legal

relative to

Opinion of the National Commission for Data Protection relating to

Bill no. 7691 amending: 1° the Code of Procedure

criminal law, 2° of the New Code of Civil Procedure, 3° of the law of 7 July

1971 relating to repressive and administrative matters,

institution

of experts, sworn translators and interpreters and supplementing the

provisions

the swearing in of experts,

translators and interpreters, 4° of the amended law of 9 December 1976

relating to the organization of the notariat, 5° of the amended law of 20 April 1977

on games of chance and sports betting, 6° of the amended law of 7 March

1980 on judicial organization, 7° of the amended law of 7 November

1996 on the organization of the courts of the administrative order, 8° of

the law of December 30, 1981 on compensation in the event of detention

preventive ineffective, 9° of the amended law of 15 March 1983 on

arms and ammunition, 10° of the amended law of 2 March 1984 relating to

compensation for certain victims of bodily injury resulting

of an offense and the repression of fraudulent insolvency, 11° of

the amended law of 4 December 1990 on the organization of the service of

bailiffs, 12° of the law of 31 January 1998 approving

adoption services and definition of their obligations, 13°

of the law of 6 May 1999 relating to penal mediation and

modification of various provisions a) of the amended law of 7 March

1980 on judicial organization, b) of the social insurance code,

14° of the law of 12 November 2002 relating to the private activities of

guarding and surveillance, 15° of the amended law of 7 June 2012 on

the court officers

Deliberation n°3/AV3/2021 of 02/10/2021

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

Opinion of the National Commission for Data Protection

relating to bill n°7691.

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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 November 12, 2020, the Minister of Justice invited the

National Commission to rule on the bill amending: 1° the Code of

criminal procedure, 2° of the New Code of Civil Procedure, 3° of the law of July 7, 1971 on

in repressive and administrative matters, institution of experts, translators and interpreters

sworn in and supplementing the legal provisions relating to the swearing in of experts,

translators and interpreters, 4° of the amended law of 9 December 1976 relating to the organization of the

notariat, 5° of the amended law of 20 April 1977 on games of chance and sports betting, 6° of the

amended law of March 7, 1980 on judicial organization, 7° of the amended law of November 7, 1996

on the organization of the courts of the administrative order, 8° of the law of December 30, 1981

on compensation in the event of ineffective preventive detention, 9° of the amended law of March 15 1983 on arms and ammunition, 10° of the amended law of 2 March 1984 relating to compensation of certain victims of bodily injury resulting from an offense and the repression of fraudulent insolvency, 11° of the amended law of 4 December 1990 organizing the service of judicial officers, 12° of the law of 31 January 1998 on the approval of services of adoption and definition of the obligations incumbent on them, 13° of the law of 6 May 1999 relating to the criminal mediation and amending various provisions a) of the amended law of 7 March 1980 on judicial organization, b) of the social insurance code, 14° of the law of 12 November 2002 relating to private guarding and surveillance activities, 15° of the law of 7 June 2012 on legal attachés (hereinafter the "draft law").

According to the explanatory memorandum “[t]he bill aims to specify the various procedures of “good repute checks” currently provided for in several legal texts relating to the jurisdiction of the Minister of Justice. ". The “good repute check” turns out, for example, necessary in the context of the recruitment of judicial personnel or in the context of the issuance of an application for an authorization, permit or approval in the field of weapons.

In this context, the authors of the bill specify that "certain administrations and State services need to know information that is sometimes subject to secrecy of instruction or considered sensitive in view of the new rules relating to the processing data” and that “[to] this end, the Public Prosecutor must be able to receive requests administrations or services exercising a prerogative of public power in order to see themselves communicate information relating to criminal proceedings or the issuance of copies of pieces that come from it”.

As the authors of the bill point out, the “good repute check” aims to allow

the State administrations to examine "a request for the granting or refusal of a permission ". The latter when they investigate such requests “must be based on facts established to the requisite legal standard, and reports or minutes drawn up by officers judicial police", which "are a source recognized for this purpose by the case law administration”.

According to the explanatory memorandum, the bill specifies “the purposes of the processing carried out in the framework of the various background check procedures, by limiting the consultation to essential and necessary data and determining the retention period of the data consulted by the competent authorities”. The authors of the bill further indicate that the objective of the bill is “to allow any person concerned by the processing of data for integrity check purposes, to understand the different types of data consulted and for what types of purposes”.

Such background checks or “fitness checks” undeniably have implications for privacy and data protection, the Commission below will formulate its observations on the issues raised in this regard by the provisions of the bill under notice.

I.

Introduction

1. On the notion of good repute

In Luxembourg law, the notion of good repute is “polysemous and depends on the materials and of the purposes for which reference is made thereto”. It is not uncommon to find that the reference made to the notion of “good repute” is found in different formulations. In effect, certain national legal provisions refer to “requirements of good repute to be respected”, “guarantees of good repute to be respected” or even conditions or guarantees of “morality” to respect” 2. The authors of the bill also use, in the explanatory memorandum, sometimes the term “background check” sometimes that of “reputability check”3.

As noted by the Council of State, the concept of good repute “is essentially used to

determine the conditions of access to a profession, often in relation to notions such as

as "morality", "professional integrity", "good

reputation" and "activities

irreproachable”. In order to determine professional integrity, the laws in question aim, in addition to

criminal record, other criteria, often defined negatively, such as the absence of

the accumulation of significant debts with public creditors or the use within the framework of the

1 See additional opinion of the Council of State of December 19, 2020 relating to draft law No. 7425 on weapons and

ammunition, document

No. 7425/08, developments under "Amendment 14".

2 See explanatory memorandum to the bill, page 5.

3 These are the terms used by the authors of the bill in the explanatory memorandum, page 4.

request for authorization of falsified or misleading documents or declarations, the absence of

bankruptcy, lack of criminal conviction, etc. »4.

According to the explanatory memorandum to the bill, the lack of a common definition of the notion

of good repute is justified by the “diversity of matters which resort to such a procedure and

result in the great differences in the degrees of interference they operate”.

While it may be difficult to find a common definition given the diversity of subjects

and related background check or “fitness check” procedures,

the use of different terms implies that each concept has its own meaning.

If this were not the case, would it not be better to use the same terminology rather

than continuing to use, for example, the terms "morality", "professional integrity",

"good reputation" or "irreproachable activities"?

Although it is regrettable that the bill under opinion does not propose a common definition of
the notion of good repute or does not use the same terminology, it should be noted that this
however, ci oversees the investigations carried out in this regard.

2. On the legal framework established by the bill

The bill establishes a legal framework with respect to background or identity checks.
“good repute checks” to be carried out within the framework of the laws referred to in the text in
project.

The authors of the bill specify in the explanatory memorandum that such a legal framework has proved
necessary because "in many cases, the law fails to define precisely on which elements
carry out the background check or “good repute check” or what data is
taken into account in such a procedure. Indeed, the current texts do not allow
thus not allowing candidates or applicants to know exactly what data concerning them is
consulted by the competent authorities”.

It appears from the said draft law that the investigations carried out for the purpose of verifying the background
can be classified into three types according to their degree of intrusion, with regard to the verification of
criminal record according to approvals, permits, authorizations to be issued according to the project
of law or positions to be filled, as referred to in the bill.

4 See additional opinion of the Council of State of December 19, 2020 relating to draft law No. 7425 on weapons and
ammunition,
parliamentary document n°7425/08, developments under “Amendment 14”.

Indeed, the first type of procedures includes background checks that are based on
the communication of an extract from the criminal record (hereinafter the “procedures for checking
antecedents of type 1”)5.

The second type of procedures includes background checks that relate to the communication of an extract from the criminal record, on the facts relating to a criminal conviction for a felony or misdemeanor and for which rehabilitation has not already been achieved at the time of the introduction of the request, and on the facts likely to constitute a crime or misdemeanor having resulted in the establishment of a police report, if these facts are the subject of a prosecution criminal proceedings in progress, excluding facts that led to a decision of dismissal or classification without follow-up (hereinafter “type 2 background check procedures”)6.

The third type of procedure concerns background checks which relate to the communication of an extract from the criminal record, police reports and reports concerning the applicant for acts which have been the subject of a criminal conviction or incriminated as a crime or misdemeanor under the law, referred to in article 563, point 3° of the Criminal Code relating to the means of minor act and violence, referred to in article 1 of the amended law of 8 September 2003 on violence (hereafter “Type 3 background check procedures”)7.

It is to be regretted that these three procedures are not more standardized as regards the actors who carry out the administrative investigations and with regard to the methods of transmission of information from such surveys.

Indeed, it should be noted that either the Public Ministry itself conducts the investigations administrative8 or he communicates the information necessary for the administrative investigation, Minister of Justice9 or Minister of Finance 10. An identical diagram is therefore not reproduced for all procedures.

5 V. articles 1 relating to the draft law relating to article 8-1 of the Code of Criminal Procedure, article 2-3° of the draft law relating to article 1251-3 of the New Code of Civil Procedure and article 13 of the bill relating to article 2 of the law of 6 May 1999 relating to the penal mediation, article 3 of the draft law relating to article 1 of the amended law of 7 July 1971 on criminal matters and administrative, institution of experts, translators and sworn interpreters

6 See article 4 of the draft law relating to article 16 of the amended law of 9 December 1976 on the organization of the notarial

profession, article 5 of the

bill relating to article 11 paragraph (3) of the amended law of 20 April 1977 on games of chance and sports betting, article 6 of the draft law relating to articles 76 and 77 of the amended law of 7 March 1980 on the organization of the judiciary, article 7 of the draft law relating

in article 90 bis of the amended law of 7 November 1996 on the organization of administrative courts, article 11 of the draft of law relating to articles 2 and 3 of the amended law of 4 December 1990 on the organization of the service of judicial officers and article

15 of the bill relating to article 2 of the amended law of 7 June 2012 on legal attachés.

7 See article 5 of the bill relating to article 11 paragraph (2) of the amended law of 20 April 1977 on games of chance and betting

athletes, article 9 of the bill relating to article 16 of the amended law of 15 March 1983 on arms and ammunition, article 12 of the bill

of law relating to article 3 of the law of January 31, 1988 on the approval of adoption services and definition of their obligations incumbent and article 14 of the draft law relating to article 8bis of the law of 12 November 2002 relating to the private activities of

guarding and monitoring.

8 See articles 4, 6, 7, 11, 12 and 15 of the bill

9 See articles 5, 9 and 14 of the bill

10 See article 5 of the bill

In addition, it should be noted that when the Public Prosecutor conducts administrative investigations,

the latter renders an opinion at the end of these, the elements of the content of which are not detailed by

the draft text. When the Minister of Justice or the Minister of Finance orders the

administrative inquiries they are forwarded by the Public Prosecutor the information

covered by the bill. The CNPD will come back to this below in point VI. of this notice.

Thus, notwithstanding the diversity of subjects, it is to be regretted that a common structure has not could be identified by the authors of the bill, with regard to the entities that carry out the administrative inquiries and the procedures for transmitting data from such enquiries.

3. On the legal framework in France

By way of comparison with the system proposed by the text under opinion, it is interesting to note that there is a common legal framework, in French law, with regard to investigations administrative whose purpose is to check the background of a person wishing to access certain professions or seeking certain authorizations or approvals. The system French is based on Articles L.114-1 and L.234-1 of the French Internal Security Code (here after the “CSI”) which set the general framework for administrative investigations and then the procedures for these surveys are supplemented by decrees.

Article L.114-1 of the CSI provides that “[a] administrative decisions on recruitment, of assignment, tenure, authorization, approval or authorization, provided for by legislative or regulatory provisions, concerning either public employment participating in the exercise of State sovereignty missions, either public or private jobs falling within the field of security or defence, i.e. private jobs or regulated private activities in the areas of gaming, betting and racing, or access to protected areas due to of the activity carried out there, i.e. the use of materials or products of a dangerous, may be preceded by administrative inquiries intended to verify that the behavior of the natural or legal persons concerned is not incompatible with the exercise of the functions or missions envisaged”. Articles R.114-2 to R.114-5 of the CSI list the professions or certifications that may give rise to the surveys mentioned in article L.114-1 of the CSI.

By way of example, it should be noted that such investigations may give rise to "persons used to participate in a private surveillance and guarding activity”11,

the “[r]ecruitment of members of administrative courts, law enforcement officials

judiciary and local judges”12 as well as the decisions relating to the authorization of

“to practice gambling in authorized casinos”13, decisions relating to

the approval of “directors and members of the management committees of authorized casinos

11 Article R.114-2, 1°, c) of the CSI

12 Article R.114-2, 2° of the CSI

13 R.114-3, 1°, a) of the CSI

as well as people employed in casino gaming rooms”14 or even the

authorizations or approvals relating to the “[a]quisition, possession, manufacture, trade,

intermediation, import, export, transfer and transit of war materials, arms,

ammunition and their parts of any category; use, exploitation, export and transit

war materials and similar materials (…)”15.

Articles L.234-1, R.234-1 of the CSI specify the files that will be consulted during a

administrative inquiry referred to in article L.114-1 of the CSI, as well as the terms of access to

such files.

It is also interesting to note that these administrative inquiries are carried out by the service

administrative security investigation16 (hereinafter the “SNEAS”) and that processing

automated processing of personal data referred to as "Automation of the consultation

central information and data center” (ACCReD) allows SNEAS to carry out the

automatic and, where appropriate, simultaneous consultation of personal data processing

staff to check whether the data subject is registered there17.

If the authors of the bill have chosen not to draw inspiration from the French approach, it is

that is to say, provide for a common legal framework, the National Commission wonders if it would not be

however, it is irrelevant that the administrative inquiries be carried out by one and the same

authority like the French SNEAS and that only opinions reporting on the results of

the investigation are communicated to the authorities concerned.

Moreover, it is recommended that the authors of the bill draw inspiration from certain provisions

French in particular in that they list the files that can be consulted during

administrative inquiries, as well as the categories of personal data that would be

collected during such surveys in the event that the data from such surveys is

preserved18.

II.

On the principle of the lawfulness of the processing carried out within the framework of the procedures

background checks or “good repute checks”

As a preliminary remark, it should be noted that the data collected, within the framework of the

administrative investigations, are initially collected and processed by the Grand Ducal Police19, by

14 Article R.114-3, 2°, a) of the CSI

15 Article R.114-5, 1° of the CSI

16 See decree no. 2017-668 of 27 April 2017 creating a service with national competence called the "national service for

administrative security investigations »

17 V. Decree No. 2017-1224 of August 3, 2017 creating an automated processing of personal data called

“Automation of centralized consultation of information and data” (ACCReD)

18 See articles R.236-1 et seq. and decree no. 2017-1224 of August 3, 2017 creating automated data processing at

personal character called “Automation of centralized consultation of information and data” (ACCReD)

19 See articles 9 and 14 of the bill.

the Public Prosecutor’s Office20 or by the State Intelligence Service (hereinafter the “SRE”)21 to

purposes of prevention, detection, investigation and prosecution of criminal offences.

matter or execution of criminal sanctions. These initial processing operations are subject to the law of the 1st August 2018 on the protection of natural persons with regard to the processing of data of a personal nature in criminal matters as well as in matters of national security.

However, it should be noted that the processing of personal data implemented operates under the background check or “screening” procedures.

of good repute” will be subject to the GDPR while the purpose pursued is the recruitment of a candidate for one of the positions covered by the text under notice, or the issuance of an authorization, a license or approval, as referred to in the bill.

Thus, although the purposes of the processing envisaged within the framework of the draft law, are administrative purposes, the very nature of the data transmitted and then used for to initiate the administrative inquiry remains identical to the nature of the data processed for the purposes of prevention, detection, investigation and prosecution of criminal offenses or execution of criminal penalties. In such a context, it is necessary to question the articulation the provisions of the GDPR with those of the law of 1 August 2018 on the protection of natural persons with regard to the processing of personal data with regard to criminal law and national security.

This issue is also illustrated in Article 11, paragraph (6), of the amended law of 20 April 1977 on games of chance and sports betting, as amended by Article 5 of the draft law. These provisions expressly refer to the law of 1 August 2018 relating to the protection of natural persons with regard to the processing of personal data in criminal matters and in matters of national security.

1. On Article 6 paragraph (3) of the GDPR

The authors of the bill are to be congratulated on the fact that, from a security point of view legal, the draft law establishes a legal basis for the investigations carried out within the framework of background checks or “fitness checks”, in accordance with Article 6,

paragraph (3), GDPR.

Indeed, the processing of personal data collected and processed in the context of

the performance of a task in the public interest or in the exercise of official authority

invested the controller must have a legal basis in accordance with Article 6,

20 See articles 4, 6, 7, 11, 12 and 15 of the bill.

21 See articles 9 and 14 of the bill.

paragraph (3), of the GDPR, read together with its paragraph (1), letters c) and e)22, which provides

that "[t]he basis of the processing referred to in paragraph 1, points c) and e), is defined by:

has. Union law; Where

b. the law of the Member State to which the controller is subject.

The purposes of the processing are defined in this legal basis or, insofar as

relates to the processing referred to in point (e) of paragraph 1, are necessary for the performance

of a mission of public interest or relating to the exercise of the official authority of which

invested the controller. This legal basis may 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; them

persons concerned; the entities to which the personal data

may be disclosed and the purposes for which they may be disclosed; the

purpose limitation; retention periods; and the operations and procedures of

processing, including measures to ensure lawful and fair processing, such as

than those provided for in other specific processing situations such as

provides for Chapter IX. »

This article provides for a specific constraint related to the lawfulness of data processing

necessary for compliance with a legal obligation or for the performance of a task in the public interest or

relating to the exercise of official authority vested in the controller. In

these two scenarios, the basis and purposes of the data processing must

specifically be defined either by the law of the European Union or by the law of the State

member to which the controller is subject.

In addition, recital (45) of the GDPR specifies that it should "(...) belong to Union law or

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 states that "[w]here this Regulation refers

to a legal basis or legislative measure, this does not necessarily mean that

the adoption of a legislative act by a parliament is required, without prejudice to the obligations laid down

the entities to which

22 Article 6, paragraph (1), letters c) and e) provides that: "Processing is only lawful if and insofar as at least one of the

following conditions is met: (…) c) the processing is necessary for compliance with a legal obligation to which the data

controller

treatment is submitted; (…) e) the processing is necessary for the performance of a task carried out in the public interest or

relating to the exercise of

the official authority vested in the controller; (…)".

under the constitutional order of the Member State concerned. However, this legal basis or 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 of the European Court of Human Rights. ".

Pursuant to the above provisions, these legal bases should establish provisions aimed at determining, among other things, the types of data processed, the persons concerned, the entities to which the data may be communicated and for which purposes, the data retention periods or the operations and procedures of treatment.

Although the legal basis, establishing the various procedures for background checks or of “good repute check”, specifies the types of data processed, the persons concerned as well as the entities to which the data may be communicated and for what purposes, the National Commission notes that certain elements relating to the processing of data are not not sufficiently specified or not specified at all (for example the retention period data) in the bill.

In addition, the entities that conduct the investigations, as provided for by the bill, will be- they are required to keep a register that will bring together all the data from such surveys? Will the Minister of Justice or the Minister of Finance keep a record in which would the data from the administrative surveys appear? What about the Ministry public, will he also keep a specific “administrative inquiries” register or will the related data processing will, if necessary, be part of the "JU-CHA" database?

If this were to be the case, the National Commission considers it essential that the creation of such registers be provided for in this bill. The legal provisions establishing the said registers must contain the elements mentioned above. On this point, reference is also made to the

French legal provisions governing the registers of data resulting from surveys

administrative23. If such files should exist, it is recommended that the authors of the project

law to draw inspiration from the French system.

2. On the principles established by the case law of the European Court of Rights

Rights and the Court of Justice of the European Union

The National Commission must emphasize the fundamental importance of the principle of legality

processing of personal data which must be read in the light of Article 8

paragraph (2) of the European Convention on Human Rights concerning the right to

privacy, as well as article 52 paragraphs (1) and (2) of the Charter of Rights

fundamentals of the European Union. In essence, these two articles, together with the

consistent case law of the European Court of Human Rights, hold that a

23 See articles R.236-1 to R.236-10 of the CSI relating to the processing of personal data called “Administrative investigations

related to public safety”

data processing carried out by a public authority may constitute interference with the

right to respect for private life or limit the exercise of the right to data protection. This

interference or limitation may be justified provided that it:

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is provided for by a law accessible to the persons concerned and foreseeable as to its

repercussions, i.e. formulated with sufficient precision (A);

is necessary in a democratic society, subject to the principle of

proportionality (B);

respects the essential content of the right to data protection;

effectively meets objectives of general interest or the need to protect

rights and freedoms of others.

More specifically, it is necessary to examine whether the first two conditions are met in the present case.

A. On the first condition

According to the case law of the European Court of Human Rights, an interference with the right to

privacy is “prescribed by law”, within the meaning of Article 8 paragraph (2) of the

European Convention on Human Rights24, if it is based on an article of national law

which has certain characteristics. The expression “prescribed by law” therefore implies, according to the

case law of the European Court of Human Rights that domestic legislation must use

terms that are clear enough to indicate to everyone sufficiently in what circumstances and

under what conditions it empowers the public authorities to resort to measures affecting the

rights protected by the Convention25. Domestic legislation must be "accessible to persons

concerned and foreseeable as to its repercussions”26. A rule is predictable "if it is

formulated with sufficient precision to allow any person – benefiting

possibly with appropriate assistance – to adapt their behaviour”27 as well as “[t]he

The degree of precision required of the “law” in this respect will depend on the subject in question. »28.

In order to fulfill these criteria of accessibility and predictability of the “law”, on the one hand, and thus limit

possible arbitrary and abusive behavior on the part of public authorities, on the other hand,

national law can therefore provide for and regulate more specifically the processing of data

24 Article 8 paragraph (2) of the European Convention on Human Rights provides that: “There can be no V. interference from

a

public authority in the exercise of this right only insofar as this interference is prescribed by law and constitutes a measure

which, in a democratic society, is necessary for national security, public safety, the economic well-being of the country,

the defense of order and the prevention of criminal offences, the protection of health or morals, or the protection of

rights and freedoms of others".

25 CouEDH, Fernández Martínezc. Spain [GC], n°56030/07, para. 117.

26 CoEDH, Amann c. Switzerland [GC], no. 27798/95, 16 February 2000, para. 50; V. also CouEDH, Kopp c. Switzerland, no. 23224/94, 25

March 1998, para. 55 and CouEDH, Iordachi and others v. Moldova, n° 25198/02, February 10, 2009, para. 50.

27 CoEDH, Amann c. Switzerland [GC], no. 27798/95, 16 February 2000, para. 56; V. also CouEDH, Malone c. UK No. 8691/79, April 26, 1985, para. 66; CouEDH, Silver and others v. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, March 25, 1983, para. 88.

28 ECtHR, The Sunday Times v. 6538/74, 26 April 1979, para. 49; V. also CouEHD, Silver and others c. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 25 March 1983, para. 88.

the European Union, requiring in particular that a

personal character made by such authorities. This legal framework would also be a

guarantor of the principle of legal certainty for the benefit of the persons concerned, the candidates for

positions covered by the draft text, or applicants for authorisation, permit or approval

provided for by the bill under notice. Legal certainty is a general principle of law

of

regulations leading to

adverse consequences for individuals is clear and precise and its application

foreseeable for litigants. The regulations must enable interested parties to find out with

accuracy of the extent of the obligations it imposes on them, must allow them to know without

ambiguity of their rights and obligations as well as enabling them to make arrangements

accordingly29.

This is why the European Court of Human Rights within its

jurisprudence affirms that "domestic law must offer some protection against attacks

arbitrary actions by the public authorities to the rights guaranteed by Article 8 paragraph 1”30. By

Consequently, the internal legislation “must define the extent and the methods of exercise of the power

with sufficient clarity – taking into account the legitimate aim pursued – to provide the individual with a

adequate protection against arbitrariness”. The Court of Justice of the European Union considers that

case of limitation of the protection of personal data or the right to respect for the

privacy, a legal text “must provide clear and precise rules governing the scope and

application of the measure in question and imposing a minimum of requirements so that the

persons whose data have been retained have sufficient guarantees allowing

to effectively protect their personal data against the risk of misuse as well as

against any unlawful access and use of such data.

Therefore, insofar as the data processing implemented in the context of surveys

administrative, covered by the bill under opinion, constitute an interference in the right to

respect for the privacy of candidates or applicants for an authorization, permit or

approval, as targeted by the bill under opinion, this should regulate more

specifically such processing in accordance with the case law of the European Court of

human rights. However, it is clear that the bill under opinion, as amended, is not,

in places, not written with sufficient precision33. The CNPD will return

particularly on this point in its developments under points IV. and V. below.

29 See e.g. Court of Human Rights, Aurubis Balgaria of 31 March 2011, C-546/09, points 42-43; Judgment, Alfamicro v.

Commission of November 14

2017, T-831/14, paragraphs 155-157.

30 ECtHR, Amann c. Switzerland [GC], n°27798/95 para 56.

31 Ibid. See also EDH Court, Malone c. United Kingdom, series A n°82, of August 2, 1984, pp. 31-32, para.66; Court EDH,

Fernández

Martinez c. Spain CE:ECHR:2014:0612JUD005603007, 12 June 2014 para.117; Court EDH, Liberty and others v. UK,

no. 58243/00, of July 1, 2008, para. 62 and 63; EDH Court, Rotaru c. Romania, App. No. 28341/95, May 4, 2000, para. 57 to 59 and Court

EDH, S and Marper v. United Kingdom, Applications Nos. 30562/04 and 30566/04, of 4 December 2008 para. 99.; Dimitrov-Kazakov v. Bulgaria

n°11379/03, of February 10, 2011.

32 Judgment of 8 April 2014, Digital Rights Ireland and others C-293/12 and C-594/12, EU:C:2014:238, paragraph 54.

33 In this sense, see M. Besch, “Personal data processing in the public sector”, Norms and legislation in law Luxembourg public, Luxembourg, Promoculture Larcier, 2019, p.469, n°619

B. On the second condition

It is apparent from the case law of the Court of Justice of the European Union and of the Court European Court of Human Rights that the grounds invoked by the public authorities for justify a limitation on the exercise of the right to the protection of personal data or interference with the right to respect for private life must be relevant and sufficient 34 and that it must be demonstrated that there are no other less intrusive methods35. The notion of necessity, as interpreted by the Court of Justice of the European Union, implies that the measures adopted are less intrusive than other options to achieve the same goal. Of more, according to the case law of the European Court of Human Rights, to respond to the necessity test, the interference must also be proportionate. In his "Manual of Law European Data Protection Agency”, the European Union Agency for Fundamental Rights European Union specifies that “[p]orportionality requires that a measure of interference in the exercise of the rights protected by the European Court of Human Rights does not go beyond what is necessary to achieve the legitimate aim pursued. Important factors to consider taken into account when assessing the proportionality test are the scope of the interference,

in particular the number of people concerned, and the guarantees or warnings put in place

place to limit its scope or its negative effects on the rights of individuals.

The European Data Protection Supervisor further indicates that “[a] review of the

Proportionality generally involves determining which “safeguards” should be

accompany a measure (which would relate for example to surveillance) in order to reduce to a

“acceptable”/proportionate level the risks posed by the planned measure with regard to the

fundamental rights and freedoms of the individuals concerned. »37.

In this case, in the absence of such details in the bill, what would be the guarantees

envisaged by the authors of the bill under opinion? Wouldn't there be methods less

intrusive than the system provided for by the draft text?

With regard more particularly to administrative inquiries which would not bear

only on the communication of an extract from the criminal record, there is reason to wonder about the

consequences that such a mechanism is likely to have for the persons concerned.

The duplication of information concerning the criminal record of a person concerned

in the hands of different authorities could be one of them. Indeed, the CNPD

asks whether, following the administrative inquiries carried out by the Minister of Justice or the

Minister of Finance, of the data contained in the files kept by the Grand Ducal Police,

by the Public Ministry or the SRE would be included again in a file

34 See the judgment of the European Court of Human Rights of 4 December 2008, S. and Marper c. UK.

35 See the judgments of the Court of Justice of 9 November 2010, C-92/09, Volker und Markus Schecke GbR/Land Hessen,

and C-

93/09, Eifert/Land Hessen and Bundesansalt für Landwirtschaft und Ernährung.

36 See page 45 of the “Handbook on European data protection law” of the Union Agency for Fundamental Rights

European.

37 See page 11 of the “EDPS Guidelines on the assessment of the proportionality of measures limiting the rights

fundamental to privacy and the protection of personal data”.

held by the Minister of Justice or the Minister of Finance. In order to avoid duplication of such data and the keeping of a kind of new “double register” by the Minister of Justice or Minister of Finance, a less intrusive method of achieving the same goal should be preferred to the system currently provided for in the bill.

Thus, the attention of the authors of the bill should be drawn to the proposal made by the Conseil of State, in its additional opinion of December 19, 2020 relating to draft law No. 7425 on weapons and ammunition38, concerning the verification of good repute referred to in article 14 of the bill aforementioned.

Instead of the integrity verification procedure introduced by the said bill, the Conseil of State proposes the mechanism of a “detailed opinion of the State prosecutor referring both to the criminal record than to all the relevant minutes and reports to which the State prosecutor can have access, and even to information transmitted to him by the Grand Ducal Police”.

This system would avoid duplication of data concerning the background legal proceedings of the person concerned while allowing the Minister of Justice or the Minister of Finance to obtain the necessary and relevant information, in the form of an opinion from the Public Prosecutor, in order to enable him to assess their “honourability”. Such a mechanism would still have the advantage that the administrative inquiry would be entrusted to an authority law enforcement, the Public Ministry, and not to one or more administrations. Indeed, such an authority would be more appropriate to carry out such an investigation given the nature of the data processed.

Furthermore, it should be noted that this opinion mechanism of the Public Prosecutor's Office is already provided for some of the background check procedures referred to in the text in project39. The National Commission considers that it would be preferable to transpose this system to

all of the background check procedures provided for in the bill.

III.

On the origin of the data

1. Article 8, 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

The National Commission understands that the data collected and processed by the Minister of

Justice, the Minister of Finance or even the Attorney General within the framework of

background check or “fitness check” procedures, come from

files held by the Grand-Ducal Police40, the Public Prosecutor's Office41 and the SRE42.

38 See additional opinion of the Council of State of December 19, 2020, parliamentary document no. 7425/08, developments

under

“Amendment 14”.

39 See articles 4, 6, 7, 11, 12 and 15 of the bill

40 Articles 9 and 14 of the bill

41 Articles 1, 2-3°, 3, 4, 5, 6, 7, 11, 13 and 15

42 Articles 9 and 14 of the bill

It should be noted that these data were initially collected by the aforementioned authorities

for the purposes of prevention and detection of criminal offences, investigation and prosecution of

the matter or execution of criminal sanctions and will be dealt with within the framework of the bill

for different subsequent purposes.

The CNPD is pleased that such a legal basis is provided for by the mechanism under opinion in accordance with

the provisions of Article 8, 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 law and national security.

This article provides that "[p]ersonal data collected by the authorities

competent for the purposes set out in Article 1 may not be processed for purposes other than

than those set out therein, unless such processing is authorized by Union law.

European Union or by a provision of Luxembourg law. ".

Nevertheless, it should be noted that the legal basis, under opinion, seems to establish a special regime

in relation to the provisions of Chapter 2, section 2, of the law of February 22, 2018 relating to

the exchange of personal data and information in police matters, and to those

provided for by article 9 paragraph (2) of the amended law of July 5, 2016 reorganizing the

ERS.

Indeed, these provisions are respectively intended to regulate the transmission of such

given by the Grand Ducal Police to other administrations as part of the verification of

good repute43, and the communication by the SRE of “[d]information collected within the framework

of its missions (…) to the administrations insofar as this information seems useful

to the accomplishment of their respective missions. »44.

It is to be welcomed that the bill expressly provides:

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the communication of data by the Public Ministry to the Minister of Justice or to the

Minister of Finance as part of background check procedures or

of "good repute control" whereas to date no legal provision provided for a

such communication; and

the processing of such data by the public prosecutor for investigation purposes

administrative, as provided for by the device under opinion.

Finally, and in order to enable data subjects to understand the extent and scope of

the administrative investigation, would it not be better to indicate in the bill that the

43 See parliamentary document no. 6975 on the bill relating to the exchange of personal data and information in police matters, comments of the authors of the bill concerning sections 26 and following of the bill.

44 V. Article 9 paragraph (2) of the amended law of 5 July 2016 reorganizing the SRE.

data collected during administrative investigations come from files kept by the police Grand Ducal, the Public Ministry or the SRE? On this point, the authors of the bill could be inspired by French legislation.

As for the files kept by the Grand-Ducal Police, it should be noted that the bill No. 7741 amending 1° the amended law of 18 July 2018 on the Grand Ducal Police, 2° of the amended law of 5 July 2016 reorganizing the SRE and 3° of the Penal Code, was tabled on December 30, 2020. The purpose of the said bill is to regulate the processing of personal data carried out in the files of the Grand-Police ducale, and more precisely in the central file.

Particular attention should be paid to access to the passive part of the central file. His access is, in fact, strictly limited to the purposes listed in paragraph (19) of Article 43-2 of bill no. 7741 (administrative inquiries are not covered therein) and is subject to the consent of the State Attorney General. Therefore, the authors of the bill should ensure that the good coherence and articulation between the two draft texts.

2. The so-called “JU-CHA” database

It should be noted that the so-called "JU-CHA" database is currently supervised by the only law of 1 August 2018 relating to the protection of natural persons with regard to the processing personal data in criminal matters as well as in matters of national security.

In its opinion of July 31, 2020 on the “JU-CHA” application, the judicial control authority

specifies that “[t]here is no doubt that the data processing carried out by the authorities competent in criminal matters as well as in matters of national security constitute a interference with the right to respect for private life and the right to data protection and that the penal provisions, in particular the Criminal Code and the Code of Criminal Procedure, constitute a sufficient legal basis for the collection of personal data in the execution of the essential missions of the public prosecutor's office and the judicial courts".

According to the judicial control authority, the "JU-CHA" application would constitute a processing of separate data by "going beyond data processing based on the procedures criminal” because it would facilitate “the exploitation and linking of information on the basis of separate legal proceedings" and would allow "reconciliations between these different processing of data for related purposes”. The terms and conditions of this processing of data is not provided for by law.

In accordance with the developments under point II. of this notice, such details should be provided for by law in order to provide greater legal certainty to

45 V. our developments under point I.3 of this opinion

litigants. The Council of State has moreover rightly noted, in its aforementioned additional opinion relating to bill no. that of the legal basis of the so-called “Jucha” databases. If the maintenance of these files were to receive a legal basis, one could envisage a system in which the State prosecutor is invited to issue an opinion on the dangerousness of the applicant, including with regard to information taken from the minutes and reports before it”46.

Thus, in the event that the Minister of Justice intends to legislate on this point, and intends given the interaction between the "JU-CHA" application and the provisions under notice, the authors of the

bill will have to ensure that the text articulates with the bill under opinion.

IV.

On the processing of personal data relating to convictions

criminal offenses and related offenses or security measures

For the purposes of verifying good repute, the draft law provides that the processing carried out will bear

on personal data relating to criminal convictions and offenses and

more specifically on the data relating to the criminal record (2) and on the facts likely to

constitute a crime or misdemeanor or relating to a criminal conviction for a crime or misdemeanor (3). Gold,

it should be remembered that these data can only be processed in compliance with the

conditions referred to in Article 10 of the GDPR (1).

1. On compliance with the provisions of Article 10 of the GDPR

Article 10 of the GDPR provides that “[t]he processing of personal data relating to

criminal convictions and related offenses or security measures based on

article 6, paragraph 1, can only be carried out under the control of the public authority, or if the

processing is authorized by Union law or by the law of a Member State which provides for

appropriate safeguards for the rights and freedoms of data subjects. ". The said item

further specifies that “[a]ny complete register of criminal convictions can only be kept

under the control of public authority.

In the absence of precision in the text under opinion or by the authors of the bill in the

commentary on the articles, the National Commission wonders what would be the guarantees that

would be planned?

Given the nature of the data that would be collected as well as the level of risk associated with the

loss of confidentiality of such data and its potential impact on individuals

concerned, it is essential that such safeguards be included in the bill.

46 See additional opinion of the Council of State of December 19, 2020, parliamentary document no. 7425/08, developments

under

Such safeguards should be more particularly provided for the procedures of

type 2 and 3 background checks while these are not based solely on

extract from the criminal record and are the most intrusive from the point of view of the privacy of

persons concerned. Indeed, they will see their data, relating to convictions

criminal offenses or to facts likely to constitute criminal offences, to be consulted or

communicated to the Minister of Justice, or to the Minister of Finance for purposes

foreign to those for which these data were initially collected47.

However, it would be advisable to avoid a duplication of such data in the hands of several

authorities48, or to avoid a multiplicity of access to such data, while this creates a

increased risk of illegitimate access to such data.

Therefore, as indicated above, it would be preferable to implement a system of

background check or “good repute check” based on a detailed opinion

of the State prosecutor, as reflected in articles 4, 7, 11, 12 and 15 of the bill.

The CNPD therefore considers it essential that guarantees be provided by the authors of the draft

law. The transmission of a detailed opinion of the Public Prosecutor's Office instead of transmissions

currently provided for by the bill, as suggested by the Council of State in its opinion

supplement of December 19, 2020 relating to draft law No. 7425 on weapons and ammunition 49,

could be one of them.

2. On the processing of data relating to criminal records

In the Luxembourg legal order, the communication of information relating to

court decisions are made by issuing extracts from the criminal record in accordance with the law

of March 29, 2013 relating to the organization of the criminal record. This law creates

several ballots with a breakdown of the entries on the respective ballots.

If it appears that the processing of an extract from a national or foreign criminal record is a

common denominator to all the background check procedures provided for by

the bill, nuances are, however, to be distinguished between the verification procedures

a history of type 1 (A), type 2 (B) and type 3 (C).

47 Reference is made to our observations set out in point II. and III. of this notice.

48 The latter would have, if necessary, at the end of the background check procedures, copies of the reports of police, extracts from minutes, judgments, extracts from criminal records, or even, in certain cases, “information required” provided by the SRE.

49 See parliamentary document no. 7425/08, developments under “Amendment 14”

A. Type 1 background check procedures

has. On the communication of the bulletin N ° 2 of the criminal record

For the purposes of appointing a sworn expert, translator and interpreter in law enforcement matters and administrative50, or the issuance of a mediator’s license51, or a facilitator’s license for restorative justice52, the Minister of Justice will request, for each of these procedures, that the applicant provides a bulletin N°2 of his criminal record.

Indeed, the bill specifies that the Minister of Justice “in accordance with article 8

paragraph 1 of the amended law of 29 March 2013 on the organization of criminal records

can take note of the entries in bulletin number 2 of the applicant's criminal record

to verify that the criminal record of the latter is not incompatible with

exercise of the functions” of experts, translators, interpreters, mediator or facilitator of justice restorative.

However, there is reason to question the relevance of the reference to Article 8 paragraph (1) of the

amended law of 29 March 2013 on the organization of criminal records53. This article refers
also to the Grand-Ducal regulation of 23 July 2016 setting the list of administrations and
legal persons governed by public law who may request a bulletin N°2 or N°3 of the criminal record
with the written or electronic consent of the person concerned (hereinafter the “Grand-Ducal Regulation
of July 23, 2016”).
Indeed, if the will of the authors of the bill is to allow the Minister of Justice
to obtain the communication of bulletin N°2 by the Public Ministry then this should be reflected
clearly in the bill. Furthermore, such details would constitute a legal basis
sufficient to enable the Minister of Justice to obtain bulletin No. 2 from the applicant. In
In such a case, the applicant's agreement would appear superfluous, whereas the communication of such
newsletter would then have a legal basis.
50 See article 3 of the draft law relating to article 1 of the amended law of 7 July 1971 on repressive and administrative
matters,
institution of sworn experts, translators and interpreters.
51 See article 2-3° of the draft law relating to article 1251-3 of the New Code of Civil Procedure and article 13 of the draft law
relating to
article 2 of the law of 6 May 1999 on penal mediation
52 See article 1 of the bill relating to article 8-1 of the Code of Criminal Procedure
53 Article 8, paragraph (1) of the amended law of 29 March 2013 on the organization of criminal records provides that “[t]he
bulletin
No. 2 of a natural or legal person is issued on request: 1) to State administrations, municipal administrations and
legal persons governed by public law seized, within the framework of their legal missions, of a request presented by the person
natural or legal entity concerned, which has given its consent in writing or electronically so that bulletin No. 2 is issued
directly to the administration or to the legal entity under public law. The list of administrations and legal entities
public and the grounds for an application for issuance are set by Grand-Ducal regulation”.
Opinion of the National Commission for Data Protection

relating to bill n°7691.

In any case, if the authors of the bill were to maintain such provisions,

these would prove to be superfluous with regard to article 1 of the bill in the light of the

provisions of the Grand-Ducal regulation of 23 July 201654.

b. On the communication of an extract from a foreign criminal record

The draft law provides that “if the applicant is a national of another Member State of the Union

European Union or a third State, the Minister of Justice may ask him to submit an extract

the criminal record or a similar document issued by the competent public authority of the

of the countries of which he is a national.

It is further specified that subject to the agreement of the applicant, the "Minister may also

send a reasoned request to the State Attorney General to obtain an extract from the

criminal record from the competent authority of the Member State of which the applicant is a national”.

The National Commission welcomes the fact that such provisions are in place and understands that

European legal55 or

these would apply in accordance with the provisions

international standards in force.

Reference is made to the comments made in point a., above, with regard to the

issue of a dual legal basis for the communication of an extract from the criminal record.

B. On type 2 background check procedures

It should be noted that the Attorney General may take cognizance56 of or communicate

the “criminal record” to the Minister of Justice57 in the context of procedures for the purposes of

recruitment covered by:

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article 16 of the amended law of 9 December 1976 relating to the organization of the notariat 58;

Article 11 paragraph (3) of the amended law of 20 April 1977 on games of chance and

sports betting59:

articles 76 and 77 of the amended law of 7 March 1980 on the organization of the judiciary 60;

Article 90 bis of the amended law of 7 November 1996 on the organization of

administrative courts61;

54 Article 1 point 7) of the Grand-Ducal regulation of 23 July 2016 provides that: “[t]he bulletin No. 2 may be issued on request

and

with the express agreement in writing or electronically of the person concerned: (…) to the Minister having Justice in his

attributions

for the instruction of: requests relating to experts, translators and sworn interpreters (…)”

55 V. the computerized system for the exchange of information on criminal records (the "ECRIS system")

56 V. articles 4, 6, 7, 11 and 15 of the bill

57 See article 5 of the bill

58 Section 4 of the bill

59 Article 5 of the bill (regarding authorization to exercise employment in connection with games of chance)

60 Article 6 of the bill

61 Article 7 of the bill

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Articles 2 and 3 of the amended law of 4 December 1990 organizing the service

bailiffs62; and

Article 2 of the amended law of 7 June 2012 on legal attachés 63.

These articles provide that the Attorney General of State may take cognizance of the "record judicial" or that the Minister of Justice may ask the Public Prosecutor to communicate of the "criminal record" and if "the applicant is a national of a Member State of the Union European Union or a third State, the Public Prosecutor may ask him to provide an extract from criminal record or a similar document issued by the competent public authority of the country of which he is a national.

The National Commission welcomes the fact that such details have been provided by the authors of the law Project.

However, as regards the issuance of an extract from the Luxembourg criminal record, it is necessary to regret that the criminal record bulletin number is not specified by the draft text.

In order to comply with the principle of foreseeability and precision to which any legal text must comply or regulatory64, it is essential that the authors of the bill specify the bulletin number of the criminal record which would be covered by the aforementioned provisions.

With regard to Article 11, paragraph (3), of the amended law of 20 April 1977 on games of chance and sports betting, as amended by the bill, the National Commission infers of the provisions of Article 1 point 7) of the Grand-Ducal Regulation of 23 July 201665 that it would be of newsletter No. 2. If this were to be the case, then this should be expressly stated in the device under notice.

As regards the issuing of a criminal record certificate for nationals of another Member State from the European Union or a third country, the CNPD understands that it is the applicant who will provide said document directly.

Unlike the Type 1 background check procedure, the provisions relating to the type 2 background check procedure do not specify that, if applicable, the Minister of Justice may "send a reasoned request to the Attorney General of State with a view to

62 Article 11 of the bill

63 Article 15 of the bill

64 In this sense, V. M. Besch, “Personal data processing in the public sector”, Norms and legislation in legal

Luxembourg public, Luxembourg, Promoculture Larcier, 2019, p.469, n°619; V. among others CourEDH, Zakharov e. Russia

[GCL

n"47413/06], § 228-229, December 4, 2015

65 Article 1 point 7) of the Grand-Ducal regulation of 23 July 2016 provides that “bulletin N°2 can be issued on request and

with

the express agreement in writing or electronically of the person concerned to the Minister having Justice in his attributions for

processing requests relating to games of chance”

obtaining an extract from the criminal record from the competent authority of the Member State whose

applicant for nationality”.

There is therefore reason to wonder about the reasons for such differences and whether a standardization of

all three procedures on this point would not be appropriate.

C. On type 3 background check procedures

These procedures refer to background check or “checking” procedures.

of good repute” relating to approvals for adoption services66, authorizations to operate

games of chance67, authorizations relating to private security and

supervision68, and to the authorisations, permits or approvals provided for by the amended law of 15 March

1983 on arms and ammunition69.

has. On the communication of bulletin N°1 of the criminal record

With respect to applications for adoption service licenses, the draft

law provides that bulletin No. 1, as referred to in the amended law of March 29, 2013 relating to

the organization of the criminal record, may be consulted, if necessary, by the State prosecutor.

However, the bulletin N°1 of the criminal record informs the complete statement of the inscriptions applicable to the same person and can only be issued to the authorities listed in Article 6 of the amended law of March 29, 2013 on the organization of criminal records. This bulletin is, for example, issued to the judicial authorities in the context of criminal proceedings.

The authors of the bill justify such communication taking into account “the obligation of the State to guarantee in all circumstances the well-being and the rights of the child, the procedure of criminal record check is intended to inform the Minister of Justice of the seriousness, integrity and behavioral aptitude of those responsible for the adoption service, license applicant. The opinion of the State prosecutor must therefore allow an assessment based on objective elements and as complete as possible through consultation of the bulletin number 1 of the criminal record, informing all the offenses of the person applicant”70.

Without prejudging the merits of such communication, such derogation should nevertheless be further justified by the authors of the bill. It is, in fact, difficult to assess whether such communication would respect the principle of data minimization in the absence of

66 Article 12 of the bill

67 Article 5 of the bill (regarding the authorization to operate games of chance)

68 Article 14 of the bill

69 Section 9 of the bill

70 V. “Ad article 12” of the bill

clarification of the criteria on which the Minister of Justice would base himself to issue or refuse such approval.

b. On the communication of the bulletin N ° 2 of the criminal record

With regard to authorizations to operate games of chance71, the bill under opinion provides for that, to obtain the authorization to operate games of chance, the Public Prosecutor “may also take note of the entries in the criminal record” in order to verify that the “behaviour of the applicant, acting as a representative of a person morally or individually is not incompatible with the operation of games of chance.

The device under opinion does not however specify the bulletin number of the criminal record which would be consulted. Nevertheless, the National Commission infers from the provisions of Article 1, point 7) of the Grand-Ducal regulation of 23 July 201673 that bulletin n°2 of the criminal record would be collected for the purposes of issuing authorizations relating to games of chance.

If this were to be the case, then this should be reflected in the device under notice in order to respect the principle of predictability and precision to which any legal or regulatory text must comply 74.

With regard to the authorizations relating to the private activities of guarding and supervision75, and the authorisations, permits or approvals provided for by the amended law of 15 March 1983 on arms and ammunition76, the texts under opinion, which are worded identically, do not not expressly the communication of bulletin N°2 of the criminal record. Indeed, the provisions under opinion provide that "the Attorney General of State communicates to the Minister a copy of the court decisions which appear, where applicable, on bulletin No. 2 of the criminal record”.

If it appears from draft law n°7425 on arms and ammunition, in particular from article 15 paragraph (4) of the said bill, that bulletin No. 2 would be collected, this is not provided for by the amended law of 12 November 2002 relating to private guarding and surveillance activities.

71V. article 5 of the bill relating to article 11 paragraph (2) of the amended law of 20 April 1997 on games of chance and betting sporty

72 See Article 11 paragraph (1) of the amended law of 20 April 1997 on games of chance and sports betting, as amended by clause 5 of the bill

73 Article 1, point 7) of the Grand-Ducal regulation of 23 July 2016 provides that “bulletin N°2 can be issued on request and

with

the express agreement in writing or electronically of the person concerned to the Minister having Justice in his attributions for processing requests relating to games of chance".

74 In this sense, V. M. Besch, "Personal data processing in the public sector", Norms and legislation in legal Luxembourg public, Luxembourg, Promoculture Larcier, 2019, p.469, n°619; V. among others CourEDH, Zakharov e. Russia [GCL

n"47413/06], § 228-229, December 4, 2015

75 See article 14 of the bill

76 See article 9 of the bill

However, the National Commission deduces from the provisions of Article 1, point 7) of the Regulation Grand-Ducal of 23 July 201677 that bulletin no. 2 of the criminal record would be collected for authorizations relating to private guarding and surveillance activities.

Therefore, in order to comply with the principle of foreseeability and precision to which any legal or regulatory text78, clarifications on this subject should be provided by the authors of the bill with regard to the authorizations relating to the private activities of guarding and surveillance.

vs. On the communication of an extract from a foreign criminal record

With regard to the communication of an extract from a foreign criminal record, it should be noted that the procedures relating to approvals of adoption services or authorizations to operate games of chance provides that "if necessary, the State prosecutor may request obtaining the criminal record from the competent authority of the Member State" whose person concerned has nationality.

There is reason to wonder about the use of the wording "if necessary" when this term

is vague and does not make it possible to understand what would be the situations where the communication

an extract from the criminal record would prove necessary or not.

Therefore, in order to comply with the principle of foreseeability and precision to which any

legal or regulatory text79, the CNPD considers that clarifications on this point should be made.

Moreover, for the sake of consistency of the bill as a whole, these should be

drafted in a manner similar to those referred to in the procedures referred to in points IV.2.

points A. and B. of this opinion.

In addition, it should be noted that another formulation is used for the procedures of

background checks for licensing purposes

deprived of guarding and surveillance80, and authorizations, permits or approvals provided for by

the amended law of 15 March 1983 on arms and ammunition 81.

In fact, articles 9 and 14 of the bill specify that the convictions handed down

abroad or by a criminal court of another Member State of the European Union, of a country

associated with the Schengen area or the European Economic Area should be taken into account

77 Article 1, point 7) of the Grand-Ducal regulation of 23 July 2016 provides that “bulletin N°2 can be issued on request and

with

the express agreement in writing or electronically of the person concerned to the Minister having Justice in his attributions for

examining requests for prohibited weapons and guarding”.

78 In this sense, V. M. Besch, “Personal data processing in the public sector”, Norms and legislation in legal

Luxembourg public, Luxembourg, Promoculture Larcier, 2019, p.469, n°619; V. among others CourEDH, Zakharov e. Russia

[GCL

n"47413/06], § 228-229, December 4, 2015

79 ibidem

80 See article 14 of the bill

81 See article 9 of the bill

relating to bill n°7691.

during the integrity check. On this point, reference is made to the observations made by

the CNPD in its additional opinion of February 4, 2021 on draft law No. 7425 on weapons

and ammunition82.

In addition, the National Commission wonders about the reasons why formulations

different are used by the authors of the bill in relation to the communication

an extract from a foreign criminal record. The disparities between each of the said provisions are

a source of illegibility and legal uncertainty for the persons concerned.

3. On the processing of data relating to facts likely to constitute a

felony or misdemeanor, or relating to a criminal conviction for a felony or misdemeanor

In addition to taking cognizance of an extract from the criminal record, it should be noted that the

type 2 and 3 background check procedures are more intrusive than type

1, based solely on the communication of an extract from the criminal record. Indeed, the

type 2 and 3 procedures are also based on the facts:

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likely to constitute a crime or misdemeanor which are the subject of a report or

a police report (B);

relating to a criminal conviction for a felony or misdemeanor (C).

Without prejudging the in concreto assessment that would be carried out in this matter, there is reason to regret

that neither the bill under opinion nor the comments on the articles specify which criteria or

what degree of seriousness of the background is taken into account by the Minister of Justice, the Minister

of Finance or the Public Ministry to assess the good repute of the persons concerned.

If the authors of the bill justify such intrusions when these elements are notably

intended to “verify that the behavior of the candidate is not incompatible with the exercise

duties and missions of notaries” or that “[i]t is important that judges and prosecutors

can (…) carry out background checks on staff as part of their

recruitment, given the sensitivity of the information brought to the attention of staff

judicial administration and the honesty required to deal with them with the confidentiality of

put” or because “[a]s public officers it must be guaranteed that the judicial officers

carry out their duties with the necessary integrity. This assessment must be made taking into account

account of criminal records" or that the verification of criminal records

is “intended to inform the Minister of Justice of the seriousness, integrity and aptitude

behavior of those responsible for the adoption service. ". These are not formulated

with enough detail.

However, in the absence of such details, it is difficult to assess whether the principle of minimizing

data would be respected. It should be recalled that by virtue of this principle, only

82 See additional opinion of the CNPD of 04/02/2021, deliberation n°2/2021, the developments formulated under point I. 1. F.

c.

processed personal data that is strictly necessary for the performance of the

purposes pursued.

A. Introductory remarks

It should be noted that Articles 4, 5, 6, 7, 9, 11, 12, 14 and 15 of the bill specify that the

background checks will cover facts that may constitute a crime or misdemeanor.

Only articles 9, 12 and 14 of the bill specify that, in addition to the facts likely to constitute

a crime or misdemeanor, the verification will relate to the facts “referred to in article 563, point 3° of the Code

criminal offense relating to assault and minor violence”, “referred to in Article 1 of the amended law of

September 8, 2003 on domestic violence”.

It is also interesting to note that the authors of the bill specify in their commentary

of article 5 relating to authorizations to operate games of chance and to exercise a job in

relationship with games of chance, that only certain offenses seem particularly

relevant for refusing such authorisations, in particular “when it concerns an offense

criminal law in connection with money laundering, theft, cases of fraud, etc. ".

Therefore, would it not be possible, like articles 9, 12 and 14 of the bill, to indicate

with more precision on what crimes or misdemeanors relate to such checks?

B. On the facts likely to constitute a crime or an offense which make

the subject of a police report or report

It should be noted that type 283 background check procedures do not cover

only on the facts likely to constitute a crime or an offense which are the subject of a report

or a police report, if these facts are the subject of an ongoing criminal prosecution, excluding

facts that led to a decision of non-suit or classification without follow-up.

The National Commission wonders whether, a contrario, in the absence of clarification on this point, the

type 384 background check procedures include the facts leading to a

decision of non-suit or classification without follow-up. This deserves to be clarified by the authors

Bill.

With regard to the processing of data relating to such facts, there is particular

to draw the attention of the authors of the bill to the fact that “a record or a report cannot

83 See the procedures referred to in Articles 4, 5 (authorization to exercise employment), 6, 7, 11 and 15 of the bill

84 V. the procedures referred to in articles 5, 9, 12 and 14 of the bill

are not the equivalent of a court decision having retained a person in the bonds of the

prevention and that the principle of the presumption of innocence must prevail. »85.

With regard to the facts which are the subject of an ongoing criminal prosecution, the authors of the project of law should pay particular attention to the secrecy of the investigation. In this regard, there is reason to note that only articles 5, 9 and 14 of the draft law specify that when the facts are covered by the secrecy of the instruction only the data enumerated by these articles can be communicated.

It should be noted that such details are not provided by Articles 4, 6, 7, 11, 12 and 15 of the bill. However, although these are procedures in which an investigation administrative procedure is carried out by the General State Prosecutor and that an opinion of the latter is issued at the end of these, should we not provide for specific provisions aimed at restricting the content of such an opinion when facts are covered by the secrecy of the investigation?

In the absence of reasons justifying such differences between the aforementioned articles on this point, the CNPD is of the opinion that a standardization of the provisions on this subject would be appropriate.

In addition, and as noted by the Council of State in its additional opinion relating to the draft Law No. 7425 on arms and ammunition86, what would be the scope of the secrecy of the investigation in relation to to the rules of non-contentious and contentious administrative procedure?

C. Facts relating to a criminal conviction for a felony or misdemeanor

It should be noted that type 2 verification procedures exclude facts relating to a criminal conviction for a felony or misdemeanor for which rehabilitation has been achieved (a) contrary to the type 3 procedure which, in the absence of precision, does not seem to exclude it (b).

Furthermore, as a general remark, it is appropriate to question the contribution of the communication of data relating to facts concerning a criminal conviction for a crime or misdemeanor when the bill already provides for the communication of a criminal record judiciary, see for some of the articles of the bill the communication of the decision appearing, where applicable, to the criminal record87. Indeed, is it relevant to communicate decisions that would not yet be final or not yet registered in the criminal record of the person

concerned?

85 See additional opinion of the Council of State of December 19, 2020 relating to draft law No. 7425 on weapons and ammunition, document

No. 7425/08, developments under "Amendment 14".

86 See additional opinion of the Council of State of December 19, 2020 relating to draft law No. 7425 on weapons and ammunition, document

No. 7425/08, developments under “Amendment 14”.

87 See articles 9 and 14 of the bill

has. On type 2 background check procedures

The procedures referred to in the articles listed under sub-paragraph a) exclude facts relating to a criminal conviction for a felony or misdemeanor and for which rehabilitation has not already been achieved at the time of submitting the application.

Despite these clarifications, the bill does not indicate the reasons for which the data relating to a criminal conviction for a felony or misdemeanor are necessary and relevant in order to check the good repute of the person concerned. These clarifications are essential as the communication of an extract from the criminal record already makes it possible to provide information on the convictions pronounced against an applicant.

In order to comply with the principle of foreseeability and precision to which any legal text must comply or regulatory88, it is essential that the authors of the bill specify the categories of data that would be covered by the aforementioned provisions.

Are these only court decisions or any documents relating to a criminal conviction for a felony or misdemeanor?

b. On type 3 background check procedures

Contrary to the procedures referred to under sub-paragraph a) above, the procedures referred to in the Articles 5, 9, 12 and 14 do not specify whether the facts relating to a criminal conviction, for which rehabilitation would have been achieved, are excluded by the said procedures. Only a limitation in the time for these facts is specified by the said articles. Indeed, the articles all state that "[T]he facts cannot have been committed more than five years before the introduction of the request of the applicant, unless these facts have been the subject of a criminal conviction, in which case the period of five years is increased to ten years, or when these facts are the subject of ongoing criminal proceedings". Justifications should be provided by the authors of the bill as to the reasons for which data relating to a criminal conviction for a crime or misdemeanor is necessary and relevant in order to verify the good repute of the data subject.

In addition, it should be noted that Articles 9 and 14 of the bill provide that upon request "the State prosecutor communicates to the Minister a copy of the judicial decisions which appear in the case applicable on bulletin No. 2 of the criminal record of the person concerned". On this point, it is referred to the developments of the National Commission in its additional opinion on to Bill No. 742589.

88 In this sense, V. M. Besch, "Personal data processing in the public sector", Norms and legislation in law Luxembourg public, Luxembourg, Promoculture Larcier, 2019, p.469, n°619; V. among others CourEDH, Zakharov e. Russia [GCL n"47413/06], § 228-229, December 4, 2015

89 See additional opinion of the CNPD of 02/04/2021, deliberation n°2/2021, point I. F. a. ii., page 16

Consequently, and in order to comply with the principle of foreseeability and precision to which any legal or regulatory text90, it is essential that the authors of the bill specify the categories of data which would be covered by the aforementioned provisions.

Furthermore, the CNPD wonders whether such provisions are necessary with regard to all the authorizations referred to in articles 5 and 8 of the law of 12 November 2002 relating to private guarding and surveillance activities? Would these provisions not be necessary only for the cases where the personnel hired would have to request a permit carrying arms? Moreover, is this not already provided for by article 11 of the law of 12 November 2002 relating to private guarding and surveillance activities? The authors of bill also note that “the same conditions as those of the law on weapons and ammunition therefore apply to the carrying of weapons in terms of guarding”91.

v.

On the processing of special categories of personal data

It follows from Articles 9 and 14 of the draft law that special categories of data within the meaning of Article 9 of the GDPR would be dealt with by the Minister of Justice.

Indeed, data relating to the health of the applicants and more specifically to their "health mental” would be collected by the Minister of Justice as part of the verification of their integrity. With regard to the collection of such data by the Minister of Justice in the context of article 9 of the bill, reference is made to deliberation n°42/2019 of 8 July 2019 from the CNPD92.

The CNPD still understands that data revealing political opinions, beliefs religious or philosophical or trade union membership of a person requesting a approval, permit or authorization, as referred to in the aforementioned articles, would be likely to be exchanged between the Minister of Justice and the SRE. The authors of the bill specify, in this regard, that the exchange of data between the SRE and the Minister of Justice has been introduced given the "current political context in terms of violent extremist tendencies", context which “demonstrates the importance for the authorities of being able to verify in more detail the person who submits an authorization to acquire, purchase, import, export, transfer, to transport, possess, carry, sell and transfer arms and ammunition”.

90 In this sense, V. M. Besch, “Personal data processing in the public sector”, Norms and legislation in law Luxembourg public, Luxembourg, Promoculture Larcier, 2019, p.469, n°619; V. among others CourEDH, Zakharov e. Russia [GCL n"47413/06], § 228-229, December 4, 2015

91 See comments of the authors of the bill “Ad article 14”

92 Opinion of the CNPD on draft law n°7425 on arms and ammunition, deliberation n°xx, v. the comments made under item IV. “On the processing of data relating to criminal offenses and health” page 10.

Furthermore, as part of the integrity check, as referred to in Articles 4, 5, 6, 7, 11, 12 and 15 of the bill, it is not excluded that other special categories of data, such as as data relating to racial or ethnic origin, genetic data, data biometrics for the purpose of uniquely identifying a natural person, data concerning the sex life or sexual orientation of a natural person, may be processed.

However, it should be recalled that in accordance with Article 9 paragraph (1) of the GDPR “[t]he processing personal data that reveals racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, as well as the treatment genetic data, biometric data for the purpose of identifying a natural person uniquely, data concerning health or data concerning sex life or the sexual orientation of a natural person are prohibited", unless one of the conditions referred to in paragraph (2) of that article applies.

The National Commission is of the opinion that the processing of special categories of data, when administrative inquiries which would be carried out by the Minister of Justice, the Minister of Finance or the Public Prosecutor, could be based on Article 9 paragraph (2), letter g) of the GDPR,

provided, however, that the conditions are met.

This article provides that “[t]he processing is necessary for reasons of important public interest, 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 measures appropriate and specific for the safeguard of fundamental rights and the interests of the concerned person ".

However, it is clear that the bill does not seem to provide for "appropriate measures and specific for the safeguard of fundamental rights and the interests of the person concerned”. Consequently, the draft text does not seem to offer a sufficient legal basis to process these special categories of data.

In order to make such data processing lawful, it is therefore essential that such measures are defined in the bill under opinion.

It should also be expressly specified that special categories of data could be collected even though this does not expressly result from reading the articles 4, 5, 6, 7, 9, 11, 12, 14 and 15 of the bill. Thus, it is suggested that the authors of the bill are inspired by French legislation on weapons, and more specifically article R.312-85 point VI of the CSI entitled "data and information from the administrative investigation". So

point, reference is made to the additional opinion of the National Commission on the amendments Bill N°7425 on arms and ammunition93.

Furthermore, there is reason to question the need for such data processing with regard to concerns all the authorizations covered by articles 5 and 8 of the law of 12 November 2002 relating to private guarding and surveillance activities? These provisions would not they are not necessary only for the cases where the personnel would have to request a permit

carrying weapons?

However, in this respect, it already appears from the new Article 16, paragraph (2) of the draft law no. 7425 that “[s]if the license to carry weapons is requested for a security guard within the meaning of the amended law of 12 November 2002 relating to private security and supervision, the medical certificate may be issued by one of the doctors referred to in points 1° and 2°, or by the competent occupational physician, after a favorable opinion from one of the physicians referred to in points 1° and 2°. ".

The authors of the bill should therefore ensure that the provisions under opinion and the provisions of article 16, paragraph (2), new of bill n°7425 on weapons and ammunition.

VI.

On the methods of transmission of data resulting from the procedures of criminal background check or “good repute check”

It should be noted that the methods of transmission of data resulting from the procedures of background checks are not sufficiently specified or are not specified at all all by the bill. It should also be noted that there is a lack of standardization between the different provisions under opinion on this point.

Thus, it is apparent from the background check procedures referred to in Articles 4, 7, 11, 12 and 15 of the bill, that the data resulting from the administrative investigation would be transmitted via opinion of the State Attorney General. These notices are transmitted to the competent authorities for the appointment of a notary94 or a bailiff95, the recruitment of staff for the judicial administration96, administrative courts97 and legal attachés98 or the issuance of a license for adoption services 99. It should be noted that

93 Opinion of the CNPD on draft law n°7425 on arms and ammunition, deliberation n°2/2021 of 04/02/2021, v. observations formulated under point IV. “On the processing of data relating to criminal offenses and health” page 10

94 Section 4 of the bill

95 Section 11 of the bill

96 Section 6 of the bill

97 Section 7 of the bill

98 Section 15 of the bill

99 Section 12 of the bill

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only relevant and necessary data should be transmitted via this notice in order to

enable the competent authorities to assess the good repute of candidates or applicants.

For the procedures referred to in Articles 9 and 14 of the draft law, the data would be

communicated by the Grand Ducal Police, the Public Ministry or the SRE to the Minister of Justice

"in the form of all or extracts of minutes or police reports, judgments,

judgments, orders, or any other document or procedural act containing the information

concerned". On this point, reference is made to the observations made by the Commission

national in its complementary opinion on the amendments of the draft law N°7425 on the

weapons and ammunition100.

However, no details are provided with regard to the methods of transmission.

data collected during the surveys referred to in Articles 5 and 6 of the bill.

The CNPD considers it essential that clarifications on these points be provided by the authors of the

bill and recalls that only necessary and relevant data may not be

communicated.

In any case, as mentioned throughout this opinion, it would be preferable for the

authors of the bill opt for a system that would be based on the communication of a notice

detailed statement of the Attorney General.

VII.

On the establishment of a monitoring system with regard to the verification of

good repute

The CNPD understands that a system for monitoring the condition of good repute would be put in place.

place, as reflected in sections 3, 9 and 14 of the bill.

With regard to sections 9 and 14 of the bill insofar as these are drafted in

Similarly, the National Commission refers on this point to its observations formulated in its

additional opinion on the amendments to draft law N°7425 on arms and ammunition101

Article 3 of the bill relating to the designation, in repressive and administrative matters, of

experts, translators and sworn interpreters, provides that the Minister of Justice "may

revoke" the sworn experts, translators or interpreters "in the event of breach of their

obligations or professional ethics or for other serious reasons. The revocation cannot

intervene only on the advice of the State Attorney General and after the person concerned has been admitted to

present their explanations.

100 See additional opinion of the CNPD on the amendments to bill No. 7425, deliberation No. 2/2021 of 04/02/2021, v. them

comments made under point IV. "On the processing of data relating to criminal offenses and health" page 10

101 Additional opinion of the CNPD on draft law n°7425 on arms and ammunition, deliberation n°2/2021 of 04/02/2021, v.

the comments made under point I.2., page 19

The authors of the bill do not specify the operation of such a system. There is, therefore,

instead of wondering about the monitoring system that would be put in place if necessary. The prosecutor

General of State consult the so-called "JU-CHA" database proactively and regularly

in order to report, in the event of an incident, to the Minister of Justice any information likely to

lead to the dismissal of the persons concerned?

Furthermore, it should be noted that such provisions are not provided for other

background check procedures, should this be the case then this should be reflected

in the bill under notice.

VIII.

On the principle of data accuracy

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

must be “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”.

However, it should be noted that the device under opinion does not provide for any provision relating to the

updating of data obtained in the context of administrative surveys. However, taking into account

of the data collected, the authors of the bill should be drawn to the fact that it

there is a significant risk that data relating to a person whose case has been closed

without action or who has in the meantime been acquitted of an offense of which she has been accused are

still in the records of the administration, without any related update or rectification.

IX.

On the principle of purpose limitation

In accordance with the principle of purpose limitation, personal data must be

collected for specified, explicit and legitimate purposes, and not to be processed

subsequently in a manner incompatible with those purposes.

With regard to the procedures which would not be carried out by the Public Prosecutor, there is

note that the transmission of data from files held by the Grand-Police

Ducale, the Public Ministry or the SRE to the Minister of Justice or the Minister of

finance for the purposes of an administrative investigation is very delicate and even risky and must therefore be

limited to exceptional and strictly limited situations.

Thus, the use of data for purposes other than those for which they were transmitted

to ministers, entails additional risks and seems a priori difficult to justify. A

such subsequent use should in any case comply with the conditions of Article 6,

paragraph (4), of the GDPR and be the subject of a law “at least as regards the essential elements of matter” in accordance with Article 11, paragraph (3), of the Constitution102.

Therefore, similar to the provisions of Article 26, paragraphs (2) and (3), of the law of 22 February 2018 on the exchange of personal data and information in police matters103, should it not be provided in the bill under opinion that the data which would be forwarded to the Minister of Justice or the Minister of Finance for investigation administrative can only be used for the purpose for which they were transmitted and supervise the transmission, if necessary, by the minister to another administration/a third party? Shouldn't it also be provided for the opinions that would be transmitted by the Public Prosecutor's Office to the authorities referred to in Articles 4, 7, 11, 12 and 15 of the bill?

On the shelf life

X.

According to Article 5 paragraph (1) letter e) of the GDPR, personal data may 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 the authors of the bill have, on several occasions, indicated that “[t]his data will only be kept for the time strictly necessary for the granting or refusal of the authorization requested”104 or “the definitive refusal of the authorization or authorization requested”105 or even “for the time strictly necessary to examine the candidacy”106. It should be noted that these details are not repeated for each of the items covered by the bill.

However, these details do not allow the National Commission to assess whether, in

In this case, the principle of limited data retention period would be respected.

102 See in this sense, M. Besch, “Personal data processing in the public sector”, Norms and legislation in law

Luxembourg public, Luxembourg, Promoculture Larcier, 2019, p.471 to 472, n°619.

103 Article 26 paragraphs (2) and (3) provides that: “(2) The data and information transmitted may not be used by

the administration only for the purpose for which they were transmitted. They are erased as soon as their storage is no longer

necessary with regard to the purpose for which they were transmitted. (3) Further transmission of data and information

by the administration of the State to a third party requires the prior written consent of the person referred to in Article 18,

paragraph 1

er, having transmitted the data and information concerned. Where applicable, Article 6(3) shall apply”.

104 See paragraph (5) of article 1251-3 of the New Code of Civil Procedure, as amended by article 2-3° of the bill,

paragraph (4) of article 1 of the amended law of July 7, 1971 relating to repressive and administrative matters, institution of

experts,

sworn translators and interpreters and supplementing the legal provisions relating to the swearing in of experts, translators

and interpreters, as amended by article 3 of the bill, paragraph (4) of article 2 of the law of 6 May 1999 on mediation

penal, as modified by article 13 of the bill

105 See paragraph (6) of Article 11 of the amended law of 20 April 1977 on games of chance and sports betting, as amended

by

clause 5 of the bill

106 See article 90 bis of the amended law of 7 November 1996 on the organization of administrative courts, as amended

by section 7 of the bill

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However, it is essential that clarifications on this subject be provided, all the more so in view of

the nature of the personal data in question. Thus, the shelf life should

be defined in the bill or it should at least specify the criteria that would be taken into account in order to determine what is the proportionate retention period for each category of personal data that would be collected during investigations administrative.

In addition and in order to take into account any appeals against administrative decisions that would be taken under the bill, it is suggested that the authors of the bill draw inspiration French legislation on weapons, which sets a retention period for weapons data from the administrative survey. Article R.312-88 of the CSI provides that: “[t]he personal data and information mentioned in d of 1° of I and in V and VI of article R.312-85 [the data resulting from the administrative investigation] are kept for a maximum duration of one year from the notification of the decisions mentioned in IV of the same article or, in the event of a contentious appeal against these decisions, until it has been definitively ruled on the dispute”.

XI.

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 the Minister of Justice, the Minister of Finance or the Public Ministry 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 have not been collected from the data subject himself, i.e. those collected indirectly with the Public Prosecutor, the Grand Ducal Police or the SRE.

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 cases where Article 14 of the GDPR would apply,
this information must be provided to the data subject no later than one month after
the controller has obtained the data.
For all practical purposes, it should be noted that French legislation on weapons provides,
in article R.312-90 of the CSI, a restriction of the rights of data subjects (see Chapter III
GDPR). This article provides in particular that: "[t]he rights to information, access,
rectification and limitation of the data mentioned in articles 13 to 16 and 18 of the [GDPR] and
in articles 104 to 106 of the aforementioned law of January 6, 1978 are exercised with the central service
arms or the territorially competent prefect, according to their respective attributions.
In order to avoid interfering with investigations, research or administrative proceedings or
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proceedings or to avoid prejudicing the prevention or detection of criminal offences, the investigation
or prosecution thereof or the execution of criminal penalties or to protect the safety
public, the rights of access, rectification and limitation may be subject to restrictions in
application of article 52 and of 2° and 3° of II and III of article 107 of the law of January 6, 1978
aforementioned. »
Therefore, it is necessary to draw the attention of the authors of the bill to the fact that without derogation
explicit in the bill, these rights are all fully applicable. However, such
derogations could prove appropriate when the information obtained within the framework of
some background check procedures relate to investigations or instructions
ongoing criminal cases.
XII.
On the security of the processing
using measurements

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

techniques 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.

The CNPD is of the opinion that the protection of the confidentiality and security of personal data

personal nature is a major issue when processing special categories

of data insofar as their disclosure is likely to constitute serious prejudice

for the people concerned.

Thus, given the nature of the data processed in question, it is essential that such measures

security measures are implemented by the various data controllers in order to ensure the

privacy and data security.

Among these security measures, the National Commission considers it important that only

people who need it in the performance of their duties and professional tasks

are authorized to have access to the necessary data. It is interesting to note that in France,

articles R.234-1 to R.234-3 and R.236-6 of the CSI list the categories of authorized persons

to access the data resulting from the administrative inquiry.

In this context, it is strongly recommended to define an access management policy, in order to to be able to identify from the start the person or the service, within each administration concerned, who would have access to the computer interface made available by the CTIE, and to what specific data that person or department would have access to.

In addition, it is necessary to provide an access logging system. On this point, the CNPD recommends that log data be retained 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, it is necessary in accordance with Article 32, paragraph (1), letter d) of the GDPR 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".

Finally, with regard to the data which would initially be subject to the law of August 1, 2018 on the protection of individuals with regard to the processing of personal data personnel in criminal matters as well as in matters of national security, the question arises of the relationship, where applicable, between the provisions provided for in Article 28 of the said law and those provided for in Article 32 of the GDPR.

XIII.

On the competent supervisory authority

There is reason to wonder which is the competent supervisory authority for control and monitor compliance with the legal provisions provided for in the draft text, in the absence of precision on this subject in the bill under opinion.

Indeed, there is some doubt as to whether the data, initially collected for the needs of prevention, research, observation and prosecution of offences, then forwarded by the Grand Ducal Police, the Public Ministry and the SRE to the Minister of Justice

or to the Minister of Finance in order to enable him to verify the good repute of a candidate,

applicant for a permit, authorization or approval referred to in the bill comes under the jurisdiction

the judicial control authority107 or that of the National Commission.

It should be recalled that paragraph (2) of article 40 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 “the operations of

processing of personal data carried out by the courts of law, including

including the public prosecutor, and of the administrative order in the exercise of their functions

107 Judicial supervisory authority as referred to in article 40 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 matters of national security.

jurisdictional, whether for the purposes referred to in Article 1 of this law or for those

covered by the [GDPR], are subject to the control of the judicial supervisory authority”.

The authors of the draft law on the protection of individuals with regard to the

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

national consider that “to determine the competence of one of the two supervisory authorities

[CNPD or judicial review authority], the decisive question will no longer be the purpose of the

data concerned, but whether the competent authority is involved in taking or

execution of a judicial decision, which is not the case for the police”108.

They further specify that "when for the processing of personal data

determined – falling within the scope of this bill – the question of the

competence of one of the two supervisory authorities arises, it would be necessary in principle to retain the

competence of the National Commission for Data Protection, unless the processing of

personal data concerned is carried out by a court in the exercise of its

judicial functions or by the public prosecutor, either in the exercise of his functions jurisdictional, either upstream or downstream of its participation in decision-making jurisdictional”109.

In this case, the Minister of Justice and the Minister of Finance are not one of the authorities referred to in article 40 of the law of August 1, 2018 on the protection of natural persons with regard to the processing of personal data with regard to criminal law as well as in terms of national security, and are not likely to render a judicial decision at the end of the administrative investigation but a decision purely administration.

Therefore, the processing of data carried out by these ministers in the context of investigations administrative, covered by the bill, could fall within the jurisdiction of the National commission.

It is interesting to note that this solution was adopted with regard to the authority competent to monitor and control the provisions of the law of 22 February 2018 relating to the exchange of personal data and police information110.

Shouldn't the same solution be adopted with regard to the processing carried out by the Public Prosecutor's Office when the latter initiates administrative investigations, as provided for by the bill under notice?

108 See parliamentary document no. 7168, “Ad article 41”, page 47.

109 See parliamentary document no. 7168, “Ad article 41”, page 47.

110 Articles 25, paragraph (1), and 28 of the law of 22 February 2018 on the exchange of personal data and information in police matters.

In order to remove any ambiguity on this point, the authors of the bill should complete

the device under notice accordingly.

For all intents and purposes, it should be noted that the competence of the CNPD with regard to data processing carried out by the said ministers within the framework of the bill under opinion in no way prejudges the competence of the judicial review authority with regard to the communication of data by the Public Ministry to these ministers, as provided for in the draft law.

XIV.

On the other laws covered by the bill but unrelated to the "control of good repute"

The bill also intends to modify articles 1007-6 and 1036 of the New Code of civil procedure as well as the law of December 30, 1981 on compensation in the event of detention preventive ineffective and the amended law of March 2, 1984 relating to the compensation of certain victims of bodily injury resulting from an offense and the repression of insolvency fraudulent. It should be noted that these provisions do not relate to the control of good repute.

With regard to the provisions under notice amending articles 1007-6 and 1036 of the New Code of Civil Procedure, it should be noted that these provisions fall under the missions carried out by the Public Ministry in civil matters.

The said articles also provide that the State prosecutor may, within the framework of these procedures “to read the entries in bulletin N°1 of the criminal record” as well as, if necessary where applicable, the “criminal record of the competent authority of the State whose parties to the hearing have the nationality ". The authors of the bill are to be commended for such clarification.

The CNPD also understands that the authors of the bill intend to provide access through the Public Prosecutor's Office to the so-called "JU-CHA" database in the context of the procedures referred to in articles 1007-6 and 1036 of the New Code of Civil Procedure.

Without prejudging the merits of such access, the CNPD wonders, however, if it would not be more

appropriate to include such provisions in a legal text relating to the "JU-

CHA" and its use by the Public Ministry in the exercise of its missions?

With regard to article 2 of the law of December 30, 1981 on compensation in the event of

preventive detention ineffective, as amended by the bill, there is reason to salute the

clarifications made with regard to the data that would be processed in the context of

the investigation of the claim for compensation as provided for by the aforementioned law.

Finally, with regard to article 9 of the amended law of March 2, 1984 relating to compensation

of certain victims of bodily injury resulting from an offense and the repression of

fraudulent insolvency, as amended by the bill, the authors of the

bill to provide a legal basis for the exchange of data between the Minister

of Justice, the Public Ministry and the Administration of Registration.

XV. Final remarks

It should be noted that the provisions of the bill under opinion which repeat article 5 of the

GDPR111 are likely to be superfluous. Indeed, the GDPR is, as a regulation

European, compulsory in all its elements and directly applicable in Luxembourg. The

National Commission takes the liberty of drawing the attention of the authors of the bill to the

problem related to the fact of partially or fully reproducing the text of a regulation

European in the internal legal order. Indeed, the Council of State regularly reminds in

its opinions the case law of the Court of Justice of the European Union according to which Member States

members must not hinder the direct applicability of the regulations or conceal their nature

European112.

Thus decided in Belvaux on February 10, 2021.

The National Data Protection Commission

Tine A. Larsen

President

Marc Lemmer

Commissioner Commissioner

Christopher Buschman

Thierry Lallemang

Commissioner

111 See articles 1, 3, 5, 6, 7, 13 and 15 of the bill

112V par. ex. the opinion of the Council of State of July 17, 2020 on draft law no. 7537 relating to certain methods of application and the

sanction of Regulation (EU) No 2019/1150 of the European Parliament and of the Council of 20 June 2019 promoting fairness and transparency

for companies using online intermediation services

Opinion of the National Commission for Data Protection

relating to bill n°7691.