

Opinion of the National Commission for Data Protection relating to the

bill n° 7606 introducing a series of measures

concerning natural persons in the context of the fight against

SARS-CoV-2 virus (COVID-19) and amending 1. the amended law of 25

November 1975 concerning the supply of medicines to the public; 2.

the amended law of April 11, 1983 regulating the placing on the

drug market and advertising.

Deliberation n° 13/2020 of June 8, 2020

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

2016 on the protection of natural persons with regard to the processing of personal data

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

(General Data Protection Regulation) (hereinafter "the GDPR"), to which refers

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, the Commission

National Commission for 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 organizations regarding legislative measures and

administrative procedures relating to the protection of the rights and freedoms of natural persons

with regard to treatment".

On June 4, 2020, the Minister of Health seized the National Commission to

decide on project no. 7606 introducing a series of measures concerning

natural persons in the context of the fight against the SARS-CoV-2 virus (COVID-19) and

amending 1. the amended law of 25 November 1975 concerning the issuance to the public of

medications ; 2. the amended law of 11 April 1983 regulating the placing on the

market and advertising of medicinal products (hereinafter the "draft law"). In said letter

The Minister specified that the project in question must enter into force no later than

June 24, 2020, date of the lifting of the state of crisis, and that therefore, she asks us to give her
send our opinion within the shortest possible time. The CNPD would like to point out that its opinion has
has thus been drawn up and adopted solely on the basis of the information available to it and under
reserve of possible future considerations not known to date.

The purpose of this bill is to create a legal framework relating to measures taken
with regard to natural persons to continue the fight against Covid-19 by limiting the
spread of SARS-CoV-2 on the territory of the Grand Duchy of Luxembourg through a
limited catalog of well-defined measures. It emerges from the explanatory memorandum that alongside the
measures centered on natural persons, the bill is structured around the three axes
following:

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limitation of freedom of assembly;
the application of protective measures as well as the identification, monitoring and
rapid spread of infected and susceptible to infection;
the establishment of "certain guarantees around the processing of data necessary
tracking people and fighting the pandemic. »

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Law No. 7606 introducing a series of measures concerning persons
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drug public; 2. the amended law of 11 April 1983 regulating

the marketing and advertising of medicinal products.

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The National Commission would like to point out on a preliminary basis that data protection personal data is not to be considered as an obstacle to the implementation of a treatment of personal data in the context of the fight against the Covid-19 epidemic, as long as the fundamental principles provided for by the GDPR are respected. It thus intends to limit its comments on the provisions of the bill having an impact on respect for life privacy and the protection of personal data, and more specifically in Article 9 thereof.

Ad article 9 of bill n°7606

Article 9 of bill n°7606 aims at the creation of an information system by the Management of health, in order to monitor the evolution of the situation related to Covid-19 and to formulate recommendations in the interest of public health for the attention of the Government (hereinafter: the “information system”). The commentary to the article specifies that for this purpose, a system monitoring system with different indicators and types of data is set up, including both personal data than non-personal data which must must be sent to the public health authority.

Pursuant to paragraph (2) of Article 9 of the draft law, various personal data personnel concerning persons infected or presumed to be infected with Covid-19 are to be transmit to the Department of Health by the hospitals, the structures accommodation and care networks with a view to detecting, evaluating, monitoring and combating Covid-19. These data are listed in articles 3 and 4 of the law of 1 August 2018 on the compulsory notification of certain diseases in the context of health protection public. Since the bill does not define other categories of personal data individual to be provided than those listed in Articles 3 and 4 above, the National Commission considers that this article should be read restrictively and that notwithstanding

the fact that the list of data to be collected includes the precision "at least", it does not should not be extended in this case, otherwise it would have to be specified. The National Commission therefore understands that it is more specifically the surname, first name, address, date of birth, medical diagnosis, date of first symptoms and date of medical diagnosis, date of sample and origin of the sample, country where the disease was contracted and the source of infection if known.

It is therefore undeniable that special categories of personal data, known as "sensitive" data will be processed through this information system. Those data, including data concerning health, are specifically regulated by Article 9 of the GDPR. As a matter of principle, it is prohibited to process sensitive data, unless one of the ten conditions provided for in paragraph (2) of Article 9 of the GDPR are met. Subject to comments that follow and with regard to the declaration of January 30, 2020 of the Organization World Health Organization (WHO) that the appearance of the coronavirus SARS-CoV-2 (Covid-19) constitutes a "global health emergency", as well as the subsequent declaration of a state of emergency on the basis of article 32 paragraph 4 of the Luxembourg Constitution by grand- of 18 March 2020¹, the CNPD considers that the exception provided for in Article 9 paragraph 2) letter i) of the GDPR is applicable in this case. This provision provides more specifically that the processing of sensitive data can be carried out when it is "necessary for reasons of public interest in the field of public health, such as protection against threats serious cross-border events affecting health, or for the purpose of guaranteeing high standards of

¹ This is the Grand-Ducal regulation of 18 March 2020 introducing a series of measures within the framework of the fight against Covid-19.

amending 1. the amended law of 25 November 1975 concerning the issue to drug public; 2. the amended law of 11 April 1983 regulating the marketing and advertising of medicinal products.

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quality and safety of health care and medicines or medical devices, on the basis of Union or Member State law which provides for appropriate measures and specific to safeguard the rights and freedoms of the data subject, in particular professional secrecy. »

Recital (46) of the GDPR specifies in this context that certain types of processing may be justified both on important grounds of public interest and on vital interests of the data subject, for example when the processing is necessary to follow epidemics and their spread.

In addition to Article 9 of the GDPR, the processing of personal data envisaged by the Health Department must base itself on one of the lawfulness criteria provided for in Article 6 of the GDPR. Based on the same considerations, the CNPD considers that this processing should be considered as being "necessary for the performance of a task in the public interest or relating to the exercise of the official authority vested in the controller" (Article 6 paragraph (1) letter e) of the GDPR).

Recital (54) of the GDPR states in this context that the "processing of categories particulars of personal data may be necessary for reasons of interest public in areas of public health, without the consent of the person concerned. »

The legal basis of the public interest on which the processing in question is therefore based² makes applicable all the rights provided for by the GDPR for the benefit of the persons concerned, excluding the right to portability. Bill no. 7606 nevertheless provides in its article 9 paragraph (4) that persons infected or suspected of being infected may not

object to the processing of their data in the information system referred to in that article. By this exclusion of the right of opposition, it appears that the authors of the bill make use of the option offered by Article 23 paragraph (1) letter e) of the GDPR to limit the rights of people to ensure, in particular, important public health objectives.

Without prejudice to its remarks under point 2. concerning the retention period of data, the CNPD can a priori understand that this limitation of the right of opposition of infected persons, as well as persons presumed to be infected and whose test proves positive, is mandatory in order to be able to follow the evolution of this virus still very little known by the scientific world, especially since "at this stage it is premature to affirm with certainty that the presence of antibodies is equivalent to immunity against infection, or even to decide on the possible duration of this protection. So right now a positive result of a test serology does not guarantee immunity. » 3

However, the CNPD does not have the scientific and epidemiological skills necessary, it is not able to assess, without additional explanations and more precise details on the part of the authors of the bill, if the absolute restriction of the right of opposition people presumed to be infected, but who test negative, is really necessary as part of the fight against Covid-19.

2 By Article 6 paragraph (1) letter e) as well as Article 9 paragraph 2) letter i) of the GDPR.

3 Press release of May 22, 2020 from the Ministry of Health and the Ministry of Higher Education and of research: "COVID-19 - An ambitious test strategy serving public health", available under: <https://gouvernement.lu/dam-assets/documents/actualites/2020/05-mai/Communique-de-presse-depistage-2252020-.pdf>.

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Furthermore, pursuant to paragraph (2) of Article 23 of the GDPR, each legislative measure which aims to limit the rights of data subjects must necessarily contain a certain number of specific provisions listed therein. In order to assess whether the text of the bill No. 7606 complies with the provisions of the GDPR and more particularly meets the requirements of Article 9 paragraph (2) letter i) of the GDPR and the said Article 23 paragraph (2) of the GDPR, the CNPD will successively analyze the purposes of the processing and the categories of data to be personal character (1.), the data retention period (2.), the guarantees intended to prevent misuse or unlawful access or transfer (3.), as well as the right of individuals to be informed (4.).

1. Regarding the purposes of the processing and the categories of personal data

Article 9 paragraph (1) of bill n°7606 lists four different purposes continued with the implementation of the information system for which the Department of Health is to consider as controller in accordance with the meaning of Article 4 point 7) of the GDPR. Pursuant to Article 5 paragraph (1) letter b) of the GDPR, the purposes of the processing of data must be determined, explicit and legitimate. The CNPD considers that the purposes, as currently described in Article 9 of Bill No. 7606, may seem rather broad, which it can a priori understand given that the consequences and the future development of Covid-19 have not yet been able to be analyzed in detail by the Health Department. Nevertheless, given the scale of the processing and the sensitivity of the data that will be processed, the National Commission recalls that these purposes must be understood strictly and that any use of the data that would not be part of them would not respect the principle the purpose limitation set out in the GDPR.

With regard to the categories of personal data, the CNPD wonders about the categories of data subjects whose data are processed. The testing strategy related to Covid-19 presented by the Minister of Health on May 22, 2020⁴ includes three different ways in which PCR⁵ diagnostic tests are used in Luxembourg: from reactively in the presence of symptoms, actively for the benefit of certain categories of people particularly at risk, as well as preventively by representative samples ("cluster prevalence studies") to support the deconfinement.

According to the CNPD's understanding of the configuration of the information system, the latter will contain data relating to two different categories of data subjects:

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Infected people, i.e. those who have tested positive for the SARS virus-CoV-2, either following a test prescribed by a doctor in the presence of symptoms, or following a test that has taken place actively for the benefit of certain categories of people particularly at risk or in a preventive way to support the

⁴ Press release of May 22, 2020 from the Ministry of Health and the Ministry of Higher Education and of research: "COVID-19 - An ambitious test strategy serving public health", available under: <https://gouvernement.lu/dam-assets/documents/actualites/2020/05-mai/Communique-de-presse-depistage-2252020-.pdf>.

⁵ Diagnostic test (qRT-PCR) (real-time polymerase chain reaction) used in Luxembourg and based on a swab sample taken at the nasal level (nasopharyngeal) or by the mouth (oro-pharyngeal), at the search for the genetic material of the virus from the sample.

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deconfinement (“cluster prevalence studies”, the CON-VINCE study project and the large-scale testing).

The CNPD understands that by combining the provisions of the law of 1 August 2018 on the compulsory notification of certain diseases in the context of health protection public, as well as article 9 paragraph (2) of bill n°7606, doctors, dentists, managers of medical analysis laboratories, hospitals, accommodation structures and healthcare networks are obliged to transmit data relating to infected or presumed persons infected with Covid-19 at the Department of Health. Nevertheless, for reasons of clarity, it proposes an exhaustive list of the various sources of given in the body of the text of article 9 paragraph (2) of bill n°7606.

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Persons presumed to be infected, i.e. those affected by one of the situations provided for in article 2 point 46 of bill no. 7606. In this context, the CNPD asks a question about the “contact tracing” system which, at present, is done manually in Luxembourg. It appears from the explanations contained on the Luxembourg government website dedicated to the Corona virus⁷ that the objective pursued by said tracking system is to ensure that people who have had high-risk contact with a person who is confirmed to be infected, so people suspected of being infected, self-quarantine in an attempt to break the chain of transmission of the virus.

The National Commission nevertheless wonders what is the source of the data to be personal character of persons presumed to be infected and how these will aware of their obligation to quarantine. Does the person infected communicates the identification data (surname, first name, telephone number, etc.) persons presumed to be infected to the Health Department, which will include them in the information system and then contact them? Or, on the other hand, does the infected person will directly contact people suspected of being infected, these the latter being in this case obliged to come forward of their own free will to the Health Directorate which will only then insert their data into the system information in order to be able to follow them?

In the case where the source is the infected person transmitting the data to the Health Directorate, the CNPD notes that this source is not listed in the subsection (2) of section 9 of the bill. If necessary, it would be necessary to add to the text the infected person as source, just as it would be necessary to add, the case where applicable, the telephone number to the list of data that can be processed, in the extent to which this data is the most efficient and the fastest to contact the people.

The CNPD assumes that the data of all individuals who tested negative, apart from the category of persons presumed infected, are not transmitted to the Management of Health by hospitals, accommodation structures and networks of care and should, a fortiori, not end up in the information system. In case the information system will nevertheless contain the said data, the National Commission asks what the purpose of this processing would be. A priori, she is of the opinion that no of the purposes mentioned in article 9 paragraph (1) of bill n°7606 does not allow

6 Referring to the different situations when a person becomes a “presumed infected person”.

7 <https://coronavirus.gouvernement.lu/fr/citoyens.html>.

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the recording and storage in the information system of the data of individuals whose

the test was negative (except again for the category of people presumed to be infected). Whether

the purpose pursued is the performance of scientific and statistical studies and/or support for the

policy, and to the extent that it would not be possible to carry out this processing from

anonymized data, the CNPD considers that in these specific cases a collection of

pseudonymised data should be sufficient.

Under these conditions, the CNPD considers that the list of categories of personal data

personnel listed above⁸ is not excessive in relation to the purposes of the processing and

respects the principle of minimization of data which must lead to the collection only of

strictly necessary data (Article 5 paragraph (1) letter c) of the GDPR). Otherwise,

said list of data to be transferred (in addition to the telephone number, if applicable) by the

hospitals, accommodation facilities and healthcare networks (in addition to

the infected person as the source, if applicable) to the Department of Health must be

considered exhaustive and may not exceed the categories of data

mentioned.

2. Regarding the storage period

Article 5 paragraph (1) letter (e) of the GDPR provides that personal data

must be "kept in a form which permits the identification of the persons

concerned for a period not exceeding that necessary with regard to the purposes for which they are processed. It also follows from recital (45) of the GDPR that when the processing is necessary for the performance of a task in the public interest or relating to the exercise of the official authority vested in the controller, it should belong to the law of the Union or the right of a Member State to establish, inter alia, the retention period of data. Furthermore, as already mentioned, Article 5 paragraph (1) letter (b) of the GDPR provides that personal data must be “collected for the purposes determined, explicit and legitimate, and not to be further processed in a manner incompatible with these purposes”.

Thus, the retention period must be determined according to the purpose that led to the storage. data collection in question. Once this objective is achieved, these data should be deleted or anonymized (in order to produce statistics in particular).

Article 9 paragraph (5) of bill n°7606 provides that personal data personnel of infected or presumed infected persons will be kept in the information system in a form allowing the identification of persons during “the duration necessary to prevent and combat Covid-19 and the data is anonymized at no later than six months after the law ceases to have effect. »

A priori, the draft law under examination will enter into force the day after its publication in the Official Journal of the Grand Duchy of Luxembourg for a period of one month (article 13 of the draft of Law No. 7606). The authors of the bill explain in the explanatory memorandum that the particularity of the bill is based on its applicability over time and that it will produce a priori effects only from June 25, 2020, end of the state of crisis, to July 25, 2020.

8 Last name, first name, address, date of birth, medical diagnosis, date of first symptoms and date of diagnosis medical, date of sampling and origin of the sample, country where the disease was contracted and the source of infection so known.

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In the commentary to article 13 of the bill, it is specified that “the health situation in

relationship with the spread of Covid-19 is constantly changing, which explains the duration

limited application of this law. The National Commission therefore understands that

the state of the health crisis will be reassessed before July 24, 2020 and according to the results,

it assumes that the Chamber of Deputies may, if necessary, decide to extend

the applicability of the law in question.

It appears from the above that there is a double data retention period: the first

deadline being that of the end of applicability of the law (a priori July 24, 2020 but depending on the

circumstances, this period could be extended as above) and the second period is

six months after the end of the first period.

The commentary to article 9 of bill no. 7606 specifies in this context that “in view of

for the purposes of the information system, the retention period of personal data

contained in the system is limited to the duration of the management of the pandemic, increased

for a period of six months to process any data processing requests

from foreign or European health authorities as well as to deal with any

requests related to scientific research, historical or statistical purposes. »

The National Commission wishes to stress first of all that it does not have the expertise

necessary scientific and epidemiological, in order to assess whether the very conservation of

data in the information system of people presumed infected, but whose test

turns out to be negative, is really necessary in the context of the fight against Covid-19. In the absence of more specific explanations by the authors of the bill, it cannot assess whether any arguments by scientific and epidemiological experts justify why this data should be kept for a certain period of time.

time lapse.

With regard to the GDPR, it is necessary and essential to define a retention period for data within the Department of Health's information system that is proportionate with regard to the purpose pursued. Therefore, it is necessary to define objective criteria justifying an adequate shelf life.

At the risk of repeating myself, the CNPD is not an expert in health and management of epidemics, it is difficult for it to assess whether it is proportionate, in order to combat the spread of Covid-19, that the personal data of infected persons and suspected infected will be kept in the information system for a number determined by month. She nevertheless wonders what are the health reasons and/or scientists who led the authors of the bill to insert in article 9 paragraph (5) GDPR a specific retention period of 6 months after future law ceases to produce its effects.

By way of comparison, French law n° 2020-546 of May 11, 2020 extending the state of emergency health and supplementing its provisions contains a provision a priori similar to the text proposed by the Luxembourg legislator. Indeed, Article 11 provides “only for the purposes to fight against the spread of the covid-19 epidemic and for the duration strictly necessary for this purpose or, at most, for a period of six months from the end of the state health emergency declared by article 4 of law n° 2020-290 of March 23, 2020 to deal with the covid-19 epidemic, personal data concerning the health relating to people affected by this virus and to people who have been in contact with them can be processed and shared, if necessary without the consent of the

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interested persons, within the framework of an information system created by Order in Council

of State and implemented by the Minister responsible for health. »

However, paragraph 2 of the aforementioned article 11 contains an important clarification, insofar as “the

personal data collected by these information systems for these purposes

may be kept at the end of a period of three months after their collection”. So even

whether the French system itself will be able to operate until no later than six months after the end

of the state of health emergency, personal data should be regularly

deleted, or even anonymized, three months after they were collected.

In Belgium, Royal Decree No. 25 of May 28, 2020 amending Royal Decree No. 18 of May 4, 2020

creating a database with Sciensano as part of the fight

against the spread of the coronavirus COVID-19, entered into force on June 5, 2020. As

Royal Decree No. 18 of May 4, 2020 already ceased to have effect on June 4, 2020, it was decided to

extend until June 30, 2020. In the report to the King, the Minister of Social Affairs and

Belgian Public Health has clarified that “the deadline for erasing personal data

staff would be adjusted accordingly (July 5, 2020 instead of June 9, 2020)”, i.e. a

data retention period of five days after the expiry of the decree in question.

To conclude, the CNPD can only note that the legislators of countries neighboring the

Luxembourg have opted in this context for much longer retention periods

short. However, as mentioned above, the National Commission does not have the elements and necessary explanations at its disposal to decide on the proportionality of a time limit storage of data of infected and presumed infected persons of six months after the law ceases to have effect.

In order to ensure that the data is not kept longer than necessary, time limits should be set either for their erasure or for periodic review. Thereby, an alternative would be to provide that, depending on the evolution of Covid-19, the relevance of a shelf life a priori shorter than six months, is subject to regular evaluation, especially since at present it is not possible to predict how often and for what period of time the applicability of the draft law will be extended.

3. As to safeguards intended to prevent misuse or unlawful access or transfer

The National Commission recalls that, whatever the emergency context, guarantees sufficient with regard to respect for the fundamental principles of the right to the protection of personal data must be provided. Control of access to health data is essential in this context with regard to the requirements provided for in Article 9 paragraph 2 letter i) GDPR.

According to Article 9 paragraph (3) of the bill under review, “only doctors and health professionals, specifically designated and authorized within the framework of this law by the Director of Health or his delegate to detect, assess, monitor and combat Covid-19 are authorized to access data relating to the health of infected persons or presumed infected. » Said paragraph continues by limiting access to data relating to health to the strict extent that it “is necessary for the performance of legal missions or entrusted to them to prevent and combat Covid-19. »

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Given the sensitive nature of health-related data, the National Commission can only approve that the circle of people who can access data related to the health and the context in which they access it is circumscribed. It follows from Article 9 paragraph (3) of the Bill that all persons whom the Director of Health may authorize to access the information system are subject to professional secrecy as provided for in Article 458 of the Penal Code, as furthermore required by the aforementioned article 9 paragraph 2 letter i) of the GDPR.

Article 9 paragraph (5) of the bill further requires that "the data are processed in conditions to guarantee its security, confidentiality and integrity. " In view of the nature and volume of the data processed as well as the risks for people in the event breach of data security, the CNPD considers it essential that security measures adequate technical and organizational security are put in place in order to guarantee state-of-the-art level of security in the healthcare sector.

In this regard, the CNPD would like to emphasize the importance of the security obligation provided for in Article 5 paragraph (1) letter f) and Article 32 of the GDPR, requiring that technical measures and organizational measures guaranteeing a level of security adapted to the risk, are put in place.

It considers that the implementation of the processing of personal data contained in the information system must in particular guarantee the use of a strong authentication of people with access and said system should be equipped with tracking (logging) individual access for a period of five years from registration of the log, which constitutes an additional guarantee in terms of data protection at

personal character. It is also essential that the data is destroyed

irreversibly after expiry of the retention period.

4. Regarding the rights of data subjects

Subsection (4) of section 9 of the bill specifies that “the rights of persons data subjects provided for in the General Data Protection Regulation (EU) 2016/679 exercised with the Department of Health”. With regard to the limitation of the right opposition, the CNPD refers to its observations above.

Under Articles 13 and 14 of the GDPR, the controller is obliged to provide data subjects certain information when personal data is collected directly from them or indirectly through a third party. An information precise and adapted must therefore be provided to the persons concerned in a context special sanitary.

Thus, under Article 14 of the GDPR, the Health Directorate is obliged to provide these information to the infected person, these data coming a priori from a third party (the hospitals, accommodation facilities and healthcare networks). In what concerns personal data relating to persons suspected of being infected in the context of "contact tracing", it is not clear whether this collection is carried out in a directly by the Department of Health or indirectly (for example via the person infected itself). In both cases, the right to information of said persons is to be complied with by the Health Department.

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Finally, the CNPD would like to point out that when a person carries out a test, they should in principle already be informed that in the event of a positive result, his data to be personal nature will be transferred to the Department of Health and recorded there in their information system.

Thus decided in Esch-sur-Alzette on June 8, 2020.

The National Data Protection Commission

Tine A. Larsen

President

Thierry Lallemand

Commissioner

Christopher Buschman

Commissioner

Marc Lemmer

Commissioner

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