

Opinion of the National Commission for Data Protection relating to the  
bill no. 7738 amending: 1° the amended law of 17 July 2020 on  
introduction of a series of measures to combat the Covid-19 pandemic  
19; 2° the law of 19 December 2020 having as its object the establishment of a  
temporary State contribution to the uncovered costs of certain  
businesses; 3° the amended law of 4 July 2008 on youth.

Deliberation n° 30/2020 of December 22, 2020

In accordance with article 57, paragraph 1, letter (c) of regulation 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 Commission for Data Protection (hereinafter referred to as "the National Commission" or  
"the CNPD") "advises, in accordance with the law of the Member State, the national parliament, the  
government and other institutions and organizations regarding legislative measures and  
administrative procedures relating to the protection of the rights and freedoms of natural persons  
with regard to treatment".

On December 21, 2020, the Minister of Health seized the Commission  
request for an opinion on draft law no. 7738 amending: 1° the amended law of 17  
July 2020 introducing a series of measures to combat the Covid-19 pandemic;  
2° the law of 19 December 2020 having as its object the establishment of a temporary contribution  
from the State to the uncovered costs of certain companies; 3° the amended law of 4 July 2008  
on Youth (hereinafter "Bill No. 7738").

The purpose of this bill is to ensure that the national health system can  
continue to function adequately for the benefit of all patients and that the

number of SARS-CoV-2 virus infections could decrease significantly. He is therefore proposed to maintain certain measures to combat the Covid-19 pandemic already in place, strengthen others and adopt new ones that will apply during the period from December 26, 2020 to January 10, 2021.

The CNPD would like to point out that given the urgency of the bill under opinion, it is not possible for it to analyze the proposed changes in depth and that its opinion has been drawn up and adopted solely on the basis of the information available to it to date. The opinion is given under subject to possible future considerations.

#### 1. Ad article 9 of bill n°7738

Article 9 of draft law no. 7738 aims to modify article 5 paragraph (3) of the amended law of July 17, 2020 introducing a series of measures to combat the pandemic Covid-19 by specifying that the transmission by health professionals to the director of the health of certain personal data of persons whose result of a test diagnosis of infection with the SARS-CoV-2 virus was negative is intended not only to

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follow the evolution of the spread of the virus, but also to acquire the knowledge fundamentals of this development.

Furthermore, according to article 5 paragraph (3) point 2 new of the amended law of July 17, 2020 introducing a series of measures to combat the Covid-19 pandemic, the

medical analysis laboratories are obliged to transmit to the director of health the surname, first names, gender, identification number or date of birth, municipality of residence or the address of the people who underwent a serological test, as well as the result of this test. These data are anonymized by the director of health or his delegate at the end for a period of two years. According to the explanatory memorandum, as “the level of antibodies against the SARS-CoV-2 decreases over time, this immune signature of the infection has no value only for a limited time. For this reason, the most appropriate shelf life turns out to be two years. »

In this respect, the National Commission refers to point 2.3 of this opinion, subject to future considerations on his part.

2. Ad article 10 of bill no. 7738: the collection of personal data in part of the vaccination program

#### 2.1. Preliminary remarks

With regard to the legal basis on which the processing carried out by director is based a priori of health in order to follow the evolution of the spread of the SARS-CoV-2 virus, more precisely the public interest under Article 6 paragraph (1) letter e) as well as Article 9 paragraph 2) letter i) of the GDPR, the CNPD would like to refer to its comments relating thereto in its initial opinion on draft law no. 7606 introducing a series of measures concerning natural persons in the context of the fight against the SARS-CoV-2 virus (COVID-19).<sup>1</sup>

Nevertheless, it wishes to specify that Article 6 paragraph (3) of the GDPR provides for a constraint particular related to the lawfulness of data processing necessary for compliance with an obligation law or the performance of a mission of public interest or relating to the exercise of authority public authority vested in the controller. In these two cases, the basis and purposes of data processing must be specifically defined either by the law of the European Union, or by the law of the Member State to which the controller

treatment is submitted.

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. [...]". Recital 41 of the GDPR further specifies that this legislative measure should be clear and precise and its application should be predictable for litigants, in accordance with the case law of the Court of Justice of the European Union and the European Court of Human Rights.

1 Deliberation n° 13/2020 of June 8, 2020.

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Thus, if a national or supranational normative text does not specifically prescribe data processing, "the purpose of the processing must however be precise, in the 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" 2.

2.2. As for the purpose pursued by the collection of data within the framework of the vaccination program

The new article 10 paragraph (1) of the amended law of 17 July 2020 introducing of a series of measures to combat the Covid-19 pandemic provides that the system system put in place by the Director of Health with a view to monitoring the evolution of propagation of the SARS-CoV-2 virus now pursues an additional purpose: "to monitor

and continuously assess the efficacy and safety of vaccines against Covid-19. »

Under article 10 point 2° of bill no. 7738, the new point 3 of article 10

paragraph (2) of the amended law of July 17, 2020 introducing a series of measures

of the fight against the Covid-19 pandemic provides as well as the information system set up

by the director of health relates, in addition to the data initially contained therein,<sup>3</sup> to a whole

series of personal data collected as part of the vaccination program

concerning the vaccinator, on the one hand, i.e. the doctor in charge of placing or

confirm the indication for vaccination and prescribe the vaccine in order to implement this

surveillance system,<sup>4</sup> as well as the person to be vaccinated, on the other hand.

Nevertheless, on the basis of the information currently available to it, the Commission

national government has difficulty in grasping the precise purpose of the collection and recording at the

information system of all these personal data concerning the vaccinator

and the person to be vaccinated. Article 5 paragraph (1) letter (b) of the GDPR indeed requires that the

personal data must be “collected for specific purposes,

explicit and legitimate, and not further processed in a manner inconsistent with

these purposes”.

The explanatory memorandum is quite vague in this respect, stating only that it should

“to ensure specific monitoring of the quality and effects of the various vaccines, in particular in order to

to build public confidence in vaccination" and that this "monitoring includes

also the usual activities of measuring vaccination coverage, measuring

vaccine efficacy and pharmacovigilance. [...] Indeed, it is necessary to verify

the real usefulness of vaccination in order to identify its benefits. Finally, this monitoring allows

adjust the vaccination strategy and the deployment plan. »

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

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

3 These are data collected pursuant to article 5 of the amended law of 17 July 2020 introducing a

series of measures to combat the Covid-19 pandemic and the data collected under Articles 3 to 5 of the law of 1 August 2018 on the compulsory notification of certain diseases in the context of health protection public.

4 As specified in the commentary to article 10 of the bill under opinion.

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Considering government statements that vaccination against the coronavirus does not will not be mandatory, the CNPD therefore wonders what exactly is the purpose continued by the processing of the personal data of the vaccinator and the person to be vaccinated. Does the purpose as indicated fall within or is it limited to a context of pharmacovigilance<sup>5</sup> or requirements of the law of July 4, 2000 relating to the responsibility of the State in terms of vaccinations enshrining the responsibility of the State in certain cases of sequelae due to legal vaccination, regulatory or recommended by the state?

Given the urgency and lack of precision in the commentary on the articles, the CNPD was not able to research and analyze the legal texts on the subject. She therefore wonders also if similar data is collected and recorded in state files in the context of vaccinations against other diseases or pathologies, in particular those listed in the amended Grand-Ducal regulation of 18 October 2001 determining the list of recommended vaccinations.

Finally, the National Commission wonders in this context whether the authors of the bill do not, moreover, implicitly refer to further processing of the data collected for the purpose of scientific research?

In order to meet the forecasting and predictability requirements that a legal text, with reference to European case law, and for the sake of transparency and of legal certainty, the CNPD recommends that the authors of the bill specify in the body of the text in more detail what are the explicit and determined purposes actually prosecuted by the collection of this large amount of personal data concerning the vaccinator and the person to be vaccinated.

2.3. Regarding the retention period of the data collected as part of the vaccination program

Article 5 paragraph (1) letter (e) of the GDPR provides that personal data must be "kept in a form which permits the identification of the persons concerned for a period not exceeding that necessary with regard to the purposes for which they are processed. It also follows from recital (45) of the GDPR that when the processing is necessary for the performance of a task in the public interest or relating to the exercise of the official authority vested in the controller, it should belong to the law of the Union or the right of a Member State to establish, inter alia, the retention period of data.

Thus, the retention period must be determined according to the purpose that led to the storage of data collection in question. Once this objective is achieved, these data should be deleted or anonymized (in order to produce statistics in particular).

5 As provided for in Article 4 paragraph (5) of the amended law of 21 November 1980 organizing the Department of Health and the amended law of August 16, 1968 creating a Center for speech therapy and services audiometric and speech therapy.

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Point 4° of article 10 of bill no. 7738 provides in this context that the data to be personal character of the vaccinators are anonymized at the latest after a period of two years after their collection, while the personal data of the persons to vaccinate are anonymized no later than twenty years after their collection.

The explanatory memorandum specifies in this context that "the data of vaccinated persons will be kept for twenty years from the date of collection, minimum period to ensure optimal follow-up of the vaccination, with a view to protecting people vaccinated over the long term. Indeed, we must not forget that we are in presence of a new vaccine that is being deployed and whose effects will manifest themselves in time real. It is therefore in the very interest of the vaccinated person that the data concerning are kept for as long as possible in order to verify whether an effect appearing after several years can, where appropriate, be related to the vaccine or not. On the other hand, with regard to the data of the vaccinators, these will be kept for two years. This is explained by their necessity in order to ensure the follow-up of adverse effects in the short and medium term only. This collection having another objective, the principle of proportionality requires shorter retention periods. »

With regard to the GDPR, it is necessary and essential to define a retention period for data within the health directorate's information system that is proportionate to the regard to the purpose pursued. Therefore, it is necessary to define objective criteria



justifying an adequate shelf life.

However, the National Commission does not have the scientific expertise and necessary epidemiological analysis, in order to assess whether the retention of personal data vaccinated for twenty years from the date of collection is really necessary and proportionate, in view of the vague and imprecise purpose as indicated in the text of the law Project.

The CNPD takes this opportunity to underline the fundamental importance of the right to information of the persons concerned. Pursuant to Articles 13 and 14 of the GDPR, the person responsible for the processing is indeed obliged to provide data subjects with certain information when personal data is collected directly from them or indirectly through a third party. Precise and appropriate information must therefore be provided to the persons concerned in a particular health context, both to vaccinators and especially to persons to be vaccinated, in particular any subsequent use of their data, bearing in mind that the expected data retention period is twenty years.

Finally, in the absence of precision in the text of bill n°7738, the CNPD wonders what is the origin of the personal data of vaccinators and people vaccinated, i.e. who is obliged to collect, as well as transmit and record the data in question in the information system of the health department. Are these the vaccinators themselves who are in charge of the vaccination program in the centers of vaccinations?<sup>6</sup> Or is it also planned in the short and medium term that doctors referents can directly vaccinate their patients and in this case, they would be obliged to transmit the data in question to the health department? In addition, there is reason to question what happens to the data thus collected by the vaccinators and then transmitted to the health department. Are the data collected by the vaccinators

<sup>6</sup> To see in this context the vaccination strategy against COVID-19 in Luxembourg:

<https://sante.public.lu/fr/actualites/2020/12/communique-strategie-vaccination/index.html>.

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immediately destroyed upon transmission or do they remain recorded in files of vaccinators for a certain period of time?

These points deserve to be clarified and specified in the text of the bill.

Thus decided in Belvaux on December 22, 2020.

The National Data Protection Commission

Tine A. Larsen

President

Thierry Lallemand

Commissioner

Christopher Buschman

Commissioner

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