Opinion of the National Commission for Data Protection relating to the

bill n°7674 on the organization of access to knowledge of

its origins in the context of adoption or procreation

medically assisted with third-party donors.

Deliberation n°52/AV30/2021 of November 29, 2021.

In accordance with Article 57, paragraph 1, letter c) of Regulation No. 2016/679 of April 27

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

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 August 1, 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”.

Not having been directly seized by the Minister of Justice, nor at the stage of the pre-

draft, nor at the draft law stage, the National Commission nevertheless wishes to express

with regard to bill n°7674 on the organization of access to knowledge of one's origins

in the context of adoption or medically assisted procreation with third-party donors

(hereinafter the "draft law"), as amended on May 4, 2021, and as regards the interactions

of the latter with the legal framework relating to the protection of personal data. the

this opinion follows the coordinated text as amended.

Internal referral by the National Commission takes place within the framework of the numerous processing

of personal data, including health data, carried out for the purposes of

the exercise of access to the knowledge of its origins and affecting the most intimate aspects

of the privacy of the persons concerned.

Although the National Commission in no way wishes to question the legitimacy of the

new measures introduced by the bill, it stresses, however, that guarantees

sufficient with regard to respect for the fundamental principles of the right to the protection of

personal data must be implemented. The National Commission

therefore raises the need to provide for legal, organizational and

techniques in order to ensure a high level of protection of personal data.

I. Cross-sectional observations

A. Introductory remarks

As a preliminary point, a question should be raised as to the scope of the draft

law under notice. Indeed, the titles of the second chapter, and in particular that of the first section

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of this chapter, lead one to think that only children born under secrecy who will subsequently be

adopted children would have the right to know their origins, while children born in secret, and

who will not be adopted, would not have this right. This interpretation

is supported by the title of the bill as well as by Article 4, paragraph 3, which provides

that "The processing of this data is necessary for the purposes of implementing the

seeking access for a child to his or her origins in the context of adoption or

medically assisted procreation with third party donors".

However, the CNPD does not see the reason for this difference in treatment, especially since it is

impossible to know at the time of delivery whether the child will be adopted. A such a distinction would have the consequence that children born in secret and who are not subsequently adopted do not have the right to be provided with the information that has been collected about them under the bill.

In addition, bill no. 6568A reforming filiation as amended does not provide such a difference in treatment insofar as the new article 312bis of the Civil Code provides that “A child has the right to have, as far as possible, access to his or her origins. [...]". The commentary to the articles specifies that “[1]the provisions of this article are applicable whether it concerns access to data relating to a person's origins in the event of childbirth under X, full adoption, medically assisted procreation or surrogacy ". Particular attention should therefore be given to the articulation of the bill under opinion with bill n°6568A.

Still on a preliminary basis, it should be clarified that the right of access to a child's origins does not should not be confused with the data subject's right of access to data personal data concerning him as provided for in article 15 of the GDPR. In this regard, it should be recalled that the right of access within the meaning of Article 15 of the GDPR grants data subjects the right to contact the controller directly to request confirmation that personal data concerning him are or are not being processed. This same right confers on the person concerned to obtain a copy of the personal data being processed, provided that such copying does not infringe the rights and freedoms of others (limitation provided for in Article 15, paragraph 4 of the GDPR). For example, a child concerned could exercise his right of access on the basis of article 15 of the GDPR with of the hospital in which he was born. The hospital in question is therefore bound, taking into account any limitations provided for in Article 15 of the GDPR, to be communicated to the child all the data concerning him. However, this exercise of the right of access on the basis of Article 15 of the GDPR should not be confused with the exercise of the right of access to its origins

what does this bill intend to put in place in that this last right of access is aimed

to another data controller (the Minister in this case) and can hardly be limited

such as the right of access provided for by the GDPR (no copy if the request infringes the

rights and freedoms of others - Article 15(4) GDPR).

Furthermore, article 1 of the bill provides that "access to one's origins does not give rise to any right

nor obligation for the benefit or at the expense of any person". This provision is particularly

ambiguous, given that the objective of the bill is precisely to establish the right of access

to its origins. It also creates obligations, such as for example in Article 20 which

provides, in the context of medically assisted procreation with third-party donors (hereinafter

"PMA"), the obligation for the authors of the parental project to make the declaration

spontaneous transmission of certain information to the minister responsible for the bill (here

after "minister"). The National Commission considers, in the light of the comments of the

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articles, that it was the intention of the authors of the bill not to create obligations

and parentage rights. It therefore agrees with the suggestion made by the Council

of State in its opinion of July 16, 20212 to delete this article.

B. With regard to Article 6(3) of the GDPR

According to Article 6, paragraph 1 of the GDPR, processing is only lawful if at least one of the

conditions listed therein are met. The National Commission understands that the bill

under opinion intends to create a condition of lawfulness within the meaning of Article 6, paragraph 1 letter c)

of the GDPR, namely that the processing is necessary for compliance with a legal obligation to

to which the controller is subject.

However, Article 6, paragraph 3 of the GDPR provides that "the basis for the processing referred to in

paragraph 1, points c) and e), is defined by:

1. Union law; Where

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

The purposes of the processing are defined in this legal basis or, insofar as

relates to the processing referred to in point (e) of paragraph 1, are necessary for the performance

of a mission of public interest or relating to the exercise of the official authority of which

invested 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 data controller

treatment; the types of data that are subject to processing; the people

concerned; the entities to which the personal data may be transferred

communicated and the purposes for which they may be communicated; the limitation of

purposes; retention periods; and processing operations and procedures, including

including measures to ensure lawful and fair processing, such as those

provided for in other specific processing situations as provided for in

chapter IX. Union law or the law of the Member States serves an objective

of public interest and is proportionate to the legitimate aim pursued. »

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 in 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. Moreover, 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 controller, the type of personal data subject to the processing, data subjects, entities to which the personal data

2 Opinion n°60.376 of July 16, 2021 of the Council of State on the bill on the organization of access to knowledge of its origins in the context of adoption or medically assisted procreation with third-party donors, p.4.

personal data can be communicated, the limitations of the purpose, the retention period and other measures to ensure lawful and fair processing [.4].

Recital (41) of the GDPR further states that "['where this Regulation makes reference to a legal basis or to a legislative measure, this does not mean necessarily that the adoption of a legislative act by a parliament is required, without prejudice obligations provided for under the constitutional order of the Member State concerned. However, this legal basis or legislative measure should be clear and precise and its application should be foreseeable for litigants, in accordance with the case law of the Court of Justice of the European Union and the European Court of Human Rights".

Although the draft law provides a legal basis for the processing in question by specifying a certain number of elements, such as the purposes of the processing or the duration of retention of data, some points are not sufficiently specified in the project of law.

The CNPD will come back to this point later, but would like to point out the mention,
in the financial statement of the project under review, the creation of a "computer tool for the
safeguarding highly sensitive confidential character data". Indeed, neither the
the bill itself, nor the explanatory memorandum refer to this computer tool.
There is therefore reason to wonder about its use in the context of exercising access to
origins, in particular with regard to any processing of personal data
personnel carried out using this tool. What data are required to appear in this
tool ? How is this tool powered? In the context of secret childbirth
in particular, does this mean that an authorized person opens the envelopes received to insert
then the information in the computer tool? What is then the fate of the support
physical ? Do subcontractors act in the operation and management of this tool?
These various questions should be answered in the text of the bill. Of the
appropriate technical and organizational security measures adapted to the risks,
given the sensitivity of the data, must in any case be put in place
by the controller(s) in accordance with Article 32 of the GDPR. Furthermore, in
case of recourse to subcontractors, the obligations incumbent both on the person responsible for the
processing only to subcontractors pursuant to Articles 28 and 29 of the GDPR will be intended
to apply.

II. As for the roles of the various stakeholders

While the authors of the bill are to be commended for taking care to determine the
minister as data controller3, inaccuracies as to the roles of the different
stakeholders remain.
Indeed, it emerges from the comments on the articles that hospitals play a
important role during secret births insofar as they constitute the most
often "the first and only contact of the future mothers in question"4.

3 Article 4, paragraph 1 of the bill

See commentary on article 5 of the bill

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Thus, article 5 of the draft law stipulates that the hospital establishment must inform the Minister

secret birth and provide the birth parents with a number

information. The same obligations are incumbent on any other professional supervising the

birth that takes place in a place other than a hospital establishment.

Under article 6 of the bill, it is up to the hospital establishment or any other

professional who supervised the birth to collect a certain amount of information

concerning the birth parents and forward them to the Minister.

In the context of Articles 16 and 17 which deal with “other national adoptions” as well as

"international adoptions", other actors are called upon to provide information to

namely the "judicial authorities", "the central authority for adoption within the meaning of the Convention

of The Hague of 29 May 1993 on the protection of children and co-operation in matters

of international adoption, the organizations authorized and qualified for adoption in accordance with

ä the law of 31 January 1998 on the approval of adoption services and the definition of

obligations incumbent on them” and “any other body or national authority involved in the

framework of adoption.

Articles 19 and 20 of Chapter 3 (access to knowledge of one's origins within the framework

of medically assisted procreation with a third party donor) of the bill introduce

still other actors likely to provide personal data, namely the

"authors of the parental project", the "fertilization centres" as well as "any doctor responsible for

to implement medically assisted procreation".

If article 4, paragraph 1 of the bill expressly determines the minister as

controller, there is no such clarity for the other actors. Indeed the

other actors set out in the bill, such as, for example, the hospital establishment or

any other professional who supervised the birth in the context of childbirth under

secret, or even for the ART the authors of the parental project or the fertility centers, or for

other national and international adoptions judicial authorities or the central authority

for adoption, play a key role in the collection of personal data and their

subsequent transmission to the controller.

However, it is important to determine in the bill the role of the various stakeholders

that the notions of "controller", "joint controller" and

"processor" are essential for the application of the GDPR insofar as they

determine who is responsible for compliance with data protection rules

and how data subjects can exercise their rights.

The draft law should therefore clearly indicate whether all these stakeholders are to be considered

as full controllers, joint controllers or

as subcontractors.

Moreover, as according to the current drafting of the text, the minister is to be considered as

sole data controller, the Commission Nationale wonders whether this observation implies

that there is creation of a centralized file of data to be considered as highly sensitive.

Indeed, the obligation incumbent on the various players to provide information to the

responsible for the treatment implies that they occupy a function of source of information

of the minister who, for his part, keeps and manages the information.

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In this context, the attention of the drafters of the bill should be drawn to the lines

guidelines drawn up by the European Data Protection Board, which serves as the

guidance to actors in determining their respective roles for the processing of

personal data5.

III. As for the purposes

Pursuant to the principle of purpose limitation provided for in Article 5, paragraph 1, letter b), of the

GDPR, personal data must be "collected for the purposes

determined, explicit and legitimate". The objectives pursued must be chosen and known

before the start of treatment. In addition, they must be precisely defined and refer

ä one or more specific goals (determined and explicit purposes).

If the authors of the bill are to be congratulated for having specified the purposes of the processing

which would be implemented by the Minister in Article 4(3) of the draft law, the

provisions are, however, drafted too vaguely in that they limit themselves to providing

that "1.1.1 the processing of this data is necessary for the purposes of implementing the

seeking access for a child to his or her origins in the context of adoption or

medically assisted procreation with third party donors".

Indeed, on reading the bill, it should be noted that the search for access to a

child at its origins revolves mainly around four objectives:

the compilation of files by the Minister on the basis of information received under the

Articles 6, 10(3°), 10(4°), 10(5°), 20, 27 or sought under Articles 16, 17 and

25 paragraph 3;

the Minister's management of access requests received by children under the

Articles 11 and 22 of the bill;

the management by the Minister of the requests of the birth parent(s) inquiring

any research by the child under Article 10 (6°) of the bill;

the communication to the children of their files and/or of the information collected.

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Thus, the provisions of Article 4, paragraph 3 of the draft law are too general in

that they do not make it possible to cover the plurality of the purposes of the processing which would be

implemented by the minister under the bill.

For example, and as noted by the Council of State, in its opinion of July 16, 2021, as to

the provisions of Article 25, paragraph (3), of the draft law which provide that the Minister

may consult the archives of the court which pronounced the adoption or, if necessary,

consult international protection files if there is any indication that one or both

birth parents were beneficiaries of such protection, that such consultation

“lies in the search for clues to the identity of the birth parents. The state Council

considers that, from a data protection perspective, this is a purpose that must be

mentioned in the text”6.

5 Guidelines 07/2020 on the concepts of controller and processor in the GDPR

6 See observations made by the Council of State on the subject of article 25 of the bill in its opinion no. 60.376 of 16 July 2021 of the Council of State on the bill on the organization of access to knowledge of one's origins within the framework of a adoption or medically assisted procreation with third-party donors, p.14.

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In addition, article 10 of the draft law, points 90 and 10°, provides that the Minister has the task of

to “manage and process the information collected” and “to review and manage requests

of access to knowledge of one's origins for the persons referred to in Article 11”.

In addition, under article 21 point 3° of the draft law, the minister still has the task of "to

receive, manage and process the information referred to in Article 20”.

However, in the absence of explanations in the commentary to the articles, there is reason to wonder about

the processing of personal data that would be implemented within the framework of this

assignment.

The National Commission wonders whether it would not be appropriate to clarify the various

data processing that would be implemented by the Minister as part of his

missions, also with a view to improving legal certainty. This would in fact allow

to improve the general understanding of the draft law and to guarantee legal certainty.

It follows from the foregoing that it appears that the purpose described in Article 4(3) of the

bill seems too vague in relation to the requirement of the GDPR to provide for purposes

determined and explicit, especially in an area as sensitive as is supposed to regulate

the bill under notice.

For all intents and purposes, it appears from the commentary to the articles that article 4, paragraph 5 of the draft

of law aims to specify the various obligations incumbent on the minister as responsible

of the treatment. However, it should be noted that the enumeration given there is limited to copying certain

principles listed in Article 5 of the GDPR.

In its opinion of July 16, 2021, the Council of State notes, in fact, that "[lie paragraph 5 does not

merely recalls the principles set out in Article 5 of Regulation (EU) 2016/679 of the Parliament

European Parliament and of the Council of 27 April 2016 relating to the protection of natural persons ä

with regard to the processing of personal data and the free movement of such

data, and repealing Directive 95/46/EC (general regulation on the protection of

data). Since this European regulation is of direct application, the provision under

journal is to be deleted. 7 The National Commission concurs with the observation of the Conseil d'Etat.

IV. Regarding the categories of personal data

It should be noted that article 4 of the bill which "constitutes the legal basis for the

management, collection and processing of data in question”8 does not specify the categories of

data that would be collected by the Minister “for the purpose of implementing research

Opinion No. 60.376 of July 16, 2021 of the Council of State on the bill on the organization of access to knowledge of its

origins in the context of adoption or medically assisted procreation with third-party donors, p.5

8 See commentary to the articles, article 4, page 15.

of a child's access to his or her origins in the context of adoption or procreation

medically assisted with third-party donors”9.

In addition, and as noted by the Council of State, paragraph (4) of the aforementioned article 410 is

superfluous "

failure to list the data processed or to refer to the provision

specifies who is listing the data”.

Indeed, it should be noted that the categories of data that would be processed in such

purposes result from the provisions of Articles 6, 10, 11, 16, 17, 20, 22, 25, 26 and 27 of the draft

law.

Articles 6, 10 and 11 are part of Chapter 2 "Access to knowledge of one's origins

in the context of an adoption", section Pre "National adoption", sub-section 'Ore

"Secret childbirth", article 16 of the sub-section "Other adoptions

national" and article 17 of section 2 "International adoption" of the said chapter.

Articles 20 and 22 belong to Chapter 3 "Access to knowledge of one's origins

in the context of medically assisted procreation with a third party donor" and Articles 25

ä 27 are part of Chapter 5 "Transitional provisions and entry into force".

It would indeed be preferable, as suggested by the Council of State, to group together in a single

article and to enumerate according to the cases (childbirth under X, national adoption,

international adoption, PMA), the categories of data that would be processed.

Alternatively, consideration could be given to including a list at the beginning of each chapter

the categories of data that would be processed in the implementation of this chapter.

A. Regarding Article 9 of the GDPR

First of all, it should be noted that insofar as part of the data processed by

controller are likely to relate to the health of the parents of the

birth, for secret deliveries and national and international adoptions,

or third-party donors, for medically assisted procreation, these are to be qualified

special categories of data, known as "sensitive data", within the meaning of Article 9 of the

GDPR.

However, such processing requires specific protection" and is subject to specific requirements.

more stringent. 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 are met.

Thus, during the implementation of the processing of so-called sensitive data, the person in charge of the

processing must pay particular attention to compliance with the provisions of Article 9, paragraph

(2) GDPR.

g Article 4, paragraph (3) of the draft of thee.

'g Article 4, paragraph (4) of the bill provides that "[in] this context personal data

which are covered by this bill".

" See the cases rendered by the CJEU of April 8, 1992, C-62/90, point 23 and of October 5, 1994, C-404/92, point 17.

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B. As to the personal data covered by the provisions of Chapter

2 of the bill

1. Ad article 6 of the bill

Article 6 of the bill deals with the various information that the hospital establishment or

any other professional having supervised the birth are required to collect and transmit

to the minister.

i.

Legal uncertainty linked to the vagueness of the terms used

The terms used in Article 6 are vague so that it is difficult to know what

information would be likely to be collected and transmitted to the minister and, if

appropriate, to the child.

Indeed, it emerges from that article that birth parents are invited to leave

"medical information about [their] health, and that of the other birth parent,

information about the origins of the child, the circumstances of the child from birth as well as

than any other information they] wish to make available to [their] child"12.

The authors of the bill in the commentary to the articles specify on this subject that the birth parents are asked to leave "any kind of information" and that the aforementioned information constitutes “non-identifying information”13.

The authors of the bill therefore do not provide any explanation of what is meant by “non-identifying information”.

However, it should be emphasized that the GDPR will apply to any information relating to an identified or identifiable natural person. Recital 26 GDPR specifies that "To determine whether a natural person is identifiable, it is necessary to consider all the means reasonably likely to be used by the data controller or by any other person to identify the person directly or indirectly […]”.

Thus, the CNPD suggests that the accumulation of information, even qualified as "non-identifiers", entails the risk of (re)identification of the natural person in question, resulting in the application of data protection rules.

Article 6, paragraph 3, of the bill further provides for the obligation for the establishment hospital as well as any other professional having supervised the birth to collect

12 Article 6, paragraph 1, point 2° and paragraph 2, point 10 of the bill

13 Commentary on the articles, article 6 page 17

14 Article 4(1) GDPR

“non-identifying information”. The authors of the bill do not yet bring into their commentary on the articles no details as to the information that would be collected.

Furthermore, it should be noted that article 12 of the bill subsequently uses the terms
“information that does not affect the identity of one or more birth parents”. The
CNPD assumes that this is the "non-identifying information" referred to in Article 6. In order
To avoid confusion, it is suggested that the same terminology be used throughout the entire
law Project.
Finally, there is still reason to note that the option is left to the birth parents to
a declaration of his identity16, in which case this information is to be considered as
personal data.
The CNPD assumes that the authors of the bill under opinion were inspired by French law
of August 2, 2021 relating to bioethics which provides that in the context of a PMA third parties
donors must provide not only their identity, but also data "not
identifiers”. Indeed, article 5 of the said French law inserts a chapter in the code of
public health on “Access to non-identifying data and to the identity of third-party donors”.
This chapter notably includes article L. 2143-3. which includes a list of data not
identifiers of third-party donors, namely: their age, their general condition as they describe it in
time of donation, their physical characteristics, their family and professional situation, their
country of birth as well as the reasons for their donation, written by them.
Consequently, given the vagueness of the terms used by the authors of the bill
and the resulting legal vagueness, it should be noted that the bill under opinion does not respect
not the requirements of clarity, precision and foreseeability to which a legal text must
respond, in accordance with the case law of the Court of Justice of the European Union and
the European Court of Human Rights16.
In order to counter this legal uncertainty as to the categories of data which would be processed
and ensure compliance of the Luxembourg legal framework with the GDPR and case law
European Union, the CNPD suggests that the authors of the bill specify, following the example of the law
French relating to bioethics of August 2, 2021, which categories of data would be

likely to be dealt with by the Minister.

In any event, the imprecision of the terms used complicates, if not renders impossible, the

task of the National Commission to assess whether the draft law respects the principle of

minimization of data according to Article 5, paragraph 1, letter c) of the GDPR according to which

15 Article 6, paragraph (1), points 2° and 3°, and paragraph (2), points 2° and 3° of the bill

16 In this sense, see M. Besch, “Personal data processing in the public sector”, Norms and legislation in

Luxembourg public law, Luxembourg, Promoculture Larcier, 2019, p.469, n°619. See among others CourEDH, Zakharov e.

Russia [GCL n°47413/06], § 228-229, 4 December 2015, ECtHR, Vavrieka and others v. Czech Republic (requests

n°47621/13 and 5 others), § 276 to 293, April 8, 2021.

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personal data must be adequate, relevant and limited to what is

necessary in relation to the purposes for which they are processed.

The necessary character is assessed in relation to the purpose of the processing as defined by

authors of the bill, namely "the implementation of the search for a child's access

to its origins […]”17. However, as mentioned in point II.B. vagueness as to the purposes

researched, do not make it possible to determine to what extent the treatment of these

data is necessary to exercise the right to know its origins.

The processing of health data

Article 6, paragraphs 1 and 2 of the bill provides for the possibility for the parent who has

gave birth to the child to leave "medical information about his health and that of the other

birth parent" or respectively for the other birth parent to leave

"medical information about his health and that of the parent who delivered the child".

Moreover, article 6, paragraph 3, of the bill creates the obligation for the establishment

hospital as well as for any other professional having supervised the birth to "collect

as far as possible [...] the medical data of one or both parents of the

birth at birth and transmit them to the Minister".

This information relating to the health of the birth parents, and whether this constitutes

personal data, constitute so-called sensitive data. The treatment of

such data must therefore be based on one of the conditions referred to in Article 9(2).

of the GDPR. On this point, reference is made to point A of point IV of this opinion.

Furthermore, it is to be regretted that neither the explanatory memorandum nor the commentary on the articles

provide explanations as to the methods of processing "medical data".

In this context, the National Commission agrees with the concerns raised by the

Council of State with regard to article 6 of the bill and in particular in that it considers that "[s]i

parents are not asked to reveal the identity of the other parent, they can nevertheless

leave medical information about the other parent. However, it is up to each parent to decide

if he wants to communicate medical information about his health. How to articulate the choice

left to the parent not to communicate his medical data with the possibility for the other

parent to provide them without his knowledge? If the legislator allows each parent not to

communicate information about his health or his identity, it is difficult to see how

articulate respect for these respective secrets" 18.

In this context, the National Commission asks itself the question of how the

controller intends to respect the principle of accuracy, provided for in article 5,

1' Article 4, paragraph 3, of the bill

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paragraph 1, letter d) of the GDPR. The National Commission refers in this respect to its developments on compliance with the principle of accuracy in point VIII of this opinion.

It should also be pointed out that the vagueness of the words "to the extent of the possible" repeated in article 6, paragraph 3, of the draft law results in legal vagueness, in such a way as to note that the bill under opinion does not meet the requirements of 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.

In addition, it is still necessary to question the relationship between the obligation for the hospital establishment, as well as for any other professional who supervised the birth, provided for by article 6, paragraph 3, of the bill, and the medical secrecy to which are subject These persons.

2. Ad article 10 of the bill

Article 10, point 5°, of the draft law provides that the Minister is required to receive "Nes declarations of identity formulated by the ascendants, descendants and collaterals of the parents of birth »

However, the bill does not provide any further details or explanations as to the categories of personal data which would appear on the said “declarations of identity”.

In addition, there is reason to wonder about the way in which this data would be collected: is it up to the ascendants, descendants and collaterals to address the minister directly

? How will the Minister ensure that statements of identity are attributed to the child

concerned, given that only the first names and sex of the child as well as the date and place

of birth (and not the identity of the birth parents) are mentioned outside

envelopes referred to in article 6 of the bill? Will the minister check whether there is in fact a

relationship between these people and the birth parents?

Under clauses 13 and 14 of the bill, the minister communicates, together with the identity

of the parent who gave birth to the child or of the other birth parent, the information referred to

in point 5 of article 10. Does this mean that the declarations of identity of

ascendants, descendants and collaterals of the parent who gave birth to the child are communicated

to the child, even if only the other birth parent has granted the lifting of the secrecy of his

identity, and vice versa? Such a way of proceeding would however thwart their desire to

remain anonymous and would infringe on their privacy. The National Commission

'9 In this sense, see M. Besch, "Personal data processing in the public sector", Norms and legislation in

Luxembourg public law, Luxembourg, Promoculture Larcier, 2019, p.469, n°619. See among others CourEDH, Zakharov e.

Russia [GCL n°47413/06], § 228-229, December 4, 2015, ECtHR, Vavheka and others v. Czech Republic (requests

n°47621/13 and 5 others), § 276 to 293, April 8, 2021.

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considers that the authors of the bill should specify the practical arrangements applicable

to the declarations of identity made by the ascendants, descendants and collaterals of the

birth parents.

3. Ad article 16 of the bill

For requests for access to origins made by children who have been the subject of a national adoption but not falling under the secret birth regime, it results from article 16 of the bill that the Minister "collects information relating to the identity of the parent who gave birth to the child and of the other birth parent with the judicial authorities".

However, neither the commentary to the articles nor the explanatory memorandum specify what is meant by "identity information". Is it only the surname and first name or this notion does it also target other data, such as the address?

In addition, the bill does not specify the terms under which the minister would obtain such "information".

Clarifications should be made on this subject in article 16 of the bill in order to clarify what data would be collected and how the Minister would collect it.

4. Ad article 17 of the bill

Article 17 of the bill intends to regulate the management of requests for access to origins formulated by children who have been the subject of international adoption.

Under the provisions of the aforementioned article, the Minister may obtain "upon request" from the from the bodies referred to in that article "all information relating to the origins of adopted".

However, this formulation is particularly vague and requires clarification. Indeed, there is question what the authors of the bill intended to mean by "the information relating to the origins of the adoptee". What information would be covered concretely ?

The Minister may also obtain "from the authorities of the country of origin of the child all the information he can obtain about the origins of the child. This wording is also particularly vague. What information could the Minister collect from foreign authorities?

In this regard, it should be noted that the Hague Convention of 29 May 1993 on the protection of children and cooperation in matters of international adoption already has in its article 16, paragraph 1, letter a) that:

“If the Central Authority of the State of origin considers that the child is adoptable,

(a) it draws up a report containing information on the identity of the child, his adoptability, social background, personal and family development, medical history and that of his family, as well as his particular needs; (...)”.

In addition, the Hague Convention of 29 May 1993 on the protection of children and cooperation in respect of intercountry adoption further explicitly provides in Article 16, paragraph 2 which the Central Authority of the State of origin "transmits to the Central Authority of the State foster parent his report on the child, proof of the required consents and the reasons for his report on the placement, taking care not to reveal the identity of the mother and father, if, in the State of origin, this identity cannot be disclosed".

Therefore, the National Commission wonders what additional information could, where appropriate, be collected whereas the aforementioned provisions provide that a report on the child will be transmitted to the Central Authority of the receiving State.

C. Regarding the personal data referred to in Chapter 3 of the bill

Article 20 enshrines the obligation of the authors of the parental project to provide the person responsible for the processing, i.e. to the Minister, the information listed in points 1° to 4° of the said article.

While the inclusion of a specific list of information to be provided to the Minister is to be welcomed, it should consider the information that would be referred to in the last paragraph of the

paragraph 1 of article 20 which provides that "any other information available on the

third-party donors may also be disclosed".

Indeed, the notion of "any information" is very vague and the commentary of the articles

does not provide any details in this regard.

However, it should be recalled that by virtue of the principle of minimization of data, devoted to

5, paragraph 1, letter c) of the GDPR, the personal data must be

adequate, relevant and limited to what is necessary in relation to the purposes for

which they are processed.

In the absence of such details, the CNPD is unable to assess whether such a principle

would be respected and therefore considers it necessary for the bill to determine precisely what

personal data would be liable to be declared to the Minister.

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In the current state of the bill, the authors of the parental project could deem it appropriate

to transmit to the minister so-called sensitive data, such as for example data

concerning the health of the third-party donor(s), who are nevertheless subject to a stricter regime

strict. The National Commission refers in this respect to its developments in point IV.A. from

this notice.

Furthermore, it should be noted that the obligation to provide this information rests,

in accordance with article 20, paragraph 1 of the bill under notice, to the parents of the project

parental. The CNPD notes that article 19 of the bill further provides that "the center of

fertilization, any doctor in charge of implementing medically assisted procreation

as well as the authors of the parental project have the obligation to check whether the information listed ä article 20, point 4 are in the file before the insemination of the gametes or implantation of supernumerary embryos". She further notes that among the information to be provide appear in point 4° of the 1 st paragraph of article 20 "the identity of the third party donors including surname, first name, date and place of birth, nationality(ies), current address, civil status as well as the matricule number if it exists".

However, the National Commission wonders about the initial source of this information. Is he belongs to the fertilization center, to the doctor in charge of implementing procreation medically assisted, to the authors of the parental project or to another intervener to enter this information in the file referred to in Article 19?

The question arises in particular in the context of the obligation of the controller to inform the person concerned. Indeed, the National Commission understands that in the framework of an MAP, the collection of the personal data of the third party donor by the actors involved, namely the data controller, the authors of the parental project, the fertilization center or any doctor in charge of carrying out procreation medically assisted, is operated indirectly, so the information is not collected directly from the data subject. However, article 14 of the GDPR obliges the controller to provide certain information to the data subject when the personal data was not collected from the data subject.

Article 14, paragraph 2, letter f) of the GDPR requires in particular that the person responsible for the processing informs about "the source from which the personal data come and, the where applicable, a statement indicating whether or not they are from sources accessible to the audience ". The National Commission wonders who would be responsible for this obligation, indeed any other obligation arising from the GDPR, if, as mentioned in point II of this notice, the roles (controller, joint controller or processor) of the various stakeholders is unclear.

In the absence of details, the CNPD is unable to verify whether the requirements of the

GDPR towards the data subject would be complied with by the bill under notice.

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D. As to the personal data referred to in the provisions of Chapter

5 of the bill

1.

Ad article 25 of the bill

It appears from the commentary to the articles that article 25 of the bill is aimed at children born before

the entry into force of the future law in the context of a secret birth.

Paragraph 2, subparagraph 1, of article 25 provides that "hospital establishments,

other professionals who supervised the birth of the child [...], as well as the organizations

authorized and authorized for adoption in accordance with the law of January 31, 1998 on the approval

adoption services and definition of their obligations as well as any other

national body or authority involved in the context of the adoption have the obligation to

communicate elements relating to the identity of the birth parents or any other

information, file and material object left by the birth parent(s) to the Minister

in the cases referred to in the preceding paragraph in a closed envelope".

According to the commentary to the articles, this provision constitutes the legal basis for these various

stakeholders to "transfer all the files they hold to the Minister" without, however,

specify what personal data would be collected for this purpose

opportunity.

If there is reason to salute the authors of the bill for creating a legal basis allowing

aforementioned stakeholders to communicate to the Minister the information they were able to gather before

the entry into force of the law, in the absence of details as to the categories of data to be

personal nature that would be communicated in this context, the National Commission

is unable to assess whether the principle of data minimization would be in this case

respected.

It should be recalled that under the principle of minimization, personal data

personnel must be adequate, relevant and limited to what is necessary in view of

of the purposes for which they are processed.

In accordance with this principle, the various parties mentioned above should therefore ensure

ä transmit to the Minister only personal data that is adequate, relevant and

limited to what is necessary in relation to the purposes for which they are processed.

Finally, insofar as the following terms "have the obligation to communicate elements

relating to the identity of the birth parents or any other information, file and object

material left by the birth parent(s) to the Minister" are worded in such a way

vague, and that the commentary on the articles does not provide any precision in this respect, the

National Commission therefore considers it necessary for the bill to determine precisely

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what personal data would be likely to be communicated to the

minister.

2.

Ad article 26 of the bill

Under article 26 of the bill, concerning other national adoptions as well as

international adoptions, the organizations mentioned therein have the obligation to communicate

elements relating to the identity of the birth parents or any other information, file and

material object left by the birth parent(s) to the Minister [...] in a sealed envelope" and

that "the first names given to the child and, where appropriate, mention of the fact that they were given by

birth mother or other birth parent to the competent minister as well as the sex of

the child and the date, place and time of his birth are mentioned outside these envelopes".

If the authors of the bill are to be commended for specifying the data that would be

communicated to the Minister, it is regrettable that the terms "any other information,

file" are too vague so that the CNPD is unable to assess whether the principle

minimization would be respected.

The authors of the bill should provide clarification in this regard.

Furthermore, it should be noted that such an obligation does not exist under Articles 16 and 17

of the bill, would it therefore not be appropriate to align this transitional provision with what

what is foreseen in these articles?

v.

On access to the RNPP and civil status registers

Pursuant to Article 5, paragraph 1, letter c) of the GDPR, personal data

must be adequate, relevant and limited to what is necessary for the purposes

for which they are processed.

Article 4, paragraph 6 of the bill provides for the possibility for the Minister to consult the

national register of natural persons (hereinafter the "RNPP") as well as the registers of

civil status.

The provision is limited to indicating that the data controller has this access

“within the scope of the purpose determined in paragraph 3”. Neither the commentary of the articles, nor

the explanatory memorandum does not provide details as to the reasons which would justify such access.

However, there is reason to wonder about the articulation of these provisions with those relating to Article

9 of the bill which provide that no investigation would be conducted into the

information provided by the parent who delivered the child or the other birth parent.

Thus, there is reason to wonder whether the consultation of the RNPP and civil status registers

would allow the controller to verify the reality of the relationship between these

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people and birth parents? For the sake of legal certainty, clarifications

should be made to the bill on this subject.

The CNPD is therefore not in a position to assess whether consultation of the RNPP and the registers

of civil status complies with the principle of data minimization provided for in Article 5, paragraph

1, letter c) of the GDPR.

VI. On access to court archives as referred to in Article 25 of the draft

law

Article 25, paragraph 3 of the bill provides that the minister "may consult the archives

of the jurisdiction that pronounced the adoption as well as the international protection files

with the Minister responsible for international protection within his jurisdiction”.

The National Commission wonders what the verb "to consult" means. Is it a

request for access that the minister submits to the minister with international protection

within its purview? Or is it direct access? The National Commission wonders

even if the data resulting from this consultation will be integrated into the centralized file

managed by the minister.

Furthermore, it is appropriate to agree with the observations of the Conseil d'Etat as to the purpose of a

such consultation which should be added to the purposes mentioned in Article 4, paragraph 3,

of the bill under notice'.

VII.

On the security of the processing

It should also be recalled that the applicable data protection rules

apply regardless of the techniques used, i.e. both to the data

called to be contained in a paper file than a computer file.

This reminder seems necessary given that, for adoptions following deliveries under secret

for example, the information provided, including personal data, seems

be written on paper in a closed envelope. The folds are then forwarded to the minister.

With regard to the security of the processing, point 4 of paragraph 5 of article 4 of the draft

of law indicates that the controller must put in place technical measures

and organizational to ensure the security and confidentiality of personal data

personal, without however giving any details.

However, this general safety obligation comes under both Article 5, paragraph 1, letter f) of the

GDPR which enshrines the principle of integrity and confidentiality and article 32 of the GDPR which

20 Opinion No. 60.376 of July 16, 2021 of the Council of State on the bill on the organization of access to knowledge of its

origins in the context of adoption or medically assisted procreation with third-party donors, p.5

further clarifies the notion of data security in the context of data protection.

personal data.

In this case, the obligation of the data controller to guarantee an appropriate level of security

the risks to the rights and freedoms of the natural persons concerned by the processing

of personal data envisaged, deserves particular attention insofar as

unauthorized access to data, data leaks or unauthorized modifications

desired are likely to cause serious harm to the persons concerned.

Thus, given the nature of the data processed in question, it is essential that such

security measures are implemented by the controller in order to ensure the

privacy and data security. Among these security measures, the Commission

national considers it important that only people who need it in the exercise of their

functions and their professional tasks are authorized to have access to the data

required.

In the event that a computer tool is used to process the data in question, this

which seems to be the case in view of the bill's financial statement, it would be necessary to provide

an access logging system. On this point, the CNPD recommends that the data

of logging are kept for a period of five years from their date of

registration, period after which they are erased, except when they are the subject of a

control procedure.

The CNPD also emphasizes the importance of proactively carrying out internal controls. HAS

For this purpose, it is necessary in accordance with Article 32, paragraph 1, letter d) of the GDPR to put implement a procedure "to regularly test, analyze and evaluate the effectiveness technical and organizational measures to ensure the security of the processing".

In addition, the National Commission considers it essential, given the sensitivity of certain data processed, to provide for the procedures for implementing this principle of integrity and confidentiality in a legislative or at least regulatory text.

VIII.

The rights of data subjects

As birth parents are likely to be referred to as data subjects within the meaning of the GDPR for the processing of data which results from the bill, it is necessary to recall that Article 5, paragraph 1, letter a) as well as Articles 12, 13 and 14 of the GDPR require the data controller to act in complete transparency with regard to data subjects concerned by providing them in particular with certain information on the processing of personal data envisaged.

In the event that the Minister indirectly collects personal data, as it seems to result in particular from article 5, 16 or even 17 of the bill, the Minister will have to comply with the provisions of Article 14 of the GDPR.

In this context, the attention of the drafters of the bill should be drawn to Article 14, paragraph 4, of the GDPR according to which "[I]t intends to carry out processing subsequent processing of personal data for a purpose other than that for which the

personal data has been obtained, the controller shall provide the

prior to the person concerned information about this other purpose and any

other relevant information referred to in paragraph 2”.

Paragraph 5 of this article lists the cases in which paragraphs 1 ä

4 do not apply. If the authors of the bill intend to invoke Article 14, paragraph

5, letter c) of the GDPR to justify, if necessary, the fact of not providing the information

mentioned in paragraphs 1 to 4, it should be emphasized that such an exemption cannot

apply only if national law "provides for appropriate measures to protect the

legitimate interests of the data subject”.

With regard to the personal data relating to the third party donor which would be

collected pursuant to Article 20, paragraph 4 of the draft law, it is necessary to draw

the attention of the authors of the bill to the fact that the latter has a right to information

pursuant to Article 14 of the GDPR or a right of rectification, which is conferred on him by

GDPR Article 16. He should therefore be able to contact the controller to

request the rectification of data which may no longer be up to date or inaccurate.

In addition, clause 6 of the bill provides that the parent who gave birth to the child may transmit

information about the other birth parent, and vice versa. GDPR Article 14

would therefore be intended to apply insofar as this provision specifies the

information to be provided by the controller when the personal data

personal data have not been collected from the person concerned.

In general, and given the purpose of the bill, the National Commission

asks how the rights of data subjects would relate to some of the

provisions of the draft sub-notice.

Indeed, in addition to the aforementioned right to information, the GDPR confers other rights on

data subjects whom the controller is required to respect, in particular the

right of access and the right of rectification provided for respectively in article 15 and article 16 of the

GDPR. In the context of the draft law under opinion, the question arises in particular as to whether how the controller intends to implement in practice the requirements that ensue for him from these rights. How does the controller intend communicate to the persons concerned the information necessary in the context of the right to information, in particular if it collects personal data in a manner

indirect? How can data subjects exercise their rights? In the hypothesis of a secret birth for which no declaration of identity has been received, but for which the hospitals communicate “non-identifiers", how does the controller intend to respond to a request right of access?

In addition, questions also arise about the respect, by the person responsible for the processing, of the principles relating to the processing of personal data to Article 5 of the GDPR. Thus, the data controller must, for example, ensure that it processes personal data in a lawful, fair and transparent manner with regard to the person concerned (principle of lawfulness, fairness and transparency) and only data accurate and, if necessary, kept up to date (principle of accuracy). So how does the manager of the processing intends to ensure that it does not process personal data of a data subject without the latter's knowledge? How can the controller he ensures the accuracy of the data, in particular if the data is collected in a manner indirect? Similarly, how can he ensure the accuracy of the identity data

provided directly if, in the event of a secret birth, no verification

(article 9 of the bill under opinion) is planned?

Thus, if the authors of the bill intend to limit the scope of the rights of persons

concerned, or even the obligations incumbent on the data controller, by having recourse

ä the possibility provided by Article 23 of the GDPR such a limitation should be provided for by a

legislative measures and meet the criteria and requirements listed in that article.

x. On the shelf life

According to the principle of limitation of storage set out in Article 5, paragraph 1, letter

e) GDPR, personal data shall not be stored for longer than

as long as necessary for the achievement of the purposes for which they are collected

and processed. Beyond that, the data must be deleted or permanently anonymized.

If the authors of the bill are to be congratulated for providing in article 4, paragraph 2 of the bill

by law a data retention period, namely for 100 years and that the data

would be destroyed after the expiry of this period, the National Commission finds itself

in the impossibility of assessing whether, in this case, the principle of limitation of storage

is respected.

In fact, neither the commentary on the articles nor the explanatory memorandum provide explanations

as to the criteria used to determine this retention period for the

data.

It should be noted that in accordance with Article 11, paragraph 3, point 5 of the draft law, the

request for access to knowledge of origins can be submitted by the descendants in

direct line of age of the child up to the 1st degree, if he is deceased. Therefore the duration of

would the 100-year conservation aim to allow first-degree direct descendants

to exercise their right of access to origins?

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It should also be noted that the bill does not provide for the deletion of data

once the child has exercised his right of access to origins. She assumes

that the data is kept to allow, if necessary, the direct descendants at the

first degree to exercise this right in turn.

However, in the absence of explanations as to the criteria used to determine this period of

retention of data by the authors of the bill, the CNPD cannot comment

on the proportionality of the time limit adopted. Such clarifications should therefore be made

by the authors of the bill.

X.

Data protection impact assessment

Article 35, paragraph 10, of the GDPR, read together with article 36, paragraphs 1 and 4, of the

GDPR indicate that in the process of drafting a legislative measure to be adopted by

a national parliament, the authors of this legislative measure may have to realize

a data protection impact assessment (hereinafter "the DPIA"), and that the result of the

the DPIA could lead to prior consultation of the competent national authority, in

the CNPD in this case.

Since it follows from Article 35(1) of the GDPR that a DPIA should be

carried out if the envisaged processing is likely to create a high risk for the rights

and freedoms of natural persons taking into account the nature, scope, context and

purposes of the processing, the National Commission wonders whether the processing envisaged by

the bill under opinion should not have been the subject of a DPIA by the authors. The case

appropriate, the DPIA would have indicated that the processing presents a high risk, thus leading the

authors of the bill, possibly already at the stage of drafting the bill,

ä consult the CNPD.

Thus decided in Belvaux on November 29, 2021.

The National Data Protection Commission

Tine A. Larsen

President

Thierry Lallemang

Commissioner

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Alain Hermann

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