

Opinion of the National Commission for Data Protection relating to

Bill no. 7762 amending the law of July 5, 2016 on

organization of taxi services.

Deliberation n° 31/AV26/2021 of October 1, 2021.

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

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

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

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

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

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

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

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

other institutions and bodies on legislative and administrative measures relating

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

By letter dated January 27, 2021, Minister of Mobility and Public Works

invited the National Commission to give its opinion on the draft law amending the law of 5 July

2016 on the organization of taxi services (hereinafter the "draft law").

According to the explanatory memorandum, the bill aims to remedy certain shortcomings

in the taxi sector as well as to include rental cars with driver (hereafter

"VLC") in the legislation.

This opinion will limit its observations to questions dealing with aspects relating to the

data protection, raised more particularly by articles 11 and 18 of the bill

under notice.

1. On the good repute condition

Pursuant to Article 7, paragraph (2), letter c) of the amended law of 5 July 2016 on

organization of taxi services, as amended by the bill, any taxi driver or

of VLC who wishes to obtain a driver's card must meet the good reputation requirements

specified in article 8 of the said law.

The purpose of article 11 of the bill is to amend article 8, paragraphs (1) and (2) of the law of

July 5, 2016 on the organization of taxi services. It appears from the commentary to article 11

[CNPID

Opinion of the National Commission for Data Protection

relating to bill no. 7762 amending the law of July 5, 2016 on the organization of

taxi services.

1/13

that the authors of the bill introduce in particular "a provision making it possible to assess

the history of a person incurred during the last 5 years preceding a

request".

A. On the assessment of good reputation

It follows from subsection (1) of Section 8, as amended by Section 11 of the Bill, that

good reputation is assessed "on the basis of the criminal record resulting" from the criminal record

of the taxi or VLC driver.

Subsection (2) of the aforementioned section 8, as amended by section 11 of the bill, lists

what would be the offenses to be taken into account for the purposes of assessing the good reputation of a

taxi or VLC¹ driver.

While it should be noted that the aforementioned law does not define the concept of "good reputation"², further details

as to the appreciation of this concept are brought by the parliamentary works relating to

article 8 of the amended law of 5 July 2016 cited above³, as well as by a judgment of the Court

Administrative Order of the Grand Duchy of Luxembourg of 8 November 2018.⁴

It emerges from parliamentary work that the assessment of the good reputation of the taxi driver is

based on "criminal record No. 2 in order to guarantee a high standard of security

for customers"⁵ and that the "fit and proper requirements are intended to

account, when verifying the award criteria, of any convictions in relation with the activity of the taxi driver”⁶. It is further specified that “[b]his in-depth verification is necessary in order to guarantee a certain level of services and to ensure the seriousness of the driver who is responsible for the proper transport of his passengers. Moreover, it is thus held account of the fact that taxi services have a considerable impact on the general image of Grand-Duchy to foreign visitors”⁷.

Paragraph (2) of article 8 of the amended law of July 5, 2016 on the organization of taxi services, as amended by article 11 of the bill, provides that “[T]he requirements in terms of good repute are satisfied, in particular if the driver of the taxi or VLC has not been the subject, within the five years preceding the request, of a criminal conviction *res judicata* pronouncing a prison sentence of at least six months for theft, fraud, breach of trust, willful attack personal integrity, sexual assault or drug offence. ”.

2 As for the absence of a definition of the concept of “good repute” in Luxembourg law, reference is made to deliberations no. 17/2020

of July 17, 2020 (points 1.2 and 1.3.) and n°3/AV3/2021 of February 10, 2021 (point 1).

3 Parliamentary document n°6588, commentary on the articles, p.16, ad article 10.

4 Judgment of the Administrative Court of the Grand Duchy of Luxembourg of 8 November 2018, number 41156C of the roll.

5 Parliamentary document n°6588/00, commentary on the articles, p.16, ad article 10.

6 Parliamentary document no. 6588/00, commentary to the articles, p.16, ad article 10.

Parliamentary document n°6588/00, commentary on the articles, p.16, ad article 10.

[CNPE1

Opinion of the National Commission for Data Protection

relating to bill no. 7762 amending the law of July 5, 2016 on the organization of taxi services.

2/13

In addition, the Administrative Court of the Grand Duchy of Luxembourg, in its judgment of 8 November 2018 cited above, was called upon to rule on the good repute of an applicant applying for a card

taxi driver in accordance with the amended law of 5 July 2016 on the organization of

taxi services.

In this judgment, the judges considered that the list of offences, referred to in paragraph (2) of article 8 of the amended law of July 5, 2016 mentioned above, was not to be considered as exhaustive and that "if the person has been the subject of a criminal conviction, his honorability is not affected not automatically affected, but it is up to the minister, in the context of the assessment of the professional integrity of a taxi driver, to assess in concrete terms whether the behavior overall character of the person concerned is not such as to deprive him of his reputation".

The Court also held that the assessment of good repute could not relate to facts committed more than 5 years ago. This principle of temporal limitation, as regards the facts retained in order to assess the good repute of a taxi driver, as determined by case law, has been taken up by the authors of the bill in article 11 of the text under opinion.

Therefore, while the authors of the bill are to be congratulated for these clarifications, the CNPD regrets that the criminal record bulletin number that would be communicated is not expressly indicated in the said article whereas it emerges from the aforementioned parliamentary proceedings and of the aforementioned case law that bulletin no. 2 would be communicated. It should be reminded that subject than in the Luxembourg legal order, the communication of information relating to court decisions is made by issuing extracts from the criminal record in accordance with the amended law of 29 March 2013 relating to the organization of criminal records.

Therefore, it would be appropriate to complete the bill in this sense.

Finally, without prejudging the assessment of good repute in concreto to be made by the minister having in his competences the law under opinion (hereinafter the "Minister"), and in order to respect the principle of predictability and precision to which any legal or regulatory text must comply⁹, the CNPD wonders whether it would not be appropriate, following the example of Belgian and French legislation, to provide an exhaustive list of the offenses which would be to be taken into account when assessing of good repute by the minister?

Judgment of the Administrative Court of the Grand Duchy of Luxembourg of 8 November 2018, number 41156C of the roll.

9 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

Opinion of the National Commission for Data Protection

relating to bill no. 7762 amending the law of July 5, 2016 on the organization of

taxi services.

3/13

B. On the national legal framework compared to that in Belgium and France

It is interesting to note that both Belgian and French law provide for a condition similar to

that required by article 8 of the amended law of 5 July 2016 organizing the services of

taxis, as amended by clause 11 of the bill.

Indeed, in Belgium article 9 of the order of the Walloon Government carrying out the decree

of 18 October 2007 relating to taxi services and car rental services with

driver, as amended, provides that a driver "satisfies the character requirements" if he has not

not been the subject of a serious criminal conviction which has become legally binding for offenses including

listed, namely "1° infringement of Book II, Title III, chapters 1 to V, title V, chapters 1 and 2,

Title VII, Chapter V, Title VIII, Chapters 1 and 2 and Title VIII of the Penal Code; 2° offense of

third and fourth degree to the regulation of road traffic; 3° offense for

speeding ; 4° driving in a state of alcoholic intoxication, alcoholic impregnation,

drunkenness or under the influence of other substances which influence the ability to drive within the framework

of his professional activity".

In France, article R.3120-8 of the French Transport Code provides that "[n]o one may exercise

the profession of driver of a private public transport vehicle if listed in bulletin no. 2 of

his criminal record, or its equivalent for non-nationals, one of the convictions

following:

1° A final conviction for an offense punishable under the Highway Code by a

halving of the maximum number of driving license points;

2° A final conviction for driving a vehicle without holding a driver's license.

drive corresponding to the category of the vehicle used or for driving despite the cancellation of the

driver's license or despite the prohibition to obtain the issuance of the license, or for refusal

to return his driving license after its invalidation or cancellation;

3° A final sentence pronounced by a court, French or foreign, to a penalty

criminal or a correctional sentence of at least six months' imprisonment for theft,

fraud, breach of trust, willful attack on the integrity of the person, aggression

sex, arms trafficking, extortion or drug offences. »

Contrary to the current national legal framework, the Belgian and French laws exhaustively list

the facts on which the assessment of "morality" or "good repute" will be based

professional "" of a driver. Therefore, in order to meet the requirements of precision and

predictability to which a legal text must respond", the CNPD wonders if the authors of the

bill should not be based on the aforementioned Belgian and French legal provisions?

1° Article R.3120-6, point 3° of the French Transport Code

11 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

CNPE1

Opinion of the National Commission for Data Protection

relating to bill no. 7762 amending the law of July 5, 2016 on the organization of

taxi services.

2. On the database dedicated to the daily management of operating licenses

of taxis and VLC as well as those of driver cards

It should be noted that the principle of creating a personal data bank

held by the Minister and dedicated to the day-to-day management of taxi operating licenses has been

introduced by article 18 of the amended law of July 5, 2016 on the organization of the services of

cabs.

Article 23 of the bill, however, intends to carry out a complete overhaul of these

provisions. The National Commission regrets that the reasons which led the authors of the project

of law to carry out such an overhaul are not set out in the commentary to the articles,

while the new provisions lack clarity and precision, unlike those

which originally appeared in the aforementioned article 18.

A. Preliminary remarks

It should be recalled that keeping a file of personal data collected and

processed by an administrative authority must have a legal basis in accordance with Article

6 paragraph (3) GDPR.

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, the entities to which the personal data may be communicated, purpose limitations, retention period and other measures aimed at to guarantee lawful and fair processing. [...]".

Pursuant to the above provisions, these legal bases should establish provisions specific aims to determine, among other things, the types of data processed, the persons concerned, the entities to which the data may be communicated and for which

[CNK1

Opinion of the National Commission for Data Protection relating to bill no. 7762 amending the law of July 5, 2016 on the organization of taxi services.

5/13

purposes, the data retention periods or the operations and procedures of treatment.

Thus, although the provisions of the aforementioned article 18 already provided for the holding of a file by the Minister, these should, following their revision by section 23 of the bill, be supplemented when they are formulated too vaguely or imprecisely.

In the developments below, the National Commission will come back to the provisions be completed or on the elements that need to be clarified.

B. On the role of the different actors

The National Commission welcomes the fact that paragraph (4) of Article 18 of the amended law of 5 July 2016 on the organization of taxi services, as amended by article 23 of the draft law, specifies the role of the various actors in the context of the processing of personal data staff referred to in the aforementioned article.

The CNPD welcomes the fact that the authors of the bill have specified that: the Minister has the status of controller within the meaning of Article 4, point 7) of the GDPR; and

the CTIE and the Société Nationale de Circulation Automobile (hereinafter the “SNCA”) act as a processor of the Minister within the meaning of Article 4(8) GDPR.

Regarding the role of the subcontractor, it should be recalled that in accordance with Article 28 of the GDPR, this “only processes personal data on documented instructions from the controller”.

C. On the purposes of the processing of personal data

As previously noted, article 23 recasts article 18 of the amended law of July 5, 2016 on the organization of taxi services. It follows from this redesign that the purposes listed in paragraph (1) of the aforementioned article 18 are deleted by article 23 of the law Project. The purposes of the processing are now listed in paragraph (2) of Article 18, as amended by clause 23 of the bill.

If said article substantially resumes the purposes which were listed in Article 18, paragraph (1), it should be noted that the purpose relating to “the implementation of analyzes and research à for purposes of planning and evaluating the quality of taxi services after depersonalization related data” has been deleted. Article 23 of the bill also introduces a

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Opinion of the National Commission for Data Protection

relating to bill no. 7762 amending the law of July 5, 2016 on the organization of taxi services.

6/13

new purpose, namely “monitoring compliance with the provisions of this law and its implementing regulations”.

The National Commission is pleased that the purposes are determined and listed in paragraph (2) of section 18, as amended by section 23 of the bill.

Nevertheless, for greater clarity, it would have been preferable for the authors of the bill to specify what data is collected and for what purposes. In the absence of such details, it is difficult for the CNPD to assess whether the principle of minimization would be respected. He is reminded that by virtue of this principle, only the personal data which are necessary for the achievement of the purposes may be processed.

D. On the origin of personal data and the categories of data to be personal character

The National Commission welcomes that the categories of personal data collected by the Minister be listed in subsection (3) of section 18, as amended by clause 23 of the bill. However, it should be noted that the initial wording of Article 18 was more precise both as regards the categories of personal data collected by the Minister as their origins. However, such provisions have been deleted and have not not taken up by article 23 of the bill.

On the origin of the data

It should be noted that Article 18, in its original version, made a distinction between categories of data that were collected directly from the data subjects of those that were collected indirectly and that came from state files.

The current wording no longer makes such a distinction. However, it appears from the comments of articles that "Access to the majority of personal data is made through access to other existing databases such as the RNPP or the database on vehicles" and that "the encoding of new personal data is very limited within from the database". In addition, subsection (5) of section 18, as amended by section 23 of the bill, also provides for indirect collection of data by the Minister through the SNCA.

Therefore, the CNPD questions the merits of deleting the provisions of Article 18, in its initial version, which specified the origin of the data collected and processed by the Minister.

CNPD

Opinion of the National Commission for Data Protection

relating to bill no. 7762 amending the law of July 5, 2016 on the organization of taxi services.

7/13

If access to state files were to be a means of collecting personal data staff then it should be specifically in the bill. The National Commission will come back to this below at point E.

Finally, it should be noted that under paragraph (5) of Article 18, as amended by Article 23 of the bill, the Minister would obtain via the SNCA "the national identification number of the candidate ". However, it should be recalled that access to the RNPP by an administration should be carried out in accordance with the procedure provided for in article 10 of the amended law of 19 June 2013 relating to the identification of natural persons as well as Articles 5 to 7 of the Grand- of November 28, 2013 setting the terms of application of the aforementioned law. It would therefore be preferable to provide that the Minister has access to the RNPP in accordance with the aforementioned provisions rather than providing for the transmission of the national identification number by the SNCA to the Minister.

On the categories of personal data

It should be noted that the Minister is provided with personal data as well as data concerning legal persons. In this regard, it should be noted that recital 14 of the GDPR states that the GDPR "(...) does not cover the processing of personal data of a personal nature which concern legal persons, and in particular companies with legal personality, including the name, legal form and contact details of the legal person". However, information relating to legal persons may, on if applicable, relate to natural persons (for example: if they include the name of the manager of the company) and must therefore be considered as personal data personal. The GDPR will therefore only apply to personal data that would be

communicated to the Minister.

It should be noted that the initial version of Article 18 was drafted with more precision and clarity regarding the categories of data collected by the Minister. Indeed, the paragraph (3) of Article 18 listed the categories of data collected indirectly via state files and paragraph (5) enumerated the categories of data which were collected directly from drivers, taxi operators or interested parties "on the waiting list".

However, the current wording of section 18, as amended by section 23 of the bill, proposes a succinct and imprecise list, which does not include some of the categories of data which were nevertheless covered by the deleted provisions. In addition, the provisions under notice do not do not mention to which data subject the personal data relates that would be collected.

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Opinion of the National Commission for Data Protection

relating to bill no. 7762 amending the law of July 5, 2016 on the organization of taxi services.

8/13

By way of illustration, it should be noted that paragraph (3) of Article 18, as amended by Article 23 of the bill, provides that "surnames and first names" would be collected. Are these the names and first names of drivers, taxi or VLC operators?

Thus, in order to meet the precision and predictability requirements that a text 1éga112, the National Commission suggests that the authors of the draft adopt the wording

initial of article 18, paragraphs (3) and (5), if not to specify in the text under opinion to which data subject relate to the categories of personal data and complete the enumeration of categories of personal data, which does not appear at this stage complete. It would be appropriate, for example, to specify that the photo of the driver would be collected as well as the extract from the criminal record of a taxi or VLC driver would be collected. Finally, a clerical error seems to have crept into paragraph (3) of Article 18, as amended by Article 23, in that it provides "for the files listed in paragraphs 1 and 2" while that it appears from the said paragraphs that the Minister maintains a single database. Moreover, at same paragraph, it also appears that the authors of the bill omitted the term "collected" just after "personal data".

E. Access to the RNPP and the vehicle database

It should be noted that the initial provisions of Article 18, paragraph (3), framed access to other state files by the Minister. Indeed, this article specified for each of the files the minister could access what data he could collect for the purposes listed therein.

However, these provisions were deleted by article 23 of the bill, although the authors of the bill specify in the commentary to the articles that "17I have access to the majority of the data personal data is done through access to other existing databases such as the RNPP or the Vehicle Database".

If access to other state databases still seems to be the will of the authors of the bill, this is no longer reflected in the current wording of section 18, as amended by clause 23 of the bill. Section 18 paragraph (5), as amended by Section 23 of the bill, furthermore providing only for the communication of data from the SNCA to the minister.

12 In this sense, V. M. Besch, "Personal data processing in the public sector", Norms and legislation in law Luxembourg public, Luxembourg, Promoculture Larcier, 2019, p469, n°619; V. among others CourEDH, Zakharov e. Russia

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no. 474131061, § 228-229, December 4, 2015

Opinion of the National Commission for Data Protection

relating to bill no. 7762 amending the law of July 5, 2016 on the organization of taxi services.

9/13

Therefore, in order to meet the requirements of precision and predictability that must be met by a text 1éga113, the National Commission considers that such access should be provided for and regulated by the bill. On this point, it is suggested that the authors of the bill take up the provisions of Article 18, paragraph (3).

Finally, there is reason to draw the attention of the authors of the bill to the fact that this access must not not allow the Minister to indirectly obtain personal data from state authority files to which he would not have access under the bill under notice.

F. On the communication of personal data to the SNCA

It should be noted that in its initial version Article 18, paragraph (10) provided that "111 Minister is authorized to communicate, by computerized processes or not, data to personal nature relating to operators or drivers, to the SNCA, for the purpose of allowing verification of a business license in process and for issuance and affixing the taxi board, the taxi zone plate and the illuminated panel. The data that may be communicated to the SNCA are determined by Grand-Ducal regulation. »

Article 14, paragraph (2), of the Grand-Ducal Regulation of July 23, 2016 setting in particular the methods of application of the legislation on the organization of taxi services, lists the data which may be communicated by the Minister to the SNCA.

To the extent that the provisions of paragraph (10) of Article 18 are deleted by Article 23 of the bill, and that the authors of the bill do not indicate the reasons for such

deletion, the National Commission wonders if such a communication is still planned?

If so, such details should be provided by the authors of the bill.

G. On access to personal data

It should be noted that the provisions set out in paragraph (7) of Article 18, as

amended by article 23 of the bill, provide for access "to the data contained in the

database" for members of the Grand Ducal Police and police officers

the customs and excise administration within the framework of the purpose referred to in paragraph (2),

point 1) of the aforementioned article.

13 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

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Opinion of the National Commission for Data Protection

relating to bill no. 7762 amending the law of July 5, 2016 on the organization of

taxi services.

10/13

However, insofar as a law must be sufficiently clear and precise in order to allow

data subjects to know the extent of the limitations, as well as the consequences

possible for e11es14, it would be advisable to specify the legal framework of the controls that can be

carried out by members of the Grand Ducal Police and agents of the administration of

customs and excise. The National Commission therefore recommends inserting at the end of the

subsection (7) of Section 18, as amended by Section 23 of the Bill, the wording

following: "in accordance with their supervisory powers as referred to in Article 22 of this

law”¹⁵.

Finally, the CNPD still wonders whether access to such a file by the Grand Ducal Police should not not be provided for in the body of article 43 of the amended law of July 18, 2018 on the Grand Police ducale, which specifies in particular the files to which the police can have access, as well as the conditions under which such access can be made. All the more then that bill n°7741 modifying 1° the amended law of July 18, 2018 on the Police Grand Duchy, 2° of the amended law of 5 July 2016 reorganizing the SRE and 3° of the Code penal, intends to modify the said article. Indeed, it appears from the explanatory memorandum to the bill No. 7741 cited above, that the planned modification of the aforementioned article 43 "aims to adapt the list files already accessible to the Police and to better supervise their access by the Police".

H. Access traceability

It should be noted that paragraph (6) of Article 18 provided specific provisions with regard to the traceability of accesses, which are now eliminated by article 23 of the draft of law. While the GDPR does not explicitly provide for such provisions to be reflected in a text of law, the National Commission nevertheless wishes to recall the principle of integrity and confidentiality which must be respected by the data controller, in this case the minister.

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, accidental destruction or damage, using technical measures or appropriate organizational (integrity and confidentiality)”.

In addition, Article 32 of the GDPR 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 in particular to prevent unauthorized access to data or data leaks.

¹⁴ See among others ECtHR, Zakharov c. Russia [GC], n°47413/06, § 228-229, 4 December 2015.

15 Article 22 of the amended law of 5 July 2016 on the organization of taxi services provides that: "files offenses against provisions of this law and its implementing regulations are sought and observed by the members of the Grand-Police. Ducale and by officials of the Customs and Excise Administration".

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Opinion of the National Commission for Data Protection

relating to bill no. 7762 amending the law of July 5, 2016 on the organization of taxi services.

11/13

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

In addition, it is necessary to provide an access logging system (log register), in order to be able to guarantee the traceability of access. Finally, the CNPD recommends that data from logging are kept for a period of five years from their recording, period after which they are erased, except when they are the subject of a control procedure.

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

I. On the retention period of personal data

In accordance with Article 5 paragraph (1), letter e) of the GDPR, personal data must not be kept for longer than necessary for the fulfillment of the purposes for which they are collected and processed.

The National Commission welcomes that Article 18, paragraph (8), as amended by Article 23 of the bill provides that "The data will be kept for a maximum of three years after forfeiture of taxi operating license, VLC operating license or card of driver. The identity photo is destroyed after the production of the driver's card".

However, do such provisions respect the principle of limitation of storage in with regard to the extract from the criminal record which would be collected under article 8 of the law of 5 July 2016 on the organization of taxi services?

Finally, it should also be noted that the draft text provides for a retention period that case of forfeiture of a taxi operating licence, VLC or driver card.

However, what about the renewal of a taxi, VLC or a driver card?

It is recalled in this respect that in accordance with the principle of accuracy, the personal data must be accurate and, if necessary, kept up to date. Thus, it is the responsibility of the person responsible for [CNPD

Opinion of the National Commission for Data Protection relating to bill no. 7762 amending the law of July 5, 2016 on the organization of taxi services.

12/13

processing to take all reasonable measures to ensure that the data inaccurate personal data are corrected or deleted without delay.

Thus decided in Belvaux on October 1, 2021.

The National Data Protection Commission

Tine A. Larsen

Thierry Lallemand

President

Commissioner

Marc Lemmer

Commissioner

Alain Hermann

Commissioner

CNPD

Opinion of the National Commission for Data Protection

relating to bill no. 7762 amending the law of July 5, 2016 on the organization of
taxi services.

13/13