Opinion of the National Commission for Data Protection relating to

to bill no. 7639 amending the law of 23 December 2016 concerning

the collection, entry and control of aid files relating to the

housing and the draft Grand-Ducal regulation repealing the regulation

Grand-Ducal of 23 December 2016 setting the implementing measures for the

law of 23 December 2016 concerning the collection, seizure and control

housing assistance files

Deliberation n°28/2020 of December 2, 2020

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

on the protection of individuals with regard to the processing of personal data

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

General on Data Protection) (hereinafter the “GDPR”), to which Article 7 of the

Law of August 1, 2018 on the organization of the National Commission for the Protection of

data and the general data protection regime, the National Commission for the

data protection (hereinafter referred to as the “National Commission” or the “CNPD”)

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

other institutions and bodies on legislative and administrative measures relating

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

By letter dated July 21, 2020, the Minister for Housing invited the Commission

to decide on the draft law amending the law of 23 December 2016 concerning the

collection, entry and control of housing assistance files (hereinafter the “project of

law") and the draft Grand-Ducal regulation repealing the Grand-Ducal regulation of 23 December

2016 setting the implementing measures for the law of 23 December 2016 concerning the collection,

entry and control of housing aid files (hereinafter the “draft regulation

grand-ducal”).

As a preliminary remark, it should be noted that the last paragraph of Article 1 of the law of 23

December 2016 concerning the collection, entry and control of aid files relating to the housing (hereinafter the “law of December 23, 2016”) continues to refer to the law of August 2, 2002 on the protection of individuals with regard to the processing of personal data.

However, this law was repealed by the law of 1 August 2018 on the organization of the Commission national data protection system and the general data protection regime. He should therefore delete this reference and henceforth refer to the legislation currently in force.

I.

Repeal of the Grand-Ducal regulation

The authors of the bill propose to repeal the Grand-Ducal regulation of 23 December 2016 laying down the implementing measures for the law of 23 December 2016 and inserting these provisions directly into law.

Thus, the provisions of the aforementioned Grand-Ducal regulation would henceforth be found in Articles 4, paragraph (5), and 5, paragraph (1), paragraph 2, of the law of December 23, 2016, as amended by the bill.

The CNPD welcomes such a modification as it had suggested in its opinion of November 25 2016 relating to bill n°7054.

However, given the other amendments that the authors of the bill intend to make to the act of 23 December 2016, the National Commission wonders whether it is still appropriate to insert in the law the enumeration of personal data that can be exchanged between state authorities. The CNPD will come back to this below in point III. of this notice.

II.

The change in terminology

The authors of the bill indicate in the explanatory memorandum that they want to take the opportunity “to clarify the text in some places, which now provides for more appropriate terminology”.

However, explanations in this respect are not provided in the explanatory memorandum or in the

article commentary.

However, the National Commission wonders whether the terms "personal data" and

of "files", would not be more appropriate than the terms "information" or

“information”, used henceforth throughout the bill, for reasons of

consistency with the GDPR which defines these notions in its article 4, paragraphs (1) and (6).

The use of concepts defined by the GDPR would also allow a better understanding

of the device under notice.

Indeed, by way of example, the initial version of paragraph (3) of Article 4, which used the term

"file", allowed a better understanding of the device, while the new

terminology used, namely "access to the information files of the minister having

the Environment within its attributions” and “access to the information files of the Minister having

Housing in its attributions", is likely to lead to confusion.

Furthermore, the authors of the bill specify in Article 4, paragraph (4), as amended by

the bill, that applicants and recipients of housing assistance must give their

“explicit” consent. The National Commission wonders what the authors mean

when they wish to specify the “explicit” nature of the consent.

In any case, it should be recalled that in terms of data protection, the

Consent is defined by Article 4(11) of the GDPR (which implies that it must be

"free, specific, informed and unequivocal") and that its collection must be carried out in accordance with the

legal provisions of Article 7 of the GDPR. Therefore, the consent of the applicants and of the

beneficiaries of housing aid must be given in accordance with the legal provisions of the

GDPR, so the explicit term can be considered superfluous.

III.

Creating new files

According to the text currently in force, the Minister having Housing in his attributions and the

Minister having the Environment in his attributions have access to external files for the

purposes detailed in the aforementioned text, while the draft law under opinion provides in article 4,

paragraphs (1) and (2), that the ministers are communicated by the state authorities,

listed in the aforementioned paragraphs, certain personal data, "information

necessary" or "relevant information".

Are we to understand that, contrary to the current system providing for consultation of files

by the Minister having Housing in his attributions and by the Minister having

the Environment in its attributions, the latter are now recipients of data

from such files? Are ministers therefore required to keep files in which

will such data be included?

If this were to be the case, the CNPD would like to reiterate its observations made in its opinion of 25

November 2016 relating to bill no. 70541 and recalls that the keeping of a data file at

personal character collected and processed by a State authority must be based on a

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

1 The CNPD noted in particular in its opinion of 25 November 2016 relating to bill no. 7054 that "[i]n the absence of consent of the data subject to the competent ministers checking directly in the files held by other administrations the information necessary for the examination of applications for housing aid, the persons concerned have in principle of an alternative consisting in providing supporting documents themselves containing information from the said files and documenting their administrative situation. This results in a need to regulate beyond the hypothesis of consent of the persons concerned, the cases where the ministers concerned would be made recipients of data from databases administrative data managed by other administrations. The CNPD considers it essential that the normative framework on this point

figure in the law"

the entities to which

This article provides for a specific constraint related to the lawfulness of data processing

necessary for compliance with a legal obligation or for the performance of a task in the public interest or

relating to the exercise of official authority vested in the controller. In

these two scenarios, the basis and purposes of the data processing must
specifically be defined either by the law of the European Union or by the law of the State
member to which the controller is subject.
In addition, recital (45) of the GDPR specifies that it should "[...] belong to Union law or
the right of a Member State to determine the purpose of the processing. Furthermore, this right could
specify the general conditions of this Regulation governing the lawfulness of the processing of
personal data, establish the specifications aimed at determining the person responsible for the
processing, the type of personal data being processed, the persons
concerned,
personal data may be
communicated, purpose limitations, retention period and other measures aimed at
to guarantee lawful and fair processing […]".
Recital 41 of the GDPR further specifies that 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 the European Court of Rights
of man 2.
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.
Thus, for the lawfulness of processing in the public sector to be ensured, it is necessary to have a
national or supranational normative text which can lead an administration or a service to
having to process data to fulfill its missions3. If a text should not prescribe
specifically data processing, "the purpose of the processing must however be precise,
insofar as the text leading the administration to process data must allow

administered to deduce the nature of the data and the purposes for which they are

used”4. The National Commission therefore considers it essential, in the event that the

above-mentioned ministers, keep one or more files, as data controllers, that

2 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.470, n°619.

3 M. Besch, “Personal data processing in the public sector”, Standards and legislation in public law

Luxembourgish, Luxembourg, Promoculture Larcier, 2019, p.470, n°619

4 M. Besch, “Personal data processing in the public sector”, Standards and legislation in public law

Luxembourgish, Luxembourg, Promoculture Larcier, 2019, p.470, n°619

this draft law provides the legal provisions for the creation of such files. these

must contain the elements mentioned above.

Insofar as the provisions of article 3 paragraph 2 of the law of 23 December 2016

concerning the collection, input and control of housing aid files5

already seem to provide for the keeping of a file by the Minister having Housing in his

attributions, these should be supplemented when they are formulated too

vague. The said provisions should in particular specify that the above-mentioned minister will have the capacity

of data controller and that the file will contain, in addition to the data currently referred to

by article 3 of the aforementioned law, the data received by the said minister by the administrations concerned

in section 4, as amended, by the bill.

Moreover, similar provisions concerning the keeping of a file by the minister having

the Environment in its attributions should also be inserted in the aforementioned article 3 then

that this is not currently specified by the text under opinion.

In any case, if the will of the authors of the bill is to provide for communication

of data to the aforementioned ministers by the administrations referred to in paragraphs (1) and (2) of

the aforementioned section 4, then this should clearly be reflected throughout the bill.

Thus, the terminology used in Article 4, paragraph should be adapted accordingly.

(4), and in Article 5, paragraph (1), as amended by the Bill, while these Articles

notably continue to refer respectively to “access to information from the

national register and the general register” and to “access by ministers to information

from the files listed in article 4 (…)”.

IV.

The exchange of data between the Minister in charge of Housing

and the Minister in charge of the Environment

Article 4, paragraph (3), as amended by the bill, maintains an exchange of data

between the Minister responsible for Housing and the Minister responsible for the Environment

within its attributions through respective access to their files.

5 Article 3 paragraph 2 of the law of 23 December 2016 concerning the collection, entry and control of aid files relating to the

housing provides that: “After the collection and entry of applications for housing aid and related documents, the

personal data is transferred to secure data carriers to which the officer of the Minister having Housing

in its attributions having carried out the collection and the seizure does not have access "

However, the categories of data to which this exchange relates are not specified.

so that the National Commission is not in a position to comment on the nature

necessary and proportionate of the exchange of data as referred to in paragraph (3) above.

It would therefore be appropriate for the bill to indicate at least the categories of data which would be

exchanged between the said ministers.

In addition, insofar as the draft law provides for specific communication of data

taken from administrative files for each of the aforementioned ministers, the attention should be drawn

of the authors of the bill on the fact that this exchange of data should not allow

ministers to indirectly obtain personal data from files

of state authorities for which they do not have access under the bill under notice.

v.

Disclosure of “information” by other authorities

According to the explanatory memorandum, the bill under opinion intends to provide in the law of December 23 2016 “to what extent and under what conditions the Ministry of Housing can obtain the communication of information from the Direct Tax Administration respectively of the Fund for the future of children, which are not yet among the authorities listed in article 4 of the said law of 2016 (…)”.

It should be noted that Article 4, paragraph (1), point 1°, as amended by the draft law, lists the personal data that may be transmitted by the Tax Administration directly to the Minister having Housing in his attributions.

However, such details are not provided for the data that would be transmitted to the Minister having Housing in his attributions and to the Minister having the Environment in his allocations pursuant to paragraphs (1), point 2° to 4° and (2) of Article 4, as amended by the law Project.

However, article 4, paragraph (5), as resulting from the bill, which is the resumption of article 1 of the Grand-Ducal Regulation of 23 December 2016 setting the implementing measures for the law of 23 December 2016, lists the categories of personal data that may be communicated “from the files listed in paragraphs 1 and 2” to the aforementioned ministers, without specifying which authorities transmit which data to which minister.

The National Commission therefore wonders how the specific provisions are structured of Article 4, paragraph (1), point 1° with the general ones of Article 4, paragraph (5).

Thus, for the sake of consistency of the internal structure of Article 4, as amended by draft of law, it would be wise for the authors of the bill to specify for each communication the data referred to in paragraphs (1) and (2) of the aforementioned article which categories are could be forwarded to Ministers and to delete subsection (5) of the Article 4, the provisions of which would become superfluous.

Finally, would it not be more relevant to provide that the identification data of the persons concerned who would be transmitted to the ministers so that they can verify the authenticity

and accuracy are communicated only by the administration which maintains the national register at the meaning of the amended law of 19 June 2013 relating to the identification of natural persons, rather to provide for this data to be communicated by the Administration des contributions direct?

Thus decided in Belvaux on December 2, 2020.

The National Data Protection Commission

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