

Second additional opinion of the National Commission for the data protection relating to the draft law n° 7425 on weapons and ammunition and bearing: 1° transposition of directive (EU) 2021/555 of European Parliament and of the Council of 24 March 2021 on the control of the acquisition and possession of weapons; 2° amendment of the Penal Code, and 3° repeal of the law of April 20, 1881 concerning transport and trade explosive materials.

Deliberation n° 29/AV24/2021 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".

On July 8, 2019, the CNPD notified draft law no. 7425 on: 1° transposition of the Directive (EU) 2021/555 of the European Parliament and of the Council of 24 March 2021 on the control of the acquisition and possession of weapons; 2° amendment of the Penal Code, and 3° repeal of the law of April 20, 1881 concerning the transport and trade of materials explosives (hereinafter the "draft law")¹.

On February 4, 2021, the National Commission issued its additional opinion on the government amendments adopted by the Justice Committee at its meeting of May 27, 2020².

On July 13, 2021, the Justice Committee adopted a series of parliamentary amendments relating to the bill (hereinafter the “amendments”).

Insofar as the amendments relate to articles of the bill that have been commented on by the CNPD and that the latter has not been asked for an opinion, it takes the matter itself in order to inform of his comments below.

' Deliberation n°42/2019 of July 8, 2019

2 Deliberation n°2/2021 of February 4, 2021

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1. Amendment n°22

Amendment No. 22 modifies paragraph (1) of Article 14 of the bill, in that it replaces the concept of “honourability” by the concept of “dangerousness”, and inserts a new paragraph in paragraph (3) of section 14.

The authors of the amendments also provide, in their comments, details as to to certain questions raised by the Council of State in its additional opinion of 19 December 2020.

A. On the replacement of the concept of “honourability” by the concept of "dangerousness"

Article 14 paragraph (1) of the draft law has been amended as follows: "Authorizations, permits and approvals provided for by this law are issued by the Minister only to persons who, taking into account their behavior, mental state and criminal record

or police, do not give rise to fear that they are likely to present a danger to themselves or for others, for public order or for public security. A conviction for a violent intentional offense is considered a indication of such a danger, have-the-necessary-rhonorality, LIne-persenne-is possession

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The amended provisions were made "in accordance with the observations of the Council of State and for the reasons given by the High Corporation”.

The Council of State had, in particular, considered in its additional opinion of December 19, 2020 that the criterion of good reputation is "difficult to transpose to the verification of the aptitude of a person to possess or handle a weapon”.

The National Commission agreed with the opinion of the aforementioned Conseil d'Etat "only insofar as it is irrelevant to use the notion of "good reputation" to assess whether an individual has the aptitude required to possess or handle a weapon”³.

Insofar as the term "honesty" has been replaced by the term "dangerousness" in Article

19 (approval of employees and collaborators of gunsmiths) and in article 24 of the bill (granting authorizations to individuals), it would like to reiterate the following observations, made in

its opinion of February 4, 2021, "(nevertheless, the reference to the notion of “good reputation” could

appear relevant with regard to the approvals that would be issued by the Minister to

3 Deliberation n°2/2021 of February 4, 2021, page 8, point I, 1, A, b, ii

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gunsmiths or brokers, the said approvals being a prerequisite for access to such professions. At this

title, it is specified that in France the notion of "good repute" is used for any person

wishing to "carry out the activity which consists, on a principal or ancillary basis, either in the manufacture,

trade, exchange, rental, hire-purchase, loan, modification, repair or

transformation, either in the negotiation or organization of operations with a view to the purchase, sale,

the supply or transfer of arms, ammunition or their components". However, this

concept is not included for people wishing to acquire or possess a weapon. In effect,

Article L.312-3-1 of the French Internal Security Code provides that "No authority

administrative authority may prohibit the acquisition and possession of arms, ammunition and their components

of categories A, B and C to persons whose behavior raises fears of the use

dangerous to themselves or to others. The National Commission will come back in more detail

on the reference made to the notion of good repute in Luxembourg legislation in its opinion

on draft law no. 7691, which aims to harmonize and specify the various procedures for

"good repute checks" currently provided for in several pieces of legislation. »4.

B. On the proposal made by the Council of State in its additional opinion

cited above, according to which it proposes the mechanism of a detailed opinion issued by

the State prosecutor and forwarded to the Minister

It emerges from the commentary to amendment no. 22 that the Council of State's proposal for a "mechanism of a detailed opinion" was not followed by the authors of the amendments.

The latter propose, in fact, to maintain the approach of supplying information to the Minister of Justice "even if it means providing him with all the required and necessary conditions, rather than to adopt the approach of an opinion to be provided by the Public Prosecutor's Office", without, however, specifying what should be understood by "required and necessary conditions".

They expose their questions and the reasons at the origin of such a position. These latter argue as well as "this way of doing things would hardly be likely to solve the problems that arise.

The Public Prosecutor's Office, legitimately, would issue this opinion on the basis of the principles which govern the opportunity prosecution, i.e. considerations drawn from the scope and seriousness of the disorder at public order, compensation for the victim, etc. This is, moreover, what he had done for a certain period in terms of guarding. However, the considerations to be taken into account in matters of granting or refusing authorizations in the field of weapons are markedly different and do not pursue the same objective. ".

In addition, they believe that "this approach raises many other questions: In the case of an opinion positive on the part of the Public Prosecutor's Office, would the latter then be exempted from any provision of information to the minister, so that the latter could not even follow the logic and the reasoning on which the positive opinion would be based? And in the case of a negative opinion, what would be the information that the Public Prosecutor's Office should then provide to the Minister? In fact, you don't have to

4 Deliberation n°2/2021 of February 4, 2021, page 26, I, 6

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forget that the applicant for obtaining a firearms license has the right, in the event of a refusal to his request, to seize the administrative jurisdictions for the cancellation of the refusal. How could the administrative courts then assess whether the minister's refusal is justified or not, if the Minister cannot provide the administrative courts with the information and facts being the basis of his decision? Added to this is that, just taking into account the Service Weapons & Guarding and without considering all the laws in force in Luxembourg which require the assessment of reputation or dangerousness before granting an authorization administrative, the Public Prosecutor's Office would probably be overwhelmed with requests for opinions, which would in fact prevent him from devoting himself to his principal activity which is the prosecution of criminal offenses criminal. Bill no. 7691, which still only concerns laws falling within the jurisdiction of the Ministry of Justice, gives an idea of the very large number of opinions whose Public Prosecutor's Office would then be seized, if we opted for this approach, in the opinion of the Public Prosecutor's Office in all materials. ".

However, on this point, the CNPD had questioned, in its additional opinion of February 4, 2021, whether such an administrative inquiry would not have the consequence of generating "a duplication of information concerning a person's criminal record in the hands of different authorities. Indeed, the National Commission understands that some of the data contained in the files kept by the Grand-Ducal Police, by the Public Prosecutor or the SRE will again appear in a file held by the Minister"5.

Thus, it would like to reiterate its following considerations "[in] order to avoid duplication of such data and the keeping of a sort of new "double register" by the Minister for persons affected by the draft law, the CNPD believes that a less intrusive method of achieving the same purpose should be preferred to the system currently provided for by the authors of the bill. It therefore agrees with the proposal made by the Council of State in its additional opinion of the December 19, 2016 according to which it proposes the mechanism of a detailed opinion issued by the state prosecutor and forwarded to the minister. This mechanism would replace the communication to the Minister of Intelligence by the Grand-Ducal Police, the Public Ministry and the SRE. Such mechanism would avoid duplication of background data of an applicant while allowing the Minister to obtain the necessary information and relevant, in the form of an opinion, in order to enable him to assess the "good repute" of a applicant. Such a mechanism still has the advantage that the administrative inquiry would be entrusted to a repressive authority, the Public Ministry, and not to an administration. In effect, such an authority would be more appropriate to conduct such an investigation given the nature of the processed data. »6.

Furthermore, the National Commission also reiterates its observations relating to the model French and Belgian who have both adopted a similar approach'.

5 Deliberation n°2/2021 of February 4, 2021, page 8, I, 1, A, b, ii

6 ibidem

Deliberation n°2/2021 of February 4, 2021, page 8, I, 1, A, b, iii

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C. On the insertion of a new paragraph 2 in paragraph 3 of article 14 of the draft

law

It emerges from the commentary to amendment no. 22 that "it is proposed to add yet another restriction to the facts that can be communicated to the Minister by inserting a new paragraph 2 in paragraph 3, aimed at excluding facts which, although corresponding to points 1° to 3° of the first paragraph of paragraph 3, have been the subject of an acquittal, a rehabilitation or a prescription. This amendment aims to respond to a question from the Council of State. The hypothesis of a dismissal has not been taken up here, whereas these facts can be the subject of a resumption of information on new charges, in accordance with articles 135 to 136 of the Code of Procedure criminal, so that these facts must also be able to be taken into account within the framework of the administrative procedures concerning the authorizations provided for by this draft law. ".

The authors of the amendments are to be commended for having made such clarifications.

However, in the absence of the categories of data that would be communicated to the Minister, the CNPD is unable to assess whether the principle of data minimization would be respected in this case.

On this point, it generally refers to its developments relating to the principle of minimization of the data formulated in its additional opinion of February 4, 2021⁸.

D. On the exchange of information between the Service Armes & Gardiennage and the Service state intelligence

It should be noted that paragraph (6) of article 14 of the bill concerning the exchange information between the Armes & Gardiennage Service and the State Intelligence Service remains unchanged.

The authors of the amendments do not provide any further details on this subject in their commentary to amendment no. 22 but state the reasons why this exchange

information is needed.

Without prejudging the need for such an exchange of information, the National Commission regrets however that its considerations formulated in its opinion of February 4, 2021 were not taken into account and would therefore like to reiterate them⁹.

Deliberation no. 2/2021 of February 4, 2021, page 17, I, 1, F.

⁹ Deliberation no. 2/2021 of February 4, 2021, page 17, I, 1, F, b

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E. Final remarks

Generally speaking, it is to be regretted that all the questions raised in the additional opinion of 4 February 2021 from the CNPD have not been taken into consideration. Thus, in addition to the reiterations formulated above, it regrets that the current text does not allow the persons concerned to "understand the extent and scope of the administrative investigation, would it not be preferable to expressly state in the new article 14 that the data collected during the administrative investigation come from the files kept by the Grand-Police ducale, the Public Ministry or the SRE? »¹⁰.

Just as "like the provisions provided for in Article 26 paragraphs (2) and (3) of the law of 22 February 2018 on the exchange of personal data and information in police matters", should it not be provided in the bill under opinion that the data

forwarded to the Minister, for the purposes of an administrative inquiry, may only be used for the purpose for which they were transmitted and supervise the transmission, if necessary, by the minister to another administration/third party? »¹² .

In addition, and as the CNPD noted in its aforementioned opinion, with regard to the processing of personal data relating to criminal convictions and offenses or related security measures, safeguards should be included “in the draft law whereas in the current state of the device under opinion, the persons concerned will see a duplication of their data relating to criminal convictions or offenses at the hands of several authorities. The collection of such data during the administrative inquiry could lead to the keeping of a sort of new “double register” by the Minister. This would dispose, if where appropriate, at the end of the investigation, copies of police reports, extracts from official reports, judgements, or “necessary information” provided by the SRE”¹³.

The same applies to the processing of special categories of data for which, the CNPD considers, in accordance with Article 9, paragraph (2), of the GDPR, that the project of law should provide for “appropriate and specific measures for the safeguard of the rights fundamental principles and interests of the data subject”. It is referred to the considerations raised in its opinion of 4 February 2021¹⁴.

Finally, the National Commission still regrets that no details have been provided, either in regarding the retention period of data obtained as part of the verification of

H' Deliberation n°2/2021 of February 4, 2021, page 10, I, 1, B

¹¹ Article 26 paragraphs (2) and (3) provides that: “(2) The data and information transmitted may not be used by the administration only for the purpose for which they were transmitted. They are erased as soon as their retention is no longer necessary with regard to the purpose for which they were transmitted. (3) Further transmission of data and information by the administration of the State to a third person requires the prior written consent of the person referred to in Article 18, paragraph 1

er, having transmitted the data and information concerned. If so, article 6, paragraph 3, is applicable”.

12 Deliberation n°2/2021 of February 4, 2021, page 11, I, 1, C

13 Deliberation n°2/2021 of February 4, 2021, page 12, I, 1, D

14 Deliberation n°2/2021 of February 4, 2021, page 12, I, 1, E

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good reputation¹⁶, nor with regard to the supervisory authority competent to control and monitor

compliance with the legal provisions provided for in article 14 of the bill¹⁶. She reiterates, therefore,

all of its observations on this subject.

For the rest, the CNPD refers to its opinions of July 8, 2019 and February 4, 2021 mentioned above.

Thus decided in Belvaux on October 1, 2021.

The National Data Protection Commission

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Tine A. Larsen

President

Thierry Lallemand

Commissioner

Marc Lemmer

Commissioner

Alain Hermann

Commissioner

" Deliberation n°2/2021 of February 4, 2021, page 17, I, 3

16 Deliberation n°2/2021 of February 4, 2021, page 17, I, 5

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