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Publication of the first draft bill (“avant-projet n°7184”) complementing the European General Data Protection Regulation (“GDPR”)

The first draft bill complementing the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (“**GDPR**”) was issued on 12 September 2017 (the “**Draft Bill**”).

In spite of its direct effect, the GDPR, which will apply to all the EU Member States as of 25 May 2018, gives the Member States a certain flexibility to take additional local provisions. The Draft Bill was issued in this context.

The current Luxembourgish legal framework regarding the protection of personal data, based on the transposition of the European Directive 1995/46/CE of 24 October 1995, mainly relies upon the amended law of 2 August 2002 concerning the protection of individuals with regard to the processing of personal data (the “**Law of 2002**”).

However, the fast evolution, since 1995, of information and communication technologies has given rise to new concerns with regard to the processing of personal data and the protection of privacy in a global environment.

Therefore, with the ever-growing concern of preserving the protection of the EU citizens’ personal data, the European Commission initiated in 2012 a reform to adapt European rules to the issues raised by the globalisation of communications and the evolution of technologies. This reform, conducted under the Luxembourgish Presidency, led to the adoption of the GDPR and the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

Given the direct effect and wide scope of the GDPR, few room was left to EU Member States to supplement it using local legislations.

In this regard, the Draft Bill completes the GDPR by:

- Adapting the Luxembourgish data protection supervisory authority to the requirements of the GDPR. Such authority remains the Commission Nationale pour la Protection des Données (the “**CNPD**”), but acquires new powers in order to carry out the missions defined under the GDPR (I), and;
- Providing specific provisions on aspects for which the GDPR required the adoption of complementary national legislations (II).

I. The creation of a “new” CNPD (Chapter 1 of the Draft Bill):

First, the creation of a “new” CNPD stems from the “accountability” approach adopted by the GDPR. This approach creates an obligation of self-control for data controllers regarding the processing of personal data that they may carry out. It involves a change in the control process operated by national data protection authorities, moving from an *ex ante* control to an *ex post* control.

The powers vested in the CNPD, currently in charge of all matters in relation to the protection of personal data unless otherwise provided by law, hence had to be adapted to such approach.

However, the GDPR is not the only reason why the CNPD had to undergo some changes. Indeed, other changes in the European data protection legal framework – notably with regard to the protection of EU citizens’ fundamental rights and the reinforcement of the independence of the EU Member States’ judicial systems – also called for adaptations to be made¹.

In this regard, the Law of 2002 created and provided a specific competence to the independent “Article 17 Supervisory Authority” to carry out the control of personal data processing in the criminal, State security, defense, and public safety areas. However, under the Law of 2002, judicial data remained outside the scope of competence of said Authority and was taken in charge by the CNPD.

The new requirements of independence of the judicial systems brought under EU law led to the adoption, on the same day as the GDPR, of the EU Directive n°2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

Owing to the necessity of implementing such Directive, Luxembourg presented bill No. 7168 on 10 August 2017. The main change carried out by this bill is the creation of an independent judicial data protection authority, and in parallel to this, the abrogation of the “Article 17 Supervisory Authority”, which activity will be absorbed by the new CNPD.

¹ Cf. article 16§2 of the Treaty on European Union and the Treaty on the Functioning of the European Union and article 8§3 of the Charter of fundamental rights of the European Union

For all of the above reasons, the first chapter of the Draft Bill notably:

- confirms the **independence of the CNPD**;
- **extends its competence to the processing of personal data in the criminal, State security, defense, and public safety areas** (currently carried out by the “Article 17 Supervisory Authority” under the Law of 2002) ;
- **strengthens the CNPD’s missions and powers, in particular by introducing the possibility for the CNPD to impose administrative penalties up to 20,000,000.00€ or up to 4% of the worldwide and annual turnover of the previous year (whichever the highest) to any company infringing the data protection laws.**

II. The specific provisions required by the GDPR (Chapter 2 of the Draft Bill):

Chapter 2 of the Draft Bill focuses on the balance that should be found between the protection of personal data and (a) the right of freedom of expression and information (article 56 of the Draft Bill), (b) the processing of personal data within the purpose of scientific, historical, and statistical research (articles 57 to 58 of the Draft Bill), and (c) the processing of special categories of data by health services (article 59 of the Draft Bill).

A) The processing of personal data and the right of freedom of expression and information:

Article 85 of the GDPR provides that EU Member States shall adopt local legislations to find a balance between the right to the protection of personal data and the rules regulating the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

By way of derogation to the general principles of data protection provided under the GDPR, the processing of personal data for journalistic purposes and the purposes of academic, artistic or literary expression will hence be allowed in Luxembourg under certain conditions clarified by the Draft Bill.

In this regard, the Draft Bill introduces the following derogations to the principles of the GDPR, in order to allow the processing of personal data for the aforementioned purposes:

1. Derogation to the prohibitions and restrictions of the GDPR regarding the processing of special categories of personal data and the processing of personal data relating to criminal convictions and offences², when :

² Article 9(1) of the GDPR “*Processing of special categories of personal data*” and article 10 of the GDPR “*Processing of personal data relating to criminal convictions and offences*”.

- The data processed were evidently disclosed to the public by the data subject, or;
 - The data are closely connected to the public life of the data subject, or;
 - The data are closely connected to the event in which the data subject willingly became involved.
2. Derogation to the obligations of the data controller regarding the transfers of personal data to third countries or international organisations³.
 3. Derogation to the data controller's obligation to provide information to the data subject where personal data are collected from the latter, under the condition that such obligation would jeopardise the collection of such personal data⁴.
 4. Derogation to the data controller's obligation to provide information to the data subject where personal data have not been obtained from the latter, under the conditions that such obligation would either jeopardise the collection of such personal data, or a contemplated publication, or the provision of such data to the general public, or would provide indications enabling the identification of the source of information⁵.
 5. Derogation to the right of access of the data subject, which is limited to ensure the protection of journalists' sources. In such case, the right of access to the relevant personal data must be exercised through the CNPD and in the presence of the President of the Press Council.

Such exemptions thus notably protect journalists from having to disclose their sources, and preserve their freedom to investigate and to express themselves on matters involving personal data.

B) The processing of personal data for the purpose of scientific, historical, and statistical research:

Article 89(2) of the GDPR provides that EU Member States may provide for derogations for certain rights of the data subject⁶ where personal data are processed for scientific or historical research purposes or statistical purposes, in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes. Such derogations may only be provided when appropriate safeguards for the rights and freedoms of the data subject are implemented.

³ Chapter V of the GDPR "*Transfers of personal data to third countries or international organisations*".

⁴ Article 13 of the GDPR "*Information to be provided where personal data are collected from the data subject*".

⁵ Article 14 of the GDPR "*Information to be provided where personal data have not been obtained from the data subject*".

⁶ *I.e.* the rights referred to in Articles 15 (right of access), 16 (right of rectification), 18 (right to restriction of processing) and 21 (right to object).

Article 57 of the Draft Bill is meant to implement such derogations under Luxembourg law, and limits the aforementioned rights of the data subject for the purposes of scientific, historical and statistical research.

Article 58 of the Draft Bill however provides that such limitation of the data subject's rights may only be applied when the data controller puts in place additional appropriate safeguard measures for the rights and freedoms of the data subject. In this regard, the Draft Bill provides quite an extensive list of measures, which notably consists of the following:

- Designating a data protection officer,
- Realising an analysis of the impact of the contemplated processing on the protection of personal data,
- Anonymising the personal data processed,
- Encrypting the personal data,
- Using technologies reinforcing the protection of the data subjects' privacy,
- Implementing restrictions to access the personal data processed within the data controller's company,
- Implementing log files that establish the purpose, the date, and the hour the files were consulted and the name of the people that consulted, modified, or deleted the personal data,
- Raising awareness of the data controller's personnel regarding personal data processing and professional secrecy,
- Assessing on a regular basis the efficiency of the technical and organisational measures implemented, through an independent audit,
- Putting in place specific processes that, in case of transfers of personal data for a future processing or for different purposes than the ones for which the data was initially collected, ensure the compliance of the processing with the GDPR,
- Implementing a data management plan,
- Adopting a sectorial code of conduct as provided under article 40 of the GDPR,
- Carrying out the personal data processing according to recognised ethical standards, etc.

C) The processing of special categories of data by health services:

Article 9(1) of the GDPR instates a general prohibition to process "*special categories of data*", namely personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

Article 9(2) of the GDPR however provides a list of exemptions to this prohibition. In particular, this prohibition shall not apply when the processing is necessary:

- ✓ "*for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional [...]*";

- ✓ “for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes [...]”.

Article 59 of the Draft Bill was taken in order to adapt such exemptions under Luxembourg law.

In this regard, the Draft Bill specifies that the processing of the aforementioned special categories of data can be carried out by medical authorities (“*instances médicales*”) when it is necessary for the purpose of preventive medicine, medical diagnosis and for the provision of care or treatments.

In addition, the Draft Bill provides that special categories of data can be processed by medical authorities, research bodies and legal or natural persons whose research project has been duly approved pursuant to the legislation applicable to biomedical research, when such project is necessary for the purposes of health or scientific research, and if the data controller gives adequate safeguard to the data subjects as defined under the aforementioned article 58 of the Draft Bill. When the data controller is a legal person, it must designate a delegated officer submitted to professional secrecy.

More surprisingly, the Draft Bill states that the processing of special categories of data, when necessary to manage health services, may be carried out by medical authorities and, when the data controller is subject to professional secrecy, by social security bodies and authorities which manage such data pursuant to their legal and regulatory missions, by insurance companies, pension fund management companies, the “Caisse Médico-chirurgicale mutualiste”, and by those natural or legal persons authorised to do so for socio-medical or therapeutic reasons under the law of 8 September 1998 where their activity falls within the areas to be listed in a Grand Ducal Regulation.

By introducing these last exceptions to the GDPR principles, the Luxembourg legislator seemingly chose to largely reinstate some of the exceptions currently defined under article 7 (3) of the Law of 2002, while such exceptions are not specifically provided under the GDPR.

It remains to be seen whether such exceptions will sustain the legislative process and remain in the final version of the new Luxembourg law, as some might argue that they fail to comply with the new requirements of the GDPR, especially with respect to the requirement of explicit consent of the data subject in the field of special categories of data.

As a general comment, it should be noted that the Draft Bill is a first version, which is likely to undergo some changes throughout the legislative process.

Nevertheless, the Draft Bill shows the government’s intention to reinforce the protection of personal data and to extend the mission of the CNPD by providing it with dissuasive means to sanction any infringements to the GDPR and the future Luxembourg data protection law. It is thus highly recommended for companies processing personal data to adopt, before the entry into force of the GDPR in May 2018, specific measures to comply with the new obligations arising from it and to show accountability in this respect.

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