

Decision of the National Commission sitting in restricted formation on
the outcome of investigation no. 3691 conducted with the General Prosecutor's Office of
Grand Duchy of Luxembourg

Deliberation No. 1FR/2021 of March 5, 2021

The National Commission for Data Protection sitting in restricted formation,
composed of Ms. Tine A. Larsen, President, and Messrs. Thierry Lallemand and
Christophe Buschmann, curators;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 relating
the protection of natural persons with regard to the processing of personal data

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

Having regard to the law of August 1, 2018 on the organization of the National Commission for the protection
data and the general data protection regime, in particular Article 41 thereof;

Having regard to the internal rules of the National Commission for Data Protection
adopted by decision no. 3AD/2020 dated January 22, 2020, in particular its article 10, point
2;

Having regard to the regulations of the National Commission for Data Protection relating to the
investigation procedure adopted by decision No. 4AD/2020 dated January 22, 2020, in particular
its article 9;

Considering the following:

I.

Facts and procedure

1.

During the second half of 2018, the judicial administration, represented by
the General Prosecutor's Office of the Grand Duchy of Luxembourg (hereinafter: the "General Prosecutor's Office"), had
proposed to hire three full-time government employees for the period of September 17
2018 to September 16, 2020. More specifically, these were two positions of referendum and

of a post of referendary-librarian.

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2.

By letter dated July 26, 2019, the National Commission for the Protection of data (hereinafter: the "National Commission" or the "CNPD") has been seized of a complaint of Mr [...] (hereinafter: the "complainant") having applied for two of the three aforementioned positions. The complaint was lodged through its agent, Master Fränk Rollinger, lawyer at the Court.

The Claimant states that during a job interview that took place on September 26

3.

2018, he was confronted with information concerning him registered in the database "Justice criminal chain known as JU-CHA" (hereinafter: the "JU-CHA database"). The JU-CHA database is an "internal application for the central management of all the services of the judiciary dealing with criminal cases [which] groups together in one sole application most of the computerized processing, accessible in whole or in part, by law enforcement agencies dealing with criminal cases".

In essence, the complainant believes that his personal data has been

4.

stored in the JU-CHA database for an excessive period of time, this violation of article 3, paragraph 1, letter e) of the law of 1 August 2018 on the protection natural persons with regard to the processing of personal data in criminal matters and national security.

Furthermore, the complainant maintains that his personal data were

5.

used in a manner incompatible with the purposes for which they were collected.

6.

During its deliberation session on August 8, 2019, the National Commission sitting in plenary session (hereafter: the “plenary session”) had decided to open an investigation with the General Prosecutor's Office on the basis of article 37 of the law of 1 August 2018 on organization of the National Commission for Data Protection and the general regime on data protection and to appoint Mr Marc Lemmer as head of investigation.

7.

The plenary session had also decided that the investigation carried out by the CNPD was limited to aspects of the processing of personal data relating to the procedure of recruitment to the General Prosecutor's Office and that the part of the complaint concerning the article 3, paragraph 1, letter e) 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 that in matters of national security was transmitted to the judicial control authority under of Article 44, paragraph 4, of this law (see also point 18 of this document).

1 Opinion of the judicial control authority on the JU-CHA application of July 31, 2020, page 2

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8.

The investigation was carried out pursuant to Article 58, paragraph 1, letter b) of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the

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

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

(General Data Protection Regulation) (hereinafter: the “GDPR”). By mail dated 4

September 2019, a questionnaire was sent to the General Prosecutor's Office to which the latter

replied by letter of September 27, 2019. A site visit then took place on September 14, 2019.

November 2019.

9.

By letter of January 23, 2020, the head of investigation communicated to the General Prosecutor's Office

the complaints made against him, namely the lack of a basis of lawfulness relating to the processing of

personal data from the JU-CHA database as part of the

recruitment of a State employee as well as non-compliance with the transparency requirement vis-à-vis

towards the persons concerned.

10.

On January 28, 2020, the General Prosecutor's Office informed the head of investigation that the letter from the

January 23, 2020 did not call for any comments on his part, while setting out the measures he

would have taken in the meantime to respond to the shortcomings noted by the head of the investigation.

The National Data Protection Commission sitting in restricted formation (hereafter

after: the “restricted committee”) takes note of this and refers to this subject to points 45 and 46 of

the current.

11.

By letter dated July 21, 2020, additional to the statement of objections of July 23

January 2020, the head of investigation informed the General Prosecutor's Office of the corrective measures he

proposed to the Restricted Committee to adopt under Article 58, paragraph 2 of the GDPR.

The General Prosecutor's Office then replied to the head of investigation by letter dated July 23, 2020 that the

corrective measures proposed did not call for any comments on his part.

12.

The case was examined by the Restricted Committee during its meeting on 23 October 2020. In accordance with Article 10, point 2, letter b) of the internal rules of the National Commission, the head of the investigation presented oral observations on the case while the General Prosecutor's Office had informed the President of the National Commission by email of September 21, 2020 that he did not intend to attend this meeting.

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II.

Place

II.1

As to the reasons for the decision

A. On the competence of the National Commission

13.

According to article 4 of the law of 1 August 2018 on the organization of the Commission national authority for data protection and the general data protection regime, the National Commission is responsible for controlling and verifying whether the data submitted to a processing are processed in accordance with the provisions:

1) GDPR;

2) the law of 1 August 2018 on the organization of the National Commission for the data protection and the general data protection regime;

3) of the law of 1 August 2018 on the protection of natural persons with regard to the processing of personal data in criminal matters as well as in matters of national security;

4) legal texts providing specific provisions for the protection

personal data.

14.

Article 5 of the law of 1 August 2018 on the organization of the National Commission

for data protection and the general data protection regime specifies

that the CNPD “is not competent to control the data processing operations

of a personal nature carried out by the courts of the judiciary, including the Ministry

public, and of the administrative order in the exercise of their jurisdictional functions”.

15.

In this case, the processing of personal data which is the subject of the

complaint and investigation were carried out as part of a recruitment process by

the General Prosecutor's Office, i.e. the public ministry.

16.

Such data processing does not fall within the jurisdictional functions of the Public Prosecutor's Office

general, so that the CNPD considers itself competent to analyze and verify the compliance of

processing operations related to the recruitment process with the legislation relating to the

data protection and, more particularly with the GDPR, the law of 1 August 2018 on

organization of the National Commission for Data Protection and the general regime

on data protection and the law of 1 August 2018 on the protection of persons

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

than in terms of national security.

17.

It is common ground that personal data appearing in the JU-CHA database – which a priori can only be processed for the purposes relating to the jurisdictional functions of the judicial authorities – were consulted and used in the context of a recruitment procedure, the processing of which pursues a specific purpose administrative and therefore a non-jurisdictional purpose.

18.

It is also in this sense that the CNPD sent a letter dated August 26, 2019 to the judicial control authority to inform it that it considered itself competent for a section or at least only for certain aspects of the complaint, just as it considered that the judicial control authority was competent to analyze another aspect of the complaint.

The letter in question had, among other things, the following content:

“The National Commission for Data Protection (CNPD) has been seized of a complaint lodged by Mr [...] on July 30, 2019 concerning the operations processing of personal data from the “JU-CHA” database in the framework of the process of recruitment of a "referendary-librarian" by the administration judicial.

The CNPD considers that the processing of personal data carried out within the framework of a recruitment, even if implemented by the public prosecutor, do not come under the "functions jurisdictional" thereof and are therefore subject to the control of the CNPD. The CNPD is thus competent for the investigation of the part of the complaint relating to the processing carried out in this recruitment process.

It appears from the complaint that the complainant considers that the rules concerning the storage data governing the “JU-CHA” database is contrary to Article 3 (1) (e) 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. However, according to the assessment of the CNPD, these questions relate presumably to the “jurisdictional functions” of the courts of the judiciary.

Therefore, the CNPD, in accordance with article 40 paragraph 2 and article 44 paragraph 4 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, takes the liberty of forwarding to you the complaint lodged by Mr [...] with regard to data processing operations carried out by the courts of the judiciary in the exercise of their judicial functions.

We would also like to inform you that Mr. [...] has been informed of this transmission in accordance with article 44 paragraph 4 of the said law. »

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B. On the breach of the purpose principle enshrined in Article 5.1 b) of the GDPR, combined with the breach of Articles 5.1 c) (principle of minimization) and 6 (lawfulness principle) of the GDPR

19.

In its capacity as controller, the General Prosecutor's Office is required to respect the data protection principles and must be able to demonstrate that these are complied with (principle of accountability – Article 5(2) GDPR).

20.

He must, moreover, still in his capacity as controller, put in place implement all the necessary measures for this purpose (Article 24 of the GDPR).

21.

Article 5, paragraph 1, letter b) of the GDPR enshrines the principle of finality, i.e.

the requirement that the data be collected for specific, explicit and

legitimate and not further processed in a manner inconsistent with these

purposes.

22.

The purpose principle is a cornerstone of the processing of personal data.

personal character. Indeed, it is in the light of the purpose that other

principles also enshrined in Article 5 of the GDPR (the principle of minimization – in the terms

of which only adequate data relevant and limited to what is necessary with regard to

of the purpose may be processed (Article 5, paragraph 1, letter c) of the GDPR)), as well as to

Article 6 of the GDPR (principle of lawfulness).

23.

The CNPD therefore considers that it follows from the economy of the aforementioned articles that the

principles of finality, minimization and legality are intrinsically linked. The CNPD

will therefore analyze these principles successively below, just as it considers that

the final assessment of these principles, for the purposes of this decision, must be made

in general.

24.

If the complainant does not question the existence of the JU-CHA database

as such which, a priori, can find a legitimate basis on the basis of the law of August 1

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

personal character in criminal matters as well as in matters of national security, he considers

however that “(...) certainly certain magistrates and members of the Public Ministry may resort

to the data processed and stored in the JuCha, but can only do so if

that they act within the framework of their jurisdictional functions, and even that within the framework

prosecution of facts likely to constitute offenses respectively at the level of

the execution of criminal penalties. In this case, the job interview conducted by a representative of the Public Ministry and magistrates obviously does not constitute, as far as the

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concerns, an act carried out within the framework of their jurisdictional functions but constitutes neither more or less than an act performed in the context of an administrative function, in this case a recruitment of three future state employees. The Claimant continues that the use of his data in the JU-CHA database "as part of a procedure of recruitment for one or more government employee positions is simply unacceptable, while such use is irretrievably outside the scope of use narrowly delimited, and rightly so, by the legislator. »

25.

If it is not up to the CNPD to decide on the purposes and legitimacy of the processing of personal data in the JU-database

CHA which pursues a judicial or jurisdictional purpose², the fact remains that the National Commission is competent to verify the compatibility between the purposes of the file JU-CHA and the administrative purpose pursued in the recruitment procedure of a state employee.

26.

If, a priori, the purpose of collecting and using personal data in the context of a recruitment procedure appears to be determined, explicit and legitimate (article 5, paragraph 1, letter b) of the GDPR), it is still necessary to check how, i.e. by which processing operations, these data were collected or obtained (source of the

data). Some personal data was collected directly from the
claiming. However, other data concerning his person were collected indirectly,
know through the JU-CHA database. As such, it is important to analyze whether the
principle of minimization or proportionality of data, with regard to the purpose
"presumed legitimate", has been respected.

27.

Indeed, under the principle of data minimization or proportionality,
pursuant to Article 5(1)(c) GDPR, personal data
must be adequate, relevant and limited to what is necessary for the purposes
for which they are processed. The extent of the data collected and processed, in this case,
or the question of whether data has been excessively processed is assessed by
relation to the purpose. As indicated above, the Restricted Committee recalls that the principles
purpose and proportionality are intrinsically linked.

28.

If the data collected directly from the person concerned does not seem
not pose a problem in terms of proportionality, it is otherwise with the data
collected and collected indirectly through the JU-CHA database. The General Prosecutor's Office
2 This competence lies with the judicial control authority, as explained under point II.A.

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justifies the consultation, verification and use of this data as follows (cf.
statement of objections, page 5):

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“To be able to estimate the degree of morality given the confidentiality of information that the candidate is called upon to process in the context of his work, in particular the degree of honesty of a candidate in relation to the question of whether he has already had contact with the law.

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Avoid recruiting candidates for whom business is in progress of instruction given the confidential nature of the files and the data personal that they would have to deal with in the event of hiring. »

29.

In view of the developments above, it must be concluded that the use of data, initially processed for judicial or jurisdictional purposes, is incompatible with the subsequent processing of these data for an administrative purpose in the context of a recruitment process and moreover excessive, unless a legislative provision does not authorize this data processing and does not make the two purposes compatible distinct, which the Restricted Committee proposes to examine in the developments which follow.

30.

The GDPR provides for the possibility that processing for another purpose, in this case incompatible with that for which the data was initially collected, may be based on national law (Article 6 GDPR).

31.

The General Prosecutor's Office indicated in its written responses of 27 September 2019 that it considers that the consultation of the JU-CHA database within the framework of the procedure recruitment of a state employee is based on article 3, paragraph 1, letter c) of the law of March 25, 2015 determining the regime and compensation for State employees. In under this provision, the employee must offer the guarantees of morality required to be

admitted to state service.

32.

During the on-site visit on November 14, 2019, the General Prosecutor's Office however claimed not to search the JU-CHA database for others state administrations as part of the verification of morality in their process of recruitment of state employees. This difference in treatment is justified in view of the specificity of the positions to be filled within the judicial administration as well as the data to which future employees are likely to have access.

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33.

The Restricted Committee finds that the legal provision invoked by the Public Prosecutor's Office general, namely article 3, paragraph 1, letter c) of the amended law of 25 March 2015 determining the regime and the allowances of State employees, does not expressly allow the Public Prosecutor's Office to consult the JU-CHA database, in order to use the data therein appearing to assess the morality of candidates for a position as a State employee in the context of of the recruitment process.

34.

The Restricted Committee comes to the conclusion that there is therefore no legal text authorizing the consultation of the JU-CHA database within the framework of the purpose administration of a procedure for recruiting a State employee within judicial administration and which would therefore make it compatible with the initial purpose of the JU-CHA database which is judicial.

35.

In support of the foregoing, the Restricted Committee concludes that Article 5, paragraph 1, letter b), in conjunction with Articles 5, paragraph 1, letter c) and 6 have not been complied with by the Prosecutor General.

C. On the breach of the obligation to process the data in accordance with the principle of transparency enshrined in Articles 5.1 a), 12, 13 and 14 of the GDPR

36.

Pursuant to Article 5, paragraph 1, letter a) of the GDPR, personal data personnel must in particular be treated transparently with regard to the person concerned.

37.

The principle of transparency implies that the controller must provide the data subject a certain amount of information, in accordance with Articles 12, 13 and 14 GDPR. Article 14 of the GDPR lists the information to be provided when the data to be personal character have not been collected from the data subject, i.e. from indirect way.

38.

According to the statement of objections of January 23, 2020, pages 8 and 9, “[t]his is apparent from the elements of the investigation that the General Prosecutor’s Office did not specifically inform the candidates of the verification concerning them in JU-CHA” so that “[i]t should be kept in mind against the data controller a breach of the obligations provided for in Articles 5 (1) (a) and 14 GDPR”.

39.

The Restricted Committee notes that it is not disputed by the General Prosecutor’s Office that the candidates were not informed of the verification of their personal data

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in the JU-CHA database and the addition of this information in their file of application in connection with the recruitment procedure.

40.

In view of the above, the panel concludes that Articles 5, paragraph 1, letter a) and 14 of the GDPR have not been complied with by the General Prosecutor's Office.

II.2.

On corrective measures

41.

In accordance with article 12 of the law of August 1, 2018 on the organization of the National Commission for Data Protection and the General Data Protection Regime data, the National Commission has the powers provided for in Article 58 of the GDPR.

42.

Under Article 58(2) of the GDPR, the CNPD has the power to:

- (a) notify a controller or processor of the fact that the operations of envisaged processing are likely to violate the provisions of this Regulation;
- b) call to order a data controller or a processor when the operations of processing have resulted in a breach of the provisions of this Regulation;
- (c) order the controller or processor to comply with requests submitted by the data subject with a view to exercising their rights under this settlement;
- d) order the controller or the processor to put the operations of processing in accordance with the provisions of this Regulation, where applicable, of

specific manner and within a specified time;

(e) order the controller to communicate to the data subject a personal data breach;

(f) impose a temporary or permanent restriction, including prohibition, of the processing;

g) order the rectification or erasure of personal data or the restriction

of the processing pursuant to Articles 16, 17 and 18 and the notification of these measures to the recipients to whom the personal data have been disclosed pursuant of Article 17, paragraph 2, and of Article 19;

(h) withdraw a certification or direct the certification body to withdraw a certification issued pursuant to Articles 42 and 43, or order the certification body not to

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not issue a certification if the requirements applicable to the certification are not or no longer satisfied;

(i) impose an administrative penalty pursuant to section 83, in addition to or in addition to put in place the measures referred to in this paragraph, depending on the specific characteristics of each case;

j) order the suspension of data flows addressed to a recipient located in a country third party or an international organization.

43.

These measures also include the power to "impose an administrative fine in application of Article 83 (...)". However, article 48, paragraph 1, of the law of 1 August 2018 on organization of the National Commission for Data Protection and the general regime

on data protection specifies that “[t]he CNPD may impose fines

administrative procedures as provided for in Article 83 of the [GDPR], except against the State or municipalities. ”.

44.

In its additional letter of July 21, 2020 to the statement of objections of the

January 23, 2020, the head of investigation proposed the following corrective measures:

“a) A call to order against the controlled for violation of Articles 5, paragraph 1,

letter a), and of article 6 of the GDPR, insofar as the controller has consulted the data

concerning Mr [...] contained in the JU-CHA system, within the framework of the

recruitment of a legal secretary under the status of state employee, and this without a basis

lawful and without prior information to the person concerned;

b) A ban on consulting the data contained in the JU-CHA system, in the

framework of the recruitment of a new State employee or a new civil servant for

administration

judicial, in

lack of basis

legal allowing a

such

counseling;

c) A warning to the control that, in the context of any recruitment of a

new employee of the State or a new civil servant for the judicial administration,

candidates for recruitment must be informed in advance of the consultation

of their personal data, under penalty of violation of the provisions of the

GDPR relating to the mandatory information of the data subject. »

45.

This decision refers to the situation as it arose when the facts

subject of the complaint took place, namely September 26, 2018, the date on which

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the job interview took place. The Restricted Committee notes that, in its letter of 28 January 2020, the Public Prosecutor's Office outlines the measures it claims to have taken to respond to the shortcomings noted by the head of investigation. Modifications intervened

later, even if they finally allow to establish the compliance of the person in charge of the processing, do not make it possible to retroactively cancel a breach noted.

46.

In any event, the measures mentioned by the General Prosecutor's Office in its letter of January 28, 2020 concern, on the one hand, the opinions issued by the judicial authorities as to the good repute and morality of citizens and, on the other hand, the recruitment of legal attachés. However, the subject of the investigation and of this decision relates to the consultation of the bank of JU-CHA data as part of the recruitment procedure for a state employee.

A. The call to order

47.

Pursuant to Article 58, paragraph 2, letter b) of the GDPR, the CNPD may remind order a controller or a processor when the processing operations resulted in a violation of the provisions of the GDPR.

48.

Given that the Public Prosecutor's Office consulted the personal data

complainant's personnel in the JU-CHA database in violation of Articles 5, paragraph 1, letters a), b) and c), 6 and 14 of the GDPR, the Restricted Committee considers that it is justified to issue a call to order against the General Prosecutor's Office.

B. Prohibition of processing

49.

Pursuant to Article 58, paragraph 2, letter f) of the GDPR, the National Commission may impose a temporary or permanent restriction, including prohibition, of the processing.

In view of the violation of articles 5, paragraph 1, letter b), 5, paragraph 1, letter c) and 6 of the GDPR, noted in this decision, the Restricted Committee considers that there is reason to prohibit consultation of the JU-CHA database within the framework of the recruitment of a state employee. This prohibition shall apply until a legal provision, where applicable, will expressly authorize the Public Prosecutor's Office to consult and use the data in the JU-CHA database for recruitment purposes of a State employee within the judicial administration.

50.

For all intents and purposes, the Restricted Committee finds that the prohibition proposed by the head of investigation also targets the recruitment of civil servants. However, the investigation based on this decision only analyzed the consultation of personal data in

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the JU-CHA database as part of the recruitment of a state employee so that this decision cannot rule on the recruitment procedure under the civil servant status.

C. Warning from the data controller

51.

With regard to the warning that the head of the investigation proposes to issue to
against the Public Prosecutor's Office on the basis of Article 58, paragraph 2, letter a) of the GDPR, the
restricted committee considers that in view of the ban imposed, it is superfluous to
issue such a warning.

D. Erasure of personal data

52.

Pursuant to Article 58, paragraph 2, letter g) of the GDPR, the CNPD may order
the erasure of personal data when they have been processed
illicit.

53.

In view of the violation of articles 5, paragraph 1, letter b), 5, paragraph 1, letter c)
and 6 of the GDPR, noted in this decision, the Restricted Committee considers it necessary
to order the Public Prosecutor's Office to erase the personal data resulting from the
JU-CHA database which can be found, where applicable, in its recruitment files
relating to people who have applied for a state employee position.

E. Publication of the decision

54.

Under the terms of article 52 of the law of August 1, 2018 on the organization of the
National Commission for Data Protection and the General Data Protection Regime
data, "[t]he CNPD may order, at the expense of the sanctioned person, the publication
in full or in extracts from its decisions, with the exception of decisions relating to the pronouncement
periodic penalty payments, and provided that:

1° the means of appeal against the decision have been exhausted; and

2° the publication is not likely to cause disproportionate harm to the parties involved. »

55.

The Restricted Committee finds that both the complainant's representative and the Public Prosecutor's Office general gave some publicity to the case giving rise to this decision, in particular by their declarations made in the national press, so that the publication of the decision is not likely to cause disproportionate prejudice to the parties involved.

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56.

Furthermore, the Restricted Committee considers that the publication of the decision on the CNPD website is justified in view of the public interest aroused by the case which gave rise to this decision.

In view of the foregoing developments, the National Commission sitting in restricted formation and deliberating unanimously decides:

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to pronounce against the General Prosecutor's Office of the Grand Duchy of Luxembourg call to order for violating articles 5, paragraph 1, letters a), b) and c), 6 and 14 GDPR;

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to pronounce against the General Prosecutor's Office of the Grand Duchy of Luxembourg prohibition to consult the JU-CHA database in the context of recruitment of a state employee. This prohibition shall apply until a legal provision, where applicable, will expressly authorize the Public Prosecutor's Office to consult and use the data contained in the JU-CHA database for

purposes of recruiting a State employee within the judicial administration;

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to enjoin the Public Prosecutor's Office of the Grand Duchy of Luxembourg to erase

month of receipt of this decision the personal data from

of the JU-CHA database which may be found in its files

recruitment relating to people who have applied for a State employee position;

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to publish this decision on the website of the National Commission as soon as

the means of appeal against this decision have been exhausted.

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Thus decided in Belvaux on March 5, 2021.

The National Commission for Data Protection sitting in restricted formation

Tine A. Larsen Thierry Lallemand

President

Commissioner

Christopher Buschman

Commissioner

Indication of remedies

This administrative decision may be subject to an appeal for review within three

months following its notification. This appeal is to be brought before the administrative court and must

must be introduced through a lawyer at the Court of one of the Bar Associations.

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