

Opinion of the National Commission for Data Protection relating to the

bill n° 7897 amending: 1° the amended law of 17 July

2020 on measures to combat the Covid-19 pandemic; 2° of the law

of March 8, 2018 relating to hospital establishments and the

hospital planning; 3° the amended law of 22 January 2021 on:

1° amendment of Articles L. 234-51, L. 234-52 and L. 234-53 of the Code of

work ; 2° temporary derogation from the provisions of Articles L. 234-51,

L. 234-52 and L. 234-53 of the Labor Code.

Deliberation n° 34/AV28/2021 of October 12, 2021

In accordance with Article 57, paragraph 1, letter (c) of Regulation (EU) n°2016/679 of 27

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

of a personal nature and on the free movement of such data, and repealing Directive

95/46/EC (General Data Protection Regulation) (hereinafter "GDPR"), to which

refers to article 7 of the law of August 1, 2018 on the organization of the National Commission

for data protection and the general data protection regime, the

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

National" or the "CNPD") "advises, in accordance with the law of the Member State, the

national, government and other institutions and organizations about the measures

legislative and administrative measures relating to the protection of the rights and freedoms of individuals

with regard to the treatment".

By email dated October 8, 2021, the Minister of Health invited the Commission

to rule on draft law no. 7897 amending: 1° the amended law

of July 17, 2020 on measures to combat the Covid-19 pandemic; 2° of the amended law

of March 8, 2018 relating to hospital establishments and hospital planning; 30

of the amended law of 22 January 2021 relating to: 1° modification of articles L. 234-51, L. 234-52

and L. 234-53 of the Labor Code; 2° temporary derogation from the provisions of Articles L. 234-

51, L. 234-52 and L. 234-53 of the Labor Code (hereinafter “Bill No. 7897”).

According to the explanatory memorandum, bill no. 7897 "proposes to bring some ad hoc adaptations to the current version of the amended law of 17 July 2020 on measures to combat the Covid-19 pandemic which expires on October 18, 2021.

The CNPD notes in this context that the new paragraph (2) of Article 2 of the draft Law No. 7897 provides that henceforth within catering and bar establishments beverages, customers and all staff of the establishment concerned are compulsorily subject to the Covid check regime,' while article 3septies of the said draft grants the option to any business manager or head of administration to invest all or only part of his business or administration under the Covid check regime in order to protect the safety and health of the workers concerned.

The customers, or even the employees concerned in the event of the choice of the Covid check regime by the employer, are therefore obliged to present a certificate of vaccination, recovery or Covid-19 test indicating a negative result as referred to in Articles 3bis, 3ter or 3quater of the bill n° 7897. However, it is not clear from the said bill, nor from the commentary to the articles, if the processing of personal data would be carried out by the employer or the operator of the catering establishments and drinks, following the presentation by a customer or an employee of such a certificate.

1 See the new definition of the “Covid check regime” provided for in article 1, point 27 of bill no. 7897.

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Will the employer or operator collect or record the data contained in these tests or the said certificates following their presentation? Indeed, an employer, how can or will he have to manage the Covid Check regime on a daily basis in practice from a protection point of view

personal data? Will he subject all employees daily to a

Covid Check control or for convenience will keep a file with the data

employees who are vaccinated or recovered. The bill does not provide an answer to these

questions and lack of precision on this subject.

It should also be recalled that the GDPR will only apply when a

processing of personal data will be carried out<sup>2</sup>, for example if the fact that a

employee or client presented a certified rapid antigen test result, a certificate of

vaccination or a serological screening test certificate is required to be recorded in

a file by the employer or operator.

In addition, in the event that data processing is carried out within the framework of the

Bill No. 7897, these must be based on one of the bases of lawfulness listed in Article

6 of the GDPR as well as fulfilling one of the conditions referred to in Article 9, paragraph (2) of the

GDPR insofar as data relating to the health of the persons concerned would be

likely to be processed.

In this respect, it should be recalled that the processing of personal data collected

and processed under a legal obligation must have a legal basis in accordance with

Article 6, paragraph (3), of the GDPR, read together with its paragraph (1), letters c).

According to Article 6(3) of the GDPR this legal obligation should define the

purposes of the processing and contain "specific provisions to adapt the application of the

rules of this regulation, among others: the general conditions governing the lawfulness of the

processing by the controller; the types of data that are subject to processing;

the people concerned; the entities to which the personal data can be

be communicated and the purposes for which they may be communicated; purpose limitation;

retention periods; and processing operations and procedures, including

measures to ensure lawful and fair processing, such as those provided for in other

special processing situations as provided for in Chapter IX".

Recital 41 of the GDPR further specifies that this legislative measure should be clear and precise and its application should be foreseeable for litigants, in accordance with the case law of the Court of Justice of the European Union and the European Court of Rights of man 3.

However, it must be noted that if data processing were to be carried out on the basis of Bill No. 7897, these could not validly be based on such a basis of lawfulness whereas the device under review does not comply with the legal requirements set out above.

In view of the above observations, the National Commission considers that in the event that data processing is carried out by the organizations concerned, the text under opinion does not meet the requirements of clarity, precision and foreseeability to which a legal text must respond, in accordance with the case law of the

2 See the definition of processing of personal data provided for in article 4.2 of the GDPR.

3 In this sense, see M. Besch, "Personal data processing in the public sector", Norms and legalistic in Luxembourg public law, Luxembourg, Promoculture Larcier, 2019, p.470, n°619. See among others CourEDH, Zakharov e. Russia [GCL n°47413/061, § 228-229, December 4, 2015, ECtHR, Vavrieka and others v. Czech Republic (applications n°47621/13 and 5 others), § 276 to 293, 8 April 2021.

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Court of Justice of the European Union and the European Court of Human Rights', and cannot, therefore, pronounce in more detail on the possible aspects which would be linked to the Protection of personal data.

With regard more specifically to the Covid check regime, the CNPD understands that after scanning the QR code of the CovidCheck certificate, the result is displayed

instantly: the screen is green if the certificate is valid and red otherwise.

However, it turns out that other additional information is also displayed on

the screen during the check. For example, in the case of a vaccinated person, these are the

following information: the surname and first names of the person concerned, their date of birth,

the reference to the Covid-19 disease or virus, the name of the vaccine, the holder of the

the marketing authorization or the manufacturer of the vaccine, the date of vaccination, the State

in which the vaccine was administered, the issuer of the certificate and its identifier.

In accordance with Article 5, paragraph 1, letter c) of the GDPR, the personal data

personnel must be "adequate, relevant and limited to what is necessary in view of

of the purposes for which they are processed (data minimization)". Furthermore, all

processing of personal data must be necessary and proportionate to the purpose

continued by said treatment.

Although the CNPD understands that the purpose of the CovidCheck.lu application is to simplify the

verifications of certificates, the CNPD wonders about the need to make visible all

information mentioned above, systematically during each check. Indeed, he

Seems the same goal could be achieved by just displaying the status of the certificate

CovidCheck (valid — green; invalid — red). Furthermore, an employer or a restaurateur

can he validate a certificate by reading the information that accompanies the QR code, if by

example the application is unavailable, if there is no network reception or if the device for

scan no longer works?

The general conditions of use of the CovidCheck application available on the site

<https://covid19.public.lu/covidcheck> further specify that the Apple App Store platforms and

Google Play Store may process personal data

communicated directly or indirectly by the user as part of the download

of the app. It should therefore be emphasized that, in view of the fact that the CovidCheck application

contains data concerning health, it is important to be particularly vigilant

use adequate technical and organizational measures in accordance with Articles

25 paragraph (2) and 32 paragraph (1) of the GDPR so that these cannot be

accessible to unauthorized persons.

Finally, although these issues do not fall within the domain of the protection of

data, the CNPD had already questioned itself in terms of labor law in its opinions of 28 May

2021<sup>5</sup> and 8 June 2021<sup>6</sup> on the consequences of an employee's refusal to submit to

the obligation to present one of the certificates mentioned in articles 3bis, 3ter or 3quater of the

Bill No. 7897. The same question also arises for employees who are neither

vaccinated, nor recovered. Will they have to present a certified Covid-19 test every other day

indicating a negative result to be able to work?

4 In this sense, see M. Besch, "Personal data processing in the public sector", Norms and

legalistic in Luxembourg public law, Luxembourg, Promoculture Larcier, 2019, p.469, n°619; See among others

CourEDH, Zakharov e. Russia [GCL n°47413/06], § 228-229, 4 December 2015, ECtHR, Vavriška and others v.

Czech Republic (applications n°47621/13 and 5 others), § 276 to 293, 8 April 2021.

5 Deliberation no. 20/AV16/2021 of 05/28/2021: <https://cnpd.public.lu/fr/decisions-avis/2020/20-AV16-PL7808-tracking-covid19.html> .

6 Deliberation n°24/AV19/2021 of June 8, 2021: <https://cnpd.public.lu/content/dam/cnpd/fr/decisions-avis/2021/24-AV19-2021-du-8-june-2021-PL-7836-Covid.pdf>

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Thus decided in Belvaux on October 12, 2021.

The National Data Protection Commission

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