

Opinion of the National Commission for Data Protection relating to

Bill no. 7524 on the quality of services for

the elderly and amending: 1° the amended law of 16 May

1975 on the status of the co-ownership of built buildings; 2° the law

of September 8, 1998 regulating relations between the State and the

organizations working in the social, family and therapeutic fields

as well as the draft Grand-Ducal regulation on the quality of

services for the elderly

Deliberation n°19/2020 of 07/22/2020

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 February 6, 2020, the Minister of Family and Integration invited

the National Commission to rule on draft law no. 7524 amending: 1° the

amended law of 16 May 1975 on the status of co-ownership of built buildings; 2° the amended law

of 8 September 1998 regulating relations between the State and organizations working in the

social, family and therapeutic areas (hereinafter the "draft law") as well as on the draft

Grand-Ducal regulation on the quality of services for the elderly ("draft

Grand-Ducal regulation").

According to the explanatory memorandum, the purpose of this bill is to overhaul the law of September 8, 1998 regulating relations between the State and organizations working in the social, family and therapeutic fields (hereinafter the "Law ASFT"). The authors of the bill further specify that the purpose of the bill is to "create a new legal framework intended for bodies managing services and structures for elderly people which will supplement the provisions relating to the ASFT law". The text under consideration thus organizes the action of the management bodies intervening in the fields of active ageing, home care and long stays in accommodation facilities for the elderly. The objective of the bill is to clarify the terminology and to complete the concepts used in relation to the current regulations.

The National Commission intends to limit its observations to the questions raised by the provisions of the bill under consideration that deal with aspects related to respect for privacy and the protection of personal data. This notice will not deal with the proposed Grand-Ducal regulation because it does not raise any observations from the point of view of the protection of personal data and respect for privacy.

I.

On the processing of personal data carried out by the Minister

1. On the creation of a new public register

According to the explanatory memorandum, the bill provides for the creation of a "register of structures and services for the elderly who will make public all information deemed relevant to the attention of the general public, in particular the establishment project and the standard contract concluded with users".

This new public register is created under the authority of the Minister having in his competences the law under notice (hereinafter the "Minister") and contains 7 headings entitled: "accommodation structures for the elderly"¹, "home help and care services"², "day centers for elderly people"³, "Aktiv Plus clubs"⁴, "meals on wheels"⁵, "activities

seniors”⁶ and “remote alarm services”⁷. The bill lists for each of the headings

aforementioned all the information contained therein.

1 Article 8 of the bill.

2 Article 22 of the bill

3 Article 36 of the bill.

4 Article 49 of the bill.

5 Article 58 of the bill.

6 Article 68 of the bill.

7 Article 77 of the bill.

It should be noted that the said register will make public information which does not constitute,

mostly personal data. Only information relating to the name of the

head of management and its delegates, if any, constitute personal data

personal.

The publication of such personal data does not raise any difficulty from a point of view.

view of the application of the GDPR while this publication would be made under an obligation

legal, which constitute sections 8, 22, 36, 49, 58, 68 and 77 of the bill.

2. On the processing of personal data carried out by the Minister in

within the framework of the requests for approval addressed to it

The National Commission understands from reading the bill that the minister is required to

collect and process personal data in the context of authorization applications

addressed to him.

Indeed, the bill specifies that the request for approval, necessary for the exercise of each

of the services covered by the bill, is sent by the managing bodies to the Minister,

and is accompanied by an approval file which includes a certain number of documents and

of information⁸. These documents and information contain personal data

personal.

The National Commission therefore wonders whether the Minister is not required to keep a file centralizing all the data collected and processed in the context of requests approval addressed to him. If this were to be the case, it should be remembered that the outfit a personal data file collected and processed by an administrative authority must have a legal basis in accordance with Article 6(3) GDPR⁹.

⁸ See article 15 for “Services and accommodation structures for the elderly” (chapter 1); article 29 for “Services home help and care” (Chapter 2); Article 43 for “Day centers for the elderly” (Chapter 3); section 53 for “Aktiv Plus Clubs” (chapter 4); Article 62 for “Meals on Wheels Services” (Chapter 5); article 72 for “Services senior activities” (chapter 6); and article 84 for “Remote alarm services” (chapter 7).

⁹ Article 6 paragraph (3), read together with its paragraph (1) letters c) and e)⁹, provides that: “The basis for the processing referred to in paragraph 1, points c) and e), is defined by:

has.

b.

Union law; Where

the law of the Member State to which the controller is subject.

The purposes of the processing are defined in this legal basis or, with regard to the processing referred to in paragraph 1(e) are necessary for the performance of a task carried out in the public interest or in the exercise of the public authority vested in the controller. This legal basis may contain provisions to adapt the application of the rules of this Regulation, inter alia: the general conditions governing the lawfulness of the processing by the controller; the types of data that are subject to processing; them 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.

The National Commission therefore considers it essential, in the event that the Minister holds a file, whether provided for by this bill. The legal provisions creating of such a register must contain the elements mentioned in the paragraph above.

Furthermore, the CNPD already intends to formulate in the developments below observations on the processing of personal data carried out by the Minister in within the framework of the applications for approval addressed to it. persons concerned; the entities to which the personal data may be communicated and the purposes for which they may be used; purpose limitation; retention periods; and operations and processing procedures, including measures to ensure lawful and fair processing, such as those provided in other specific processing situations as provided for in Chapter IX. ”.

has. On the purposes of the processing

In accordance with the principle of purpose limitation, personal data must be collected for specified, explicit and legitimate purposes, and not to be processed subsequently in a manner incompatible with those purposes.

Although the bill and the commentary to the articles do not expressly specify the purposes pursued by the Minister, the CNPD understands that the personal data collected and processed by the Minister are processed for the purposes of granting and managing approvals. In accordance with principle of purpose limitation, said data could not be used by the Minister for purposes other than those mentioned above.

b. On categories of personal data and persons concerned

The managing bodies, as defined in chapters 1 to 7 of this bill, must attach to their application for approval the documents and information listed by the bill¹⁰.

The CNPD welcomes such a list which specifies, for each document or information covered by the bill, the persons concerned and the categories of related data.

Nevertheless, it appears from the provisions of the bill that the Minister "may request any other document or information essential to the establishment of the application file approval"¹¹. The authors of the bill specify on this subject in the comments of the articles that "The Minister reserves the right to request any other document to verify the proper functioning and the non-endangerment of residents"¹² without however specifying which types of documents it could be and the people affected by these measures additional. If this "essential document or information" contains data to be personal character then the CNPD considers it necessary that details on this subject be made in the bill.

¹⁰ See article 15 for "Services and accommodation structures for the elderly" (chapter 1); article 29 for "Services

home help and care” (Chapter 2); Article 43 for “Day centers for the elderly” (Chapter 3); section 53 for “Aktiv Plus Clubs” (chapter 4); Article 62 for “Meals on Wheels Services” (Chapter 5); article 72 for “Services senior activities” (chapter 6); and article 84 for “Remote alarm services” (chapter 7).

11 Paragraph (3) of sections 15, 29, 43, 53, 62, 72 and 84 of the bill.

12 The commentary to articles 29, 43, 53, 62, 72 and 84 refer to the commentary to article 15

In addition, if the Minister were in this case to indirectly collect data relating to managing bodies, managers or supervisory staff from other state files, then such communication of data between ministries or administrations should be specified in the text of the bill.

vs. On access to data

accidental damage,

In accordance with Article 5 paragraph (1), letter f) of the GDPR the personal data

must be “processed in such a way as to guarantee appropriate security of the personal data

personal data, including protection against unauthorized or unlawful processing and against the loss, destruction or

using technical measures or

appropriate organizational (integrity and confidentiality)”.

In addition, Article 32 of the GDPR provides that "the controller and the processor

implement the appropriate technical and organizational measures to guarantee a

level of security appropriate to the risk”. Such measures must be implemented in order to in particular to avoid unauthorized access to data or data leaks.

Among these security measures, the National Commission considers it important that only

people who need it in the performance of their duties and professional tasks

are authorized to have access to the necessary data. The CNPD therefore recommends that

be provided within the ministry having the bill under opinion in its competences that the access

to such data is limited to only agents who need to know it in the context of their

function. It would also be appropriate to provide for the modalities of this access and to put in place a procedure including appropriate safeguards aimed at excluding any use going beyond beyond the purposes for which these data are initially processed and in particular, provide for a logging system (i.e. recording in “log files” or “logs”) of user activities, anomalies and security-related events.

d. On the data retention period

According to Article 5 paragraph (1), letter e) of the GDPR, personal data may only be not be kept longer than necessary for the fulfillment of the purposes for which they are collected and processed.

The National Commission regrets that the authors of the bill did not indicate the durations retention of data processed for the purposes of granting and managing approvals, so that it is not in a position to assess whether, in this case, the principle of duration of Limited data retention is observed regarding the collection of this data.

II.

On the processing of personal data carried out by the organizations managers

1. On the processing of personal data relating to the condition professional integrity of managers and staff supervising

It should be noted that the managing bodies which are responsible for the management and operation of structures or activities, as covered by the bill, may only employ for the positions of manager and supervisory staff that the persons who meet the conditions set by the bill for the occupation of such positions.

One of the conditions that must be met by the manager and the supervising staff is in particular the condition of “professional integrity” which “is assessed on the basis of its antecedents insofar as they relate to facts dating back no more than ten years”^{13 14}.

The bill further specifies with regard to this condition that: "constitutes a breach depriving the manager of professional integrity, any behavior or action that affects his professional integrity so seriously that it can no longer be tolerated, in the interest of the residents concerned, whether he exercises or continues to exercise the authorized function or to authorize" 15 and that: "constitutes a depriving breach good repute professional any behavior or action that so seriously affects its integrity professional that we can no longer tolerate, in the interest of the residents [or users] concerned, that he exercises or continues to exercise the function for which he is responsible.

In the absence of details in the bill and in the commentary to the articles, the CNPD asks what are the criteria for assessing such professional integrity.

13 The same wording is used identically in articles 4, 18, 33, 47, 57, 66 and 75 of the bill with regard to the executive officers.

14 The same wording is used identically in articles 5, 19, 34, 48, and 67 of the draft law with regard to the staff supervising.

15 The same wording is used identically in Articles 4, 18, 33, 47, 57, 66 and 75 of the bill.

16 The same wording is used identically in Articles 5, 19, 34, 48, and 67 of the bill.

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If the condition of professional good repute is assessed on the basis of a criminal record, the CNPD understands that this will be done in accordance with the legal provisions of Article 8-5 of the Law of July 23, 2016 amending 1) the Law of March 29, 2013 on the organization of the criminal record, 2) the Code of Criminal Procedure, 3) the Penal Code. If so, she suggests specifying in the text of the bill for greater clarity the term "judicial" just after the term "antecedents". Furthermore, it would be important to specify what degree of seriousness criminal records would be taken into account by the managing bodies in order to to assess the condition of professional integrity of the manager and staff

supervising. The CNPD wonders in particular whether any entry in the criminal record entails automatically a negative assessment in terms of professional integrity or if, by
However, registrations must have reached a certain level of severity.

If this condition of professional integrity is not limited to criminal records alone,
the National Commission recommends specifying in the bill the elements to be taken into
account in assessing professional integrity.

For example, the CNPD refers the authors of the bill to Chapter 3 entitled
"Professional integrity" of the amended law of September 2, 2011 regulating access
the professions of craftsman, merchant, industrialist as well as certain liberal professions
and the Grand-Ducal regulation of 1 December 2011 determining the terms of the instruction
administrative procedure provided for in article 28 of the amended law of 2 September 2011. These provisions
legal requirements specify the elements on which professional integrity is assessed.

Finally, the CNPD understands that it is up to the managing bodies to assess the condition
professional integrity of the manager and the supervisory staff, because the latter
must produce, when applying for approval, a certificate attesting that the manager
and the supervising staff meet this condition¹⁷. However, she wonders if the Minister
is also not likely to appreciate such good reputation on the basis of the provisions
contained in paragraphs (3) of sections 15, 29, 43, 53, 62, 72 and 84 of the bill¹⁸. If such was
If so, it should be provided for in the text of the bill.

In addition, the National Commission raises the question of the continuity of the provisions of
Article 8 of the amended Grand-Ducal regulation of 8 December 1999 concerning the authorization to
grant to managers of services for the elderly, which provides that the condition
of good reputation is assessed in particular "on the basis of all the elements provided by the investigation

¹⁷ See articles 15, paragraph (2), 2° and 3°, 29, paragraph (2), 2° and 3°, 43, paragraph (2), 2° and 3°, 52, paragraph (2), 2°
and 3°, 62

paragraph (2), 2°, 72, paragraph (2), 2° and 3°, 84 paragraph (2), 2° and 3°

18 See our developments under point I, 2, b) of this opinion

administration”? Indeed, the CNPD understands that the provisions of said Grand-Ducal regulation will no longer be intended to apply, insofar as the bill aims to establish a framework new law and to complete the ASFT law. She wonders, however, whether this instruction administrative will still be carried out? If so, it would be useful to also include this element in the bill under consideration as well as detailing the data to which access the competent authority within the framework of the administrative instruction.

2. On the creation of an individual file

has. About the controller

The National Commission regrets that the bill does not specify which entity will have the quality of data controller for the processing of personal data carried out within the framework of the establishment of the aforementioned individual file.

Nevertheless, the draft law provides for an obligation for the managing bodies in charge the operation of services and accommodation structures for the elderly, services home assistance and care, day centers for the elderly, and remote alarm services, to establish an individual file for each resident or user of such services¹⁹.

the commentary on the articles of the authors of the bill²⁰ that the managing body must establish for each resident or user an individual file.

The controller within the meaning of the GDPR therefore seems to be the managing body. The CNPD therefore suggests that all articles relating to the file mention individual that the managing body will be the data controller.

b. On the legal basis on which the processing is based

It should be remembered that any processing of personal data is lawful only if at the unless one of the conditions referred to in Article 6, paragraph (1), letters a) to f) is met.

The processing of personal data carried out by the managing bodies, in the framework of the creation of an individual file, is based on a legal obligation, introduced by the

draft law in sections 12, 26, 40 and 81, and does not raise any particular observations.

19 See article 12 for accommodation services and structures for the elderly, article 26 for assistance and care services at home, article 40 for day centers for the elderly, article 81 for remote alarm services.

20 See comments on articles 12, 26, 40 and 81.

Furthermore, it should be noted that the data collected under Articles 12, paragraph (2), point 7°, 26, paragraph (2), point 6°, 40, paragraph (2), point 8° and 81, paragraph (2), point 7° are to be qualified as sensitive data within the meaning of Article 9 of the GDPR, these being relative to the health of residents and users.

Such processing requires specific protection²¹ and is subject to stricter requirements.

strict. The processing of sensitive data is, in fact, prohibited unless one of the conditions referred to in paragraph (2) of Article 9 of the GDPR is fulfilled.

With regard to the processing of sensitive data referred to in the aforementioned articles of the draft law, the CNPD considers that the condition referred to in Article 9, paragraph (2), letter h), of the GDPR is fulfilled in the present case insofar as the individual file is set up in order to in particular to ensure the medical follow-up and the continuity of the care of the resident or the user.

vs. On the purposes of the processing of personal data

It should be noted that the articles of the bill creating an individual file do not do not mention the purposes of the processing of personal data.

However, it is apparent from the commentary to Article 12 that the purpose of the personal file is to facilitate "the creation and monitoring of the resident's care plan as well as access to the data of the resident and thus makes it possible to find, at any time, all the historical elements concerning his career and his activities. The single individual record ensures continuity of care by offering a common file accessible by the various stakeholders during the treatment of the resident and allows the traceability of each action on his file with regard to the forensic aspects. ". Therefore, with regard to Article 12, the CNPD understands that the purposes of the processing are essentially the follow-up of the care of the resident.

In the absence of comments from the authors of the bill on this subject for articles 26, 40 and 81, the CNPD wonders if the same purposes are applicable for individual files referred to in the aforementioned articles.

The National Commission recommends that the purposes of the processing be indicated in the articles 12, 26, 40 and 81 taking into account each time the specificity of the services offered.

21 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.

d. On the categories of personal data

The National Commission welcomes that the categories of personal data collected by the managing bodies are precisely listed in the articles of the draft law relating to the individual file.

However, the National Commission assumes that the national identification number (number) of residents or users will be collected by the managing bodies when the establishment of such individual files.

If this is the case, she recommends specifying this in the text of Articles 12, 26, 40 and 81 of the bill to avoid any future difficulties insofar as the use of the number national identification number is strictly governed by the amended law of 19 June 2013 relating to the identification of natural persons, in the national register of natural persons, à la carte of identity, to the municipal registers of natural persons²².

e. On access to data

The National Commission welcomes that the bill lists the persons and entities having access personal data contained in the personal file²³. Just as she welcomes the fact that the draft law provides that the personal file is accessible to persons and entities referred to in paragraphs (1) of Articles 12, 26, 40 and 81 for the information referred to in paragraphs (2) of the said articles which concern them in the exercise of their mission. It comes out by elsewhere in the bill that the Minister will not have access to such records.

Regarding access to the Insurance Assessment and Control Administration

dependency, the CNPD understands that it has access to the individual file as part of its

control missions as detailed in paragraph (1) of article 384bis.

Finally, with regard to access to the individual file for residents or users and, where

where appropriate, to their legal representative with regard to their data, the National Commission

asks whether such access is not similar to that provided for by Article 15 of the GDPR, which confers on

the data subject the right to access the personal data which have been

collected about him in order to learn about the processing and to verify its lawfulness.

22 Indeed, Article 2, paragraph (6) provides that “The deeds, documents and files established for the performance of a service

service requested by the person whose number is used and for which a legal or regulatory provision requires the

communication of the identification number must contain this number”.

23 cf. paragraph 1 of articles 12, 26, 40 and 81 of the bill.

If this is the case, it is suggested that the legal provisions providing that the resident or user,

where applicable, his legal representative, can access his individual file or only

to the data concerning him for the legal representative under the conditions and in accordance with

GDPR Article 15.

f. On the shelf life

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.

The bill provides for each individual file a retention period of 10

years from the end of the hosting contract²⁴, the care contract²⁵ or the contract

of services²⁶.

The CNPD assumes that for setting the retention period of 10 years, the

authors of the bill wanted to align themselves with the retention period for medical records

of patients provided for in article 15 (4) of the law of July 24, 2014 on the rights and obligations

of the patient. However, in the absence of explanations from the authors of the bill in the comments of the

aforementioned articles as to the need to keep the data for a period of 10 years, the CNPD is unable to assess whether this duration is adequate and proportionate to the purposes continued.

g. On the security of the processing

It should be recalled that under Article 32 of the GDPR, the controller must put implement the appropriate measures to guarantee a level of security appropriate to the risk.

It is particularly appropriate to draw the attention of the authors of the bill to the fact that in

to the extent that sensitive data (health data) are to be processed, the

managing bodies will have to put in place protective measures to ensure the

confidentiality and security of such data, including in particular a logging system

(i.e. a recording in “log files” or “logs”) of the activities of the

users, anomalies and security-related events. Indeed, the disclosure of

sensitive data could cause serious harm to users or residents.

24 Last paragraph of paragraph (2) of Article 12.

25 Last paragraph of paragraph (2) of Article 26 and paragraph (3) of Article 40.

26 Paragraph (3) of Article 81.

Thus decided in Esch-sur-Alzette on July 22, 2020.

The National Data Protection Commission

Tine A. Larsen

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