

Opinion of the National Commission for Data Protection relating to

to bill n°7543 amending the amended law of 18 July

2018 on the Grand-Ducal Police and the draft Grand-Ducal regulation

concerning: 1° fixing of the conditions and methods of the special stage of

the competitive examination for admission to the internship for the categories of

treatment A and B and treatment group C1 of the police officer; 2°

setting the terms and conditions of recruitment for the group of

C2 treatment of the police framework; 3° amending the regulations

amended Grand-Ducal of 30 September 2015 setting the conditions and

procedures for registration and organization of examinations-competitions

admission to the internship in the administrations and services of the State

Deliberation n°17/2020 of 07/17/2020

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 Data Protection) (hereinafter "the GDPR") as well as Article 46, paragraph

1, letter (c) of Directive (EU) No. 2016/680 of 27 April 2016 on the protection of

natural persons with regard to the processing of personal data by the authorities

authorities for the purposes of the prevention, investigation and prosecution of criminal offences.

matters or the execution of criminal penalties, and on the free movement of such data, and repealing

Council Framework Decision 2008/977/JHA, each supervisory authority is responsible for

advise "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 the processing. »

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

data protection and the general data protection regime specifically provides

that the National Commission for Data Protection (hereinafter referred to as "the Commission National" or "the CNPD") carries out the missions entrusted to it by virtue of Article 57 of the GDPR, while article 8 point 3° of the said law of August 1, 2018 is based on article 46, paragraph 1, letter (c) of the aforementioned directive (EU) No. 2016/680 by providing that the CNPD

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"advises the Chamber of Deputies, the Government and other institutions and organizations in subject of legislative and administrative measures relating to the protection of the rights and freedoms of natural persons with regard to the processing of personal data".

By letter dated March 25, 2020, the Minister of Homeland Security invited the National Commission to decide on the draft Grand-Ducal regulation on: 1° fixing of the conditions and methods of the special test of the examination-competition for admission at the training period for treatment categories A and B and treatment group C1 of the police officer ; 2° setting the terms and conditions of recruitment for the C2 salary group of the executive policeman ; 3° amending the amended Grand-Ducal regulation of 30 September 2015 setting the conditions and methods of registration and organization of the examinations-competition for admission to the internship in the administrations and services of the State (hereinafter the "draft ducal").

This draft Grand-Ducal regulation is in line with Bill No. 7543 on modification of the amended law of 18 July 2018 on the Grand-Ducal Police (hereinafter the "draft law"), as part of a reform of access to police careers and the training of trainee police officers.

If the purpose of the draft Grand-Ducal regulation is in particular to set the conditions required for admission to the traineeship for treatment categories A and B and treatment group C1 of the police framework, it should be noted that the bill also provides that in order to be admitted during the internship, candidates must "have the moral qualities necessary for the execution of a

of the functions of the police officer”<sup>1</sup>. In order to determine whether applicants meet this condition, a morality investigation is carried out by the Grand-Ducal Police.

Insofar as the draft Grand-Ducal regulation and the draft law both deal with conditions for admission to the internship for one of the functions of the police officer, the Commission national authority self-seize to notify the bill together with the draft grand-ducal.

<sup>1</sup> Article 1 of the bill aimed at modifying article 58 of the amended law of 18 July 2018 on the Grand Ducal Police.

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I.

On the bill

#### 1. Preliminary remarks

The National Commission welcomes the fact that Article 58 of the amended law of 18 July 2018 on the Grand-Ducal Police, from the point of view of legal certainty, constitutes the legal basis for the morality investigation carried out by the Grand-Ducal Police in the context set out above, in accordance with Article 6 paragraph (3) of the GDPR<sup>2</sup>.

Indeed, it should be recalled that the processing of personal data collected and processed in the context of the performance of a mission of public interest or relating to the exercise of the official authority vested in the controller must have a legal basis in accordance with Article 6 paragraph (3) of the GDPR, read together with its paragraph (1) letters c) and e) <sup>3</sup> which provides that: “The basis for 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

2 It should be noted that the Law of 1 August 2018 on the protection of individuals with regard to the processing of personal data in criminal matters as well as in matters of national security is not intended to apply in the case present while the processing implemented by the Grand Ducal Police is for recruitment purposes

3 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; (...)"

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than those provided for in other specific processing situations such as provides for Chapter IX. »

the entities to which

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. [...]”.

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. Recital (41) of the GDPR further states that "Where this Regulation makes reference 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 provided for under the constitutional order of the Member State concerned. However, this basis legal or 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 Union European Union and the European Court of Human Rights. ". At the national level a base legal act can therefore constitute a legislative or regulatory act, which is the case here. of the bill and the draft Grand-Ducal regulation under examination.

Thus, the National Commission must emphasize the fundamental importance of the principle of

lawfulness of personal data processing 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

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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:

- is provided for by a law accessible to the persons concerned and foreseeable as to its repercussions, i.e. formulated with sufficient precision;
- is necessary in a democratic society, subject to the principle of proportionality;
- 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.

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As regards the first condition, according to the case law of the European Court of human rights, an interference with the right to respect for private life is not "in accordance with the law", within the meaning of Article 8 paragraph (2) of the European Convention on Human Rights<sup>4</sup>, that if it is based on an article of national law which has certain characteristics. The expression "provided by law" therefore implies, according to the case law of the European Court of Human Rights

human beings that internal legislation must use terms that are clear enough to indicate to everyone sufficiently in what circumstances and under what conditions it empowers the power to resort to measures affecting their rights protected by the Convention<sup>5</sup>. The legislation internal must be “accessible to the persons concerned and foreseeable as to its repercussions”<sup>6</sup>. A rule is foreseeable “if it is formulated with sufficient precision to allow anyone – possibly benefiting from appropriate assistance – to adapt behavior”<sup>7</sup> as well as “The degree of precision required of the ‘law’ in this regard will depend on the subject in question. »<sup>8</sup>.

4 Article 8 paragraph (2) of the European Convention on Human Rights provides that: “There shall be no interference by 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”

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

6 CouEDH, Amann c. Switzerland [GC], no. 27798/95, 16 February 2000, para. 50; see 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.

7 CoEDH, Amann c. Switzerland [GC], no. 27798/95, 16 February 2000, para. 56; see also CouEDH, Malone v. 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.

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

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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 of personal nature carried out by such authorities, such as the Grand Ducal Police. This legal framework would also guarantee the principle of legal certainty for the benefit of persons concerned, candidates for police careers. Legal certainty is even a general principle of European Union law, requiring in particular that a regulations resulting in adverse consequences for individuals are clear and precise and predictable application for litigants. The regulations should allow interested parties to know the exact extent of the obligations it imposes on them, must allow them to know their rights and obligations unambiguously and allow them to make their arrangements accordingly.

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(1)"<sup>10</sup>. 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 by the Grand Ducal Police within the framework of the draft law and the draft Grand-Ducal regulation constitutes an interference in the right to respect for the privacy of candidates for police careers, the bill and the draft Grand-Ducal regulation should provide a more specific framework for such processing



in accordance with the case law of the European Court of Human Rights. This

legal framework would also guarantee the principle of legal certainty for the benefit of

9 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.

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

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

EDH Court,

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

58243/00 of July 1, 2008, para. 62 and 63; EDH Court, *Rotaru v. Romania*, App. No. 28341/95, May 4, 2000, para.

57 to 59 and Court EDH, *S and Marper c. 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.

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

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persons concerned, candidates for police careers. Legal certainty is

even a general principle of European Union law, requiring in particular that a

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precise and predictable application for litigants. The regulations should allow

interested parties to know the exact extent of the obligations it imposes on them, must

allow them to know their rights and obligations unambiguously and allow them

to make their arrangements accordingly.

In addition, the protection of personal data constitutes at national level a

matter reserved for the law insofar as it concerns the protection of the privacy of citizens (article

11 paragraph (3) of the Constitution). According to Article 32, paragraph (3), of the Constitution,

in the said matters reserved to the law by the Constitution, "the Grand Duke cannot take regulations and decrees only by virtue of a specific legal provision which sets, in addition to the objectives, the principles and essential points of the implementing measures. » 14.

The essential elements<sup>15</sup>, objectives and principles<sup>16</sup> must therefore be included in the law at strict sense of the term.

Thus, and although the investigation of morality has a legal basis, as provided for by article 58 of the amended law of 18 July 2018 on the Grand Ducal Police, the National Commission falls that the terms and conditions of the processing implemented during the morality investigation do not are not specified in the aforementioned article 58, as amended by article 1 of the bill, then that this investigation constitutes an interference with the right to respect for private life and the right to Data protection.

## 2. On the investigation of morality

The National Commission welcomes that the morality inquiry is provided for by a legal basis, such as than provided for in Article 58 of the amended law of 18 July 2018 on the Grand Ducal Police. Likewise that it is pleased that the aforementioned article 58, as amended by article 1 of the bill, specifies henceforth the consequences of the lack of the moral qualities necessary for the execution of one of the

13 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.

14 Opinion No. 52976 of the Council of State of 24 July 2018 relating to the Draft Grand-Ducal Regulation 1. amending the Grand-Ducal Regulation of August 10, 2005 relating to the operation of the pilot school, and 2. repealing the Grand-Ducal regulation of August 27, 2012 on on the classes of the upper division of secondary education in the training cycle of the Ermesinde high school.

15 Judgment of the Constitutional Court - Judgments n° 00132 and 00133 of March 2, 2018.

16 Opinion No. 52976 of the Council of State of 24 July 2018 relating to the Draft Grand-Ducal Regulation 1. amending the

## Grand-Ducal Regulation

of August 10, 2005 relating to the operation of the pilot school, and 2. repealing the Grand-Ducal regulation of August 27, 2012 on

on the classes of the upper division of secondary education in the training cycle of the Ermesinde high school.

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functions of the police officer. However, and as set out above, certain details deserve to be provided.

has. On the lack of definition of the moral qualities required by candidates

to one of the functions of the police officer in the law

Indeed, in the absence of definition of the moral qualities required by the candidate for one of the functions of the police officer, it is difficult to grasp the contours and scope of the investigation of morality.

In addition, the lack of definition of the moral qualities required by candidates for one of the functions of the police officer, which is nevertheless one of the essential conditions for their admission to the internship, does not meet the requirements of precision and predictability that must be met by a legal text. A law must be clear and precise enough to allow people concerned to know the extent of the limitations, as well as the possible consequences for they<sup>17</sup>.

i.

Principles identified by administrative case law

If article 58 of the amended law of 18 July 2018 on the Grand-Ducal Police, as amended by the bill, remains silent as to the definition of the notions of moral qualities, it is necessary to note that administrative case law provides some answers as to what covers such concepts.

It follows in particular from the principles established by administrative case law that morality

of a candidate for one of the functions of the police officer is assessed on the basis of broad criteria which do not are not based solely on the assessment of the applicant's criminal record (for example the candidate's state of mind, his sense of responsibility)<sup>18</sup>. This is further corroborated by the parliamentary work relating to bill n°7045 on the reform of the Grand Ducal Police which specify in the parliamentary document 7045/0919 that: "the police are responsible for to ensure internal security and are equipped for this purpose with means of constraint, which justifies that their moral conditions are not assessed on the basis of the criminal record alone".

<sup>17</sup> See among others CourEDH, Zakharov e. Russia [GCL n°47413/06, § 228-229, December 4, 2015.

<sup>18</sup> Indeed, administrative case law specifies that the notion of morality implies an overall assessment "of the moral qualities of a candidate for the exam and in particular his state of mind, his sense of responsibility, his social skills, his attitude relating to compliance with the standards of the country, given that the members of the Grand Ducal police have the precise mission of ensuring

internal security by ensuring the maintenance of public order and compliance with and enforcement of laws and regulations. ".

See in this sense

judgment of 2 April 2019 of the Administrative Tribunal of the Grand Duchy of Luxembourg, 4th chamber, roll number 39804, and judgment

of 18 January 2019 of the Administrative Tribunal of the Grand Duchy of Luxembourg, 4th chamber, roll number 41619.

<sup>19</sup> Pages 29 and 30.

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It also emerges from administrative case law in this area that the assessment of the morality of a candidate must be made in concreto<sup>20</sup> and falls within the discretionary power of the Police Grand Ducal<sup>21</sup>.

Therefore, insofar as it is not the law that defines which elements relate to the morality investigation or what are the criteria or the degree of seriousness of the antecedents taken into account but the administrative jurisprudence and this while the investigation of morality constitutes a

undeniable interference with the right to privacy and data protection of candidates, the

National Commission considers it necessary that Article 58, as referred to in the draft law, reflect the principles identified by administrative case law regarding the notion of moral quality.

Indeed, the current text lacks transparency and does not allow the candidate to know which are the criteria or what degree of severity of his or her history, if any, is taken into account by the Grand Ducal Police, in order to assess whether he has the necessary moral qualities. During of this investigation, is the Grand-Ducal Police required to consult state files, internal files of the Grand Ducal Police or other files? An enumeration of files consulted, rather than the current formula used<sup>22</sup>, would allow the candidate to have a better understanding of the conditions he must fulfill in order to access one of the functions of the police officer.

Furthermore, by way of example, the attention of the authors of the bill should be drawn to the fact that the law of June 15, 2004 relating to the classification of documents and security clearances, as amended, provides for the procedures for the security investigation to which the State officials and State employees assigned to the Intelligence Service, in order to check in particular whether they have guarantees of morality. Although this law does not define the notion of "guarantee of morality", it is however more precise with regard to access to the database consulted as part of the security investigation and the processing of data collected during such an investigation (see Articles 21 to 23 of the aforementioned law).

<sup>20</sup> Case law states that: "the power to appoint is not required to take into consideration only qualified facts criminally directly related to the function to be exercised, just as he is not bound by the assessment of certain facts made by correctional judges, in that the objective of his intervention is different from that of the latter who have to sanction reprehensible behavior within the meaning of the law, whereas the Minister must ensure, through an assessment in concreto, that the conditions set by law for police candidates, particularly from the point of view of their morality. ". See in this sense judgment of 2 April 2019 of the Administrative Tribunal of the Grand Duchy of Luxembourg, 4th chamber, roll number 39804,

and

judgment of January 18, 2019 of the Administrative Tribunal of the Grand Duchy of Luxembourg, 4th chamber, roll number 41619.

21 Judgment of 2 April 2019 of the Administrative Tribunal of the Grand Duchy of Luxembourg

22 Article 58 of the amended law of 18 July 2018 provides that the Grand-Ducal Police “may consult the files which are legally accessible and insofar as this consultation is relevant for the purpose sought”

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ii.

The national legal framework compared to that in Belgium and France

In the context of the recruitment of police officers, it is interesting to note that both Belgian law and French law provide for a condition similar to that required by article 58 of the amended law of 18 July 2018 on the Grand-Ducal Police, namely that the candidate for one of the functions of the executive police officer must have the “moral qualities necessary for the performance of one of the functions of the police officer”.

Indeed, in Belgium, a candidate for one of the posts in the operational framework within the police must in particular “to be of irreproachable conduct and not to present risk factors which constitute an obstacle to enlisting in the police”. The Belgian law also specifies that the aforementioned conditions result from: “a) a certified copy of the criminal record complete dating from less than three months on the date of submission of the application; b) an investigation environment and background, including an interview with the candidate at home and at the place of possible residence of the latter, carried out by the local police force; c) of all the available information transmitted by the intelligence and security services and by the Coordinating Body for Threat Analysis; d) all available information relating to municipal administrative sanctions imposed for a mixed offence; e) judicial data, communicated by the police services, with the authorization of the

competent judicial authorities; f) other validated data and information available to police services. »<sup>24</sup>.

The ministerial decree of December 28, 2001 implementing certain provisions of the decree of March 30, 2001 on the legal position of police service personnel (hereinafter the “royal decree of 30 March 2001”) clarifies the contours and scope of the community investigation and background. Section 3 entitled “The background and background survey” details the persons carrying out the survey and specifies the list of databases consulted.

In France, in the context of recruitment within the police, one of the conditions required by the candidate is that he must not have any “entries on bulletin no. 2 of his record judiciary incompatible with the exercise of functions”<sup>25</sup>. In addition, an administrative inquiry is also carried out, as provided for in article L.114-1 of the Internal Security Code which essentially provides that “Administrative decisions on recruitment, (...) concerning either public employment involved in the exercise of State sovereignty missions, or public or private jobs in the field of security or defense (...) can be preceded by administrative inquiries intended to verify that the behavior of persons

<sup>23</sup> Article 12, 3° of the Law of 26 April 2002 relating to the essential elements of the status of members of the personnel of the police and various other provisions relating to police services

<sup>24</sup> Article 12 of the Law of 26 April 2002 on the essential elements of the status of members of the staff of the police services and making various other provisions relating to policing

<sup>25</sup> Article 5 of Law No. 83-634 of July 13, 1983 on the rights and obligations of civil servants

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natural or legal persons concerned is not incompatible with the exercise of the functions or envisaged missions” and that “These surveys may give rise to the consultation of automated processing of personal data covered by Article 31 of Law No. 78-17 of January 6, 1978 relating to data processing, files and freedoms, with the exception of files

identification. The conditions under which interested persons are informed of this

consultation are specified by decree. ".

According to article 31 of law n° 78-17 of January 6, 1978 relating to data processing, files and

freedoms, the processing of personal data implemented on behalf of the State

and which either concern the security of the State, defense or public security, or have as their object the

prevention, research, observation or prosecution of criminal offenses or the execution

criminal convictions or security measures, including the processing carried out by

the national police and gendarmerie services, must be authorized by order of the

competent ministers, taken after publication of a reasoned opinion by the National Commission for

data processing and freedoms (the French counterpart of the CNPD). Said treatments are thus

all framed legally, such as the file of criminal records<sup>26</sup>, the file

serial analysis<sup>27</sup> or the file of wanted persons<sup>28</sup>.

Consequently and contrary to the current national legal framework, respectively to the draft law

and draft Grand-Ducal regulation under consideration, it should be noted that both Belgian law and the

French law provide a much more precise framework for the processing of data carried out

as part of these recruitment procedures. In order to meet the requirements of precision and

predictability that a legal text must meet, the CNPD recommends that the authors of the

draft law and the draft Grand-Ducal regulation to draw inspiration from it.

b. On access to files that are legally accessible to the Grand Police

ducale during the morality investigation

The National Commission welcomes the fact that Article 58 of the amended law of 18 July 2018 provides

that the Grand-Ducal Police "may consult the files which are legally accessible to it and for

as long as this consultation is relevant for the purpose sought".

The CNPD understands that the Grand Ducal Police therefore has access to all the

files referred to in article 43 of the amended law of 18 July 2018 on the Grand Ducal Police. In

the lack of precision as to the categories of data contained in such files and which



would actually be consulted as part of the morality investigation, the Commission

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Provided for by articles 230-6 to 11 of the French Code of Criminal Procedure.

27 Provided for by articles 230-12 to 18 of the French Code of Criminal Procedure.

28 Provided for by article 230-19 of the French Code of Criminal Procedure

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national authority cannot, however, assess whether such access is justified and proportionate relation to the purpose sought, namely the recruitment of a candidate for one of the functions of the police officer. This is all the more so since the access provided for the files listed in article 43 of the amended law of 18 July 2018 on the Grand Ducal Police are used for different purposes, namely in the exercise of the judicial and administrative police missions of the members of the Police with the status of judicial officer or administrative police officer.

In addition, the CNPD considers that the bill should specify the possible access of the Police Grand Ducal to its own files, like the Belgian and French laws. This all the more in view recent concerns of citizens regarding respect for civil liberties and the protection of their personal data in the police and judicial field, it is therefore important that clarifications on access to the aforementioned files and systems can be found at the level of the law in the formal sense.

vs. On the criteria to be taken into account when assessing moral qualities of the candidate

The National Commission welcomes the fact that the authors of the bill have specified in Article 1 of the bill amending article 58 of the amended law of 18 July on the Grand-Ducal Police which would be the consequences of the candidate's lack of moral qualities. Indeed, when such qualities are lacking, the candidate is not admitted to the internship.

However, no details as to the criteria taken into account by the Grand Ducal Police when

of the assessment of the moral qualities of the candidate does not appear in the said article or in the comments from the authors of the bill. However, it is necessary that the criteria taken into account or the degree of seriousness of the antecedents taken into account by the Grand-Ducal Police are previously specified in order to draw the consequences, namely the refusal of the admission of the trainee candidate.

For the rest, the National Commission refers to its developments under point I. 2. A. of the this notice.

#### d. On the retention period of personal data

It should be recalled that pursuant to Article 5 paragraph (1) letter e) of the GDPR, the data to be personal character should not be kept longer than necessary for the fulfillment of the purposes for which they are collected and processed.

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The National Commission regrets that the draft law does not indicate the retention period of the data collected relating to a candidate and therefore wonders what the criteria would be used to determine such duration. Clarifications on this subject should be provided.

by the authors of the bill.

Therefore, the CNPD is not in a position to assess whether the principle of limited retention period data is respected.

#### 3. Final remarks

Finally, it should be noted that on the basis of the current wording of Article 58 of the amended law of July 18, 2018, the National Commission does not have all the information available to it.

necessary to enable it to fully assess whether the processing carried out in the framework of the morality investigation comply with the GDPR.

Moreover, in the absence of details, certain questions remain unanswered: what are the categories of data collected as part of these morality surveys? The right to

information (Articles 13 and 14 of the GDPR) of the persons concerned is respected when implementation of the processing generated by the morality investigation?

In addition, the National Commission notes that in order to access certain professions it is conducted background checks or character or good repute investigations or more administrative investigations. Such investigations or verifications are in particular performed for:

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the persons targeted by the background check procedure provided for by the Chapter 3 of the draft Grand-Ducal regulation on civil aviation security and conditions of access to Luxembourg airport;

State officials and State employees assigned to the Intelligence Service of the state. A security investigation is carried out against them in order to verify in particular whether they have guarantees of morality<sup>29</sup>;

the candidate for a state employee position who must offer the "guarantees of morality required »<sup>30</sup>;

Candidates for the competitive examination for legal attachés. Candidates for admission to the examination-competition must "present the required guarantees of good repute"<sup>31</sup>;

<sup>29</sup> See articles 21 to 23 of the law of 15 June 2004 relating to the classification of documents and security clearances, as amended

<sup>30</sup> Article 3, paragraph (1), letter c) of the law of 25 March 2015 determining the regime and compensation for State employees

<sup>31</sup> Article 2, paragraph (2), 2) of the law of 7 June 2012 on legal attachés

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the agent who wishes to carry out the activity of guarding and surveillance. This one must meet the necessary conditions of good repute<sup>32</sup>;

persons requesting the granting of an authorization, approval or permit in material of arms.

Although this list is not exhaustive, it already makes it possible to realize the disparities that exist in Luxembourg law with regard to investigations or verifications antecedents which would be expedited by the administrations or public authorities for access to certain professions.

For the sake of consistency, the National Commission wonders if it would not be appropriate to harmonize all of these procedures by using similar terminologies, for example.

In fact, each of the special laws uses their own terminology, whereas certain notions seem to overlap. This is the case, for example, with the notions of good repute and morality. The use of a common terminology would thus make it possible to ensure in law national coherence between these various disparate special laws which nevertheless pursue a similar purpose.

## II.

On the draft Grand-Ducal regulation

The purpose of the draft Grand-Ducal regulation is to specify the special stages organized by the Grand-Ducal Police to be passed for candidates wishing to access to police careers in order to take into account the changes in terms of recruitment within of the Police following the alignment of the examination-competition procedures for access to careers police officers in the general framework of the Public Service.

In order to have a better reading of the regulatory text relating to recruitment in the

police careers, it was decided not to modify the Grand-Ducal regulation of 17 August 2018 relating to: 1° fixing the conditions of recruitment of the personnel of the police framework; 2° repeal of the Grand-Ducal Regulation of 31 October 2001 determining the national services and the international bodies in which police personnel may be employed by order of the Government (hereinafter the "Grand-Ducal Regulation of 17 August 2018") existing, but of repeal it and replace it with the draft Grand-Ducal regulation under consideration.

32 Article 8, 1) of the law of 12 November 2002 relating to private security and surveillance activities

33 New article 14 of draft law n°7425 on arms and ammunition (parliamentary document n°7425/07)

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The National Commission intends to limit its observations to the questions raised by the provisions of the draft Grand-Ducal regulation under examination which deal with aspects relating to the privacy and the protection of personal data.

#### 1. On the investigation of morality

Due to the repeal of the Grand-Ducal regulation of 17 August 2018, it should be noted that the this draft Grand-Ducal regulation does not provide as a condition of eligibility for the special test for admission to the internship that the candidate offers the "guarantees of morality required in the light of the morality investigation ordered by the Minister", contrary to what is specified in the Grand-Ducal regulation of 17 August 2018<sup>34</sup>.

However, the CNPD notes that this condition is intended to be maintained, as shown of article 1 of the bill under consideration. Since this condition is included in the bill, it is therefore not necessary for it to also appear in the draft Grand-Ducal regulation.

#### 2. On the medical examination

It follows from article 23 of the draft Grand-Ducal regulation under opinion that the candidate before each admission to the internship is subject to a thorough medical examination, as detailed in article 24 of said project.

It should be recalled that the personal data brought to be collected within the framework of these examinations are to be qualified as sensitive data within the meaning of Article 9 of the GDPR, because they relate to the health of the candidates. The processing of such data therefore requires specific protection<sup>35</sup> and are subject to stricter requirements.

The National Commission welcomes the fact that the authors of the draft Grand-Ducal regulation have specified in detail the medical examinations to which candidates are subjected. Just as she welcomes the fact that the criteria for incapacity for such examinations are specified in Annex A of the draft grand-ducal regulation.

<sup>34</sup> See Articles 2 point 3°, 5 point 4° and 15 point 5° of the Grand-Ducal Regulation of 17 August 2018 as regards the conditions eligibility for the examination.

<sup>35</sup> See the cases rendered by the CJEU of 8 April 1992, C-62-90, point 23 and of 5 October 1994, C-404/92, point 17

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In addition, the CNPD understands that the doctor from the Public Sector Occupational Health Division, the Public Sector Medical Services Administration, in charge of such examinations medical, will only transmit to the competent service of the Grand-Ducal Police the information that the candidate is fit or unfit in accordance with Article 3 of the Grand-Ducal Regulation of 5 March 2004 concerning health and safety at work and medical checks in the function public, as amended.

### 3. On access to the national register of natural persons

Paragraph (3) of Article 19 of the draft Grand-Ducal regulation lists the documents which must be produced by the candidate when applying for the special stage.

The last paragraph of the paragraph of the aforementioned article, however, provides that the latter "has not need to provide a copy of his identity card or an extract of the birth certificate when the data concerning his surname and first name(s), his date of birth and his nationality are qualified

accurate in the national register of natural persons and if he has his habitual residence in

Grand Duchy of Luxembourg ".

The National Commission understands that the Grand-Ducal Police is therefore carrying out the verification of the aforementioned information of the candidate in the national register of natural persons.

However, if article 43, 1° of the amended law of 18 July 2018 on the Grand-Ducal Police provides for access in this register to members of the Grand Ducal Police having the status of judicial police officer

or administrative police officer in the exercise of their police duties

judicial and administrative police, it should be noted that access to such data in the

present case is not carried out within the same framework but is carried out within the framework of a recruitment

(see our developments in point I. 2. c. of this opinion).

Access to this file for the purpose of recruiting candidates for police careers is therefore not

not provided for in article 43 of the amended law of 18 July 2018 on the Grand Ducal Police. He

it would therefore be appropriate for this purpose to be provided for in the aforementioned article.

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Thus decided in Esch-sur-Alzette on July 17, 2020.

The National Data Protection Commission

Tine A. Larsen

President

Thierry Lallemand

Commissioner Commissioner Commissioner

Christopher Buschman

Marc Lemmer

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