Opinion of the National Commission for Data Protection relating to the

bill n°7768 amending the amended law of 17 July

2020 on measures to combat the Covid-19 pandemic.

Deliberation n°5/AV4/2021 of February 16, 2021

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

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

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

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

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

data protection and the general data protection regime, the Commission

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

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

government and other institutions and organizations regarding legislative measures and

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

with regard to treatment”.

On February 12, 2021, the Minister of Health seized the National Commission

a request for an opinion on bill no. 7768 amending the amended law of 17

July 2020 on the measures to combat the Covid-19 pandemic (hereinafter the "draft law

No. 7768").

It is clear from the explanatory memorandum that this draft law aims to maintain the restrictions

currently in place while providing for a number of clarifications concerning, among

others, the “regime applicable to the processing of personal data,

particularly with regard to the large-scale screening program and within the framework of

the vaccination. »

The CNPD would like to point out that given the urgency of the bill under opinion, it is not possible for it

analyze the proposed changes in depth and that its opinion has been drawn up and adopted

solely on the basis of the information available to it to date. The opinion is given under subject to possible future considerations.

I. Ad article 4 of bill n°7768

Article 4 of bill n°7768 aims to modify various provisions of article 5 of the law of 17 July 2020 introducing a series of measures to combat the Covid-19 pandemic (hereinafter: “amended law of July 17, 2020”). The CNPD formulates three remarks in this regard:

1. To Article 5 paragraph (1) of the amended law of July 17, 2020, a new category of persons who can access health-related data in the part of the contact tracing activity and who must be named by the health director. Indeed, the paragraph in question now provides that infected persons must provide information on their state of health and the identity of people with whom they had contact likely to generate a high risk of infection “the director of health or his delegate, as well as the civil servants, employees or employees made available to the Ministry of Health pursuant to

Article L. 132-1 of the Labor Code or any other person designated for this purpose by the director of health.

The commentary to the articles specifies that "this addition is only intended to be able to adapt to changes in the epidemiological situation, particularly with regard to different existing variants, and allow to adjust the capacities of the team in charge tracking and tracing through volunteers called in as backup, if necessary. This

new category is aimed more specifically at retired care staff. »

The CNPD considers, however, that the current wording of bill no. 7768, and more particularly the added snippet of "any other person", is more only vague and it considers that such a formulation could in no way legitimize a possible tracing of internal contacts implemented by private employers or public, in parallel with the tracing implemented by the Department of Health. In fact, had in view of the risk that certain private or public employers could carry out, good faith, to internal contact tracing, it notes that the legality of such contact tracing is far from being legally clear in current legislation.

2. During the Council of Government of January 25, 2021, the ministers meeting had expressed their agreement with the introduction of an obligation to present a SARS-test Negative CoV-2 before boarding for all people traveling to the Grand Duchy of Luxembourg by air. 1 Thus, since January 29, 2021,

“any person, regardless of nationality, aged 6 or over, wishing to travel by air to the Grand Duchy of Luxembourg, must present the negative result on boarding (on paper or electronic document) of a viral detection test by PCR of the viral RNA of SARS-CoV-2 or viral antigen testing (rapid test) performed within 72 hours before the flight”.2

The CNPD wonders in this context whether, in addition to the processing provided for in the current article 5 paragraph 2bis of the amended law of July 17, 2020, i.e. the collection of personal data through the location forms of the passengers, additional processing of personal data by the airlines would take place, such as keeping a copy of the negative test or the recording of the data relating thereto. In this case, as the personal data included in a negative test are to be considered

such as data concerning health3, the airlines carry out a

processing of special categories of personal data

within the meaning of Article 9 of the GDPR. The processing of such data being in principle

prohibited under Article 9 paragraph (1) of the GDPR, airlines

must be based on one of the ten conditions for exemption provided for in paragraph (2) of

GDPR Article 9.

1 See press release on the summary of the work of the government council of January 25, 2021:

https://gouvernement.lu/fr/actualites/toutes_actualites/communiques/2021/01-janvier/25-conseil-government.html.

2 See press release from the Ministry of Health and the Ministry of Foreign and European Affairs of 26 January 2021:

https://covid19.public.lu/fr/actualite-covid-19/communiques/2021/01/26-mesures-sanitaires-displacements.html.

3 Article 4 point 15 of the GDPR defines data concerning health as “personal data

relating to the physical or mental health of a natural person, including the provision of health care services

health, which reveal information about the health status of that person. » Recital (35) of the GDPR specifies

that personal data relating to health should include: “[…] information

obtained during the testing or examination of a part of the body or a bodily substance […]. »

The CNPD considers that the only condition applicable in this case would be Article 9

paragraph 2) letter i) of the GDPR (processing necessary for reasons of public interest

in the field of public health), read together with Article 6 paragraph (1)

letter c) of the GDPR (processing necessary for compliance with a legal obligation to which

controller is subject). In these cases, the basis and the

purposes of data processing must be specifically defined either by law

of the European Union, or by the law of the Member State to which the controller

treatment is submitted.

In addition, recital (45) of the GDPR specifies that it should “[...] belong to the right to

the Union or the right of a Member State to determine the purpose of the processing. [...]". the

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

to the case-law of the Court of Justice of the European Union and of the Court

European human rights.

passengers present

Thus, in the event that, on the basis of the decision taken by the Council of Government, a processing

of personal data is implemented by the airlines at the

when

negative SARS-CoV-2 test before

boarding, the CNPD recommends that the authors of the bill provide for this

treatment either in the body of the text of the bill under opinion, or in another text

legal in order to meet the forecasting and predictability requirements to which

respond to a legal text, with reference to European case law, and with a view to

transparency and legal certainty.

their

3. Pursuant to Article 5 paragraph (3) first point of the amended law of 17 July 2020,

health professionals are already obliged, in order to follow and acquire the

fundamental knowledge on the evolution of the spread of the SARS-CoV-2 virus,

to transmit to the director of health or his delegate the surname, first names, sex,

identification number or date of birth as well as the municipality of residence or
the address of persons whose result of a diagnostic test for infection with the virus
SARS-CoV-2 was negative. On the other hand, said point no longer provides that these data are
anonymized by the Director of Health or his delegate at the end of a period of
seventy-two hours after receipt. The commentary to the article states that
"the reference to the retention period which appears in the same point is replaced by
the proposed amendment to Article 10, paragraph 5."
Thus, it follows from a combined reading of Articles 5 paragraph (3) first point and
10 paragraph (5) of the amended law of July 17, 2020, as amended by the draft
of the law under review, that the personal data of persons whose
result of a diagnostic test for infection with the SARS-CoV-2 virus was negative are
pseudonymized no later than the end of a period of six months after their collection for
a period of three years after which they are anonymized, i.e.
that they are kept for a total of three and a half years.
The National Commission would like to point out that it does not have the expertise
scientific and epidemiological necessary in order to assess whether it is justified and proportionate
that the data of persons whose result of a diagnostic test for infection with
SARS-CoV-2 virus has been negative are henceforth kept for three years and
half and no longer for only 72 hours. In the absence of further explanation
specified by the authors of the bill, it cannot therefore assess whether any
new knowledge recently acquired on the SARS-Cov-2 virus
justify why this data should be kept for a
a much longer period of time than initially foreseen by the legislator.

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fight against the Covid-19 pandemic.

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II. Ad article 5 of bill n°7768

Article 5 of the bill seeks to amend various provisions of article 10 of the amended law of July 17, 2020. Once again, the CNPD would like to make three observations in this regard:

1. New Article 10 paragraph (1bis) of the amended law of 17 July 2020 provides that the “Direction de la santé is responsible for the processing referred to in paragraph 1, the exception of the identification of the categories of people to be invited within the framework of the large-scale screening and vaccination programs that fall under the responsibility of responsibility of the General Inspectorate of Social Security. » The commentary of articles specifies that this “new paragraph 1bis is inserted in order to reflect the responsibility of the General Inspectorate for Social Security, a stakeholder in data processing carried out within the framework of screening programs large-scale and vaccination, particularly with regard to the management of invitations. The latter has the expertise and the demographic and socio-economic factors needed to sample the people to be invited to the part of the large-scale screening program and the vaccination program, depending on the evolution of the epidemic in Luxembourg. »

It appears that the authors of bill n°7768 consider that the Inspection General of Social Security (hereinafter: “IGSS”) assumes the function of responsible processing within the meaning of Article 4 point 7 of the GDPR4 with regard to data of a personal nature processed as part of the management of invitations related to the large-scale screening program and vaccination program.

The CNPD would like to point out that in order to be qualified as data controller, the IGSS should be able to decide on the means of the aforementioned treatments, i.e. to take the decision on the basis of which criteria which people will be invited to be

testing/vaccinating, without an exchange of the personal data of the
people who have received such an invitation with the Health Department should only have
venue. On the other hand, if the Directorate of Health decides on the basis of which criteria the
people will be invited to be tested/vaccinated and that the IGSS selects
only people meeting the said criteria and sends on behalf of the
Direction the corresponding invitations, the IGSS should rather be considered as
subcontractor of the Department of Health.5

2. With specific regard to the role of the IGSS, Article 10 paragraph (3bis)
new to the amended law of July 17, 2020 provides that “the General Inspectorate of
social security is the recipient of the processed data, which it pseudonymises for the
purposes set out in paragraph 6”, i.e. for the purposes of scientific research or
historical or statistical purposes. The commentary to the articles specifies that this
new paragraph 3bis “is inserted to transfer the data to the Inspection
general of social security so that it pseudonymizes them through its

4 Article 4 point 7 of the GDPR defines the controller as “the natural or legal person,
the public authority, service or other body which, alone or jointly with others, determines the purposes
and means of treatment; when the purposes and means of this processing are determined by the law of
the Union or the law of a Member State, the controller may be designated or the specific criteria
applicable to his appointment may be provided for by Union law or by the law of a Member State. »

5 Article 4 point 8 of the GDPR defines the processor as “the natural or legal person, the public authority,
the service or other body which processes personal data on behalf of the data controller
treatment. »

secure technical device and makes them available to public bodies for

research, in accordance with its legal missions. »

The National Commission wonders to what extent the IGSS, which should a priori

in this specific context be considered as a subcontractor of the Health Department,

would have permanent and continuous access to the information system of the said Department in order to

to regularly pseudonymise all the data contained therein? Where is it

that the IGSS would only receive on request, based on a specific search and

related search criteria, personal data contained in

the information system in order to pseudonymize them? In the latter case, it is

essential that technical and organizational measures be implemented

appropriate in accordance with Article 32 of the GDPR to secure data flows

communication between the Health Department and the IGSS.

It should also be noted that the CNPD has already repeatedly insisted on the need for a

legislative framework for the activity of trusted third parties which would make it possible to support

the development of innovative services in terms of pseudonymization and

of anonymization in Luxembourg.6

3. The CNPD can only approve for the purpose of enhancing the transparency of

processing carried out,7 the new point 2bis of paragraph 2 of article 10 of the law

amended on July 17, 2020 lists in detail the data processed by the IGSS with a view to

draw up the list of people to be invited as part of the screening program at

scale and the vaccination program.

However, in view of the principle of data minimization (Article 5 paragraph (1)

letter c) of the GDPR), she wonders whether the processing of data on the composition of the

household, as well as on the employer (in addition to data on the sector of activity

professional), is really necessary for the identification of the categories of

persons to be invited as part of said large-scale screening programs and

vaccination.

In general, the CNPD congratulates the authors of bill no. 7768 under examination for having

determined more precisely the purposes of the personal data collected

within the framework of the vaccination program concerning the vaccinator and the person to be

vaccinate, as well as the retention periods of said data, which have been adapted in

depending on the amount of data strictly necessary for the purposes envisaged and

the retention period of twenty years. The commentary of the articles gives in addition more

explanations in this regard by explaining for example that the “period of twenty years is justified

with regard to pharmacovigilance, the purpose for which the files of notified cases are

generally kept for a period of at least twenty years. The goal is to be able

go back to the file in order to establish the link between the side effects of a patient and the vaccine

administered. For example, the vaccination campaign deployed as part of the

H1N1 pandemic in 2009 demonstrated that pharmacovigilance records required

long retention of associated data. Thus, following the identification of narcolepsy

as a proven side effect of the H1N1 vaccine, those vaccinated may have

submit compensation claims for which it was necessary to associate a

patient / a vaccine / an effect in order to be able to establish the causal link. However, two vaccines had

administered, it was therefore necessary to be able to identify which was administered to which patient. »

6 See, for example, its additional opinion on bill no. 7061 amending certain provisions of the Code

of social security, deliberation n° 930/2017 of November 17, 2017.

7 See commentary on article 5 of bill no. 7768.

Furthermore, the CNPD notes with satisfaction that the authors of bill no. 7768 have taken into
takes into account the comment made in its opinion on draft law no. 7738 amending the law
of 17 July 2020 introducing a series of measures to combat the
Covid19 pandemic on the origin of the personal data of vaccinators and
persons vaccinated8 in the sense that paragraph 2 point 5 of article 10 of the amended law
of 17 July 2020 now provides that it is the vaccinators or the people placed
under their responsibility who immediately record the data referred to in point 3° a) and b) of the
paragraph in question concerning precisely the vaccinator and the person to be vaccinated.
Finally, as the information system set up by the Health Department contains
personal data concerning vaccinated persons, by deduction, a
file on non-vaccinated persons could be created. However, the CNPD understands that such
data processing, a potential source of discrimination and stigmatization, will not be
implemented, neither by the Department of Health nor by the IGSS.

Thus decided in Belvaux on February 16, 2021.

The National Data Protection Commission

Tine A. Larsen

President

Marc Lemmer

Commissioner Commissioner

Christopher Buschman

Thierry Lallemang

Commissioner

8 Deliberation no. 30/2020 of December 22, 2020.
