

Additional opinion of the National Commission for the Protection of

data relating to the draft Grand-Ducal regulation prescribing a

general census of the population, housing and buildings of the

Grand Duchy as of November 8, 2021

Deliberation n°25/AV20/2021 of July 2, 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

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

On June 1, 2021, the CNPD notified the draft Grand-Ducal regulation prescribing a census

general population, housing and buildings of the Grand Duchy on 1 June 2021 (here

after the “draft Grand-Ducal regulation”) as well as government amendments to the

draft Grand-Ducal regulation, adopted by the Council of Government at its meeting of 2

April 2021.

By letter dated June 11, 2021, the Minister of the Economy invited the Commission

national government to notify the government amendments, adopted by the Council of Government

in its meeting of June 11, 2021 (hereinafter the “amendments”).

#### 1. Ad Amendment 1

The authors of the draft Grand-Ducal regulation specify in the commentary to Article 2, as

as amended, that the processing of the data referred to in that article and which concern the sexual life

or the sexual orientation of a natural person will be processed on the basis of Article 9, paragraph (2), letter j), of the GDPR.

While such clarifications are to be welcomed, the CNPD reiterates its observations made in its opinion of June 1, 2021 regarding the additional appropriate measures that will have to be implemented implemented by STATEC when the latter is required to process such data for the purposes statistics<sup>2</sup> as well as the issue relating to the articulation of the provisions of the law of the 1<sup>st</sup>

<sup>1</sup> Opinion of the Data Protection Commission on the draft Grand-Ducal regulation prescribing a general census of the population, housing and buildings of the Grand Duchy on June 1, 2021, as well as government amendments to the draft Grand-Ducal regulation, deliberation n°23/AV18/2021 of 1 June 2021.

<sup>2</sup> See point II. 3., page 10.

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August 2018 on the organization of the National Commission for Data Protection and the general regime on data protection, with those of the draft Grand-Ducal regulation<sup>3</sup>.

## 2. Ad Amendment 2

The purpose of this amendment is to introduce a new article 3 which provides that “[t]he census will collect the following information for administrative purposes:

- a) surname and first name;
- b) the identification number within the meaning of the amended law of 19 June 2013 relating to identification some people.

This information will only be used to combine data from administrative records as well as than those collected through the questionnaires”.

In the commentary to the new article 3, the authors of the draft Grand-Ducal regulation specify that these data would be used "only" to combine the various administrative registers and that no statistical use of these data would be planned by STATEC.

For a better understanding of the device under review and insofar as STATEC will be the controller, the term “census” should be replaced by the

“STATEC”.

With regard to the data listed in points a) and b) of the aforementioned article, which would be now collected for administrative purposes by STATEC (and not for statistical purposes), it there is reason to wonder about the meaning of such purposes.

It should be remembered that the purposes of processing personal data correspond to the objective pursued by the data controller when the latter puts implement such processing. In this case, the CNPD understands that STATEC will collect such data because they will be necessary for the proper organization of the census.

Furthermore, the use of the national identification number “for internal administrative purposes”, as referred to in Article 2, paragraph (2), of the amended law of 19 June 2013 relating to the identification natural persons, is to be understood, for example, as the use by a administration of the registration number of one of its constituents as part of the processing of his file.

Consequently, the National Commission wonders whether the terminology used to designate the purposes provided for by the new Article 3, reflects the purposes which would actually be pursued by STATEC in such a context.

In any case, the terminology used is too vague and does not comply with the requirements clarity, precision and predictability that a legal text must meet, in accordance with the case law of the Court of Justice of the European Union and the European Court of Rights of man 4.

3 See point II.1., page 5.

4 In this sense, see M. Besch, “Personal data processing in the public sector”, Norms and legislation in law Luxembourg public, Luxembourg, Promoculture Larcier, 2019, p.469, n°619; See among others CourEDH, Zakharov e. Russia [GCL

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In addition, with regard to the use of the national identification number, the CNPD reiterates its observations made in its opinion of June 1, 2021 according to which it considers that, failing

appropriate legal basis in the amended law of 19 June 2013 relating to the identification of natural persons, the use of the national identification number within the framework of the census should be regulated by law<sup>5</sup>.

### 3. Ad Amendment 3

The authors of the draft Grand-Ducal regulation are to be congratulated for having modified Article 3, paragraph 3, of the draft Grand-Ducal regulation following the observations made by the CNPD in its opinion of June 1, 2021.

Just as the National Commission welcomes the details provided by the authors of the draft of the Grand-Ducal Regulation, according to which “[T]ATEC will not have direct access to the register of the Common Center. Only the data mentioned will be provided to STATEC by the Inspection General Social Security”.

### 4. Ad Amendment 4

The purpose of this amendment is to modify Article 4, last paragraph, of the draft grand-ducal in these terms “[o]nce these two operations are completed, this information will be deleted as soon as the identification of natural persons is no longer necessary in the statistics production chain. This deletion of data must be done within a maximum of three years after the census date so that no nominative data does not appear in the computer file established on the basis of the data of the census. ”.

According to the authors of the draft Grand-Ducal regulation, this amendment takes into account the remarks of the National Commission and “this in order to be consistent with article 16 of the law amended on July 10, 2011 on the organization of STATEC. The conditions mentioned in this article are even stricter than those found in the STATEC law because these operations must be carried out within three years from the date of the census”.

Although the authors of the draft Grand-Ducal regulation are to be congratulated for taking into account account the considerations of the CNPD in its opinion of June 1, the criteria, which

justify that the data be deleted within the 3-year period, are not indicated

in the text of the draft Grand-Ducal regulation or in the comments to the article.

Therefore, in the absence of such details, the National Commission is not in a position to assess whether, in this case, the principle of limited data retention would be respected.

n°47413/06], § 228-229, 4 December 2015, ECtHR, Vavříčka and others v. Czech Republic (applications n°47621/13 and 5 others), § 276-293, April 8, 2021.

5 See points I.1., page 2 and II.4., page 12.

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For the remainder and with regard to the retention period of data processed for purposes statistics and not covered by the aforementioned article, it is appropriate to reiterate the observations made by the CNPD in its aforementioned opinion<sup>6</sup>.

#### 5. Ad Amendment 5

The authors of the draft Grand-Ducal regulation should be commended for having specified the elements that make up the identification key.

Moreover, although article 9 of the draft Grand-Ducal regulation, as modified by the amendment 5, provides that "[t]his technical key is unique per person, does not allow the user to find the number and is only used for administrative purposes", no details as to the link between this key and the national identification number were provided by the authors of the draft grand-ducal regulations.

However, STATEC in its opinion of 9 March 2021 relating to the draft Grand-Ducal regulation had indicated that this key would allow "the merging of administrative data and those from questionnaires at the individual level, will be used in addition to the registration number so that this data fusion is optimal. This data fusion is a key step in the success of the census of the population. Without this fusion, the collected data will not be

exploitable and STATEC will not be able to meet the obligations of European regulations".

Therefore, in the absence of such details, the CNPD is not in a position to enter the possible problems that could arise from the point of view of the protection of data.

Moreover, insofar as this key would constitute a unique identifier, she wonders if a such a key would not be analyzed as a "new registration number".

#### 6. Ad Amendment 6

The authors of the draft Grand-Ducal regulation are to be congratulated for having expressly provided in article 10 of the draft Grand-Ducal regulation that STATEC will be responsible processing within the meaning of Article 4(7) of the GDPR.

However, details on the roles of municipalities, enumerators and the CTIE, were not provided by the authors of the draft Grand-Ducal regulation. Therefore, the CNPD reiterates on this subject its observations made in its opinion of 1 June 2021<sup>7</sup>.

In addition, this amendment introduces a new paragraph 4 to article 6 of the draft grand-ducal which specifies that the communes will take advantage of the census "in order to control, by their own resources, the exhaustive nature of their population register", while providing that the data collected by the latter, within the framework of the census, cannot be used "to update their population register".

<sup>6</sup> See point II.7., page 16.

<sup>7</sup> See point II.2., page 7.

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However, although the principle of non-reuse of data collected by municipalities, in the framework of the census, now appears in the aforementioned article, there is reason to wonder about the means that would allow the municipalities to check the exhaustive nature of their register of the population, if not precisely by reusing the data that the latter will collect as part of the census.

## 7. Ad Amendment 7

This amendment follows the observations of the National Commission formulated in its opinion of June 1, 2021 and proposes the introduction of a new article 21, the purpose of which is to specify the derogations that would be made to the rights of data subjects.

Nevertheless, in accordance with the principle of the hierarchy of legal norms, which imposes the parallelism of forms, such provisions, which intend to derogate from the rights of persons concerned, as provided for in article 63 of the law of 1 August 2018 on the organization of the National Commission for Data Protection and the general data protection regime data, should be included in a law and not in a Grand-Ducal regulation.

The National Commission reiterates all of its observations made in its opinion of June 1, 2021 relating to its questions regarding the compliance of the draft regulation Grand Ducal to the provisions of Articles 11, paragraph (3) and 32, paragraph (3) of the Constitution, while it would regulate essential points of a matter reserved for the law, in particular when it defines who is the data controller, the purposes of the processing that would be implemented, in that it provides for access to administrative files by STATEC, or even in that it provides for the use of the national identification number<sup>8</sup>.

Thus decided in Belvaux on July 2, 2021.

The National Data Protection Commission

Tine A. Larsen

President

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