

MEMORIAL

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Law of 2 August 2002 on the Protection of Persons with regard to the Processing of Personal Data

I, Henri, the Grand Duke of Luxembourg, Duc of Nassau;

Agreed by the *Conseil d'Etat*;

With the assent of the *Chambre des Députés*;

Given the decision of the *Chambre des Députés* dated 17 July 2002 and that of the *Conseil d'Etat* of 19 July 2002 which did not give rise to a second vote;

Have ordered and am ordering:

Chapter I. General provisions relating to the protection of the person with regard to the processing of personal data

Article 1. Purpose

This law protects the fundamental rights and freedoms of natural persons, particularly their private lives, as regards the processing of personal data, and ensures respect of the legally protected interests of legal persons.

Article 2. Definitions

For the purposes of this Law:

(a) "*code of conduct*": sector contributions drawn up in order to apply this Law correctly. Codes of conduct are drawn up at a national or community level by professional associations and other organisations representing the controllers, and may optionally be submitted to the Commission Nationale or the group for the protection of individuals with regard to the processing of personal data, as provided under Article 29 of Directive 95/46/EC;

(b) "*Commission Nationale*": the Commission Nationale pour la Protection des Données [National Commission for Data Protection];

(c) "*consent of the data subject*": any express, non-equivocal, free, specific and informed indication of his wishes by which the data subject or his legal, judicial or statutory representative signifies his agreement that the personal data may be processed;

(d) "*recipient*": will mean a natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not; authorities which may receive personal data pursuant to the performance of a legal or supervisory inquiry or task will not be regarded as recipients;

(e) "*personal data*" (hereinafter referred to as "data"): any information of any type regardless of the type of medium, including sound and image, relating to an identified or identifiable person ('data subject'); a natural or legal person will be considered to be identifiable if they can be identified, directly or indirectly, in particular by reference to an identification number or one or more factors specific to their physical, physiological, genetic, mental, cultural, social or economic, identity;

(f) "*health data*" any information about the data subject's physical or mental state, including genetic information;

(g) "*genetic data*": any data concerning the hereditary characteristics of an individual or group of related individuals;

(e) "*personal data filing system*" (hereinafter referred to as "filing system"): will mean any structured set of data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;

(i) "*medical authority*": any health practitioner and any person subject to the same professional secrecy obligation as well as any hospital covered by the Law of 28 August 1998 on hospitals, carrying out the data processing necessary for the purpose of preventative medicine, medical diagnosis, provision of care or treatment, or health service management;

(j) "*combination*": any form of processing that consists of correlating data processed for one purpose with data processed for identical purposes or correlating data connected by any controllers;

(k) "*Minister*": the Minister in charge of data protection;

(l) "*social security body*": any public or private body that provides optional or compulsory services relating to sickness, maternity, old age, physical accident, invalidity, dependency, death, unemployment as well as any family benefits or social assistance;

(m) "*third country*": non-Member State of the European Union;

(n) "*data subject*": any natural or legal person, public or private or *de facto* grouping who is the subject of data processing of a personal nature;

(o) "*controller*": a natural or legal person, public authority, agency or any other body which solely or jointly with others determines the purposes and methods of processing personal data. When the purposes and methods of processing are determined by or pursuant to legal provisions, the controller is determined by or pursuant to specific criteria in accordance with those legal provisions;

(p) "*processor*": a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller;

(q) "*supervision*": any activity requiring technical resources in order to detect, observe, copy or record the movements, images, words, writings or state of an object or of a stationary or moving person;

(r) "*third party*": any natural or legal person, public authority, agency or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorised to process the data. In the public sector, a third party means a ministry, Civil Service department, public institution, regional authority or public service other than the controller or his processor;

(s) "*processing of personal data*" (hereinafter referred to as "*processing*"): any operation or set of operations performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

Article 3 - Scope

(1) This Law will apply to the processing of data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

(2) The following are governed by this Law:

(a) processing by a controller subject to Luxembourg law;

(b) processing by a controller who is not based on Luxembourg territory or the territory of any other Member State of the European Union but uses processing resources situated on Luxembourg territory, apart from resources that are used only for the purposes of transit through the said territory or that of another European Union Member State.

As regards the processing stated under Article 3, paragraph (2) letter (b), the controller will appoint by written declaration to the Commission Nationale a representative based on Luxembourg territory who will take the controller's place in fulfilling his obligations as stated under this Law without releasing the latter from his own

liability.

(3) This Law will apply to the processing of data relating to public security, defence, seeking out and prosecuting criminal offences, or State security, even if those data are related to a major economic or financial interest of the State, without prejudice to the specific provisions of national or international law governing these areas.

(4) This Law will apply to all forms of capture, processing and dissemination of sounds and images that identify natural or legal persons.

(5) This Law will not apply:

- to the processing by a controller pursuant exclusively to his personal or domestic activities,
- to the processing of data on a legal person the publication of which is required by a law or regulation.

Chapter II. Conditions governing the lawfulness of processing

Article 4. Data quality

(1) The controller will ensure that he processes the data in a fair and lawful manner, and notably that the data are:

- (a) collected for specified, explicit and legitimate purposes and not further processed in a way that is incompatible with those purposes.
- (b) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- (c) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
- (d) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected and processed without prejudice to paragraph (2) below.

(2) The data processed for specific purposes may be processed subsequently for historical, statistical or scientific purposes and are subject to the conditions provided under the prior authorisation systems of the Commission Nationale as stated in Article 14.

(3) Any party who carries out processing in breach of the provisions of this Article will be liable to a prison sentence of between eight days and one year and a fine of between 251 and 125,000 euros or only one of these penalties. The court hearing the case may order the discontinuance of processing that is contrary to the provisions of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 5. Legitimacy of processing

(1) Data may be processed only if:

- (a) processing is necessary for compliance with a legal obligation to which the controller is subject; or if
- (b) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or if
- (c) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or if
- (d) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1, or if
- (e) processing is necessary in order to protect the vital interests of the data subject; or if
- (f) the data subject has given his consent.

(2) Any party who carries out processing in breach of the provisions of this Article will be liable to a prison sentence of between eight days and one year and a fine of 251 to 125,000 euros or only one of these penalties. The court hearing the case may order the discontinuance of processing that is contrary to the provisions of this

Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 6. Processing of specific categories of data

(1) Processing operations that reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and the processing of data concerning health or sex life, including the processing of genetic data, are forbidden.

(2) Paragraph (1) will not apply where:

(a) the data subject gave his consent to such processing, subject to the inalienability of the human body and unless forbidden by law, or where

(b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in particular in the field of employment law in so far as it is authorised by law, or

(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or

(d) processing is carried out with the consent of the data subject by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade union aim in the course of its legitimate activities and on condition that the processing relates to the necessary data solely of members of that body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to third parties without the consent of the data subjects; or if

(e) the processing relates to data that have been clearly made public by the data subject, or

(f) processing carried out in accordance with the rules of legal procedure applicable to civil matters is necessary to acknowledge, exercise or defend a right at law if it is implemented for this sole purpose, or if

(g) processing is necessary in the public interest for historical, statistical or scientific reasons without prejudice to Article 7 hereafter and the said processing is implemented in accordance with the prior authorisation of the Commission Nationale as stated in Article 14, or if

(h) processing is implemented via a Luxembourg regulation as stated in Article 17.

(3) Article 6 paragraph (1) will not apply in the event of legal proceedings or criminal investigations. However, genetic data may be processed only to verify the existence of a genetic link for the purpose of legal proof, for compensation of the data subject, or the prevention or punishment of a specific criminal offence.

(4) By way of derogation to Article 6, paragraph (1), genetic data may be processed only:

(a) in cases covered by Article 6, paragraph (2) letters (c), (f), (g), (h), Article 6 paragraph (3) and Article 7 of this Law, or if

(b) if the data subject has given his consent and if the processing is carried out only in the area of healthcare or scientific research subject to the inalienability of the human body and except where the law provides that the prohibition stated in paragraph (1) cannot not lifted by the data subject's consent.

(5) Any party who carries out a processing operation or notifies a third party in violation of the provisions of the aforementioned paragraph (1) is liable to a prison sentence of between eight days and one year and a fine of between 251 and 125,000 euros or just one of these penalties. The court hearing the case may order the discontinuance of processing or communication that are contrary to the provisions of paragraph 1 of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 7. Processing of specific categories of data by the health services

(1) When the processing of data as defined in Article 6 paragraph (1) of this Law is necessary for the purpose of preventative medicine, medical diagnosis, the provision of care or treatment or the management of healthcare services, scientific research in the field of biology and medicine, processing of the said data may be carried out by the medical authorities, as it also can be, when the controller is subject to professional secrecy, by social security bodies and authorities that manage the said data in performance of their legal and regulatory tasks, 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 governing relations between the State and the bodies working in the areas of social security, family and therapeutic matters as appointed by Luxembourg regulations. It is possible to use a processor under the conditions stated in Article 21.

(2) The above processing has received prior authorisation from the Commission Nationale.

(3) By way of derogation to paragraph (2) above, notification will be required in respect of:

- processing in accordance with Article 36 of the Law of 28 August 1998 on hospitals;
- processing by a doctor regarding his patients,

(4) Provided their processing is in itself lawful as stated in Articles 6 and 7, the data covered therein may be notified to third parties or used for research purposes in accordance with terms and subject to conditions to be determined by Luxembourg regulations.

(5) Any party who carries out processing or operates a communication to a third party in violation of the provisions of this Article will be liable to a prison sentence of between eight days and one year and a fine of between 251 and 125,000 euros or just one of these penalties. The court hearing the case may order the discontinuance of processing or notification that is contrary to the provisions of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 8. Processing of legal data

(1) The processing of data for the purpose of criminal investigations and legal proceedings will be performed pursuant to the provisions of the *Code d'Instruction Criminelle*, the *Code de Procédure Civile*, the law relating to procedural regulations in administrative courts or other laws.

(2) The processing of data relating to offences, criminal convictions or security measures may be carried out only pursuant to a legal provision.

(3) A complete compendium of criminal convictions can be held only under the auspices of the competent public authority.

(4) Any party acting privately who carries out processing in breach of the provisions of this Article will be liable to a prison sentence of between eight days and one year and a fine of between 251 and 125,000 euros or only one of these penalties.

The court hearing the case may order the discontinuance of processing that is contrary to the provisions of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 9. Processing and freedom of expression

(1) Without prejudice to legal provisions on freedom in mass communications methods, and in as far as the undermentioned derogations are necessary to reconcile the right to privacy to the rules governing freedom of expression, processing carried out solely for journalistic, artistic or literary expression are not subject:

- (a) - to the prohibition on processing the specific categories of data provided under Article 6, paragraph (1);
- to the limitations concerning the processing of legal data stated in Article 8, if the processing is in connection with data that have manifestly been made public by the data subject, or to data which are closely related to the public character of the data subject or the event in which he is involved;
- (b) to the condition that the adequate protection required in the case of processing of data that is transferred to a third country as stated in Article 18 paragraph (1) should be provided;
- (c) to the information obligation of Article 26, paragraph (1) if its application would compromise the collection of data from the data subject;
- (d) to the information obligation of Article 26, paragraph (2) if its application would either compromise the collection of data, or a planned publication, or public disclosure in any form whatsoever of the said data, or would provide information that would make it possible to identify the sources of information;
- (e) to the data subject's right of access which may be deferred or limited in accordance with Article 28, paragraph (4) and Article 29.

(2) When notification of processing carried out for the purposes of journalism or artistic or literary expression is made, the notification will state only the name(s) and address(es) of the controller or his representative.

Article 10. Processing for supervision purposes

(1) The data may only be processed for supervision purposes:

- (a) if the data subject has given his consent, or

(b) in surroundings or in any place accessible or inaccessible to the public other than residential premises, particularly indoor car parks, stations, airports and on public transport, provided the place in question due to its nature, position, configuration or frequentation presents a risk that makes the processing necessary for the safety of users and for the prevention of accidents, or

(c) in private places where the resident natural or legal person is the controller.

(2) Data subjects will be informed by appropriate means such as signage, circulars and/or letters sent by registered post or electronic means of the processing stated in paragraph (1) letters (b) and (c). At the request of the data subject, the controller will provide the latter with the information stated in Article 26, paragraph (2).

(3) The data collected for supervision purposes may be communicated only:

(a) if the data subject has given his consent, except where forbidden by law, or

(b) to the public authorities as stated in Article 17, paragraph (1), or

(c) to the competent legal authorities to record a criminal offence or take legal action in respect of it and to the legal authorities before which a legal right is being exercised or defended.

(4) Any party that carries out processing in breach of the provisions of the paragraph (1) above will be liable to a prison sentence of between eight days and one year and a fine of between 251 and 125,000 euros or only one of these penalties. The court hearing the case may order the discontinuance of processing that is contrary to the provisions of paragraph (1) of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 11. Processing for the purposes of supervision at the workplace

(1) Processing for supervision reasons at the workplace may be carried out by the employer in accordance with Article 14, if the employer controls processing. Such processing may be carried out only if it is necessary:

(a) for the safety and health of employees, or

(b) to protect the company's property, or

(c) to control the production process relating solely to machinery, or

(d) to temporarily control production or the employee's services if such a measure is the only way of determining the exact earnings, or

(e) in connection with the organisation of work under a flexible hours scheme in accordance with the law.

In the cases stated in letters (a), (d) and (e), the Mixed Works Council, where established, has the decision-making power as defined in Article 7, paragraphs (1) and (2), of the amended Law of 6 May 1974 establishing mixed works councils in private sector companies and organising employee representation in public companies (sociétés anonymes). The data subject's consent does not render processing carried out by the employer lawful.

(2) Without prejudice to the data subject's right to information, the employer will inform beforehand:

- the data subject and

- for persons falling within the scope of legislation on contracts under private law: the mixed works council, or in its absence the employee representatives, or in their absence the *Inspection du Travail et des Mines*;

- for persons falling within the scope of a statutory regime: the employee representative bodies as provided by the relevant laws and regulations.

(3) Any party that carries out processing in breach of the provision of this Article will be liable to a prison sentence of between eight days and one year and a fine of between 251 and 125,000 euros or only one of these penalties.

The court hearing the case may order the discontinuance of processing that is contrary to the provisions of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Chapter III. Formalities prior to processing and advertising of processing

Article 12. Prior notification to the Commission Nationale

(1) (a) Apart from cases that fall within the scope of the provisions of Articles 8, 14 and 17, the controller will notify the Commission Nationale of the processing of data beforehand.

(b) Processing operations carried out by a single controller that are for identical or interlinked purposes may be

contained in a single notification. In this case, the information required under Article 13 will be supplied for each processing operation only where it is specific to that operation.

(2) For data processing operations which by their nature are not capable of infringing the fundamental freedoms or privacy of the data subjects, the Commission Nationale will establish and publish directives regarding simplified notifications.

These directives will state:

- a) the purpose or purposes of the processing operation subject to simplified notification;
- b) the category or categories of data processed;
- b) the category or categories of data subjects;
- d) the recipients or categories of recipients to whom the data are disclosed;
- e) the length of time the data are to be stored.

The processing operations that correspond to these directives will be the subject of a simplified notification of conformity sent to the Commission Nationale by electronic means where appropriate.

(3) Exemptions from the obligation to notify:

- (a) any controller who appoints an official to protect the data specifically responsible for independently ensuring implementation of the relevant legal provisions and establishing and forwarding to the Commission Nationale a register of the processing operations carried out by the controller in accordance with the provisions relating to the disclosure of processing operations as provided under Article 15;
- (b) any processing operation for the sole purpose of keeping a register which, under a legal provision, is intended for public information purposes and which is open to consultation either by the public in general or by any person demonstrating a legitimate interest;
- (c) any processing carried out in accordance with the rules governing legal proceedings applicable to civil matters and necessary to acknowledge, exercise or defend a right at law.

(4) Any party that does not carry out the obligation to notify or supplies incomplete or inaccurate information is liable to a fine of between 251 and 125,000 euros. The court hearing the case may order the discontinuance of processing that is contrary to the provisions of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 13. Content and form of the notification

(1) The notification will include at least the following information:

- (a) the name and address of the controller and of his representative and processor;
- (b) the cause of legitimacy of the processing;
- (c) the purpose or purposes of the processing;
- (d) a description of the category or categories of data subjects and of the data or categories of data relating to them;
- (e) the recipients or categories of recipients to whom the data might be disclosed;
- (f) the third countries to which it is proposed to transfer the data;
- (g) a general description allowing a preliminary assessment to be made of the appropriateness of the measures taken pursuant to Articles 22 and 23 to ensure security of processing.
- (h) the length of time the data are to be stored.

(2) Any amendment affecting the information stated in paragraph (1) must be notified to the Commission Nationale prior to the processing.

(3) Notification to the Commission Nationale will be made on paper or under the form of an electronic file in a manner that it will establish. Acknowledgement of receipt of notification will be given.

(4) A Luxembourg regulation will set forth the amount and methods of payment of the fee to be collected for any notification and amendment to a notification.

Article 14. Prior authorisation by the Commission Nationale

- (1) Prior authorisation by the Commission Nationale will be required for:
 - (a) the processing operations provided in Article 6, paragraph (2) letters (a), (b), (e) and (g), and paragraph (4) letter (b), in Article 7, paragraph (1), and Articles 10 and 11 of this Law;
 - (b) the data processing operations for historical, statistical or scientific purposes referred to in Article 4, paragraph (2).

The Commission Nationale will check in particular if this processing could not be carried out on the basis of data that have been rendered anonymous;
 - (c) the combination of data as referred to in Article 16;
 - (d) processing relating to the credit status and solvency of the data subjects;
 - (e) the usage of data for purposes other than those for which they were collected. Such processing may be carried out only where prior consent is given by the data subject.
- (2) The request for authorisation will include at least the following information:
 - (a) the name and address of the controller or his representative and where applicable his processor;
 - (b) the cause of legitimacy of the processing;
 - (c) the purpose or purposes of the processing;
 - (d) the origin of the data;
 - (e) a detailed description of the data or the categories of data as well as of the proposed processing operations;
 - (f) a description of the category or categories of data subjects;
 - (g) the recipients or categories of recipients to whom the data might be disclosed;
 - (h) the third countries to which it is proposed to transfer the data;
 - (i) a detailed description to evaluate compliance with the security measures provided in Articles 22 and 23;
 - (j) the length of time the data are to be stored.
- (3) Processing operations that have a single purpose relating to categories of identical data and intended for the same recipients or categories of recipients may be authorised by a single decision of the Commission Nationale. In this case, the controller for each processing operation will send the Commission Nationale a formal undertaking of its compliance with the description that appears in the authorisation.
- (4) Any party who carries out processing in breach of the provisions of this Article will be liable to a prison sentence of between eight days and one year and a fine of 251 to 125,000 euros or only one of these penalties. The court hearing the case may order the discontinuance of processing that is contrary to the provisions of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 15. Disclosure of processing operations

- (1) The Commission Nationale will hold a public register of processing operations.
- (2) This register will include:
 - (a) processing operations notified to the Commission Nationale under Article 12, paragraph (1);
 - (b) processing operations authorised by the Commission Nationale under Article 14, paragraph (1); and
 - (c) processing operations overseen by the official in charge of data protection and forwarded to the Commission Nationale under Article 12, paragraph (3) (a).
- (3) The register held by the Commission Nationale will contain the information required respectively under Article 13, paragraph (1) and Article 14, paragraph (2) for each processing operation. For the processing operations subject to prior authorisation, the register also gives information on the authorisation issued by the Commission Nationale.
- (4) Any person may examine free of charge the information contained in this public register which is available online apart from that provided in Article 13, paragraph (1) letter (g) and Article 14, paragraph (2) letter (i).

- (5) However, the Commission Nationale may restrict this disclosure if such a measure is necessary to safeguard:
- (a) national security;
 - (b) defence;
 - (c) public safety;
 - (d) the prevention, tracking down, recording and prosecution of criminal offences, including combating money laundering, or the progress of other legal proceedings within the meaning of Article 8 paragraph (1) and Article 17 of this Law.
 - (e) an important economic or financial interest of the State or of the European Union, including monetary, budgetary and taxation matters;
 - (f) the protection of the data subject or of the rights and freedoms of others;
 - (g) freedom of expression;
 - (h) a monitoring, inspection or regulatory task connected, even occasionally, with the exercise of official authority in the cases referred to in (c), (d) and (e); and
 - (i) professional secrecy and trade secrecy of the data subject and of the controller;

(6) The Commission Nationale will publish an annual report listing notifications and authorisations.

(7) This Article does not apply to processing operations the sole purpose of which is to keep a register which under a Luxembourg law or regulation is intended to provide information to the public and which is open to consultation either by the public in general or by any person demonstrating a legitimate interest.

Article 16. Combination of data

(1) The combination of data not expressly provided for by law must be authorised in advance by the Commission Nationale following a joint request presented by the relevant controllers.

(2) The combination of data must allow the achievement of legal or statutory objectives that are of legitimate interest for controllers, must not result in discrimination or the reduction of rights, freedoms and appropriate safeguards for the data subjects, must contain appropriate security measures and must take account of the type of data being combined.

(3) Combination is authorised only where the fact that the filing systems are for the same or related purposes and the professional secrecy to which the controllers are bound, where applicable, are respected.

Article 17. Authorisation by regulatory means

(1) The following are subject to a Luxembourg regulation:

(a) processing operations of a general nature necessary for the prevention, tracking down and recording of criminal offences that are restricted to the Luxembourg police force, the *Inspection Générale de la Police* and the Customs and Excise authority in line with their respective legal and regulatory duties.

The Luxembourg regulation will determine the controller, the cause of legitimacy of the processing, the purpose or purposes of the processing, the category or categories of data subjects and the data or categories of data relating to them, the origin of these data, the third parties or categories of third parties to which these data may be disclosed and the measures to be taken to ensure secure processing pursuant to Article 22 of this Law.

(b) processing operations relating to State security, defence and public safety, and

(c) data processing operations in the area of criminal law carried out under international treaties or inter-governmental agreements or in the context of cooperation with the International Criminal Police Organisation (OIPC – Interpol).

(2) The monitoring and supervision of processing operations carried out pursuant wither to a provision of national law or an international treaty will be carried out by a supervisory authority made up of the *Procureur Général d'Etat* [State Prosecutor] or his deputy who will act as its chairman and two members of the Commission Nationale, appointed at the latter's proposal by the Minister.

The organisational structure and operations of the supervisory authority will be covered by a Luxembourg regulation.

The supervisory authority will be immediately informed of a data processing operation as referred to in this Article.

It will ensure that the said processing operations are carried out in accordance with the legal provisions that govern them.

In order to perform its function, the supervisory authority will have direct access to the data processed. In respect of the processing operations carried out, it may perform on-site checks and obtain any information and documents required to perform its duties. It may also appoint one of its members to perform specific supervisory functions that will be carried out under the conditions stated above. The supervisory authority will make any necessary rectifications and deletions. Each year it will present a report on the performance of its function to the Minister.

The right of access to data referred to in this Article may be exercised only through the supervisory authority. The supervisory authority will carry out the appropriate verification and investigations, arrange for any necessary rectifications and will inform the data subject that the processing in question does not contain any data contrary to the treaties, laws and implementing regulations.

(3) Any party acting privately who carries out processing in breach of the provisions of this Article will be liable to a prison sentence of between eight days and one year and a fine of between 251 and 125,000 euros or only one of these penalties. The court hearing the case may order the discontinuance of processing that is contrary to the provisions of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Chapter IV. Transfer of data to third countries

Article 18. Principles

(1) Transfers to a third country of data that are the subject of processing, or that will be the subject of processing after their transfer, may take place only where the country in question provides an adequate level of protection and complies with the provisions of this Law and its implementing regulations.

(2) The adequacy of the level of protection afforded by a third country must be assessed by the controller in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particularly the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

(3) In the event of doubt, the controller will immediately inform the Commission Nationale which will consider whether the third country offers an adequate level of protection. In accordance with Article 20 the Commission Nationale will notify the European Commission of cases where it considers that the third country does not offer an adequate level of protection.

(4) If the European Commission or Commission Nationale finds that a third country does not have an adequate level of protection, transfer of data to that country will be prohibited.

(5) Any party who transfers data to a third country in violation of the provisions of paragraphs (1), (2) and (4) above will be liable to a prison sentence of between eight days and one year and a fine of between 251 and 125,000 euros or only one of these penalties. The court hearing the case may order the discontinuance of any transfer that is contrary to the provisions of paragraphs (1), (2) and (4) of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 19. Derogations

(1) The transfer of data or a set of data to a third country that does not offer an adequate level of protection within the meaning of Article 18, paragraph (2), may, however, take place, provided:

- (a) the data subject has given his consent to the proposed transfer; or
- (b) the transfer is necessary for the performance of a contract to which the data subject and the controller are parties or the implementation of pre-contractual measures taken at the data subject's request; or
- (c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or
- (d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of a legal claim; or
- (e) the transfer is necessary in order to protect the vital interests of the data subject; or
- (f) the transfer occurs from a public register as provided in Article 12, paragraph (3) letter (b).

(2) In the case of a transfer made to a third country that does not offer an adequate level of protection within the meaning of Article 18, paragraph (2), the controller must provide the Commission Nationale with a report stating the conditions under which it made the transfer.

(3) Without prejudice to the provisions of paragraph (1), the Commission Nationale may authorise, as a result of a duly reasoned request, a transfer or set of transfers of data to a third country that does not provide an adequate level of protection within the meaning of Article 18, paragraph (2) if the controller offers sufficient guarantees in respect of the protection of the privacy, freedoms and fundamental rights of the data subjects, as well as the exercise of the corresponding rights. These guarantees may result from appropriate contractual clauses. The controller is required to comply with the decision of the Commission Nationale.

(4) Any party who transfers data to a third country in violation of the provisions of this Article will be liable to a prison sentence of between eight days and one year and a fine of between 251 and 125,000 euros or just one of these penalties. The court hearing the case may order the discontinuance of a transfer that is contrary to the provisions of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 20. Reciprocal information

(1) The Commission Nationale will inform the Minister of any decision taken pursuant to Article 18, paragraph (3) and (4), and Article 19, paragraphs (1) and (2). The Minister will inform the European Commission thereof.

(2) The Minister will inform the Commission Nationale of any decision relating to the level of protection of a third country taken by the European Commission.

Chapter V. Subordination and security of processing operations

Article 21. Subordination

Any person who acts under the authority of the controller or of the processor, including the processor himself, and who has access to data may not process them except on instructions from the controller, unless he is required to do so by law.

Article 22. Security of processing operations

(1) The controller must implement all appropriate technical and organisational measures to ensure the protection of the data he processes against accidental or unlawful destruction or accidental loss, falsification, unauthorised dissemination or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing. These measures will be contained in an annual report to be submitted by the controller to the Commission Nationale.

(2) If the processing is carried out on behalf of the controller, the latter must choose a processor that provides sufficient guarantees as regards the technical and organisational security measures pertaining to the processing to be carried out. It is up to the controller as well as the processor to ensure that the said measures are respected.

(3) Any processing carried out on another's behalf must be governed by a written contract or legal instrument binding the processor to the controller and providing in particular that:

- (a) the processor will act only on instructions from the controller, and
- (b) the obligations referred to in this Article will be also incumbent on the latter.

Article 23. Special security measures

Depending on the risk of the breach of privacy, as well as the state of the art and the costs associated with their implementation, the measures referred to in Article 22, paragraph (1) must:

- (a) prevent any unauthorised person from accessing the facilities used for data processing (monitoring of entry to facilities)
- (b) prevent data media from being read, copied, amended or moved by any authorised persons (monitoring of media);
- (c) prevent the unauthorised introduction of any data into the information system, as well as any unauthorised

knowledge, amendment or deletion of the recorded data (monitoring of memory);

(d) prevent data processing systems from being used by unauthorised person using data transmission facilities (monitoring of usage);

(e) guarantee that authorised persons when using an automated data processing system may access only data that are within their competence (monitoring of access);

(f) guarantee the checking and recording of the identity of third parties to whom the data can be transmitted by transmission facilities (monitoring of transmission);

(g) guarantee that the identity of the persons having had access to the information system and the data introduced into the system can be checked and recorded ex post facto at any time and by any person (monitoring of introduction);

(h) prevent data from being read, copied, amended or deleted in an unauthorised manner when data are disclosed and data media transported (monitoring of transport);

(i) safeguard data by creating backup copies (monitoring of availability).

Article 24. Professional secrecy

(1) Members of the Commission Nationale and any other person who carries out duties at the Commission Nationale or on its behalf, as well the official in charge of data protection, are subject to the compliance with professional secrecy obligations as provided under Article 458 of the *Code Pénal* [Criminal Code] even after their duties have ceased.

(2) Officials in charge of data protection when carrying out these functions may not plead the professional secrecy to which they are subject to the Commission Nationale.

(3) Certified service providers may not plead the professional secrecy to which they are subject in accordance with Article 19 of the Law of 14 August 2000 relating to electronic commerce to the Commission Nationale.

(4) Controllers acting within the framework of fulfilling their duties as specified in Article 7, paragraph (1) may not plead the professional secrecy to which they are subject to the Commission Nationale if the latter has been instructed in accordance with Article 32, paragraphs (4) and (5).

Article 25. Sanctions relating to the subordination and security of processing operations

Any party who carries out a processing operation in breach of the confidentiality and security rules referred to in Articles 21, 22 and 23, will be liable to a prison sentence of between eight days and six months and a fine of between 251 and 125,000 euros or just one of these penalties. The court hearing the case may order the discontinuance of processing that is contrary to the provisions of Article 21, 22 and 23, subject to a financial penalty the maximum amount of which will be set by the said court.

Chapter VI. Rights of the data subject

Article 26. The data subject's right to information

(1) When the data are collected directly from the data subject, the controller must supply the data subject, no later than the point at which the data are collected and regardless of the type of media used, with the following information unless the data subject has already been informed thereof:

(a) the identity of the controller and of his representative, if any;

(b) the purpose or purposes of the processing for which the data are intended;

(c) any further information such as

- the recipients or categories of recipients to whom the data might be disclosed;

- whether answering the questions is compulsory or voluntary, as well as the possible consequences of failure to answer;

- the existence of the right of access to data concerning him and the right to rectify them;

- the length of time the data are to be stored.

(2) Where the data have not been obtained from the data subject, the controller must at the time of undertaking

the recording of personal data or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed, provide the data subject with the following information, except where the data subject already has it:

- (a) the identity of the controller and of his representative, if any;
- (b) the purpose or purposes of the processing for which the data are intended;
- (c) any further information such as
 - the categories of data concerned;
 - the recipients or categories of recipient of the data to whom the data might be disclosed;
 - the existence of the right of access to data concerning him and the right to rectify them;
 - the length of time the data are to be stored.

(3) Any party who is in breach of the provisions of this article will be liable to a prison sentence of between eight days and one year and a fine of 251 to 125,000 euros or only one of these penalties. The court hearing the case may order the discontinuance of processing that is contrary to the provisions of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 27. Exceptions to the data subject's right to information

(1) Article 26, paragraphs (1) and (2), do not apply when the processing is necessary to safeguard:

- (a) national security;
- (b) defence;
- (c) public safety;
- (d) the prevention, tracking down, recording and prosecution of criminal offences, including combating money laundering, or the progress of other legal proceedings within the meaning of Article 8, paragraph (1) and Article 17 of this Law;
- (e) an important economic or financial interest of the State or of the European Union, including monetary, budgetary and taxation matters;
- (f) protection of the data subject or the rights and freedoms of others.

(2) The provisions of Article 26 are subject to derogations if the data are collected in the conditions provided under Article 9, paragraph (1) letter (c).

(3) The provisions of Article 26 paragraphs (1) and (2) will not apply where, in particular for a processing operation for a statistical, historical or scientific purpose, it is not possible to notify the data subject or doing so entails disproportionate efforts, or if the recording or the notification of the data is provided by law.

(4) Any party in breach of the provisions of paragraphs (1) and (2) above will be liable to a prison sentence of between eight days and one year and a fine of 251 to 125,000 euros or only one of these penalties. The court hearing the case may order the discontinuance of processing that is contrary to the provisions of paragraphs (1) and (2) of this Article, subject to a financial penalty the maximum amount of which will be set by the said court.

Article 28. Right of access

(1) Upon application to the controller, the data subject or his beneficiaries who can prove they have a legitimate interest may obtain free of charge, at reasonable intervals and without excessive waiting periods:

- (a) access to data on him;
- (b) confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned and the recipients or categories of recipients to whom the data are disclosed;
- (c) disclosure to him in an intelligible form of the data undergoing processing and of any available information as to their source;
- (d) knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 31;

(2) Any party who intentionally obstructs by any method whatsoever the exercise of the right of access will be

liable to a prison sentence of between eight days and one year and a fine of between 251 and 125,000 euros or just one of these penalties.

(3) Patients have the right of access to data on them. The right of access will be exercised by the patient himself or through a doctor he appoints. In the event of the patient's death, his non legally separated spouse and his children as well as any other person who at the time of the death has lived with him in his household, or in the case of minors, his father and mother, may exercise the right of access as stated in the previous paragraph through a doctor they have appointed.

The patient's right of access may still be exercised during the lifetime of a person under guardianship or trusteeship as set forth under the Law of 11 August 1982 through a doctor appointed by his guardian or trustee.

(4) Any person has a right of access to the data on him used for the purpose of processing implemented in the context of freedom of expression as provided under Article 9. As long as the data to which access is requested have not been published, these data as well as any information available on their origin may only be disclosed through the Commission Nationale.

(5) As appropriate, the controller will rectify, delete or block data the processing of which does not comply with this Law, in particular due to the incomplete or inaccurate nature of the data, subject to the penalty of a temporary or definitive ban on the processing or the destruction of these data under the conditions stated in Article 33.

(6) Any person who when exercising his right of access has realistic reasons for assuming that the data disclosed to him do not comply with the data processed may inform the Commission Nationale thereof and it will carry out the necessary checks.

(7) Any rectification, deletion or blocking carried out in accordance with paragraph (5) will be immediately notified by the controller to the recipients to whom the data have been disclosed unless this should prove impossible.

(8) Without prejudice to the sanction provided in paragraph (5), any party who intentionally breaches the provisions of this Article or any party who intentionally takes an assumed first name or surname or pretends to a false capacity to obtain disclosure of the data being processed pursuant to paragraph (1) will be liable to a prison sentence of between eight days and one year and a fine of between 251 and 125,000 euros or just one of these penalties.

Article 29. Exceptions to the right of access

(1) The controller may restrict or defer exercise of a data subject's right of access if such a measure is necessary in order to safeguard:

(a) national security;

(b) defence;

(c) public safety;

(d) the prevention, tracking down, recording and prosecution of criminal offences, including combating money laundering, or the progress of other legal proceedings within the meaning of Article 8, paragraph (1) and Article 17 of this Law;

(e) an important economic or financial interest of the State or of the European Union, including monetary, budgetary and taxation matters;

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

(g) freedom of expression and provided the exceptional measure is taken in accordance with Article 28, paragraph (4);

(h) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);

(2) In the event that there is obviously no risk of breaching the privacy of a data subject, the controller may limit the right of access when the data are being processed solely for the purposes of scientific research, or are stored in data form for a period not exceeding that necessary for the sole purpose of establishing statistics, and the said data cannot be used for the purpose of taking a measure or a decision relating to specific persons.

(3) The controller must state the reason for which he is limiting or deferring exercise of the right of access.

When the right of access is deferred, the controller must state the date from which the right of access can again be exercised. The controller will notify the reason to the Commission Nationale.

(4) In the case of limitation of the data subject's right of access, the right of access will be exercised by the

Commission Nationale which has investigative powers and arranges for the rectification, deletion or blocking of data the processing of which does not comply with this Law. The Commission Nationale may notify the data subject of the result of its investigations, while at the same time not endangering the purpose or purposes of the processing operations in question.

(5) Any party who is in breach of the provisions of paragraph (3) above will be liable to a prison sentence of between eight days and one year and a fine of 251 to 125,000 euros or only one of these penalties.

Article 30. The data subject's right to object

(1) Any data subject will be entitled:

- a) to object at any time, for compelling and legitimate reasons relating to his special situation, to the processing of any data on him except in cases where legal provisions expressly provide for that processing. Where there is a justified objection, the processing instigated by the controller may not involve those data;
- b) to object upon request and free of charge to the processing on him proposed by the controller for the purpose of marketing; it will be incumbent on the controller to bring this right to the attention of data subject;
- c) to be informed before data on him are disclosed for the first time to third parties or used on behalf of third parties for marketing purposes and to be expressly offered the right to object to the said disclosure or usage free of charge.

(2) Any party who intentionally breaches the provisions of this Article will be liable to a prison sentence of between eight days and one year and a fine of 251 to 125,000 euros or only one of these penalties.

Article 31. Individual automated decisions

A person may be subject to an individual automated decision producing legal effects on him if that decision:

- (a) is taken in the course of the entering into or performance of a contract, provided the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or that there are suitable measures to safeguard his legitimate interests, such as arrangements allowing him to put his point of view, or
- (b) is authorised by law which also lays down measures to safeguard the data subject's legitimate interests.

Chapter VII. Monitoring and supervision of the implementation of the law

Article 32. Duties and powers of the Commission Nationale

(1) A supervisory authority named the "Commission Nationale pour la Protection des Données" has been set up in charge of monitoring and checking that data being processed are processed in accordance with the provisions of this Law and its implementing regulations.

2) Every year the Commission Nationale will submit a written report to the members of the Cabinet on the fulfilment of its duties. In this report it will cover in particular the status of notifications and authorisations, and the defects or misuses that are not specifically covered by the existing legal, regulatory and administrative provisions. It will publish its annual report. The report will be examined by the consultative commission on human rights, a consultative government body on human rights on Luxembourg territory whose membership and duties are set out in a Luxembourg regulation.

(3) The duties of the Commission Nationale are as follows:

- (a) to ensure implementation of the provisions of this Law and its implementing regulations, in particular those relating to the confidentiality and security of processing operations;
- (b) to receive notifications prior to the implementation of a processing operation and changes affecting the content of those notifications and to carry out ex post facto monitoring of the lawfulness of the processing operations notified; likewise it will be promptly informed of any processing subject to prior authorisation;
- (c) to publicise the processing operations notified to it by keeping an appropriate register, unless otherwise provided;
- (d) to authorise the implementation of processing operations subject to the system described in Article 14 of this Law;
- (e) to be asked for its opinion on all draft or proposed laws relating to the creation of a processing operation as

well as all regulatory or administrative measures issued on the basis of this Law. These opinions will be published in the annual report referred to in Article 15, paragraph (6);

(f) to present to the Government any suggestions that might simplify and improve the legislative and regulatory framework with regard to the processing of data;

(g) to receive and where applicable, following discussions with the authors, approve codes of conduct relating to a processing operation or a set of processing operations submitted to it by professional associations which represent the controllers;

(h) to advise the Government, either at the request of the latter or on its own initiative, regarding the consequences of developments in information processing technologies with regard to the respect of the freedoms and fundamental rights of individuals; to this end it may commission studies, surveys or expert reports;

(i) to promote, on a regular basis and by any method it deems fit, the dissemination of information relating to data subjects' rights and controllers' obligations, particularly as regards the transfer of data to third countries.

4) The Commission Nationale may be approached by any person, acting on his own behalf, through his lawyer or by any other duly authorised natural or legal person, with a request relating to respect of his fundamental rights and freedoms as regards a processing operation. The data subject will be informed of the outcome of the request.

(5) The Commission Nationale may, in particular, be approached by any data subject with a request to check the lawfulness of a processing operation in the event of refusal or limitation of the exercise of the data subject's right of access in accordance with Article 29, paragraph (4) of this Law.

(6) If the Commission Nationale is approached by one of the persons or bodies referred to in Article 11, paragraph (2), regarding a violation of that Article, it will give a ruling within a month of the referral.

(7) Under this Law, the Commission Nationale has the power to investigate under which it has access to data that are subject to the processing in question. It will collect all the information necessary for fulfilling its monitoring duties. To this end, it will have direct access to premises other than residential premises where processing takes place, as well as to the data that are being processed, and will carry out the necessary checks.

(8) The Commission Nationale is entitled to engage in legal proceedings in the interests of this Law and its implementing regulations. It will notify the legal authorities of any offences of which it is aware.

(9) The Commission Nationale will co-operate with its counterparts which are supervisory authorities set up in other Member States of the European Union to the extent required for them to perform their duties, notably by exchanging any appropriate information.

(10) The Commission Nationale will represent Luxembourg on the "group for the protection of individuals with regard to the processing of personal data" set up by Article 29 of Directive 95/46/EC;

(11) Any party who intentionally prevents or obstructs by any method whatsoever the performance of the duties incumbent upon the Commission Nationale will be liable to a prison sentence of between eight days and one year and fine of between 251 and 125,000 euros or just one of these penalties. Refusing its members access to premises other than residential premises where processing takes place, as well as to the data that are being processed, or refusing to disclose any information and documents requested will be regarded as intentional prevention or obstruction of the performance of the duties incumbent on the Commission Nationale.

Article 33. Administrative sanctions

(1) The Commission Nationale may take the following disciplinary sanctions:

(a) alert or admonish controllers who have violated the obligations imposed upon them by Articles 21 to 24;

(b) block, delete or destroy data that have been subject to a processing operation contrary to the provisions of this Law or its implementing regulations;

(c) impose a temporary or definitive ban on a processing operation that is contrary to the provisions of this Law or to its implementing regulations;

(d) order publication of the prohibition decision in full or in extracts in newspapers or by any other method, at the cost of the person sanctioned.

(2) An appeal may be made against the above decisions pursuant to Article 3 of the Law of 7 November 1996 relating to the organisation of the administrative courts.

Article 34. Membership of the Commission Nationale

(1) The Commission Nationale is a public authority in the form of a Public Institution (*Etablissement Public*). Its headquarters are in Luxembourg City. The headquarters may be transferred at any time to any other location in Luxembourg pursuant to a Luxembourg regulation.

The Commission Nationale has a legal personality and has financial and administrative autonomy under the supervision of the Minister.

It carries out the duties with which it is invested under this Law in a totally independent manner.

(2) The Commission Nationale is made up of three permanent members and three substitute members appointed and dismissed by the Grand Duke at the proposal of the Cabinet. The President is appointed by the Grand Duke.

Members are appointed for a term of six years. This term may be renewed once.

On each occasion the Cabinet will suggest to the Grand Duke as a permanent and substitute member at least one legal specialist and one information technology specialist who have completed university studies.

Before taking up office, the President of the Commission Nationale will take the following oath before the Grand Duke or his representative: "I swear loyalty to the Grand Duke and obedience to the constitution and laws of the State. I promise to carry out my duties with integrity, precision and impartiality."

Before taking up office, members of the Commission Nationale will take the following oath before the President of the Commission Nationale: "I swear loyalty to the Grand Duke and obedience to the constitution and laws of the State. I promise to carry out my duties with integrity, precision and impartiality."

When the President or a permanent member of the Commission Nationale comes from the public sector, he will receive special leave for his term of office retaining all benefits and rights arising from his respective status. He will continue in particular to receive his pay, compensation or salary as appropriate, as well as enjoying the social security arrangements pertaining to his status.

In the event of termination of the term of office, he will at his request be reintegrated into his original department in a position carrying the same salary that he previously received plus increments and index increases in respect of the years of service as President or permanent member up to the highest scale for the grade.

If there is no vacancy, a new exceptional position with the same wage may be created; this position will automatically cease when a vacancy occurs for an appropriate ordinary position.

When the President or a permanent member of the Commission Nationale comes from the private sector, he will receive remuneration calculated with reference to the regulations setting the relevant compensation of employees of State departments and services on the basis of an individual decision taken under Article 23 of the Luxembourg regulation of 28 July 2000 setting out the arrangements for the compensation of employees of State departments and services. He will continue to belong to the social security scheme which he was part of when carrying out his last occupation.

In the event of termination of the term of office, for a maximum period of one year he will receive transitional monthly compensation equal to the average monthly salary or pay in respect of the last contributory professional earnings pertaining to his current insurance history prior to the commencement of his duties as President or a permanent member of the Commission Nationale. That transitional compensation will be reduced where the party receives professional income or has a personal pension.

The President and permanent members of the Commission Nationale will receive special compensation reflecting the commitment required by their duties which will be set by Luxembourg regulation.

The resignation of a member of the Commission Nationale will automatically occur when he reaches the age limit of 65.

Substitute members will receive compensation the amount of which will be set by a Luxembourg regulation.

(3) Members of the Commission Nationale may not be members of the Government, the *Chambre des Députés*, the *Conseil d'Etat* or the European Parliament and may not carry out any professional activities, or directly or indirectly hold interests in a company or any other body involved in the field of data processing.

(4) If a member of the Commission Nationale ceases to carry out his duties during the course of his term of office, the term of office of his successor will be limited to the remaining outstanding period.

Article 35. Operation of the Commission Nationale

(1) The Commission Nationale will be a collegiate body. It will draw up its internal rules of procedure, including its working procedures and methods, within a month of being set up. The internal rules of procedure will be published in the *Mémorial*.

(2) Subject to the provisions of this Law, the internal rules of procedure will set forth:

- (a) the rules of procedure applicable before the Commission Nationale,
- (b) the rules of operation of the Commission Nationale,
- (c) the organisation of the departments of the Commission Nationale.

(3) The permanent members of the Commission Nationale will be invited to attend meetings by the President. Meetings are properly called at the request of two permanent members. The invitation will contain the agenda.

Permanent members who are unable to attend a meeting are required to notify their substitutes and forward the invitation to them.

(4) The Commission Nationale may validly sit and deliberate only if there are three members present.

(5) Members of the Commission Nationale may not sit, deliberate or pass decisions on any matter in which they have a direct or indirect interest.

(6) Resolutions are passed by majority vote. Abstentions are not permitted.

(7) The Cabinet which has proposed the appointment of a member of the Commission Nationale may propose his dismissal to the Grand Duke. The opinion of the Commission Nationale will be heard before any dismissals.

(8) Whilst performing their duties, the members and substitute members of the Commission Nationale will not receive any guidance from any authority.

Art. 36. Status of members and employees of the Commission Nationale

(1) The executive staff of the Commission Nationale will include the following roles and positions:

In the normal public service career structure, the seniority scale reference is: grade 7,

“*carrière de rédacteur*” (junior executive officer):

- “*inspecteurs principaux 1er en rang*” (chief inspectors, first grade)
- “*inspecteurs principaux*” (chief inspectors)
- “*inspecteurs*” (inspectors)
- “*chefs de bureau*” (head clerks)
- “*chefs de bureau adjoints*” (deputy head clerks)
- “*rédacteurs principaux*” (senior executive officers)
- “*rédacteurs*” (junior executive officers)

Normal public service junior executive officers (“*carrière moyenne des rédacteurs*”) are State civil servants, in particular as regards their status, pay and pension scheme, which is governed by the legal provisions governing State civil servants.

(2) The managerial staff provided in paragraph (1) above may be supplemented by both State white-collar employees and State blue-collar workers subject to the limits of the credit available.

The earnings of State employees are set in accordance with the Luxembourg ruling of 28 July 2000 setting out the arrangements for the compensation of employees of Government departments and services.

(3) The earnings and other compensation of all members, staff and employees of the Commission Nationale will be paid by the Commission Nationale.

(4) The Commission Nationale may in certain cases use external specialists whose services will be defined and paid for on the basis of an agreement under private law.

Article 37. Financial provisions

(1) Upon its formation, the Commission Nationale will receive initial funding of two hundred thousand euros from the State budget. The State will provide it with the movable and immovable property required to perform and carry out its duties properly.

(2) The financial year of the Commission Nationale will be the same as the calendar year.

(3) The Commission Nationale will draw up its operating account for the previous year and its annual report before 31 March each year. Before 30 September of each year, the Commission Nationale will draw up the budget for the next financial year. The budget, the annual accounts and reports drawn up will be sent to the Cabinet which will decide whether to discharge the Commission Nationale in respect of its duties. The decision confirming that the Commission Nationale has been discharged of its duties and the annual accounts of the Commission Nationale will be published in the *Mémorial*.

(4) The Commission Nationale will be authorised to deduct the equivalent of the costs of its serving staff and its operational expenses from the fees collected as provided in Article 13 of this Law. In respect of the balance of the expenses still to be covered pursuant to its duties under this Law, the Commission Nationale will receive funding at an amount to be set on an annual basis and included in the State budget.

(5) The Law of 27 November 2001 concerning the State income and receipts budget for financial year 2002 will be amended as follows:

a section entitled "00.9 Commission Nationale pour la Protection des Données" will be added to the expenditure budget in Chapter III – Current expenses under "00 – Ministry of State", showing the following Articles:

"12.300: Payment by the State of the expenses incurred by the Commission Nationale pour la Protection des Données. (non-specific grant not tied to any financial year) 200,870

33.000: Initial funding allocated to the Commission Nationale pour la Protection des Données.
200,000 "

Chapter VIII. Judicial remedies

Article 38. General provisions

Without prejudice to the criminal sanctions introduced by this Law and the actions for damages governed by ordinary law, in the event of a processing operation that violates formalities provided for under this Law being undertaken, any person is entitled to legal remedies as stated hereafter.

Art. 39. Action for discontinuance

(1) At the petition of

- the State Prosecutor who has instigated public action for the violation of this Law,

- by the Commission Nationale, should a disciplinary sanction as referred to in Article 33 of this Law, against which has been no appeal or which has been upheld by the administrative court, not have been complied with,

or

- by an injured party, should the Commission Nationale not have declared itself in respect of a claim made on the basis of Article 32, paragraph (4), (5) or (6) of this Law, the presiding judge of the district where the processing operation was carried out, or the judge who replaces him, will order the discontinuance of processing that is contrary to the provisions of this Law and the temporary suspension of the activity of the controller or processor. The presiding judge of the district where the processing operation is being carried out, or the judge who replaces him, may order the temporary closure of the business of the controller or processor if its sole activity is to process data.

(2) The action will be admissible even when the illegal processing has ceased or is not likely to recur.

(3) The action will be introduced and heard in summary proceedings in accordance with Articles 932 to 940 of the *Nouveau code de procédure civile*. However, by way of derogation to Article 939, paragraph 2, of the *Nouveau code de procédure civile*, no application may be made to set the summary proceedings aside.

(4) Articles 2059 and 2066 of the Code Civil will also apply.

(5) Publication of the decision in full or in extracts may be ordered in newspapers or by any other method, at the cost of the offender. Publication may be made only by virtue of a legal decision passed *res judicata*.

(6) Temporary suspension and, where applicable, temporary closure may be ordered independently of the public action. Temporary suspension or temporary closure ordered by the presiding judge of the district court or by the judge who replaces him will, however, cease in the event of a discharge or acquittal, and no later than the expiry of a period of two years from the date of the initial suspension or closure decision.

Chapter IX. The data protection official

Article 40. The data protection official

(1) Any controller may, pursuant to Article 12, paragraph (3) item (a), and for the purposes stated therein, appoint a data protection official whose identity he will notify to the Commission Nationale.

(2) The powers of the data protection official are as follows:

(a) investigative powers to ensure supervision of the controller's compliance with the provisions of this Law and its implementing regulations;

(b) a right to be informed by the controller and a correlative right to inform the controller of the formalities to be carried out in order to comply with the provisions of this Law and its implementing regulations.

(3) In the performance of his duties, the data protection official is independent of the controller who appoints him:

(a) he does not have a subordinate relationship (*lien de subordination*) to the controller and may not be connected to the controller by a contract of employment;

(b) he may not be dismissed for reasons connected with the performance of his duties except in the case of a breach of his legal or contractual obligations.

(4) The data protection official will consult the Commission Nationale in the event of doubt regarding the compliance with this Law of a processing operation under his supervision.

(5) Natural or legal persons who are approved by the Commission Nationale may be appointed to the post of data protection official.

(6) Approval for the activity of data protection official will be subject to proof of completion of university studies in law, economics, commercial management, natural science or information technology as well as financial resources of a value of 20,000 euros.

(7) By way of derogation to the previous paragraph, members registered in the following controlled professions can be approved unconditionally as data protection officials: barristers, auditors (*réviseurs d'entreprises*), accountants (*experts-comptables*), doctors.

A Luxembourg regulation may add to this list other controlled professions that are subject to a supervisory or disciplinary body, either an official body or one specific to the profession and recognised by law.

(8) The Commission Nationale will check the qualities of all data protection officials. It may at any time object to the appointment or continuance of the data protection official if he:

(a) does not have the qualities required for the position of data protection official, or

(b) is already in contact with the controller in connection with activities other than the processing of data and this contact gives rise to a conflict of interests limiting his independence.

In the event of objection by the Commission Nationale, the controller will have three days to appoint a new data protection official.

(9) The Commission Nationale will define the methods of continuous monitoring of the qualities required for the position of data protection official.

(10) A Luxembourg regulation will set forth the methods for the appointment and dismissal of the data protection official, the performance of his duties and his relations with the Commission Nationale.

Chapter X. Specific, transitional and final provisions

Article 41. Specific provisions

(1) (a) The competent authorities referred to in Articles 88-1 to 88-4 of the *Code d'instruction criminelle* [Criminal Code], and

(b) the authorities acting in connection with a flagrant offence or in connection with Article 40 of the *Code d'Instruction Criminelle* will have automatic access on request and through the *Institut Luxembourgeois de Régulation* (hereinafter ILR) to the data on the identity of subscribers and users of both electronic communications operators and suppliers and the postal services and the suppliers of these services. The "112" emergency services centre and the fire and rescue services of the City of Luxembourg will have access under the same terms and conditions as the authorities stated in the previous paragraph solely to the data on the identity of subscribers and users of electronic communications operators and suppliers.

(2) To this end, operators and suppliers will automatically provide the ILR free of charge with the data described in paragraph (1). The data must be updated at least once a day. Access must be guaranteed twenty-four hours per day seven days a week. A Luxembourg regulation will determine the electronic communications and postal services for which the service operators and suppliers need to make data available as well as the nature, format and methods of making the data available.

(3) Automatic access is restricted to special supervision measures as provided for in Articles 88-1 to 88-4 of the *Code d'instruction criminelle*, those taken in respect of flagrant offences or pursuant to Article 40 of the *Code d'Instruction criminelle* and the specific emergency measures provided in connection with the activities of the "112" emergency services centre and the fire and rescue service of the City of Luxembourg.

(4) The procedure will be fully automated pursuant to authorisation by the Commission Nationale. The Commission Nationale will check in particular that the information system used is secure. That automation will allow remote access by electronic communication.

Article 42. Transitional provisions

(1) Processing operations in automated or non-automated filing systems existing prior to introduction of this Law must be made to conform with the provisions of Chapter II and Chapter VI within a period of two years with effect from the introduction of this Law.

(2) However, any data subject may obtain on request, particularly with respect to the exercise of his right of access, the rectification, deletion or blocking of data that are incomplete, inaccurate, or kept in a manner that is incompatible with the legitimate purposes pursued by the controller.

(3) The Commission Nationale may allow data kept solely for historical research purposes to be dispensed from compliance with paragraph (1).

Article 43. Effectiveness of the transitional provisions

(1) The Commission Nationale will establish a notification schedule as provided in Article 13 paragraph (3) within four months of the date when its members are appointed. It will inform the public by means of publication in the *Mémorial* and a press release to newspapers published in Luxembourg of the date from which the notification schedule will be available at the Commission Nationale.

(2) Controllers will proceed to notify their processing operations within four months of the date of the official publication mentioned in paragraph (1).

(3) Controllers whose processing operations are authorised under a Luxembourg regulation or ministerial decree "authorising the creation and operation of a data bank" when this Law comes into force will notify or request authorisation of their processing operations only on the expiry of the period of validity of the authorisation granted, unless they consider it necessary to do so beforehand for reasons of compliance with the provisions of this Law.

(4) Non-automated processing operations involving data contained in or likely to appear in a filing system must be notified within twelve months of the date of the official publication mentioned in paragraph (1).

Article 44. Final provisions

(1) The amended law of 31 March 1979 governing the usage of name data in computer processing is repealed.

(2) In so far as they are not contrary to the provisions of this Law, regulations made in performance of the aforementioned amended Law of 31 March 1979 will remain in force until they are replaced by new provisions.

Article 45. Effectiveness

This law will be effective on the first day of the fourth month following its publication in the *Mémorial*. By way of derogation to the above, Articles 34, 35, 36 and 37 will be effective three days after publication of this Law in the *Mémorial*.

Communications Minister,

François Biltgen

Justice Minister

Luc Frieden

Minister for Public Services

and Administrative Reform

Lydie Polfer

Cabasson, 2 August 2002.

Henri

Parliamentary document 4735; ordinary session 2000-2001 and 2001-2002; directive 95/46/EC.