

Opinion of the National Commission for Data Protection relating to

the draft Grand-Ducal regulation prescribing a general census

of the population, housing and buildings of the Grand Duchy in the 1st

June 2021 and government amendments

Deliberation n°23/AV18/2021 of June 1, 2021

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

on the protection of individuals with regard to the processing of personal data

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

General on Data Protection) (hereinafter the “GDPR”), to which Article 7 of the

Law of August 1, 2018 on the organization of the National Commission for the Protection of

data and the general data protection regime, the National Commission for the

data protection (hereinafter referred to as the “National Commission” or the “CNPD”)

“advises, in accordance with the law of the Member State, the national parliament, the government and

other institutions and bodies on legislative and administrative measures relating

to the protection of the rights and freedoms of natural persons with regard to processing”.

By letter dated April 2, 2021, the Minister of the Economy invited the Commission

national to notify the draft Grand-Ducal regulation prescribing a general census of the

population, housing and buildings in the Grand Duchy as of 1 June 2021 (hereinafter the “draft

Grand-Ducal Regulation”) as well as government amendments to the draft

Grand-Ducal regulations, adopted by the Council of Government at its meeting of 2 April 2021

(hereinafter the “amendments”).

The purpose of the draft regulation is to organize the general census of the population,

housing and buildings, which will take place on November 8, 2021. This census will be organized and

led by the National Institute of Statistics and Economic Studies of the Grand Duchy of

Luxembourg (hereinafter “STATEC”) in accordance with article 2 of the amended law of 10 July

2011 on the organization of the National Institute of Statistics and Economic Studies and

amending the amended law of 22 June 1963 establishing the salary regime for civil servants in the State (hereinafter the "amended law of July 10, 2011 on the organization of STATEC" or the "law organization of STATEC"), which provides that STATEC's mission is "to carry out the censuses of population, housing and buildings, the date and methods of these censuses being fixed by Grand-Ducal regulation".

In addition, it emerges from the explanatory memorandum that "[t]he performance of this statistical operation falls under Regulation (EC) N° 763/2008 of the European Parliament and of the Council of July 9, 2008 concerning population and housing censuses, the purpose of which is to establish common rules for the decennial provision of exhaustive data on population and lodging ". The authors of the bill further specify that at the national level, article 4bis of the amended municipal law of December 13, 1988 provides that "[i]n order to determine the number members of the municipal council assigned to each municipality, it is proceeded, at least all every ten years, in the census of the population of the Grand Duchy of Luxembourg. The date and the modalities of this census are fixed by grand-ducal regulation (...)".

The draft Grand-Ducal regulation is therefore based on the said legislation.

Moreover, it appears from the explanatory memorandum that the novelty of this next census will be the use by STATEC of a so-called "combined" census. The authors of the draft regulation Grand-Ducal specify that the combined census will be based on access, by STATEC, to data contained in administrative registers and on data collected through questionnaires in paper and electronic versions. This "combined" census distinguish it from other censuses carried out in the past, which were based on data collected via a questionnaire in paper version.

It is therefore undeniable that the census which will soon be carried out by STATEC raises issues relating to data protection for which the National Commission will make the following observations.

#### I. Preliminary remarks

First of all, it should be noted that Article 11, paragraph (3), of the Constitution establishes as matter reserved for the law exceptions to the guarantee by the State of the protection of privacy<sup>1</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 the 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 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 leaving most of the rules of substance and form to the implementing regulations do not meet these constitutional requirements. If elements

<sup>1</sup> See in this sense M. Besch, Norms and logistics in Luxembourg public law, Vademecum, Larcier, Edition 2019, p.472, n°619.

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>2</sup>.

However, it is clear that both article 2 of the amended law of July 10, 2011 on organization of STATEC that article 4bis of the amended municipal law of 13 December 1988 limit themselves to respectively stating that STATEC's mission is to "carry out the censuses of population, housing and buildings, the date and methods of these censuses being fixed by Grand-Ducal regulation” and that “[i]n order to determine the number members of the municipal council assigned to each municipality, it is proceeded, at least all every ten years, in the census of the population of the Grand Duchy of Luxembourg. The date and the modalities of this census are fixed by grand-ducal regulation (...)”.

Thus, the National Commission wonders whether the draft Grand-Ducal regulation is likely of not being in conformity with the aforementioned constitutional device while it would settle points essentials of a matter reserved for the law, in particular when it defines who is responsible for the processing, the purposes of the processing that would be implemented, in that it provides for access to administrative files by STATEC, or even in that it provides for the use of the number national identification system “with a view to interconnecting the various administrative registers”<sup>3</sup>. Therefore, should we not ensure rigorous application of the principles of the framework above-mentioned normative with regard to the distinction between what must come, in essence, from the law in the strict sense and what can be the subject of a normative framework by a text regulatory?

Consequently, the CNPD considers that the role of the various actors involved in the census, the purposes of the processing, the principle of access by STATEC to registers administrative measures in the context of the census or even the use of the identification number national should be provided for in the law in the strict sense of the term, and not in an act regulatory<sup>4</sup>.

II.

On the processing of data for statistical purposes

It should be noted that Article 2 of the draft Grand-Ducal regulation lists the data which would be collected for statistical purposes.

The CNPD will make its observations below on the issues relating to data protection and which arise in the context of such processing.

<sup>2</sup> See M. Besch, Norms and legislation in Luxembourg public law, Vademecum, Larcier, Edition 2019, p.37, n°19.

<sup>3</sup> Draft Grand-Ducal regulation, explanatory memorandum, page 5.

<sup>4</sup> See in this sense M. Besch, Norms and legalistics in Luxembourg public law, Vademecum, Larcier, Edition 2019, p.472, n°619.

1. On compliance with the amended law of July 10, 2011 on the organization of STATEC

applicable data protection rules

It should be noted that the amended law of 10 July 2011 on the organization of STATEC takes particular importance in the context of the organization of the census. This law governs in particular the powers available to STATEC when it is called upon to carry out statistical operations, as is the case in the context of the census.

The authors of the draft Grand-Ducal regulation indicate that the provisions of Article 2 of said law “would already constitute a sufficient legal basis for carrying out the census”<sup>5</sup> and that the STATEC “is empowered by the [amended law of July 10, 2011 on the organization of STATEC] (...) to access and use administrative sources for statistical purposes”<sup>6</sup> or that Article 12 of the said law “stipulates that in the choice of data collection method, STATEC favors use of administrative files. It only resorts to surveys or censuses if the exploitation of administrative files proves to be impossible or is not likely to provide reliable and relevant statistical information”<sup>7</sup>.

Indeed, article 12 of the amended law of July 10, 2011 on the organization of STATEC provides that “in the choice of data collection method, STATEC favors the use of administrative files. Article 13 of the said law also provides that “the administrations public authorities, municipalities and public establishments as well as all natural persons or legal entities are required to provide the statistical information requested by STATEC within the deadlines set in his request” and that “in the context of the missions provided for in Article 2, STATEC has a right of access to the information, even individual, contained in the files and databases of public administrations and services, collected as part of their administrative powers”.

However, insofar as the provisions of STATEC's organic law predate with the provisions of the GDPR, there is reason to wonder about the conformity of the provisions of the law organization of STATEC with those of Article 6, paragraph (3), of the GDPR (i) as well as on the relationship between the provisions of the aforementioned law and those of article 65 of the law of 1 August

2018 on the organization of the National Commission for Data Protection and the general data protection regime (ii).

5 Draft Grand-Ducal regulation, explanatory memorandum, page 7.

6 Draft Grand-Ducal regulation, Ad article 3.

7 Draft Grand-Ducal regulation, explanatory memorandum, page 7.

i.

On Article 6(3) GDPR

As previously noted, the National Commission understands that the authors of the draft Grand-Ducal regulation intend to rely on Articles 12 and 13 of the amended law of 10 July 2011 organizing STATEC's access by STATEC to administrative registers, referred to in Article 3 of the draft Grand-Ducal regulation.

However, there is reason to question the conformity of the aforementioned provisions with those of Article 6(3) GDPR.

Indeed, it should be recalled that this article provides for a particular constraint linked to the lawfulness data processing necessary for compliance with a legal obligation or the performance of a mission of public interest or relating to the exercise of the public authority vested in the controller. In these two cases, the basis and the purposes of the data processing operations must be specifically defined either by Union law European Union, or by the law of the Member State to which the controller is subject.

In addition, recital (45) of the GDPR specifies that it should "belong to Union law or to the right of a Member State to determine the purpose of the processing. Furthermore, this right could specify the general conditions of this Regulation governing the lawfulness of the processing of personal data, establish the specifications aimed at determining the person responsible for the processing, the type of personal data being processed, the persons concerned, personal data can be

communicated, purpose limitations, retention period and other measures aimed at to guarantee lawful and fair processing”.

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<sup>8</sup>.

Moreover, it emerges from the work entitled “Norms and legislation in Luxembourg public law” that this case law “still requires that the basis in domestic law be accessible to the person concerned, who moreover must be able to foresee the consequences for it, and its compatibility with the rule of law. To satisfy the requirement of foreseeability, it is necessary that the “law”, in its material acceptance, uses terms clear enough to indicate to all in a way sufficient in what circumstances and under what conditions it empowers public authorities to resort to measures affecting their rights protected by the Convention, in this case the entities to which

<sup>8</sup> In this sense, see M. Besch, Norms and logistics in Luxembourg public law, Vademecum, Larcier, Edition 2019, p.470, n°619,

see among others ECtHR, Zakharov c. Russia [GC], n°47413/06, § 228-229, 4 December 2015. interference with private life protected by Article 8 of the European Convention on Human Rights the man”<sup>9</sup>.

Thus, for the lawfulness of processing in the public sector to be ensured, it is necessary to have a national or supranational normative text which can lead an administration or a service to having to process data to fulfill its missions<sup>10</sup>. If a text should not prescribe specifically data processing, “the purpose of the processing must however be precise, insofar as the text leading the administration to process data must allow administered to deduce the nature of the data and the purposes for which they are used”<sup>11</sup>.

However, it is clear that the provisions of Articles 12 and 13 of the amended law of 10 July 2011 on the organization of STATEC do not seem to meet the requirements of the provisions aforementioned in particular in that they do not meet the criteria of precision and clarity to which a text of law must respond.

ii.

On the articulation of the provisions of the organic law of STATEC with those of article 65 of the law of 1 August 2018 on the organization of the Commission national data protection system and the general data protection regime

Datas

As noted above, the organic law of STATEC predates the GDPR as well as the entry into force of the law of 1 August 2018 on the organization of the National Commission for data protection and the general data protection regime. But these two latest legal texts provide for specific measures regarding the processing of data for statistical purposes.

Indeed, in accordance with Article 89 of the GDPR, the processing of personal data for statistical purposes is subject to "appropriate safeguards for the rights and freedoms of the concerned person. These guarantees guarantee the implementation of technical measures and organisational, in particular to ensure compliance with the principle of minimizing data ".

With regard to the safeguards to be implemented by the controller, recital 156 of the GDPR states that "[m]ember States should provide safeguards appropriate for the processing of personal data for archival purposes in public interest, for scientific or historical research purposes or for statistical purposes. The

9 See M. Besch, Norms and legislation in Luxembourg public law, Vademecum, Larcier, Edition 2019, p.469, n°619.

10 M. Besch, Norms and legislation in Luxembourg public law, Vademecum, Larcier, Edition 2019, p.470, n°619.

11 M. Besch, Norms and legislation in Luxembourg public law, Vademecum, Larcier, Edition 2019, p.470, n°619.



specific processing concerned, as well as measures

Member States should be allowed to provide, under specific conditions and subject to appropriate safeguards for the persons concerned, special provisions and waivers regarding information requirements and rights to rectification, erasure, oblivion, restriction of processing, data portability and the right to object when personal data is processed for archival purposes in the public interest, for scientific or historical research purposes or for statistical purposes.

The conditions and warranties in question may include specific procedures allowing data subjects to exercise these rights if this is appropriate in view of the purposes of techniques and organizational measures aimed at reducing the processing of personal data to a minimum. personnel in accordance with the principles of proportionality and necessity".

With regard more specifically to processing for statistical purposes, recital 162 of the GDPR provides the following clarifications "[w]here personal data are processed for statistical purposes, this Regulation should apply to that processing. the Union law or the law of the Member States should, within the limits of this Regulation, determine statistical content, define data access control and stop special provisions for the processing of personal data for the purposes statistics as well as appropriate measures to safeguard the rights and freedoms of the data subject and to maintain statistical confidentiality. ".

In Luxembourg law, article 89 of the GDPR is transposed into article 65 of the law of 1 August 2018 on the organization of the National Commission for Data Protection and the general data protection regime which lists the appropriate measures which must be implemented during such processing.

Thus, in view of the foregoing, the CNPD wonders to what extent the provisions of the

chapter 2 of the aforementioned law of 1 August 2018 must be articulated with the provisions of the law amended on July 10, 2011 on the organization of STATEC.

## 2. On the role of the different actors involved in the census

It appears from the draft Grand-Ducal regulation that different actors will be involved in the census, namely STATEC (i), municipalities and enumerators (ii) and CTIE (iii).

In the absence of specific provisions in the text under opinion, it is necessary to analyze their role as a point of view of data protection, i.e. to determine whether the various actors mentioned above act as a controller or processor.

### i.

#### On the role of STATEC

Article 2 of the amended law of July 10, 2011 on the organization of STATEC provides that the STATEC's mission is to "carry out censuses of the population, housing and buildings, the date and methods of these censuses being fixed by Grand-Ducal regulation".

Article 10 of the draft Grand-Ducal regulation further specifies that "[t]he census is organized, directed, compiled and controlled by STATEC" and Article 16 of the draft Grand-ducal indicates that "[t]he municipal administrations and enumerators comply the circulars and instructions issued by STATEC concerning the execution of this regulation".

STATEC would thus be qualified as data controller within the meaning of Article 4, point 7), of the GDPR, in that it determines the purposes and means of the processing that would be implemented as part of the census despite the fact that it would actually be up to the legislator or the government to determine the ends and the means (see point II.1.i above).

The CNPD regrets that the text under opinion does not expressly state that STATEC would have the quality of data controller. Such details should be provided in the draft Grand-Ducal regulation, for a better understanding of the text under opinion.

### ii.

On the role of municipalities and enumerators

With regard to the role of municipalities and enumerators in the implementation of implementation of the census, Article 10 of the draft Grand-Ducal regulation provides that “[a]n the plan communal, the census is carried out by enumerators under the direction and supervision of colleges of mayors and aldermen. These designate the agents enumerators. The municipalities ensure the exhaustive nature of the count on the ground”.

This article further specifies that “[t]he municipalities refrain from adding to the questionnaires of the STATEC any other question in any form whatsoever”.

The authors of the draft Grand-Ducal regulation specify in the commentary to the articles that “[i]f the general organization, the analysis of the questionnaires as well as the publication of the results fall within STATEC's area of expertise, data collection operations on the ground require the intervention of municipal administrations. The municipalities will be in particular required to verify that all persons having their main residence on their territory, and having not responded electronically, be invited to participate in this census through the distribution of a paper questionnaire through an enumerator. They will not be able to add other questions or collect information other than those provided for in this Regulation. »<sup>12</sup>.

12 Draft Grand-Ducal regulation, Ad Article 10.

The authors of the draft Grand-Ducal regulation further specify that "it is up to the municipalities to recruit enumerators responsible for distributing and collecting questionnaires paper. It is also the responsibility of the municipal authorities to check the documents submitted by these enumerators and to proceed, if necessary, with the necessary corrections. The necessary instructions are provided by STATEC agents during training sessions online organized specifically for this purpose. It should be noted that the compensation of agents enumerators will be paid for by STATEC”<sup>13</sup>.

Finally, as previously stated, municipalities and enumerators “comply with the

circulars and instructions issued by STATEC concerning the execution of this rules”<sup>14</sup>.

Insofar as municipalities act on instructions from STATEC and process data of a personal nature on behalf of STATEC, the latter would be qualified as sub-processors within the meaning of Article 4(8) of the GDPR.

Regarding the role of the subcontractor, it should be recalled that the provisions of Article 28 of the GDPR will be respected and that in accordance with said article the subcontractor "does not process the personal data only on documented instructions from the controller" and "ensure that persons authorized to process personal data undertake to maintain confidentiality or are subject to an appropriate legal obligation of confidentiality".

The CNPD also understands that the enumerators would act under the authority of the municipalities. The provisions of article 29 of the GDPR<sup>15</sup> should therefore also be respected.

Nevertheless, the CNPD wonders if this qualification of subcontractor of the municipalities is likely to apply when they collect the documents entitled "the summary statement

"Census wards "QR"<sup>16</sup> and "Electoral sections "SE"<sup>17</sup> which allow

in particular to the communes to certify the number of resident persons by electoral section.

Indeed, these provisions seem to stem from articles 4bis and 5ter of the municipal law of 13 December 1988, as amended.

<sup>13</sup> Draft Grand-Ducal regulation, explanatory memorandum, page 6.

<sup>14</sup> Article 16 of the draft Grand-Ducal regulation.

<sup>15</sup> Article 29 of the GDPR provides that "[t]he processor and any person acting under the authority of the controller or under that of the subcontractor, who has access to personal data, cannot process this data, except on instructions of the controller, unless required to do so by Union law or the law of a Member State. ".

<sup>16</sup> Article 9, point 5°, of the draft Grand-Ducal regulation.

<sup>17</sup> Article 9, point 6°, of the draft Grand-Ducal regulation.

In its opinion of 1 February 2021 relating to the draft Grand-Ducal regulation, the Syndicat des Villes and Communes Luxembourgeoises also indicates that if “the communes are strongly involved in carrying out the general population census (...) [t]his can be explained without doubt by the fact that, in accordance with article 4bis of the amended municipal law of 13 December 1988, the fixing of the number of members of the municipal councils is based on the number of inhabitants determined by means of a decennial census”.

Therefore, for better readability of the text under opinion, it would be appropriate to clarify the role of municipalities within the framework of the census in order to make it possible to distinguish when these collect data on behalf of STATEC or, where applicable, for their own account.

iii.

On the role of the CTIE

According to the explanatory memorandum, one of the novelties of the next census will be the possibility of respond to electronic questionnaires via “MyGuichet.lu”. It appears from the draft Grand-Ducal regulation that this digital interface was set up by the CTIE in collaboration with STATEC<sup>18</sup>.

The CTIE therefore appears to be acting as a processor within the meaning of Article 4(8) of the GDPR.

Regarding the role of the subcontractor, it should be recalled that the provisions of Article 28 of the GDPR will have to be respected. In accordance with said article, the CTIE, as a subcontractor, must process “personal data only on documented instructions from the person responsible for the processing” and must ensure “that the persons authorized to process personal data staff undertake to respect confidentiality or are subject to a legal obligation appropriate level of confidentiality”.

3. On the collection of special categories of data

Pursuant to article 2 of the draft Grand-Ducal regulation, STATEC will notably collect the information relating to “the family situation”<sup>19</sup>, “the links between the different members of the household”<sup>20</sup> or even “the possible situation of disability”<sup>21</sup>. To the extent that these data

are likely to reveal data concerning health or data concerning life

sexual or sexual orientation of the person listed, these data are to be qualified as

special categories of data, known as “sensitive data” within the meaning of Article 9 of the GDPR.

18 Article 7 of the draft Grand-Ducal regulation.

19 Article 2, 1° letter k) of the draft Grand-Ducal regulation.

20 Article 2, 1° letter l) of the draft Grand-Ducal regulation.

21 Article 2, 1° letter p) of the draft Grand-Ducal regulation.

Such processing requires specific protection<sup>22</sup> and is subject to stricter requirements.

strict. The processing of “sensitive data” is, in fact, prohibited unless one of the conditions

referred to in paragraph (2) of Article 9 of the GDPR is fulfilled.

In the present case, the National Commission wonders whether the processing will be based on Article

9, paragraph (2), letter j), of the GDPR which states that “the processing is necessary for the purposes

archives in the public interest, for scientific or historical research purposes or for

statistics, in accordance with Article 89(1), on the basis of Union law or the law

of a Member State which must be proportionate to the objective pursued, respect the essence of the right to

data protection and provide appropriate and specific measures for the safeguard

fundamental rights and interests of the data subject”, or on Article 9, paragraph

(2), letter g), of the GDPR which states that “the processing is necessary for reasons of interest

important public, on the basis of Union law or the law of a Member State which must be

proportionate to the objective pursued, respect the essence of the right to data protection and

provide for appropriate and specific measures to safeguard the fundamental rights and

interests of the data subject”.

In addition, it should be noted that article 64 of the law of 1 August 2018 on the organization of the

National Commission for Data Protection and the general data protection regime

data provides that “[t]he processing of special categories of personal data

personnel as defined in Article 9, paragraph 1 of the [GDPR], can be implemented

for the purposes set out in Article 9, paragraph 2, point j) of the same Regulation, if the controller fulfills the conditions of Article 65.

Article 65 of the law of 1 August 2018 lists the additional appropriate measures that must be implemented by the data controller when the latter is called upon to process personal data for statistical purposes.

In the absence of details in the draft Grand-Ducal regulation and in the comments of the articles as to the appropriate and specific measures for the safeguard of the rights fundamental principles and interests of the data subject which would, where appropriate, be taken by STATEC, the CNPD is unable to assess whether the conditions of Article 9, paragraph (2), letter j) or g), of the GDPR would be fulfilled in this case.

With regard to the problem of the articulation of the aforementioned provisions with those of the draft Grand-Ducal regulation, it is referred to above in point II of this opinion.

In any case, the authors of the draft Grand-Ducal regulation should ensure the proper coherence between all of the aforementioned provisions as well as providing for appropriate measures

22 See the cases rendered by the CJEU of 8 April 1992, C-62/90, point 23 and of 5 October 1994, C-404/92, point 17. and specific for the safeguard of fundamental rights and the interests of the person concerned.

#### 4. On the collection of the national identification number

It emerges from articles 2, 3, and 4 of the draft Grand-Ducal regulation that the identification number national within the meaning of the amended law of 19 June 2013 relating to the identification of persons will be collected during the census for statistical purposes<sup>23</sup> and in order to “combine the different sources of data between them. This would be collected directly by STATEC via access to the National Register of Natural Persons (hereinafter the “RNPP”).

If the National Commission understands that the national identification number would be necessary to the quality of the statistics produced within the framework of the census, it should however be noted that the amended law of 19 June 2013 relating to the identification of natural persons supervising

the use of the national identification number does not provide for such data processing.

Indeed, Article 2, paragraph (2), of the aforementioned law provides that “[t]he deeds, documents and established files referred to in Article 1, paragraph (1), letter b) may contain the number identification, provided that it is reserved for use for internal administrative purposes, relations between the State and the municipalities or relations with the holder of the number”.

However, the draft Grand-Ducal regulation provides that the national identification number would be processed by STATEC for statistical purposes and not for internal administrative purposes, as is provided for in the aforementioned article 2.

Finally, the CNPD considers that the use of the national identification number within the framework of the census should be governed by a law (see above points I and II).

#### 5. Access to administrative registers

The authors of the draft Grand-Ducal regulation are to be congratulated on the clarifications provided by article 3 of the draft Grand-Ducal regulation as to the origin of personal data personal. This article provides, in fact, that “[t]he census is based on data from administrative registers as well as those collected through questionnaires that will be merged”.

This article further specifies that when the data is not collected via the registers administrative, the rest of the information, referred to in Article 2 of the draft Grand-Ducal regulation,

23 Article 2 of the draft Grand-Ducal regulation

24 Article 4 of the draft Grand-Ducal regulation

will be collected using the “private household” questionnaire or using the questionnaire “collective household”. These questionnaires will be available in electronic version or in paper.

Although the clarifications provided by Article 3 of the draft regulation should be welcomed Grand Ducal as to the categories of data that would be collected via these files, the National Commission would like to make the following considerations.



i.

On access to the RNPP

It should be noted that Article 4, paragraph (1), of the amended law of 19 June 2013 relating to the identification of natural persons provides that “[t]here is established a national register whose purpose is purposes: (...) the provision of data of natural persons to the persons in charge of the files of public bodies within the limits of the legal missions of these bodies or, provided that the data is anonymised, for statistical purposes”.

Details on the scope of these provisions are provided by bill no. 6330 relating to the identification of natural persons, to the national register of natural persons, to the identity card, to the municipal registers of natural persons, from which it appears that the “register will also make it possible to compile statistics about the population in the Luxembourg”<sup>25</sup>.

In addition, article 41 of the amended law of 19 June 2013 relating to the identification of persons physical states that “[t]he data or lists of data appearing in the national register or communal cannot be communicated to third parties. This prohibition does not apply to the authorities, administrations, services, institutions or bodies empowered, by or under the law, to obtain such data or lists of data and this for the information to which this empowerment”.

The National Commission welcomes the fact that such details have been provided, all the more that the provisions provided for in article 13 of the amended law of 10 July 2011 on organization of STATEC<sup>26</sup> are worded vaguely (see above in point II of this notice).

<sup>25</sup> Bill n°6330, parliamentary document n°6330/00, Ad Article 4, page 23.

<sup>26</sup> Article 13 of the amended law of 10 July 2011 on the organization of STATEC provides that “STATEC has a right of access to

individual information, contained in the files and databases of the administrations and public services, collected in

within the framework of their administrative attributions.

ii.

On the registers of the Joint Center for Social Security and Buildings  
and Housing

It appears from article 3 of the draft Grand-Ducal regulation that STATEC will have access to the register  
the Common Social Security Center and the Buildings and Housing Register.

If the authors of the draft Grand-Ducal regulation are to be congratulated for having specified the  
categories of data that would be collected through such registers, certain details  
deserve to be provided.

Indeed, it is not clear from the provisions under notice whether STATEC will have direct access  
in the register of the Joint Social Security Center insofar as Article 3 of the draft  
Grand-Ducal regulation stipulates that the data will be “taken from the Joint Center for  
social security through the General Inspectorate of Social Security”.

However, no details regarding this access are provided by the authors of the draft.

Grand-Ducal regulation in the commentary to the articles. Is it, therefore, an access by the  
STATEC in the register of the Joint Social Security Center or a communication from  
given by the General Social Security Inspectorate to STATEC?

The authors of the draft Grand-Ducal regulation should provide details on this subject.

With regard to the Register of Buildings and Accommodation, it should be noted that it is clear  
of the explanatory memorandum that this register was “created and maintained by STATEC on the basis of  
2011 census. The National Commission understands that STATEC would therefore have access to  
one of its own files.

In this respect, it should be recalled that the keeping of a personal data file  
collected and processed by a state authority must have a legal basis in accordance with  
Article 6(3) GDPR. The CNPD refers on this subject to its developments above  
in point II of this opinion.

Finally, if files were to be created by STATEC, such as the register of buildings and des Logements, based on data collected as part of the draft Grand-ducal then this should be expressly reflected in the draft grand-ducal regulation under notice.

iii.

#### Final remarks

It should be noted that in its opinion of 9 March 2021 relating to the draft Grand-Ducal regulation, STATEC specifies that it “will continue, in the coming years, its efforts to collect a maximum information through the administrative registers in order to reduce the burden statistics of persons enumerated”<sup>27</sup>.

If this is STATEC's will, it is imperative that specific provisions regarding the access that would be provided to various administrative registers comply with the provisions current applicable data protection laws, as noted in the developments above in point II of this opinion.

#### 6. On security measures

accidental damage,

In accordance with Article 5, paragraph (1), letter f) of the GDPR the personal data must be “processed in such a way as to guarantee appropriate security of the personal data personal data, including protection against unauthorized or unlawful processing and against the loss, destruction or

using technical measures or

appropriate organizational (integrity and confidentiality)”.

Article 32 of the GDPR further provides that “the controller and the processor implement the appropriate technical and organizational measures to guarantee a level of security appropriate to the risk”. Such measures must be implemented in order to avoid including unauthorized access to data, data leaks or changes

unwanted.

While the authors of the draft Grand-Ducal regulation are to be congratulated for having provided for a ban on “officials concerned, enumerators and any person collaborating in the census work or in connection with the said work, to disclose, disseminate or to use for other purposes and in any manner whatsoever the information and data they come to know in the accomplishment of their mission or their intervention”<sup>28</sup>, it is however, it is essential that such security measures be implemented by STATEC and the administrations whose data are accessed in the context of its access to the various administrative files, provided for in article 3 of the draft Grand-Ducal regulation, in order to ensure the privacy and data security.

In this context, it is strongly recommended to define an access management policy, in order to to be able to identify the person from the start, and to what precise data this person would have access.

<sup>27</sup> Page 5 under point 3 entitled “Use of administrative registers”.

<sup>28</sup> Article 17 of the draft Grand-Ducal regulation.

It is also recalled that such access should be limited to people who need it.

know within the framework of their function. Just as this access should not allow a use that differs from the purposes for which this data is processed.

In addition, it is necessary to provide an access logging system. On this point, the

CNPD recommends that log data be kept for a period of

five years from their registration, after which time they are erased, except when they are subject to a control procedure.

The CNPD also emphasizes the importance of proactively carrying out internal controls. In this

effect, in accordance with Article 32 (1) (d) of the GDPR, it is necessary to implement

implements a procedure “aimed at regularly testing, analyzing and evaluating the effectiveness of technical and organizational measures to ensure the security of the processing”.

With regard to the collection of data via paper questionnaires, STATEC should also ensure compliance with the aforementioned provisions when the collection of said questionnaires is done by the municipalities or enumerators.

Finally, with regard to the electronic questionnaires which would be accessible via the platform "MyGuichet.lu", STATEC should also oversee all the provisions of the aforementioned article 32 and ensure that the CTIE, as a subcontractor, takes all measures required under the aforementioned article.

#### 7. On the data retention period

According to Article 5, paragraph (1), letter e) of the GDPR, personal data must only be not be kept longer than necessary for the fulfillment of the purposes for which they are collected and processed. Beyond that, the data must be deleted or anonymized.

The draft Grand-Ducal regulation does not specify the retention period for data which would be collected for statistical purposes, or what criteria should be taken into account in order to determine such duration.

However, it should be noted that article 16 of the amended law of 10 July 2011 on organization of STATEC provides that "[w]hen the performance of its missions or the statistical purposes pursued require the use of data from identifiable statistical units, processing is done with respect for the fundamental rights and freedoms of individuals concerned. Access to this data is reserved solely for the persons in charge of establishing these statistics. As soon as the identification of statistical units and especially persons physical data is no longer necessary in the statistics production chain, the data will be anonymized".

In accordance with the aforementioned provisions, should it therefore be understood that the data will be anonymized as soon as they are no longer necessary "in the production chain of statistics " ?

In the absence of details on this subject in the draft Grand-Ducal regulation and in the commentary on the articles, the National Commission is not in a position to assess whether, in this case, the principle of limited data retention period would be respected.

#### 8. On the rights of data subjects

According to Article 5, paragraph (1), letter (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).

This principle implies in particular that STATEC 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 has not been collected from the data subject himself, i.e. those collected in particular via access in administrative records.

Under these articles, the controller must provide the data subject with information about the processing concerning him, in particular to guarantee processing fair and transparent. It is specified that in the case of article 14 of the GDPR, this information must be provided to the person concerned no later than one month after the person responsible for the processing has obtained the data.

Furthermore, Article 89, paragraph (2), of the GDPR provides that “[w]here data to be personal nature are processed for the purposes of scientific or historical research or for statistics, Union law or the law of a Member State may provide for derogations from the rights referred to in Articles 15, 16, 18 and 21, subject to the conditions and guarantees referred to in paragraph 1 of this article, insofar as these rights might make it impossible or seriously impede the achievement of the specific purposes and where such derogations are necessary to achieve these ends.

Article 63 of the law of 1 August 2018 on the organization of the National Commission for the data protection and the general data protection regime further provides that

“[w]here personal data is processed for scientific research purposes

or historical, or for statistical purposes, the controller may derogate from the rights of

the data subject provided for in Articles 15, 16, 18 and 21 of the [GDPR] insofar as these

rights may render impossible or seriously impede the achievement of the purposes

specific, subject to the implementation of appropriate measures as referred to in Article

65”.

If the authors of the draft Grand-Ducal regulation intend to derogate from the rights of persons

concerned in accordance with the aforementioned provisions, this should be specified

in the text under notice.

III.

On the use of the national identification number “for purposes of merging

data from administrative registers and electronic questionnaires or

papers »

Article 3 of the draft Grand-Ducal regulation provides that the data collected would be

“combined with each other through the identification number and the residence address”. At this

subject, the authors of the draft Grand-Ducal regulation specify in their comments

articles that “data drawn from registers and alternative sources (questionnaires

electronic or paper) are merged using national identification numbers.

These mergers are carried out in an automated manner”<sup>29</sup>.

It also emerges from article 4 of the draft Grand-Ducal regulation that the identification number

would be collected in order to “combine the different data sources together”<sup>30</sup>. The

authors of the draft Grand-Ducal regulation specify in the commentary to the articles that such

national identification number would be used “for the purpose of merging data from the registers

administrative documents and electronic or paper questionnaires”<sup>31</sup>.

However, it should be noted that, in the explanatory memorandum, the authors of the draft

Grand-Ducal regulation use different terminology and refer to the “use of the

national identification number for

registers

administrative”<sup>32</sup>.

the interconnection of the different

1. On the notion of "interconnection"

However, with regard to the term "interconnection", it should be recalled that in terms of

data protection the concept of “interconnection”<sup>33</sup> means that the processing of

<sup>29</sup> Draft Grand-Ducal regulation, Ad Article 3.

<sup>30</sup> Article 4 of the draft Grand-Ducal regulation.

<sup>31</sup> Draft Grand-Ducal regulation, Ad Article 4.

<sup>32</sup> Draft Grand-Ducal regulation, explanatory memorandum, page 3.

<sup>33</sup> The initial version of the law of 2 August 2002 on the protection of individuals with regard to the processing of personal data staff, now repealed, defined in Article 2, letter (j) interconnection as: “any form of processing which consists of the correlation of data processed for one purpose with data processed for identical or related purposes by one or more controllers”.

data are linked and can be managed by the persons responsible for the different treatments

concerned. However, as this does not appear to be the case here, the CNPD understands that

STATEC wishes to pool, by technical means, the data collected via

administrative registers and questionnaires (in paper and electronic form).

For clarity and to avoid confusion, care should be taken to use a

uniform terminology on this subject.

2. On the link between the national identification number and the “census key”

As noted above, “data drawn from registers and alternative sources

(electronic or paper questionnaires) are merged using the numbers

national ID. These mergers are carried out in an automated manner”<sup>34</sup>.

However, it still emerges from the draft Grand-Ducal regulation that “[t]he role of agents



enumerators is essential because, in addition to the distribution of paper questionnaires, it allows to improve the participation rate and to make the link between the data resulting from the data administrative data and data from the questionnaires through the 'census key', key that is indicated by the enumerators on the checklists and on the quizzes".

In addition, in its opinion of March 9, 2021 on the draft Grand-Ducal regulation, STATEC indicates that "[t]he merging of data from administrative registers and questionnaires will be facilitated because unlike the "postal mail" option, the enumerator must indicate on each questionnaire a unique "census" key per person. This key, allowing the fusion of administrative data and data from questionnaires at the individual level, will be used in addition to the personnel number so that this data fusion is optimal. This Data fusion is a key step in the success of the population census. Without this merger, the data collected will not be usable and STATEC will not be able to satisfy the obligations of European regulations".

However, in the absence of precision as to the elements that would constitute this "census" key, the National Commission wonders what the link would be between this key and the identification number national, both of which aim to merge the data collected as part of the census.

In addition, is this key made up of a random number assigned to a registered person or is it made up in part of the national identification number of the person enumerated?

34 Draft Grand-Ducal Regulation, Ad Article 3.

Clarifications on this subject should be provided by the authors of the draft regulation. grand-ducal.

### 3. On the data retention period

According to Article 5, paragraph (1), letter e) of the GDPR, personal data must only be not be kept longer than necessary for the fulfillment of the purposes for

which they are collected and processed. Beyond that, the data must be deleted or anonymized.

It should be noted that article 4 of the draft Grand-Ducal regulation provides that the number identification, residence address, surname and first name “will be deleted as much as possible three years after the date of the census”.

However, article 16 of the amended law of 10 July 2011 on the organization of STATEC provides that “[w]here the performance of its missions or the statistical purposes pursued require the use of data from identifiable statistical units, the processing is done respecting the rights and fundamental freedoms of the persons concerned. Access to these data is reserved solely for the persons responsible for establishing these statistics. As soon as the identification of statistical units and especially of natural persons is no longer necessary in the statistics production chain, the data will be anonymised”.

The National Commission therefore understands that the provisions of Article 4 of the draft Grand-Ducal Regulation derogate from the provisions of the aforementioned Article 16.

While it should first be recalled that a Grand-Ducal regulation cannot derogate from a law, the CNPD is still wondering about the criteria that would justify the national identification number, the residence address, surname and first name are kept for a maximum of three years after the census date?

In the absence of details on this subject in the commentary to the articles, the National Commission is unable to assess whether, in this case, the principle of limited storage data would be respected.

Clarifications on this subject should be provided by the authors of the draft regulation. grand-ducal.

Thus decided in Belvaux on June 1, 2021.

The National Data Protection Commission

Tine A. Larsen

President

Thierry Lallemand

Commissioner

Christopher Buschman

Marc Lemmer

Commissioner Commissioner