Opinion of the National Commission for Data Protection relating to the

Bill no. 7257 amending the amended law of 21

September 2006 on residential leases and modifying certain

provisions of the Civil Code.

Deliberation n° 20/2020 of 07/28/2020

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 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”.

By letter dated May 7, 2020, the Minister for Housing invited the Commission

national government to decide on draft law no. 7257 amending the amended law

of September 21, 2006 on residential leases and amending certain provisions of the Code

civil law (hereinafter the “proposed law”).

The purpose of this bill is to modify the law of 21 September 2006 on leases

residential use and modifying certain provisions of the Civil Code (hereinafter the "Law of 21

September 2006”). The measures provided for in the bill are intended to deal with

the housing crisis that the Grand Duchy of Luxembourg is currently experiencing.

The main points of the bill are as follows:

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the introduction of a weighting coefficient (“rental reference value”) intended to

limit the impact of the purchase prices of rental properties on rents legally

possible;

the obligation for lessors to include in any new lease contract the capital invested

as well as the rent reference value;

the redefinition of the concept of "luxury accommodation" appearing in the aforementioned law of 21

September 2006; and

the creation of the national rent commission with national powers,

in particular for the collection of data relating to residential leases and for the fixing

subsequent to the "rental reference value".

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This opinion will limit its observations to Article 1 point 5° of the bill insofar as it

creates a database that will be held by the National Rent Commission, only article

relating to the protection of personal data.

1. Preliminary remarks

Article 1 point 5° of the bill introduces a new paragraph (6) to article 3 of the

law of September 21, 2006 which provides for the obligation for each lessor to include in any new

lease contract the capital invested as well as the reference value of the rent. The lessor or his

representative must, in addition, send a copy of the lease contract to the national commission

rents which will be recorded in a database "subject to the provisions of the law of

2 August 2002 on the protection of individuals with regard to the processing of personal data

personal character”1 “the location of the accommodation, the type of accommodation, the surname, first name and

address of the owner, the surname and first name of the tenant, the capital invested, that adjusted to the year

1995 reference value, the revalued and discounted amount, the rent reference value and the amount

rent". The surname, first name and address of the owner, and the surname and first name of the tenant constitute personal data within the meaning of Article 4, paragraph (1) of the GDPR.

The National Commission is pleased that the bill provides for the principle of the creation of such a database in accordance with Article 6, paragraph (3) of the GDPR2. This article provides, in fact, a specific constraint related to the lawfulness of a necessary data processing compliance with a legal obligation or the performance of a mission of public interest or falling within the scope of the exercise of official authority vested in the controller. In these two cases figure, the basis and purposes of the data processing must specifically be provided for either by European Union law or by the law of the Member State to which the controller is submitted.

However, and although the principle of creating such a database is provided for in the bill, the National Commission notes that certain elements relating to the processing of data are not (or not sufficiently) specified in the bill.

Indeed, 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

1 The National Commission would like to point out that the law of 2 August 2002 on the protection of individuals with regard to the processing of personal data was repealed by Article 72 of the Law of 1 August 2018 on the organization of the Commission national data protection system and the general data protection regime. It is therefore appropriate to refer to the legislation currently in force.

2 Article 6, paragraph (3) provides that the "legal basis may contain specific provisions to adapt the application of the rules of the regulation, among others: the general conditions governing the lawfulness of the processing by the controller; them persons concerned ; the entities to which the personal data may be communicated and the purposes for which which they may be; purpose limitation; retention periods; and processing operations and procedures,

including measures to ensure lawful and fair processing, such as those provided for in other specific situations of treatment as provided for in Chapter IX".

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the entities to which

processing, the type of personal data being processed, the persons

concerned,

personal data may be

communicated, purpose limitations, retention period and other measures aimed at

to guarantee lawful and fair processing. […]". Pursuant to the aforementioned provisions, these legal bases should contain specific provisions concerning, inter alia, the types of data

processed, data subjects, entities to which the data may be

communicated and for what purposes, the retention periods of the data or the

processing operations and procedures.

2. On the determination of the purposes of the processing

It should be noted that according to Article 5 paragraph (1), letter b) of the GDPR, the data

of a personal nature must be "collected for specified, explicit and

legitimate purposes, and not further processed in a manner incompatible with those purposes

(...)".

As set out above, Article 6 paragraph (3) of the GDPR, read together with its paragraph (1)

letter c) and (e), provides for a particular 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 provided for either by European Union law or by the law of the State

member to which the controller is subject.

Recital (41) of the GDPR further specifies that "this legal basis or measure

legislation should be clear and precise and its application should be predictable for litigants, in accordance with the case law of the Court of Justice of the European Union and of the European Court of Human Rights. ".

However, it should be noted that the current drafting of the bill does not respect the aforementioned provisions, whereas the purposes of the processing referred to in the new Article 3 paragraph (6) of the law of September 21, 2006 do not clearly result from the proposal for law.

Details as to the purposes that would be pursued are also not provided by the authors of the bill. Indeed, the latter limit themselves to exposing, in their commentary to article 1 point 5° of the bill, the process by which the data will be collected by the National Rent Commission.

Thus, it is specified that: "a copy of each lease contract concluded or modified after the entry into force of this law, is transmitted within one month following the conclusion by the lessor or his representative — for example a real estate agent — to the National Commission for rents", then "the national commission records the location of the accommodation, the type of accommodation, the surname, first name and address of the owner, the surname and first name of the tenant, the capital

invested, that adjusted to the reference year 1995, the revalued and discounted amount, the value of reference of the rent and the amount of the agreed rent in a database". He is still specified that "(…) the national commission verifies the copies of lease contracts which have been transmitted under these provisions. In the event that the National Commission finds that a contract does not meet the requirements of this law, it takes the initiative to have the contractual terms in question".

The CNPD therefore understands that the personal data collected by the commission national rents via the copy of the lease contract would be for two distinct purposes, one would be in order to fulfill its mission of control and the second would be so that these data

appear in the aforementioned database.

It should also be noted that, according to the explanatory memorandum, the aforementioned database allows to make "statistical data, anonymized, available to the Observatoire de l'Habitat, of STATEC and other research and statistics centres, in order to improve the monitoring of rental market" 3.

Nevertheless, as noted by the Council of State in its opinion of April 28, 2020 relating to this bill: "The communication of personal data could still be understand, to some extent, from the perspective that the national rent commission would be in charge of setting the weighting coefficients. However, according to the authors of bill, this fixing will belong to the National Institute of Statistics and Studies economic. »4.

Therefore, like the Council of State, the CNPD considers it necessary that the purposes of the processing implemented by the National Rent Commission are clearly specified in the text of the bill and therefore considers it essential that the authors of the bill indicate precisely which categories of data are processed for which purposes.

This problem arises with all the more importance since, as pointed out by the Conseil of State, the bill "in addition provides for substantial criminal penalties in the event of breach of the obligation to communicate".

In the absence of clarification of the purposes pursued, the National Commission wonders how the national rent commission in the context of the implementation of the treatments of personal data covered by this bill is able to determine whether it complies with the principles of data minimization and limitation of the retention of data while pursuant to paragraph (2) of Article 5 of the GDPR the controller "shall be responsible for compliance with paragraph (1)5 and is able to demonstrate that it is respected" (see sections 3 and 5 of this opinion).

3 Page 27 of the bill.

4 Parliamentary document n°7257/05, page 4.

5 Article 5 paragraph (1) of the GDPR provides that: “(1) Personal data must be: (…)

The CNPD can only approve the remarks of the Council of State in that it “cannot admit that in the absence of a clear determination of a specific purpose of the processing, the data can be kept and used by the National Rent Commission beyond the examination which it can proceed under article 5 of the bill under opinion. »6.

3. On the principle of minimization of personal data

Article 5 paragraph (1), letter c) of the GDPR provides that personal data must be “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed”.

It follows from this principle that only the data necessary to the fulfillment of the purpose of the processing. In other words, it's about not giving access to more data than necessary for the national rent commission in the framework of the processing implemented.

However, in the absence of precision as to the purposes that would be pursued by the commission National Rent Agency as part of the implementation of data processing personnel covered by article 1 point 5° of the bill, the CNPD is not in a position to to assess whether the categories of data listed in the aforementioned article are adequate, relevant and limited to what is necessary for those purposes. Therefore, the CNPD does not know whether the principle of data minimization would be respected in this case.

The National Commission would also like to emphasize the importance of this principle as it it is up to the legislator to implement and concretely apply the principle of minimization of data, otherwise the law would not meet the requirement of precision and predictability to which a legal text must respond without the case law of the European Court of human right7.

Although it is not possible for it to assess whether the principle of minimization would be respected, the

CNPD welcomes the fact that point 5° of article 1 of the bill lists the data to be

personal character brought to appear in the database8. However, she finds that

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adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (minimization

Datas); (…)

kept in a form allowing the identification of the persons concerned for a period not exceeding that

necessary in relation to the purposes for which they are processed; personal data may be stored

for longer periods insofar as they will be processed exclusively for archival purposes in the public interest,

for scientific or historical research purposes or for statistical purposes in accordance with Article 89(1), provided

that the appropriate technical and organizational measures required by this Regulation are implemented in order to

guarantee the rights and freedoms of the data subject (limitation of storage); (…)"

6 Parliamentary document n°7257/05, page 4.

7 See in particular ECHR, Libert c. France, 22 February 2018, paragraph 43.

8 According to article 1 point 5° of the bill, the national rent commission would collect "the location of the

accommodation, the type of accommodation, the last name, first name and address of the owner, the last name and first name

of the tenant, the capital invested, that

adjusted to the reference year 1995, the revalued and discounted amount, the reference value of the rent and the amount of

the rent" as well as

the "(…) copy of each lease contract entered into or modified after the entry into force of this law (…)".

is not clear from the bill whether the copies of the lease contract - which will contain

undeniably still other personal data than those listed in Article 1 point 5°

- are also required to appear in the database while the lessors or their

representative are required to provide such a copy to the National Rent Commission, or if

such copies will be in a separate database while the explanatory memorandum

specifies that the national commission “will centralize the lease contracts”.

Clarifications on this subject deserve to be provided by the authors of the bill.

4. On the consultation of the data appearing in the database held by the

national rent commission

The bill provides that "The database of data recorded by the commission

National Rent Fund can be consulted for statistical and research needs. The

consultation procedures are set by Grand-Ducal regulation”.

The authors of the bill specify in the commentary to the articles that "The bank

data recorded by the National Rent Commission can be consulted for

statistical and research needs, such as STATEC, the Observatoire de l'Habitat,

research centers. For this purpose the data is of course made anonymous. The

consultation procedures are set by Grand-Ducal regulation”.

In the absence of a draft Grand-Ducal regulation setting the procedures for consulting the

database, the National Commission is not in a position to fully assess whether the

consultation of the data contained in the “data bank recorded by the

national rent commission” complies with the GDPR.

However, it would already like to point out that it is apparent from the comments of the authors of the

bill as to the provisions set out above, that only data provided

anonymous data would be communicated to STATEC and the Observatoire de l’Habitat and to “centres

of research ". The CNPD therefore understands that STATEC, the Housing Observatory and the

“research centers” (whose identity should be specified where appropriate) would not, in

reality, no access to said database but only access to data

anonymized by the National Rent Commission.

To the extent that the comments of the authors of the bill differ from the provisions

provisions of article 1 point 5° of the bill, it should be clearly mentioned in the

bill if it is a direct access to personal data contained in the

database or if it is a communication of anonymized data, obtained on

database contained in the database.

In addition, article 1 point 5° of the bill aimed at consulting data “for

statistical and research needs”, it should be recalled that under the principle of

purpose limitation (Article 5 of the GDPR), personal data must be collected for

specified, explicit and legitimate purposes, and not to be further processed by a

manner incompatible with these purposes. Thus, the data must not be processed for

purposes "incompatible" with the original purposes. Nevertheless, recital 50 of the GDPR

specifies that "Further processing for archival purposes in the public interest, for the purposes of

scientific or historical research or for statistical purposes should be considered as

compatible lawful processing operation”.

Articles 6 paragraph (4) and 89 of the GDPR as well as article 65 of the law of 1 August 2018

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

general on data protection, specify the appropriate measures that must be put in place

implemented by the data controller during such subsequent data processing.

The National Rent Commission will therefore have to fulfill all the conditions provided for by

the legal provisions set out above in order to allow the communication of data to

personal character contained in the said database at STATEC, at the Observatory of

Housing and “research centres”.

As mentioned above, the actual text of the bill does not specify that the data

should be anonymized for "statistical and research purposes", but only the

commentary to the articles refers to it. That said, the CNPD notes that such a measure constitutes

indeed one of the appropriate measures referred to in article 65 of the aforementioned law of 1 August 2018. This

article provides that: “anonymization, pseudonymization within the meaning of article 4,

paragraph 5 of Regulation (EU) 2016/679 or other functional separation measures
guaranteeing that the data collected for the purposes of scientific or historical research, or
statistical purposes, cannot be used to make decisions or actions with regard to
of the persons concerned".

However, the National Commission intends to draw the attention of the authors of the bill
on the fact that anonymization is a processing operation that consists of using a set of techniques
in such a way as to render impossible, in practice, any identification of the person by any
means whatsoever and irreversibly. On the contrary, pseudonymization, such as
defined by Article 4 paragraph (5) of the GDPR, is a processing of personal data carried out
in such a way that they can no longer be attributed to a specific data subject
without having recourse to additional information, provided that this information
additional data are kept separately and subject to technical and
organizational to ensure that personal data is not attributed
to an identified or identifiable natural person".

Therefore, it is important that the authors of the bill analyze whether the commission
national rents will communicate pseudonymised data within the meaning of the GDPR, or
truly anonymized or "anonymized" data, in which case the GDPR would not have
intended to apply from the moment such data no longer allow any
identification of the person by any means whatsoever and irreversibly.

Finally, the National Commission also suggests that the authors of the bill
use the exact terminology of the GDPR and the law of 1 August 2018 on the organization of
the National Commission for Data Protection and the general regime on the protection
data, with regard to the processing of personal data "for the purposes
statistics" or for the purposes of "scientific or historical research" and not as
mentioned in this bill "for statistical and research purposes".

5. 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.

In the absence of specification of a retention period in the bill or in the commentary on the articles, the CNPD is not in a position to assess whether, in this case, the principle limited data retention period is respected regarding the collection of data of a personal nature recorded in the database covered by this proposal of law as well as concerning the copies of the lease contract.

The CNPD therefore considers it necessary for the authors of the bill to specify in the text of article 1 point 5° what is the retention period or at least the criteria allowing to determine what is the proportionate retention period for the categories of data stated above.

Thus decided in Belvaux on July 28, 2020.

The National Data Protection Commission

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