Additional opinion of the National Commission for the Protection of

data relating to bill no. 7524 on the quality of services

for the elderly and amending: 1° the amended law of

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

amended law of 8 September 1998 regulating relations between the State and the

organizations working in the social, family and therapeutic fields

Deliberation n°17/AV9/2022 of May 20, 2022

In accordance with article 57, paragraph 1, letter (c) of regulation (EU) 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 body for data protection (hereinafter the “National Commission” or the “CNPD”)

“advises, in accordance with the law of the Member State, the national parliament, the government and

other institutions and bodies on legislative and administrative measures relating

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

On July 22, 2020, the CNPD notified 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

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 fields as well as

as well as the draft Grand-Ducal regulation on the quality of services for the elderly

(hereinafter the “draft law”)1.

On September 27, 2021, Madam Minister of Family, Integration and Greater

Region invited the National Commission to notify the government amendments to the project

of law, approved by the Government Council in its meeting of September 29, 2021 (see below).

after “Amendments” or “Government Amendments”).

This notice will be limited to questions relating to the data protection aspects to be

personal character raised by the government amendments.

1 Deliberation n°19/2020 of 07/22/2020.

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On the processing of personal data carried out by the organizations

managers

1. On the creation of an individual file

I.

has. On the purposes of the processing, the categories of personal data

and the controller

The National Commission congratulates the authors of the bill for having followed its observations

formulated in its opinion of July 22, 20202. Indeed, clarifications are provided with regard to

concerns the purposes of the processing and the categories of personal data which

would be processed in the context of each of the individual files covered by the bill.

Thus, the amendments specify for each of the individual files, that the organization

manager is to be qualified as data controller, the purposes of the processing relating to

the establishment and management of the individual file, and list more precisely the

categories of personal data that would be collected as well as the recipients

data included in the personal file3.

The amendments further provide that each individual file includes "a file

structured healthcare individual containing all data, assessments and

information of any kind concerning the state of health of the resident and its evolution. Regulations

Grand-Ducal specifies its content".

However, it is regrettable that this draft Grand-Ducal regulation was not communicated

at the same time as the amendments to the bill, so that the CNPD is not able

to assess whether it is likely to raise issues from the point of view of the

Data protection.

b. On access to data

The National Commission regrets that the government amendments have not responded

to the question of whether access to the data contained in the personal file by the

residents or users, and, where applicable, by their legal representative was similar to that provided

by Article 15 of the GDPR.

2 Deliberation n°19/2020 of July 22, 2020, see point II.2.

3 Namely the following amendments: amendment 28 which modifies article 12 of the bill, amendment 53 which inserts a new Article 27(1) for home help and care services, amendment 72 which inserts a new Article 42 for day centers for the elderly, amendment 128 which inserts a new article 87 for remote alarm services.

The CNPD would therefore like to reiterate its observations made in its aforementioned opinion according to

which it suggests, if this access is similar to that provided for in Article 15 of the GDPR, that "the

legal provisions providing that the resident or user, where applicable, his legal representative,

can access his personal file or only the data concerning him for the

legal representative, [are] under the conditions and in accordance with Article 15 of the GDPR"4.

vs. On the data retention period

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

years from the end of the accommodation contract5, the care contract6 or the contract

of services7 "for statistical purposes, research and continuous improvement of the organization

manager" and that "at the end of this period, the data must be irretrievably

destroyed or anonymized".

As for the criteria that would justify such a duration, the authors of the bill confine themselves to

indicate that the said provisions are based "on a wording provided for in the amended law of 8

March 2018 on hospital establishments and hospital planning"8. In effect,

Article 38 paragraph (6) point 5 of the said law provides that the medical documentation service

has the mission of keeping the data produced for a period of 10 years.

However, clarification should be made as to the criteria which would justify that a

such duration is also relevant and necessary in the present case, by virtue of the principle of limitation

the data retention established by article 5.1.e) of the GDPR.

Furthermore, with regard to the storage for statistical and research purposes of

special categories of personal data, as defined in Article 9,

paragraph 1 of the GDPR, in this case health data, it should be noted that such

retention for such purposes constitutes processing of personal data.

Therefore, it should be recalled that paragraph 2, letter j), of Article 9 of the GDPR provides that

where the processing is necessary for "scientific or historical research purposes or for

statistical purposes, in accordance with Article 89(1), on the basis of Union law or

law of a Member State which must be proportionate to the objective pursued, respect the essence of the law

to data protection and provide for appropriate and specific measures for the

safeguarding the fundamental rights and interests of the data subject".

4 Deliberation n°19/2020 of July 22, 2020.

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

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

7 Paragraph (3) of Article 81.

8 Ad amendment 29, page 14 of parliamentary document n°7524/09.

In addition, article 64 of the law of August 1, 2018 on the organization of the National Commission

for data protection and the general data protection regime specifies that

such processing of special categories of data may be implemented by the

controller if it meets the conditions of article 65 of the aforementioned law. This

article lists additional appropriate measures that should be implemented for

such treatments.

Therefore, it is appropriate to draw the attention of the authors of the bill to the need to implement

implement such additional appropriate measures in the context of the envisaged processing.

2. On the processing of personal data relating to the condition

the professional integrity of managers and supervisors

The National Commission regrets that the observations concerning the lack of precision as to

the criteria to be taken into account to assess the professional integrity of the persons in charge of

management and supervisory staff were not taken into consideration by the authors of the

law Project.

Thus, the CNPD would like to reiterate its remarks made in its opinion of July 22, 2020 according to

which it considered that “[s]if the condition of professional integrity is assessed on the basis

criminal record, the CNPD understands that this will be done in accordance with the provisions

of Article 8-5 of the law of July 23, 2016 amending 1) the law of March 29, 2013

relating to the organization of the criminal record, 2) of the Code of Criminal Procedure, 3) of the Penal Code.

If this is the case, 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 of the criminal record would be taken into account by the organizations

managers in order to assess the condition of professional integrity of the manager and

coaching staff. The CNPD wonders in particular whether any entry in the criminal record

automatically leads to a negative assessment in terms of professional integrity or

if, on the other hand, the registrations must have reached a certain level of severity. If this condition

professional integrity is not limited to criminal records alone, the Commission

recommends specifying in the bill the elements to be taken into account for

assess professional integrity”.

With regard to the observations of the CNPD with regard to the criminal record, it is necessary

to note that the Council of State agrees with such observations in that it considered, in its

aforementioned opinion of April 1, 2022, that "if the proof as to the language requirements and qualifications

required seems easy to report using certificates or diplomas, it is otherwise

with regard to the condition of good repute, insofar as the text under opinion does not

9 Deliberation n°19/2020 of July 22, 2020, see point II. 1).

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determines neither precisely under what conditions this good repute is lacking nor by what way this good repute can be proven. In view of the observations made by the Council of State with regard to Articles 4, paragraph 8 and 5, paragraph 4 relating to the concept of “honourability” and the means of documenting it, the Council of State asks for the sake of legal certainty and under penalty of formal opposition, to refer to the “antecedents judicial » »10.

II.

On the processing of personal data carried out by the Minister in within the framework of the requests for approval addressed to it

The authors of the bill are to be commended for following up on the comments made by the CNPD in its aforementioned opinion regarding the keeping of a register of approval files by the Minister.

Indeed, the government amendments intend to introduce a new article 16 entitled “Management of accreditation files”, which creates the principle of creating a register kept by the Minister and which concerns the management, the administrative follow-up, the control of the requests for approval as well as the management of the authorization files and the authorizations granted, in accordance with Article 6(3) GDPR.

With regard to the provisions of paragraph (5) of Article 16 concerning the treatment of data for scientific or historical research purposes or for statistical purposes, it is necessary to recall that the provisions of articles 89 of the GDPR and 65 of the law of 1 August 2018 on organization of the National Commission for Data Protection and the general regime find application in such cases.

These measures provide in particular that the controller must implement

additional appropriate measures. The data controller must therefore ensure that

respect for them.

Finally, paragraph (6) of Article 16 of the bill provides that “[t]he data processed is

irretrievably anonymized or destroyed no later than five years after

the end of the authorization or, in the event that the application for authorization has been refused, after the

refusal decision. In the event that data from the approval file is replaced by

new data, the data to be replaced are irretrievably anonymized or destroyed

at the latest after a period of five years from their replacement.

10 Parliamentary document no. 7524/13, opinion of the Council of State of April 1, 2022, p. 21.

If the authors of the bill are to be congratulated for having provided for such a duration, it is

regret that the criteria which would justify such a duration were not specified in the

commentary on the articles, so that the CNPD is unable to assess whether the principle

of the storage limitation would be respected.

For the rest, the CNPD reiterates its observations according to which it had considered that the

following provisions “[t]he Minister may request any other document or information

essential to the establishment of the file of the application for approval "would deserve to be

specified if these concern personal data11.

III.

On the creation of an ethics committee

The government amendments intend to introduce new provisions which provide the creation of an ethics committee set up by one or more (in association) organizations managers, who “is entitled to obtain communication of the medical elements, aids and care as well as the individual file of the resident concerned which he needs to decide knowingly”12 within the framework of the missions conferred on it by the draft law13.

The authors of the bill specify regarding these provisions that "to ensure the proper operation of ethics committees, it is specified that the managing body must ensure that provide them with all the necessary means, which they are entitled to obtain communication of the medical, aid and care elements and the individual file of the resident”14.

In addition, if the people making up the ethics committee were not to be professionals subject to professional secrecy, the CNPD wonders whether the latter should not be subject to it, in particular within the framework of some of their missions15, although the decision rendered by the ethics committee is confidential, given the nature of such data (i.e. special categories of data within the meaning of Article 9 of the GDPR and more precisely the health data of residents or users).

Finally, it should be noted that the consultation by the ethics committee of “medical elements, aid and care and the individual file” of the resident or user, when the latter is seized by the manager or the staff of a management body, constitutes a collection

11 Deliberation n°19/2020 of July 22, 2020, see point I.2).

12 See articles 7, 22, 37 of the bill.

13 Articles 7, paragraph (3), article 22 paragraph (3) and article 37, paragraph (3) of the draft law.

14 Ad amendment 19, page 9 of parliamentary document n°7524/09.

15 The missions referred to in points 1° and 2° of paragraph (3) of Articles 7, 22 and 37 of the draft law.

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indirect data by the ethics committee. In such a case, it will be necessary to ensure compliance with the

provisions of Article 14 of the GDPR. Under this article, the controller must

provide the data subject with information about the processing that concerns him or her,

in particular to ensure fair and transparent treatment. This information should be

provided to the data subject no later than one month after the controller,

in this case, the ethics committee obtained the data.

Thus decided in Belvaux on May 20, 2022.

The National Data Protection Commission

Tine A. Larsen

President

Thierry Lallemang Marc Lemmer Alain Herrmann

Commissioner

Commissioner Commissioner

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