an applicant fails the background check if he has committed, attempted

to commit or if there are real and corroborating indications to believe that he committed or attempted to

commit the offenses referred to in Directive (EU) 2017/541 of the European Parliament and of the

Council of 15 March 2017 on the fight against terrorism and replacing the framework decision

2002/475/JHA and amending Council Decision 2005/671/JHA, as well as whether it makes any

false declarations in his application", while paragraph 3 "adds a list not

comprehensive list of non-binding evaluation criteria. For the final decision all the elements

of the file are taken into consideration, each file is assessed individually, such as

stipulated in the aforementioned bill n°7475. In particular, it is taken into account whether the applicant has committed,

attempted to commit or if there are real and corroborating indications to believe that he committed or attempted

to commit the offenses referred to in Directive (EU) 2016/681 of the European Parliament and of the

Council of 27 April 2016 on the use of Passenger Name Record (PNR) data for

the prevention and detection of terrorist offenses and serious forms of crime, as well as

as for the investigation and prosecution of the matter".

If such details are to be welcomed, it is regrettable that certain details have not been brought.

77. Indeed, the following questions remain:

- how will the Grand Ducal Police obtain the information listed in

paragraph 3 of the new article 14 via access to its own files, via the SRE, the CRF

or other national or foreign authorities?

- what information would be obtained? Are these final court decisions?

and/or not final? Reports or police records?

- what about the information that would be obtained in the context of an investigation and

what measures, if any, would be taken to respect the secrecy of

instruction?

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

22/28

-

how will the Grand Ducal Police verify the authenticity of the

information provided by the applicant and listed in Article 13 of the draft Grand-

ducal?

78. Furthermore, with regard to obtaining clues "relating to alcoholism, drug addiction,

dependence on medication or the regular abuse of these substances", it is necessary to draw

the attention of the authors of the draft Grand-Ducal regulation to the provisions of Article 9 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

would apply in this case. Indeed, such indices relate to a state of health in

insofar as they provide information on a possible addiction of the person subject to

background check. The indices collected are therefore likely to constitute

special categories of data within the meaning of the aforementioned article 9.

79. Furthermore, it is also worth recalling Article 6, paragraph 1, of the law of 1 August

2018 on the protection of natural persons with regard to the processing of personal data

personal character in criminal matters as well as in matters of national security which provides that

“[f]act-based personal data shall, as far as possible, be

distinguished from those based on personal assessments”. The Grand Ducal Police

should therefore ensure compliance with those provisions.

80. In any event, the National Commission considers that the draft regulation

ducal should specify the origin of the data, which categories of data would be collected

and by what means these would be obtained.

5. On the new article 15 of the draft entitled “Processing and retention period of

personal data”

81. This new article introduced by amendment 4 aims to define “the framework for the

processing of personal data and the retention period of the data for the

background check”.

a) On the establishment of a centralized IT system

82. It follows from paragraph 1 of the new article 15 of the draft Grand-Ducal regulation

that “[t]he Grand-Ducal Police is setting up a centralized computer system for the management

background check requests. With a view to making the decision, the minister having

the Grand-Ducal Police in its attributions will have access to this system to consult the opinion of the

Grand-ducal police and on request, to consult the entire file concerned”.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

23/28

The authors of the draft Grand-Ducal regulation specify on this subject that “[in] order to clarify the

interactions between the Grand-Ducal Police and its Minister, in paragraph 1 the Grand-Ducal Police

Ducale sets up a computer system to which the Minister has access. However, the rights of access of the Minister having the Police in his attributions are restricted and a request is required for access to the entire file.

83. It is not clear from the said provisions whether a file, within the framework of the background check, would be held by the Police or if it would be a computer tool facilitating the administrative management of background check requests. If a file was to be held by the Grand Ducal Police so this should be expressly reflected in the law Project.

84. Furthermore, as previously indicated, what would be the criteria that would justify the if necessary, access to the entire file by the Minister? It is to be regretted that the text under Opinion remains silent on such details.

b) On the retention period of the data collected by the Grand Ducal Police as part of the background check

85. In accordance with the principle of retention limitation, personal data personal are kept "in a form allowing the identification of the persons concerned for a period not exceeding that necessary with regard to the purposes for which they are processed.

86. In addition, in accordance with Article 4 of Directive 2016/680 "personal data personnel are accurate and, where necessary, kept up to date; all reasonable measures must be taken so that personal data which is inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay".

87. It is also worth recalling the recommendation issued by the CNPD within the framework of its opinion relating to the central file of the Grand-Ducal Police in which it considers that "the deadlines storage or at least the applicable criteria for determining the storage period as well as the procedures allowing the regular verification of the need for said deadlines deserve to be clarified by the legislator in order to limit as much as possible the room for maneuver

of the controller and guarantee transparency, accessibility and proportionality

of the said deadlines”<sup>35</sup>.

34 Article 3 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.

35 Deliberation n°45/2019 of September 13, 2019, p. 30.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

24/28

88. Paragraph 2 of the said article intends to specify the retention period of the data

collected by the Grand Ducal Police as part of the background check and the

paragraph 3 specifies the period after which the data would be erased. There is a place to salute

the effort of the authors of the draft Grand-Ducal regulation to have provided for durations of

conservation, as suggested by the CNPD in its aforementioned opinion <sup>36</sup>.

89. Thus paragraph 2 of the new article 15 sets a duration of one year for the data

collected as part of the background check "in the event of a positive decision", it is

further specified that this duration is extended in the event of renewals.

In addition, the same duration of one year is set for applications “incomplete or withdrawn by

the applicant or the entity to which he belongs”. The Government specifies in the commentary of the

amendments that this duration was proposed "with the aim of simplifying the process

administrative procedure in the event of a subsequent resumption of the request concerned”.

Finally, a 30-day data retention period is set in the event of failure of the

request for background check.

90. Furthermore, paragraph 3 of Article 15 provides that the data would be erased

the end of each of the pre-mentioned deadlines but that a succinct sheet “will be kept for a period of five years” and that it would contain the information listed in the said paragraph.

91. There is further reason to draw the attention of the authors of the draft Grand-Ducal regulation to article 6, paragraph 2, 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 national security which provides that “[t]he competent authorities shall take all necessary measures reasonable to ensure that personal data which is inaccurate, incomplete or are no longer up to date are not transmitted or made available”.

92. Finally, in the absence of precision on this subject in the texts under opinion, it is necessary to wonder about the retention periods for opinions as well as information that would be communicated to the minister and the commission. Such details should be provided.

## 6. Final remarks

93. In its initial opinion on the draft law and the draft Grand-Ducal regulation, the National Commission wondered how the Grand Ducal Police would proceed

36 See the observations made under point 4 of deliberation no. 59/2019 of 17 December 2019 of the Commission national for data protection, doc. speak. No. 7475/01.

### Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the police and on the operation of Luxembourg airport as well as on the construction of a new terminal; the draft Grand-Ducal regulation on civil aviation security and the conditions of access to Luxembourg airport

25/28

it has an “equivalent” background check for non-resident workers. She had, in fact, noted that “[a] priori, as the Grand-Ducal Police does not have access to corresponding files of foreign countries, this control may seem less effective and less

intrusive than that for resident workers”<sup>37</sup>.

It now seems that this situation is provided for in Article 14, paragraph 1, of the draft

Grand-Ducal regulation, while this expressly provides for the possibility for the Grand-Ducal Police  
ducale to consult foreign police and judicial authorities.

IV.

On the rights of data subjects

1. On the processing of personal data carried out by the Grand-Police

ducal

avoid interfering with official or legal inquiries, research or proceedings;

avoid prejudicing the prevention or detection of criminal offences, the investigation or

94. It is appropriate to draw the attention of the authors of the draft law and the draft regulation

ducal on article 14 of the law of 1 August 2018 on the protection of natural persons at

with regard to the processing of personal data in criminal matters as well as in

national security which provides that “[t]he controller may limit, entirely

or partially, the data subject's right of access, as soon as and for as long as a

such partial or complete limitation constitutes a necessary and proportionate measure in a

democratic society, having regard to the purpose of the processing concerned, and taking due account

the fundamental rights and legitimate interests of the natural person concerned, for:

has)

b)

prosecution in the matter or the execution of penal sanctions;

vs)

d)

e)

If this should be the will of the authors of the texts under opinion then the legal provisions

should specify the limitation of the rights of data subjects in accordance with the



provisions of the aforementioned article 14.

protect public safety;

protect national security and national defence; Where

protect the rights and freedoms of others”.

95. Finally, it should also be specified that Article 17 of the aforementioned law is likely to

find application while the Grand-Ducal Police may be required to process data at

personal nature relating to facts which are the subject of a preliminary investigation or

preparatory instruction.

37 See comments made under the point “Ad. Art. 13. Application for background check”, deliberation

n°59/2019 of December 17, 2019 of the National Commission for Data Protection, doc. speak. No. 7475/01.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

26/28

2. On the processing of personal data carried out by the Minister or

the Commission

96. As indicated in paragraphs 11 to 16 of this Opinion, the GDPR is likely to

apply to the processing carried out by the Minister or the commission.

97. According to Article 5 (1) (a) of the GDPR, personal data

must be processed in a lawful, fair and transparent manner with regard to the data subject

(principle of legality, loyalty, transparency).

98. This principle implies in particular that data controllers must comply with

the provisions of Article 13 of the GDPR for data collected directly from the

data subject, otherwise those of Article 14 of the GDPR, when the personal data

personal data have not been collected from the data subject himself, for example

those collected indirectly from the Grand Ducal Police.

Under these articles, the controller must provide the data subject with

information about the processing of personal data concerning him, in particular for

ensure fair and transparent treatment. In cases where Article 14 of the GDPR

would apply, such information should be provided to the data subject no later than one

months after the data controller has obtained the data.

99. In addition, according to Article 15 of the GDPR data subjects have the right to receive

certain information relating to the personal data processed by the person responsible for

processing (right of access).

100.

The attention of the authors of the bill should be drawn to the fact that without

explicit derogation in the bill, these rights would all be fully applicable. But he

seems that the authors of the bill intend to derogate from these rights when they provide

in article 1, paragraph 3, subparagraph 6, of the bill that “[t]he person who has failed the

background check may, upon written request and within thirty days from

the date of notification of the refusal or withdrawal, request from the Minister having the Police in his

attributions access to the opinion of the Police on which the decision is based, subject to the

legal limitations. The opinion issued by the commission is not communicated to it”.

Therefore, in such cases and in accordance with Article 23 of the GDPR, the details of the limitations,

as well as their duration should be provided for in the bill.

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the

police and on the operation of Luxembourg airport as well as on the construction of a

new terminal; the draft Grand-Ducal regulation on civil aviation security and

the conditions of access to Luxembourg airport

Thus decided in Belvaux on July 21, 2022.

The National Data Protection Commission

Tine A. Larsen Thierry Lallemand Marc Lemmer

President Commissioner Commissioner

Opinion of the National Commission for Data Protection

relating to bill no. 7475 amending the amended law of July 26, 2002 on the  
police and on the operation of Luxembourg airport as well as on the construction of a  
new terminal; the draft Grand-Ducal regulation on civil aviation security and  
the conditions of access to Luxembourg airport