Opinion of the National Commission for Data Protection relating to

to bill n°7876 amending 1° the amended law of 1 August 2007

relating to the organization of the electricity market; 2° the amended law of

August 1, 2007 relating to the organization of the natural gas market

Deliberation n° 27/AV11/2022 of July 1, 2022.

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 October 25, 2021, Minister of Energy and Planning

of the Territory Claude Turmes invited the National Commission to comment on the bill

amending 1° the amended law of 1 August 2007 on the organization of the electricity market;

2° the amended law of 1 August 2007 relating to the organization of the natural gas market (hereinafter the

" law Project ").

According to the explanatory memorandum, the purpose of the bill is to transpose Directive (EU) 2019/944

of the European Parliament and of the Council of 5 June 2019 on common rules for the

internal electricity market and amending Directive 2012/27/EU (hereinafter the “Directive”),

this directive repeals directive 2009/72/EC which had “until then constituted the European framework

of the internal electricity market”.

It is apparent from the explanatory memorandum that the directive “presents the rules applicable to the generation,

transmission, distribution, supply and storage of electricity. She

also addresses aspects related to consumer protection, in order to create within

European Union of integrated, competitive, customer-oriented electricity markets

consumers, flexible, fair and transparent".

Furthermore, it should be noted that certain provisions of the bill deal with aspects

related to respect for privacy and the protection of personal data. These are the

provisions relating to the national energy data IT platform (I), those

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relating to the recording of telephone conversations (II) and those relating to counting

clever (III).

On the implementation of a national IT data platform

energy

I.

It is clear that the principle of setting up a national IT platform

of energy data is already provided for by Article 27, paragraph (15) of the amended law of 1 st

August 2007 on the organization of the electricity market1.

According to the explanatory memorandum, the bill under opinion "provides for an adaptation of the provisions

for the implementation of a national IT platform for data

energy. Thus it provides that it must be implemented by the network operator of

transport because of its central role and its neutrality on the Luxembourg market. It specifies the

purposes of the platform, the methods of application, the data to be entered, the protection of

data as well as the rules of access to the platform and provides, among other things, that the communication

market is managed by this platform".

However, it is necessary to wonder about the motivations which would justify that a private company would manage such a platform in the public interest, rather than the minister having energy in his powers or the Institut Luxembourgeois de Régulation (hereinafter “the ILR”)?

Indeed, entrusting the management of a national platform in the public interest and the processing of data relating thereto by law to a private company would constitute a precedent.

Would it not, for example, be preferable given the missions of the ILR, as referred to in Article 54, paragraph (2) of the amended law of August 1, 2007 on the organization of the market of electricity, as amended by the bill, that as a regulator in the sector of electricity2, the ILR manages the platform envisaged by the bill?

Article 21 of the bill intends to introduce a new article 27ter which specifies the legal basis for the implementation of said platform and provides that it "is deployed by the transmission system operator which also provides it, within the limits provided for in paragraph 2 of this paragraph, the role of data controller referred to in Article 4, point 7, of the [GDPR]”.

The National Commission understands that this platform will also aim to centralization of all data collected by players in the electricity market and

1 This provision was introduced by the law of February 3, 2021 amending the amended law of August 1, 2007 on the organization of the electricity market for which the opinion of the CNPD does not seem to have been requested.

2 Article 1, (42) of the amended law of 1 August 2007 on the organization of the electricity market.

will ensure the conservation of said data "for archival purposes, for research purposes

scientific or historical or for statistical purposes".

The commentary to the articles specifies, in fact, on this subject that this platform which "serves as a

central reference directory for energy data" will allow "archiving

centralized energy data, thus avoiding a multiplication of data at different

actors and will serve as a basis for data to be made available for research purposes and for

general public (open data)".

If the introduction of such provisions is necessary with regard to the provisions of Article 6,

paragraph (3) of the GDPR, it should be noted that the said provisions are not drafted

with enough detail.

The CNPD will return to this more specifically in its developments below.

A. On the principle of lawfulness of the processing referred to in Article 27ter

The authors of the bill are to be congratulated on the fact that, from a security point of view

legal, the bill establishes a legal basis for the implementation of such a platform

national data computing in accordance with Article 6(3) GDPR.

Indeed, when the processing of personal data is "necessary for compliance

a legal obligation to which the controller is subject"4 or "is necessary

for the performance of a task in the public interest"5 then the basis for such processing is

in particular defined by "the law of the Member State to which the controller is subject"

in accordance with Article 6(3) of the GDPR.

Article 6(3) of the GDPR provides that "[t]he basis for the processing referred to in

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

has. Union law; Where

b. 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

specific provisions to adapt the application of the rules of this Regulation,

among others: the general conditions governing the lawfulness of the processing by the

controller; the types of data that are subject to processing; them

3 Article 27ter, paragraph (2), letter a) of the draft law.

4 Article 6, paragraph (1), letter c) of the GDPR

5 Article 6, paragraph (1), letter e) of the GDPR

persons concerned; the entities to which the personal data

may be disclosed and the purposes for which they may be disclosed; the

purpose limitation; retention periods; and the operations and procedures of

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

than those provided for in other specific processing situations such as

provides for Chapter IX. »

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 may be communicated, purpose limitations, retention period and other measures aimed at to guarantee lawful and fair processing (...)".

Recital (41) of the GDPR further states that "[w]here this Regulation refers to a legal basis or legislative measure, this does not necessarily mean that the adoption of a legislative act by a parliament is required, without prejudice to the obligations laid down under the constitutional order of the Member State concerned. However, this legal basis or this 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 of the European Court of Human Rights. ".

the entities to which

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.

However, it must be noted that some of these elements do not appear or are not detailed with sufficient precision by Article 27ter. The CNPD will come back to this in its developments below.

organization of the electricity market; 2° the amended law of 1 August 2007 relating to

the organization of the natural gas market

In addition, the National Commission must emphasize the fundamental importance of the principle of

lawfulness of personal data processing which must be read in the light of Article 8

paragraph (2) of the European Convention on Human Rights concerning the right to

privacy, as well as article 52 paragraphs (1) and (2) of the Charter of Rights

fundamentals of the European Union. In essence, these two articles, together with the

constant case law of the European Court of Human Rights, hold that any

limitation to the exercise of the right to the protection of personal data, such as the

data processing is only permissible if such interference or limitation can be justified on

provided that she:

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is provided for by a law accessible to the persons concerned and foreseeable as to its

repercussions, i.e. formulated with sufficient precision;

respects the essential content of the right to data protection;

is necessary in a democratic society, subject to the principle of

proportionality;

effectively meets objectives of general interest or the need to protect

rights and freedoms of others.

To the extent that certain legal provisions of the bill do not comply with the requirements

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

rights6, the National Commission will focus more particularly on the first condition aforementioned.

Thus, according to the case law of the European Court of Human Rights, domestic legislation must be “accessible to the persons concerned and foreseeable as to its repercussions”7. A rule is foreseeable "if it is formulated with sufficient precision to allow any person – possibly benefiting from appropriate assistance – to adapt their behaviour”8 as well as “[t]he degree of precision required of the ‘law’ in this regard will depend on the subject in question”9.

This legal framework would also guarantee the principle of legal certainty for the benefit of persons concerned. Legal certainty is a general principle of EU law European Union, requiring in particular that regulations having consequences unfavorable to individuals is clear and precise and its application foreseeable for

6 In this sense, see M. Besch, “Personal data processing in the public sector”, Norms and legislation in law Luxembourg public, 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, Vavřička and others v. Czech Republic (applications no. 47621/13 and 5 others), § 276-293, April 8, 2021.

7 CoEDH, Amann c. Switzerland [GC], no. 27798/95, 16 February 2000, para. 50; V. also CouEDH, Kopp c. Switzerland, no. 23224/94, 25 March 1998, para. 55 and CouEDH, Iordachi and others v. Moldova, n° 25198/02, February 10, 2009, para. 50.

8 CoEDH, Amann c. Switzerland [GC], no. 27798/95, 16 February 2000, para. 56; V. also CouEDH, Malone c. UK No. 8691/79, April 26, 1985, para. 66; CouEDH, Silver and others v. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, March 25, 1983, para. 88.

9 ECtHR, The Sunday Times v. 6538/74, 26 April 1979, para. 49; V. also CouEHD, Silver and others c. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 25 March 1983, para. 88.

litigants. The regulations must allow interested parties to know exactly
the extent of the obligations it imposes on them, must allow them to know without ambiguity
their rights and obligations and to enable them to make arrangements in
consequence10.

This is why the European Court of Human Rights within its
jurisprudence affirms that "domestic law must offer some protection against attacks
arbitrary actions by the public authorities to the rights guaranteed by Article 8(1)”11. By
Consequently, the internal legislation “must define the extent and the methods of exercise of the power
with sufficient clarity – taking into account the legitimate aim pursued – to provide the individual with a
adequate protection against arbitrariness”. The Court of Justice of the European Union considers that
case of limitation of the protection of personal data or the right to respect for the
privacy, a legal text “must provide clear and precise rules governing the scope and
application of the measure in question and imposing a minimum of requirements so that the
persons whose data have been retained have sufficient guarantees allowing
to effectively protect their personal data against the risk of misuse as well as
against any unlawful access and use of such data.

In this case, the legal provisions which intend to provide for the processing of data to
personal character via the electronic platform are not written with sufficient
details, so that it is difficult to understand what treatments would be envisaged and
carried out by which entities and for which purposes. However, such clarifications turn out to be
necessary in order to analyze whether the principles referred to in Article 5, paragraph (1) of the GDPR would be

respected and more particularly the principles of purpose limitation and minimization of

data.

In addition, the National Commission is all the more concerned by the lack of such details.

as she wonders what would happen to data from smart meters and

kept by the transport network manager in the “central reference directory”.

It should be recalled that the European Data Protection Supervisor (hereinafter the

“EDPS”) in its Opinion on the Recommendation of the European Commission on the

preparation for the introduction of smart metering systems considered that “without

the adoption of adequate measures guaranteeing that only authorized third parties can access the

data and process them for clearly specified purposes and in compliance with the legislation

applicable in terms of data protection, the deployment of intelligent systems of

10 See e.g. Court of Human Rights, Aurubis Balgaria of 31 March 2011, C-546/09, points 42-43; Judgment, Alfamicro v.

Commission of November 14

2017, T-831/14, points 155-157

11 ECtHR, Amann c. Switzerland [GC], n°27798/95 para 56.

12 Ibid. See also EDH Court, Malone c. United Kingdom, series A n°82, of August 2, 1984, pp. 31-32, para.66; EDH Court,

Fernandez Martinez v. Spain CE:ECHR:2014:0612JUD005603007, 12 June 2014 para.117; Court EDH, Liberty and others v.

58243/00 of July 1, 2008, para. 62 and 63; EDH Court, Rotaru c. Romania, App. No. 28341/95, May 4, 2000,

para. 57 to 59 and Court EDH, S and Marper c. United Kingdom, Applications Nos. 30562/04 and 30566/04, of 4 December

2008 para. 99.;

Dimitrov-Kazakov v. Bulgaria n°11379/03, of February 10, 2011.

13 Judgment of 8 April 2014, Digital Rights Ireland and others C-293/12 and C-594/12, EU:C:2014:238, paragraph 54.

measure could result in the monitoring of people's daily lives in their own
accommodation and the establishment of a detailed profile of all individuals based on their activities
servants. Given the sheer amount of information amassed by these counters
intelligence, the ubiquitous availability of data from other sources, and advances in
data mining technology, the potential for extensive data mining is
considerable. Consumption behaviors can be observed in each
household, but also in several households; gathered, aggregated and sorted by region, according to the
demographics, etc. It is therefore possible to establish profiles and then apply them to
households or members of those households.

The EDPS also underlined that consumption behaviors which could be
data from smart meters could, moreover, “prove very useful for
analyze our energy consumption for energy conservation purposes. On the other hand, the
trends and profiles can be used for many other purposes, including – this is perhaps
be the most important point – for commercial and advertising purposes”15 and concluded
that “[g]iven the risks to data protection, the guarantee of a high level of
protection of personal data is one of the main prerequisites for the
deployment of smart metering systems”16.

However, in the current state of the drafting of the bill, it is difficult to understand, if necessary,
whether data from smart meters would be processed for further purposes
different from those for which they were initially collected.

In addition, the provisions of the draft law clearly do not allow for an analysis of whether such
processing would generate risks and abuses for the persons concerned, and in particular
whether such data would be used for commercial purposes and
advertisers.

In the light of the developments above, it is therefore essential that the provisions of

of Article 27ter are drafted with sufficient precision to enable responses to the

questions raised previously.

B. On the actors of the platform

Pursuant to the provisions of Article 27ter, paragraph (1), of the draft law, the manager of

transport network would have the “role of controller” within the meaning of Article 4, point 7,

of the GDPR.

The said provisions further specify that “[t]he transmission system operator is not

responsible only for the processing of data on the platform. When a company

14 Item 18

15 Item 19

16 Item 22

of electricity or natural gas performs a processing using the platform, it is responsible

the veracity and accuracy of the data. Nevertheless, the transmission system operator

must provide a procedure to verify the veracity and accuracy of the data on the

platform, to erase or rectify inaccurate data without delay following a request for

rectification and to notify any rectification in accordance with Article 19 of EU Regulation 2016/679

of April 27, 2016 to the recipients of the rectified data”.

According to the commentary to the articles, paragraph (1) of article 27ter of the draft law “charges the

transport network manager of the mission of setting up such a platform, and

specifies that the latter is responsible for data processing on the platform. It is therefore

responsible for the implementation and proper functioning of the platform. On the contrary, the

electricity and natural gas companies, as users of the platform, hold the
responsibility for the veracity and accuracy of the data they enter or modify on the
platform. This is explained by the fact that certain data processing on the platform is
play between market players without the transmission system operator being directly involved
involved ".

However, both the legal provisions provided for by the bill and the explanations provided by the
authors of the bill do not make it possible to clearly determine the respective roles of the
transmission system operator and electricity or gas companies from the point of view
of data protection.

The authors of the bill should also be made aware of the fact that “[t]here may be
joint controllers when more than one actor is involved in the processing.

The GDPR introduces specific rules for joint controllers and establishes
a framework that governs their relationship. The essential criterion for joint liability of the
processing is the joint participation of two or more entities in determining the purposes
and means of a processing operation. A joint participation can take the form
from a joint decision made by two or more entities or from converging decisions
adopted by two or more entities, when the decisions complement each other and are necessary for the
carrying out the processing in such a way that they have a concrete effect on the determination of the
purposes and means of processing”.

Further, “[t]he joint controllership also requires that two or more entities
exerted an influence on the means of treatment. This does not mean that, for there to exist
joint responsibility for processing, each entity concerned must in all cases
determine all means of treatment. Indeed, as clarified by the CJEU, different entities
may occur at different stages of treatment and to varying degrees. Therefore,

17 Guidelines 07/2020 concerning the notions of controller and processor in the GDPR, adopted on 7
July 2021 by the European Data Protection Board, page 3

different joint controllers of the processing can define the means of this in a
varying extent, depending on who is actually able to do so”18.

It should also be noted that the subcontractor is “the natural or legal person, the authority
public authority, service or other body which processes personal data for the
account of the controller. There are two basic requirements to be considered
as a processor: it must be a separate entity from the controller and it must
process personal data on behalf of the controller”.

Insofar as the provisions under notice intend to target a plurality of processing operations for
different purposes and which, according to the understanding of the CNPD, would be carried out by
different actors, the role of all users of this platform should be determined
in the light of the developments above.

Indeed, there is reason to wonder about the role of the transmission system operator if it does not
only takes care of the provision of the platform. Moreover, what would be its role if it
is required to maintain the "central reference directory" and retains the data collected by
market players? What would still be the role of electricity and gas companies if
“certain data processing on platforms takes place between market players without the
transmission system operator is directly involved"?

In addition, the determination of the controller is essential when it is on this
compliance with all the principles set out in Article 5 of the GDPR. The article
24 of the GDPR further provides in this regard that "the controller implements
appropriate technical and organizational measures to ensure and be able to

demonstrate that the processing is carried out in accordance with this Regulation".

However, in this case and given the current wording of the bill, it is impossible to

know on which actor such obligations would be imposed or whether these would be respected.

Finally, the provisions under notice should not discharge the controller(s)

their obligations under the GDPR. Thus, if the network manager of

transport should be the data controller then the provisions of article 27ter,

subsection (1) of the Bill should not exclude its liability for the "truthfulness

and the accuracy of the data" that would be used via the platform.

18 Guidelines 07/2020 concerning the notions of controller and processor in the GDPR, adopted on 7

July 2021 by the European Data Protection Board, §63, page 24.

19 Guidelines 07/2020 concerning the notions of controller and processor in the GDPR, adopted on 7

July 2021 by the European Data Protection Board, page 4.

In any case, for a better understanding of the text under opinion and in order to respect

the principle of predictability to which any legal or regulatory text must comply20, the CNPD

considers it essential to clarify, in the light of previous developments, the role of

different actors in the context of article 27ter of the bill.

The National Commission takes the liberty, moreover, of reiterating its observations formulated under the

point I of this opinion in that it questions the entity that should be responsible for managing

of such a platform.

C. On the "objectives" pursued by the platform

It should be noted that paragraph (2) of Article 27ter lists the "objectives" of the

platform which are:

- “serve as a central reference repository”21: it is specified in the commentary

articles that this central reference directory "will provide efficient, user-friendly access

and secure for electricity and natural gas companies”22;

- ensure “the preservation of data for archival purposes, for research purposes

scientific or historical or for statistical purposes”23;

- ensure “centralized management of market communication”24 (communication

market is defined as being “an exchange, by means of a communication

electronic and standardized, between the network operators 25 and the actors of the

market, of all the data and information referred to in Article 27ter, paragraph (3),

paragraph 1, point c)”;

- to ensure the "efficient execution of contracts as well as legal obligations and

enable stakeholders to cope with market developments in terms of

flexibility”26;

- “to enable the development and provision of statistics and data

anonymized for monitoring, transparency and research purposes”27.

Although the effort to enumerate the objectives pursued should be commended, it is clear that

that some of the said provisions do not meet the requirements of clarity, precision and

20 In this sense, V. M. Besch, “Personal data processing in the public sector”, Norms and legislation in law

Luxembourg public, Luxembourg, Promoculture Larcier, 2019, p.469, n°619; V. among others CourEDH, Zakharov e. Russia

[GCL

n"47413/06], § 228-229, December 4, 2015.

21 Article 27ter, paragraph (2), letter a) of the draft law.

22 See AD Article 21, commentary to the articles.

23 Article 27ter, paragraph (2), letter a) of the draft law.

24 Article 27ter, paragraph (2), letter b), i) of the draft law.

25 Article 1, paragraph (25) of the law of 1 August 2007 on the organization of the electricity market, coordinated text, which provides

that a network operator is “either a transmission network operator or a distribution network operator

or a manager of an industrial network or a manager of a direct line”.

26 Article 27ter, paragraph (2), letter b), i) of the draft law.

27 Article 27ter, paragraph (2), letter c) of the draft law.

foreseeability that a legal text must meet, in accordance with the case law of the Court

Justice of the European Union and the European Court of Human Rights.

This difficulty of understanding is all the more accentuated, whereas the data seem

be processed for a number of different purposes. Furthermore, the CNPD wonders if the

data that would be collected via the platform would be for subsequent purposes that

would be different from those for which they were initially collected.

On this principle, it should be recalled that in accordance with the purpose limitation principle29,

the data must be collected for specific, explicit and legitimate purposes, and not

must not, in principle, be processed for purposes "incompatible" with these purposes

of origin.

It should be noted that the EDPS, in his opinion on the Commission proposal amending the

Directive (EU) 2015/849 and Directive 2009/101/EC entitled “Access to information on

beneficial owners and implications for data protection”30, underlined the importance

of such a principle. The EDPS considers that the provision of the GDPR relating to the principle of

purpose limitation is “particularly important with regard to law enforcement

public in the protection of personal data, because the proportionality of their

processing will have to be assessed against the political objective defined by the legislator.

In this respect, we consider that legislative instruments allowing multiple processing

and/or simultaneous processing of personal data by different data controllers

data and for incompatible purposes, without specifying the purpose for which each data processing

is carried out, is likely to cause considerable confusion with regard to the application of the

principle of proportionality.

This is why compliance with the principle of purpose limitation is essential, in particular for

the cases in which the legislation authorizes two categories of data controllers to process

data, a task that they do not necessarily perform for the same purposes.

In cases where the purposes of data processing are defined by terms

general or vague, or for which the various data controllers have

a completely different relationship with the purpose pursued both in terms of structure and

resources and the ability of each manager to comply with the rules in certain

given circumstances, the principle of purpose limitation is formally compromised and

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

Luxembourg public, 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, Vavřička and others v. Czech Republic (applications no. 47621/13 and 5

others), §

276-293, April 8, 2021.

29 Article 5, paragraph (1), letter b) of the GDPR.

30 EDPS Opinion 1/2017, on the Commission proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC –

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substantially and, therefore, the principle of proportionality will also not be

duly applied”31.

Insofar as the National Commission considers that such observations are relevant

taking into account the legal provisions under opinion, it is necessary to wonder about the respect of the principle

purpose limitation in this case.

In addition, it should be recalled that if personal data were to be collected

for subsequent purposes different from those for which they were collected

initially, then the provisions of Article 6, paragraph (4), of the GDPR would be intended to

apply.

Thus, Article 6, paragraph (4), of the GDPR provides that “[w]here the processing for a purpose other than

that the one for which the data was collected is not based on the consent of the

data subject or on Union law or the law of a Member State which constitutes a

necessary and proportionate measure in a democratic society to ensure the objectives

referred to in Article 23, paragraph (1)32, the controller, in order to determine whether the

processing for another purpose is compatible with the purpose for which the personal data

personnel were initially collected, takes into account, among other things:

a) the possible existence of a link between the purposes for which the personal data

data have been collected and the purposes of the further processing envisaged;

b) the context in which the personal data was collected, in particular

with regard to the relationship between data subjects and the controller;

c) the nature of the personal data, in particular if the processing relates to

special categories of personal data, pursuant to Article 9, or if

31 EDPS Opinion 1/2017, on the Commission proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC – access
beneficial ownership information and data protection implications.

32 Article 23(1) of the GDPR provides that "[t]he Union law or the law of the Member State to which the data controller processing or the processor is subject may, by means of legislative measures, limit the scope of the obligations and rights provided for in Articles 12 to 22 and in Article 34, as well as in Article 5 insofar as the provisions of the law in question correspond
to the rights and obligations provided for in Articles 12 to 22, where such limitation respects the essence of the fundamental rights and freedoms
and that it constitutes a necessary and proportionate measure in a democratic society to guarantee:

a) national security;

b) national defence;

c) public safety;

d) the prevention, detection, investigation and prosecution of criminal offenses or the execution of
criminal sanctions, including protection against threats to public safety and prevention of such threats;

(e) other important objectives of general public interest of the Union or of a Member State, in particular an economic interest or important financial institution of the Union or of a Member State, including in the monetary, budgetary and fiscal fields, health Public and Social Security;

f) protection of the independence of the judiciary and of judicial proceedings;

g) the prevention and detection of ethical breaches by regulated professions, as well as the investigation and
legal proceedings;

h) a mission of control, inspection or regulation linked, even occasionally, to the exercise of public authority,
in the cases referred to in points a) to e) and g);

i) the protection of the data subject or the rights and freedoms of others;

j) the execution of civil law claims".

relating to bill no. 7876 amending no. 1 the amended law of 1 August 2007 relating to organization of the electricity market; 2° the amended law of 1 August 2007 relating to the organization of the natural gas market

personal data relating to criminal convictions and offenses are processed, under Article 10;

d) the possible consequences of the envisaged further processing for data subjects;

(e) the existence of appropriate safeguards, which may include encryption or pseudonymization".

Therefore, in the event that data is collected for subsequent purposes different from those for which they were initially collected, the aforementioned provisions are intended to apply.

Finally, it is still appropriate to draw the attention of the authors of the bill more particularly to compliance with the purpose limitation principle by the transmission system operator if the latter ci is required to maintain a central reference directory. Indeed, if this one is a company private sector invested with a mission of public interest, it is important to ensure that the data appearing in this central repository and which would be collected initially for the purposes necessary for the performance of a task in the public interest, are not reused at a later date by the network operator for commercial purposes.

On the advisability of appointing a private company to manage such a platform, it is referred to the comments made in point I of this opinion.

D. On the categories of personal data "stored on the platform"

Article 27ter paragraph (3) provides that: "The platform includes the following data:

a) the names, addresses, contact data and the unique identifier provided for in paragraph (6) of the network users and connection subscribers covered by this law as well as by Article 1, paragraphs (41), respectively (33bis), of the amended law of 1 August 2007 relating

the organization of the natural gas market, and, insofar as the persons listed below
before are legal persons, the names, addresses and contact details of the person of
contact designated by them;
b) the data collected on the occasion of the metering referred to in Article 29 of this law as well as in
Article 35 of the amended law of August 1, 2007 on the organization of the natural gas market;
(c) the data and information necessary for the proper functioning of the electricity markets and
natural gas as well as interconnected networks as defined by regulation by
the regulator after a consultation procedure organized in accordance with Article 59; the
National Data Protection Commission being asked for its opinion;
d) the data referred to in Article 17, paragraph (1);
e) all other data necessary for the proper functioning of the electricity and electricity markets;
natural gas which are not personal data".
While the enumeration of the categories of data that would be collected is to be welcomed, it is appropriate
to note, given the plurality of processing envisaged, that it would have been preferable, for
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a better understanding of the provisions, that the text under opinion specifies the purposes for
which each of these categories of data would be collected.
Furthermore, it is regrettable that the categories of data referred to in letter c) of the
aforementioned provisions are not specified. If it is indicated that a proposed grand-
ducal would specify such data and information, it is to be regretted that such a draft
Grand-Ducal regulation was not transmitted at the same time as the bill.
As for the provisions which provide that "the National Commission for the Protection of

data being requested in its opinion", it should be specified that its missions are set by the law of 1 August 2018 on the organization of the National Commission for the Protection of data and the general data protection regime. Thus, the latter "advises the Chamber of Deputies, the Government and other institutions and bodies regarding the legislative and administrative measures relating to the protection of the rights and freedoms of natural persons with regard to the processing of personal data". Therefore, if the provisions under opinion provide that the National Commission be asked for its opinion within the meaning of the provisions of Article 8, point 4° of the aforementioned law of 1 August 2018, the CNPD considers that such provisions are superfluous.

Nevertheless, if the text under opinion intends to provide for a specific consultation of the CNPD and, not covered by the law of August 1, 2018 on the organization of the National Commission for the Protection of data and the general data protection regime, it should be recalled that since the entry into application of the GDPR, the CNPD is not responsible for validating a priori the processing categories of data (principle of accountability).

E. On processing for archival, scientific or historical research purposes or for statistical purposes and making the data available to the general public

It emerges from the commentary on the articles that the central repository "will also allow archiving centralized energy data, thus avoiding a multiplication of data at different actors and will serve as a basis for data to be made available for research purposes and for general public (open data)" and that the "platform will allow the provision of statistics and data used to monitor the sector, ensuring transparency sufficient and for research purposes.

With regard to processing for the purposes of scientific or historical research or for the purposes statistics, it should be recalled that Article 89, paragraph (1), of the GDPR provides that "[t]he processing for archiving purposes in the public interest, scientific research purposes or history, or for statistical purposes is subject, in accordance with this Regulation, to

33 Article 8, point 4° of the law of 1 August 2018 on the organization of the National Commission for Data Protection and the general data protection regime

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appropriate safeguards for the rights and freedoms of the data subject. These guarantees guarantee the implementation of technical and organizational measures, in particular for ensure compliance with the data minimization principle. These measures may include pseudonymisation, insofar as these purposes can be achieved in this way.

Whenever these purposes can be achieved by further processing that does not allow or more the identification of the persons concerned, it should be done in this way. ".

In addition, article 65 of the law of August 1, 2018 on the organization of the National Commission for data protection provides that “[g]iven taking into account the nature, scope, context and purposes of the processing as well as the risks, including the degree of probability and seriousness varies, for the rights and freedoms of natural persons, the controller implemented for scientific or historical research purposes, or for statistical purposes, must implement the following additional appropriate measures:

1° the appointment of a data protection officer;

2° carrying out an analysis of the impact of the planned processing operations on the protection of personal data;

3° anonymisation, pseudonymisation within the meaning of Article 4(5) of Regulation (EU) 2016/679 or other functional separation measures ensuring that the data collected for scientific or historical research purposes, or for statistical purposes, cannot be used to make decisions or actions with regard to the data subjects;

4° the use of a trusted third party functionally independent of the controller

for the anonymization or pseudonymization of data;

5° encryption of personal data in transit and at rest, as well as management

state-of-the-art keys;

6° the use of technologies strengthening the protection of the privacy of individuals

concerned;

7° the establishment of restrictions on access to personal data within the

controller;

8° log files which make it possible to establish the reason, date and time of the

consultation and identification of the person who collected, modified or deleted the data to be

personal character;

9° raising the awareness of personnel involved in the processing of personal data and

professional secrecy;

10° the regular evaluation of the effectiveness of the technical and organizational measures implemented

place through an independent audit;

11° the prior establishment of a data management plan;

12° the adoption of sectoral codes of conduct as provided for in Article 40 of Regulation (EU)

2016/679 approved by the European Commission pursuant to Article 40(9) of the

regulation (EU) 2016/679.

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The data controller must document and justify for each project for the purposes of

scientific or historical research or for statistical purposes the exclusion, where appropriate, of a

or more of the measures listed in this article. »

Therefore, the CNPD considers it essential that the data controller ensures compliance with the aforementioned provisions and ensures in particular the implementation of appropriate guarantees additional fees referred to in article 65 of the law of 1 August 2018 on the organization of the Commission National Data Protection Authority.

Moreover, it still emerges from the commentary of the articles that "[t]his directory will also allow a centralized archiving of energy data, thus avoiding a multiplication of data at different actors and will serve as a basis for data to be made available for the purposes of research and the general public (open data)".

In the absence of further details on this subject and insofar as the bill is not drafted with sufficient precision, the CNPD cannot assess the issues from a of data protection which would, if necessary, be raised.

There is still reason to draw the attention of the authors of the bill to the fact that the provisions of the law of July 25, 2015 relating to electronic archiving or those of the amended law of 17 August 2018 relating to archiving would, where applicable, be likely to apply.

Finally, the authors of the bill should ensure on this point that there is good coordination with the provisions of the law of 29 November 2021 on open data and the reuse of public sector information, if applicable. Moreover, although a regulation Grand Ducal is referred to in paragraph (8) of Article 27ter and is intended to define "the frequency publication and scope" of data on the electricity and gas sectors natural according to the principles of open public data, it is regrettable that such a project of Grand-Ducal regulation was not transmitted at the same time as the bill.

F. On security measures

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

techniques or

appropriate organizational (integrity and confidentiality)".

accidental damage,

using measurements

Article 32 of the GDPR further 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 avoid

including unauthorized access to data, data leaks or changes

unwanted.

It should be remembered that it is strongly recommended to define an access management policy,

in order to be able to identify from the beginning the person or the service, within each entity

concerned, and what specific data that person or department would have access to.

In addition, it is necessary to provide an access logging system. On this point, the

CNPD recommends that log data be kept for a period of

five years from their registration, after which time they are erased, except when they

are subject to a control procedure.

The CNPD also stresses the importance of proactively carrying out internal controls. In this

effect, it is necessary in accordance with Article 32, paragraph (1), letter d) of the GDPR to implement

implements a procedure "aimed at regularly testing, analyzing and evaluating the effectiveness of

technical and organizational measures to ensure the security of the processing".

Thus, in the context of the implementation of data exchanges via the platform targeted by the bill, such security measures would have to be implemented by the individual(s) data controller(s) to ensure confidentiality and data security.

The implementation of these measures should take into account the specificities of each access contemplated by the bill.

Indeed, it should be noted that different access via this platform would be envisaged:

- Access by electricity and natural gas companies, as referred to in paragraph (5) of article 27ter;
- "Individual and secure" access to the platform for the persons referred to in paragraph (3), paragraph 1, point a) of Article 27ter, as referred to in paragraph (6) of article 27ter;
- Access “via a standardized interface to extracts and information to the Minister, regulator, to the Government Commissioner for Energy or to the National Institute for statistics and economic studies that request it for the purposes of carrying out their respective missions", as referred to in paragraph (7) of Article 27ter.

Moreover, within the framework of the various accesses envisaged by the bill, the principle of minimization should be respected, so that only data that is adequate, relevant and limited to what is necessary in relation to the purposes for which they would be processed be communicated.

Finally, it should be noted that a Grand-Ducal regulation referred to in paragraph (14) of Article 27ter, would “specify the functionalities, the technical and organizational specifications,

the terms and conditions relating to data accessibility". However, it is regrettable that a such draft Grand-Ducal regulation has not been transmitted at the same time as the draft law.

G. On data retention

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

The draft law does not specify the retention period for the categories of data collected through the use of the platform referred to in Article 27ter. In the absence of such details, the National Commission is not in a position to assess whether, in this case, the principle of limited data retention period would be respected regarding the collection of those data.

In addition, to the extent that the data collected, as part of the implementation of the platform, are for different purposes, it would be appropriate to specify a duration of adequate storage for each of the categories of personal data.

In addition, the data collected must be deleted or anonymized as soon as they are storage is no longer necessary for the achievement of the purposes for which they are collected and processed.

Therefore, even if the retention periods are not defined in the draft law, the latter should at least specify the criteria that would be taken into account to determine what is the proportionate retention period for each category of personal data that would be collected under the bill.

On the recording of telephone conversations by network managers electricity

II.

It should be noted that the provisions of Article 27, paragraph (6), of the amended law of 1 August 2007 relating to the organization of the electricity market, were introduced by the draft

law no. 7266 amending the amended law of August 1, 2007 relating to the organization of the electricity.

Insofar as the National Commission has not been seized to advise this bill, it nevertheless takes the liberty of commenting on such provisions, in the context of its referral to the draft law under notice.

Article 27(6) provides that “[w]ithout prejudice to the implementation of any other legally accepted treatment, the operator of an electricity network, holder of a concession

within the meaning of article 24 of this law may, within the framework of the execution of its mission of public service, the performance of public service obligations and labor relations, plus in particular implement processing within the meaning of the [GDPR], in the form of a recording of telephone conversations, even without the consent of the persons concerned. This recording must relate to telephone conversations aimed at ensuring the electrical energy flows on the networks, or to notify the network manager of a breakdown, a malfunction or any other generally unspecified anomaly affecting the networks, or targeting all maneuvers and technical operations relating to the networks.

The persons concerned by this processing are the representatives and interlocutors of the other network managers and suppliers, people reporting a breakdown, a malfunction or any other anomaly affecting networks and people and employees involved in maneuvers and technical operations relating to networks.

The purpose of this processing is to ensure the continuity of the public service, the execution of public service obligations, user and public safety, accident prevention,

safety and health of workers and the protection of the assets of the network operator.

The data retention period is limited to one month, except in the event of legal proceedings.

In this case, the data may be kept until the final closure of the procedure”.

It emerges from the commentary on the articles of bill no. 7266 that "the network operator,

having a concession, can implement processing in the form of registration

telephone conversations necessary for the performance of a public service mission or

the fulfillment of public service obligations. The [GDPR] expressly admits in its article 6 that

Member States may make specific provisions regarding the processing

necessary for the performance of a task in the public interest. Furthermore, according to Article 88 of the same

regulation, Member States may lay down more specific rules with regard to

data processing in the context of employment relationships”.

While it is true that Article 6, paragraph (1), letters c) and e) provides that the lawfulness of the processing may

be based on “a legal obligation to which the controller is subject” or is

"necessary for the performance of a task in the public interest or in the exercise of authority

with which the controller is invested", it is still necessary that these bases of lawfulness

fulfill the conditions referred to in paragraph (3) of Article 6 of the GDPR. These bases of lawfulness

defined by the law of the Member States must in particular meet “an objective of public interest

public and [be] proportionate to the legitimate aim pursued”.

The CNPD therefore wonders whether the legal provisions provided for in Article 27, paragraph (6) of the

amended law of 1 August 2007 relating to the organization of the aforementioned electricity market,

meet an objective of public interest and are proportionate to the legitimate objective pursued.

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With regard to Article 88 of the GDPR, it should be noted that the legal provisions
current rules, providing for more specific rules on the processing of data in the
framework of labor relations, are currently referred to in Article L.261-1 of the Labor Code. Of the
therefore, there is reason to wonder about the articulation of the provisions provided for in Article 27, paragraph
(6) of the amended law of 1 August 2007 on the organization of the electricity market with that
of article L.261-1 of the Labor Code.

Furthermore, to what extent the provisions of Article 27, paragraph (6), of the amended law of
August 1, 2007 relating to the organization of the electricity market, are articulated with the provisions
of the amended law of 30 May 2005 concerning the protection of privacy in the sector of
electronic communications?

Indeed, it should be noted that the recordings of telephone conversations fall
within the scope of the amended law of 30 May 2005 concerning the protection of life
private sector in the electronic communications sector.

Article 4, paragraph (2), of the aforementioned law provides that “[i]t is prohibited for any other person
that the user concerned to listen, to intercept, to store the communications and the data
relating to the related traffic, or to subject them to any other means of interception or
surveillance without the consent of the user concerned”.

Paragraph (3), letter d) of the same law specifies that the aforementioned paragraph (2) “does not affect
the recording of communications and related traffic data, when it is
carried out within the framework of lawful professional uses, in order to provide proof of a
commercial transaction or any other commercial communication. The parties to
transactions or any other commercial communications are informed in advance of this
that recordings are likely to be made, the reason(s) for which
communications are recorded and the maximum retention period of the
recordings. Recorded communications are to be erased as soon as the purpose is achieved,
and in any event, upon expiry of the legal period for appealing against the transaction”.

If it could be conceivable that some of the recordings referred to in Article 27 paragraph (16) are possible, subject to the exception referred to in paragraph (3), letter d), of Article 4 of the amended law of 30 May 2005 concerning the protection of privacy in the electronic communications sector, it is appropriate to question the articulation of the provisions of Article 27, paragraph (16), of the amended law of 1 August 2007 relating to the organization of the electricity market, with those of Article 4, paragraph (2) of the amended law of May 30, 2005 cited above, which lays down the principle of the prohibition of telephone recordings without the consent of the user concerned?

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Finally, it should be noted that a company active in the field of network management gas and electricity had appealed against a decision of the CNPD which had refused the data processing envisaged by the aforementioned article of the bill.

Following an appeal lodged by the said company against the decision, the position of the National Commission had moreover been confirmed by judgment of 19 May 2016 rendered by the Administrative Court of Luxembourg34.

The judges had thus considered that the establishment, by a transport network company and distribution of gas and electricity, “a system of telephone tapping and recording of calls made to the Dispatch Center from which all of the national electricity and gas networks would be managed in practice, which would generate the need to make certain cuts during interventions to be carried out in the field, such as network maintenance, the repair of defective parts on an electricity pylon or even a gas line”, violates the special provisions of article 4 of the law of May 30, 2005 as soon as

when the recordings are not made in the context of professional use

lawful in order to provide proof of a commercial transaction or any other communication

commercial.

Therefore, it is surprising to say the least that the provisions of Article 27,

paragraph (16), of the amended law of 1 August 2007 relating to the organization of the

electricity derogate from the provisions of the amended law of 30 May 2005 mentioned above by providing that

the recording of telephone conversations covered by these provisions would be permitted in order to

to “ensure the continuity of public service, the performance of public service obligations, the

safety of users and the public, accident prevention, safety and health of

workers and the protection of the assets of the network operator".

On the smart metering system

3.

The bill introduces new provisions in paragraph (7) of article 29 of the law

of 1 August 2007 relating to the organization of the electricity market.

The purpose of these provisions is to transpose Article 20(a) of the Directive “taking into account

account of the definition of “near real time” provided for in Article 2, point 26, of the Directive.

Access to this data in near real time is done via an interface on the

network user’s smart meter”.

Thus, and as provided for by the bill, end customers can have access "to

non-validated data relating to its consumption in near real time, i.e. a short

period usually not exceeding a few seconds or reaching at most the period of

34 Administrative Tribunal of the Grand Duchy of Luxembourg dated 19 May 2016, 2nd chamber, number 35399 of the roll

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settlement of imbalances in the electricity market. Access to this data is made from
securely, at no additional cost, via a standardized interface on the meter, in order to
encourage automated programs to improve energy efficiency, the
active demand participation and other services". It is further specified that "the
system operators can offer, if necessary against remuneration, a device to
users of the network that allows remote access to this data".

Regarding remote access, the CNPD wonders if this is a correct transposition
of the Directive whereas Article 20(a) provides that "[t]end customers must also
be able to easily access non-validated data relating to time consumption
almost real and in a secure manner, at no additional cost, via a standardized interface or
via remote access.

Finally, the National Commission understands that access to this data, which would be encrypted, does not
would be possible only by means of an electronic key which would be provided on request by the
network manager. The establishment of such a system is to be welcomed.

Furthermore, with regard to the smart metering system, the National Commission
reiterates its concerns expressed in its opinion on the draft Grand-Ducal regulation
relating to methods for metering electrical energy and natural gas with regard to the
retention of data from smart meters in that it had considered that "a
data storage on a "quarter-hourly" basis for electricity and "hourly" basis for natural gas
for a period of fifteen years provides an extremely detailed profiling of habits
individuals, so that the interests and rights and freedoms of the data subject prevail
on the interests of system operators and suppliers. Moreover, as the Commission
national authority has already expressed it in this opinion, the risks of deviations linked to the use of
data thus collected are intrusive to the privacy of individuals, so that there is reason to
reduce the data retention period as much as possible.

Furthermore, it should also be underlined that the EDPS in his opinion on the recommendation

of the Commission on preparing for the introduction of smart metering systems,

pointed out that the legal basis for the deployment of smart metering systems

“is not as such specific enough to be considered as a

“legal obligation” within the meaning of Article 7(c) of Directive 95/46/EC. To guarantee the

legal certainty, the EDPS therefore recommends making a clear distinction between the purposes

(i) for which energy consumption data may be processed for purposes

public interest (Article 7(e)) or other legitimate interests (Article 7(f))

without the customer's consent, on the one hand, and (ii) the purposes for which the customer's consent

client is required, on the other hand”36.

35 Deliberation n°566/2013 of December 13, 2013.

36 Point 45 of the Opinion of the European Data Protection Supervisor on the Commission Recommendation on the

preparation for the introduction of smart metering systems on 8 June 2012.

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