

Opinion of the National Commission for Data Protection relating to the draft Grand-Ducal regulation on the organization of internal systems prison centers.

Deliberation n°32/AV27/2021 of October 1, 2021.

In accordance with article 57, paragraph I, letter (c) of regulation n° 2016/679 of April 27, 2016 on the protection of individuals with regard to the processing of personal data personal data and on the free movement of such data, and repealing Directive 95/46/EC (Regulation General on Data Protection) (hereinafter the "GDPR"), to which Article 7 of the Law of August 1, 2018 on the organization of the National Commission for the Protection of data and the general data protection regime, the National Commission for the data protection (hereinafter referred to as the "National Commission" or the "CNPD") " advises, in accordance with the law of the Member State, the national parliament, the government and other institutions and bodies on legislative and administrative measures relating the protection of the rights and freedoms of natural persons with regard to processing". By elsewhere, in accordance with article 8 point 3° of the said law of 1 August 2018 (transposing into law national Article 46, paragraph 1, letter (c) of Directive (EU) No 2016/680), the CNPD "advises the Chamber of Deputies, the Government and other institutions and organizations in the subject of legislative and administrative measures relating to the protection of the rights and freedoms of natural persons with regard to the processing of personal data".

By letter dated February 8, 2021, the Minister of Justice invited the Commission national authority to decide on the draft Grand-Ducal regulation on the organization of prisons (hereinafter the "draft Grand-Ducal regulation").

By letter dated June 16, 2021, the Minister of Justice invited the Commission national authority to decide on the government amendment relating to the same project.

According to the explanatory memorandum, the purpose of the draft Grand-Ducal regulation is to "fix the rules relating to the prison regime of Luxembourg prisons" and will repeal the

amended grand-ducal regulation of 24 March 1989 concerning the administration and the internal system
penal institutions.

The authors of the draft Grand-Ducal regulation further specify that in the draft
Grand-ducal regulation “a chapter dedicated to the processing of personal data of
detained. Following the entry into force of data protection legislation
personal data strict rules regarding the processing of data apply. He returns
the data controller to set the rules and general conditions”.

The National Commission will limit its observations to questions relating to the protection of
personal data, raised by Chapter VIII and Articles 103 and 121 of the draft
of Grand-Ducal regulation.

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I.

On the processing of data carried out by the prison administration

The purpose of article 127, paragraph (1), of the draft Grand-Ducal regulation is to list the
categories of data that would be processed by the prison administration as part of its
missions referred to in article 3 of the law of 20 July 2018 reforming the administration
prison.

1. Preliminary remarks

It is apparent from the commentary to the articles that the data listed in paragraph (1) of article
127 of the bill "were already dealt with on the basis of article 43 of the regulation of March 24, 1989.
In view of the provisions of the law of August 1, 2018 relating to the protection of persons
with regard to the processing of personal data in criminal matters as well as

that in terms of national security, it was considered useful first of all to sort

in the registers listed in article 43 of the aforementioned 1989 regulations, whereas certain

registers no longer exist, and moreover, to list in detail all

the data which will henceforth be processed by the prison administration”.

Article 43 of the Grand-Ducal regulation of 24 March 1989 concerning the administration and the

prison establishments, which will be repealed by the draft Grand-Ducal regulation,

listed 16 registers namely:

the register of defendants who are under warrant of arrest, warrant of committal

the sentence register;

1.

the register of persons placed at the disposal of the Government for

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vagrancy and begging or by virtue of a measure taken in execution of article 15 of

the law of March 28, 1972 concerning the entry and residence of foreigners;

3.

or arrest warrant;

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regulation; and

16.

the register of minors placed in the disciplinary section;

the register of military detainees;

the register of the daily state of the prison population;

the register of punishments;

the register of cash deposited by detainees and

the alphabetical directory of detainees;

the alphabetical directory of prisoners' correspondence;

the individual files of detainees;

the register of declarations of opposition;

the register of declarations of appeal and appeals in cassation;

the enlargement agenda;

the register mentioning the voluntary prisoners according to article 332 of the

the register of domicile elections.

From now on, the draft Grand-Ducal regulation only seems to provide for 6, namely:

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the admission register';

See article 128 of the draft Grand-Ducal regulation

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the 1ndiv1due12 folder;

the social integration file³;

the register of excavations⁴;

the register referred to in Article 123 of the draft Grand-Ducal regulation; and

the register of visits⁵.

Furthermore, the CNPD understands that some of the categories of data listed in article 127, paragraph (1), of the draft Grand-Ducal regulation are intended to be found in the registers aforementioned.

2. About the data controller

According to the provisions of Article 127, paragraph (1), of the draft Grand-Ducal regulation, the prison administration will process the data listed there. The National Commission therefore understands that the prison administration should be qualified as responsible for the treatment.

According to article 4 of the law of July 20, 2018 reforming the prison administration, the prison administration includes the management, the penitentiary center of Uerschterhaff, the Luxembourg penitentiary center, the Givenich penitentiary center and the training institute prison.

Since the prison administration encompasses several bodies, the Commission national authority wonders whether the bodies making it up would not be, for certain data processing data, to be qualified as separate data controllers.

Indeed, and by way of example, Articles 128 and 129 of the draft Grand-Ducal regulation refer à registers which would be kept by the registry of the penitentiary centres. Holding such

registers by penitentiary centers suggests that the latter should be qualified as data controllers.

Clarifications on this subject should be made by the authors of the draft regulation grand-ducal.

3. On the purposes of the processing of personal data

As previously noted, article 127 of the draft Grand-Ducal regulation aims to list in paragraph (1) the categories of data which would be processed by the prison administration in accordance with article 3, paragraph (4), of the law of July 20, 2018 reforming prison administration.

2 See article 129 of the draft Grand-Ducal regulation

3 See article 130 of the draft Grand-Ducal regulation

See article 121 of the draft Grand-Ducal regulation

5 See article 103 of the draft Grand-Ducal regulation

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Article 3, paragraph (4), of the law of July 20, 2018 reforming the prison administration provides that "The prison administration is authorized to process personal data personnel relating to the persons for whom it is responsible and those relating to offences, convictions and other court decisions. These data may only be processed for the purpose purposes referred to in Articles 1(2) and 37".

Article 1, paragraph (2), of the aforementioned law provides in particular that "[The objective of the implementation of custodial sentences is to reconcile the protection of society, the punishment of

condemned and the interests of the victim with the need to prepare the insertion of the person detained in order to enable him to lead a responsible life and to prevent the commission of new offences. ".

Article 37, paragraph (1), of the aforementioned law further provides that "access by any person, including those referred to in Article 24, a penitentiary center may be subject to a control security and safety of the person, his identity, his luggage and personal effects, as well as the vehicle and its load when this vehicle enters the premises of the center prison. This check cannot relate to files, documents or exhibits which are covered by professional secrecy or which fall under the secrecy of the investigation. The door-documents or other containers in which the records, documents or exhibits are located concerned can only be the subject of a brief visual check to ascertain that they do not contain objects, materials and substances prohibited by law or prohibited by Grand-ducal regulation taken on the basis of article 36, paragraph 2, excluding any control which would make it possible to become acquainted with the contents of the files, documents or exhibits concerned".

Furthermore, it should be noted that it results from the preparatory work of the law of August 1, 2018 on the protection of natural persons with regard to processing in criminal matters and that in terms of national security that "The prison administration, for its part, will be sometimes subject to the provisions of Regulation (EU) No 2016/679, sometimes to those of the future law transposing Directive (EU) No 2016/680, depending on the exact purpose of the processing of personal data: if it concerns data that the prison administration processes for implement the decisions taken in the context of the execution of sentences, the provisions of the future law will apply; on the other hand, if it concerns processing of personal data staff whose purpose is the simple management of penitentiary centres, such as the management of entry or visitor badges, Regulation (EU) No 2016/679 will be of application. ".

Therefore, in order to determine the provisions that would apply to the processing of personal data carried out by the prison administration within the framework of the draft Grand-Ducal regulation, particular attention should be paid to the purposes which would be pursued by the controller.

However, it is to be regretted that the authors of the draft Grand-Ducal regulation refer only to the law of August 1, 2018 on the protection of natural persons with regard to processing in criminal matters as well as in matters of national security.

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Indeed, the CNPD considers that the processing carried out within the framework of Article 37, paragraph (1), of the law of July 20, 2018 reforming the prison administration should be subject to the provisions of the GDPR.

4. On the categories of data collected by "the administration penitentiary »

The CNPD welcomes the fact that article 127, paragraph (1) of the draft Grand-Ducal regulation lists the categories of data to be processed by the controller.

However, certain inaccuracies remain, so that the National Commission intends make the following comments.

A. On data relating to minors

The CNPD understands that personal data relating to minors would be likely to be processed.

Indeed, it results from article 6 of the modified law of August 10, 1992 relating to the protection of the youth, that a minor may be placed in a State disciplinary establishment, either at the

Luxembourg Penitentiary Centre, if a placement measure in an establishment

ordinary care, nurturing or preservation is inadequate because of poor

conduct or dangerous behavior of the minor in question.

However, the attention of the authors of the draft Grand-Ducal regulation should be drawn to recital

50 of the Directive on the protection of individuals with regard to the processing of

personal data in criminal matters as well as in matters of national security which

states that "the measures taken by the controller should include

establishing and implementing specific safeguards for data processing

of a personal nature relating to vulnerable natural persons such as children".

B. On special categories of data

Article 127, paragraph (1), of the draft Grand-Ducal regulation provides in particular that

"the prison administration can process (...) 2° any documentation noting injuries

visible suffered prior to his admission to the penitentiary centre;

11° the names and

first names of persons to be notified in the event of (...) serious illness or death; 12° the

information contained in the psychological, psychosocial and

psychotherapy of detainees; 13° the information contained in the reports

of expertise".

The CNPD understands that the aforementioned expert reports refer to expert reports

referred to in Article 17, paragraph (1), of the law of 20 July 2018 reforming the administration

penitentiary which stipulates that "The prison administration receives by right, at the time of

detention of a person, copy of the judicial decision on the basis of which the

detention is carried out, as well as expert reports concerning the detainee".

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The authors of Bill No. 7042 reforming prison administration had clarified with regard to these reports that "[t]his main target is the reports relating to the physical and mental health of the person concerned".

The information contained in such reports is therefore likely to relate to the physical and mental health of the prisoner concerned.

Thus, the aforementioned information referred to in Article 127, paragraph (1), of the draft regulation grand-ducal are likely to be qualified as special categories of data in the insofar as these are likely to relate to the prisoner's state of health.

Furthermore, if such processing is carried out in the context of the implementation of decisions taken within the framework of the execution of sentences then the provisions of article 9 of the law of the first August 2018 on the protection of natural persons with regard to the processing of personal data of a personal nature in criminal matters as well as in matters of national security will be applicable. On the other hand, if the processing is carried out for the purposes of managing the centers prisons, then the provisions of article 9 of the GDPR will apply.

has. On compliance with the specific legal provisions relating to the categories particular data

It should be noted that the processing of special categories of data requires a specific protection and are subject to stricter requirements.

Thus, if the law of August 1, 2018 relating to the protection of natural persons with regard to the processing of personal data in criminal matters as well as in matters of security national authority is intended to apply, then the provisions provided for in its article 9 will be applicable.

where authorized by European Union law or pursuant to this

These provisions provide in particular that such processing is authorized "only in

case of absolute necessity, subject to appropriate safeguards for the rights and freedoms of the

data subject, and only:

has)

law or another provision of Luxembourg law;

b)

physical, or

vs)

concerned person ".

when the processing relates to data clearly made public by the

to protect the vital interests of the data subject or of another person

Chapter VIII of the draft Grand-Ducal regulation as well as the comments of the articles

however, do not specify what would be the appropriate safeguards that would be implemented

by the controller.

The CNPD considers it important, given the nature of the data in question, that

such guarantees are provided by the controller.

6 See bill, parliamentary document n°7042/00, Ad article /8, page 33.

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In addition, if the GDPR is intended to apply then the provisions of Article 9 of the GDPR

will apply.

This article provides that in principle such processing of data is prohibited unless one of the

conditions referred to in paragraph (2) of the aforementioned article are fulfilled.

In the present case, the National Commission considers that such data processing

could be based on Article 9, paragraph (2), letter h) of the GDPR which provides that "the

treatment is necessary for the purposes of preventive medicine or occupational medicine, the assessment of the worker's capacity for work, of medical diagnoses, of the treatment health or social burden, or the management of health care systems and services or social protection on the basis of Union law, the law of a Member State or pursuant to a contract concluded with a healthcare professional and subject to the conditions and guarantees referred to in paragraph 3".

Thus, the authors of the draft Grand-Ducal regulation should pay particular attention to the "appropriate and specific measures to safeguard the rights and freedoms of the person data subject" which should be implemented by the data controller in the context of processing of special categories of data.

b. On the origin of special categories of data

i. On "the information contained in the psychological follow-up assessments, psychosocial and psychotherapeutic

Although the draft Grand-Ducal regulation specifies that the "information contained in the psychological, psychosocial and psychotherapeutic follow-up assessments" appear in the file individual⁷ and in the prisoner's social integration file⁸, there is reason to question the origin "information contained in the psychological, psychosocial and psychotherapeutics".

The CNPD wonders whether the "information contained in the psychological follow-up assessments, psychosocial and psychotherapeutic treatments" would come from the prisoner's medical file.

If this were to be the case, it should be noted that Article 26, paragraph (4), of the law of 20 July 2018 on the reform of the penitentiary administration provides that "plenty of health care services health are documented by the inmate's attending physician in a medical record. Without prejudice to the professional secrecy referred to in article 458 of the Penal Code or any other obligation of professional confidentiality, the detainee's attending physician and all other professionals, where applicable, bound by professional secrecy or an obligation to

confidentiality may exchange information with the prison administration

essential when it is in the interests of the prisoner concerned, other prisoners, staff

or the safety, sanitation of the penitentiary center or other people with

Article 129 of the draft Grand-Ducal regulation

8 Article 130 of the draft Grand-Ducal regulation

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physical contact with detainees, including in relation to disease control

contagious”.

In the bill relating to the law of 20 July 2018 reforming the administration

penitentiary the authors of the bill had noted that the said legal provisions were aimed

à "confer legal value on the prisoner's right to benefit from the care he needs

in accordance with his state of physical and mental health" and to create "a legal basis

allowing a better exchange of information this time between doctors and other

stakeholders, where applicable, bound by professional secrecy or an obligation of confidentiality

and prison administration. (...) paragraph 4 under consideration provides a legal provision

aimed at enabling the actors involved to communicate better with each other and to exchange

information necessary for the best care of the detainee/patient. (...) It is important to note à

In this regard, there is in no way a question of imposing an exchange of information on anyone

whatever, but on the contrary to create a legal basis aimed at allowing an exchange of information

when their holder is convinced that an exchange is conducive to the health of the prisoner/his

patient. The wording „Without prejudice to professional secrecy..." therefore aims to emphasize that the

actors involved are not released from their obligations of secrecy and/or confidentiality, but

that they are allowed and encouraged, for example, to seek consent more actively of their patient in order to exchange information”⁹.

Therefore, in such a case, the processing of data relating to "information contained in the psychological, psychosocial and psychotherapeutic follow-up assessments of prisoners" should be done in accordance with the provisions of Article 26, paragraph (4) of the aforementioned law.

In any case, the National Commission considers that the prison administration should not not have access to all the information contained in the medical file and therefore to all of the “information contained in the psychological, psychosocial and psychotherapy of prisoners”.

Indeed, access to such data should be limited to "essential information when it is in the interests of the prisoner concerned, other prisoners, staff or security, the sanitation of the penitentiary center or of other persons having physical contact with prisoners, including with regard to the fight against contagious diseases".

ii.

On the information contained in the expert reports

The CNPD understands that the expert reports would be sent by the State Attorney General to the prison administration in order to enable the latter to have the information which are necessary for the execution of its missions.

Indeed, the authors of Bill No. 7042 reforming the prison administration specified in this respect that the information contained in the expert reports relating to the physical and mental health of the detainee constitutes "essential information for g Parliamentary document n°7042//00, Ad article 26, p. 39 to 41.

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the prison administration so that it can fulfill its missions with regard to this prisoner

in accordance in particular with Article 1 (2) and Article 3 (3) and (4)'10.

Without prejudging the need to transmit such information, there is reason to wonder about

the retention and subsequent access to such data within the prison administration while

that it appears from article 130 of the draft Grand-Ducal regulation that the latter would have

intended to be kept in the social integration file of each prisoner.

The CNPD will come back to this below in points III and IV of this opinion.

iii. Final remarks

It should be noted that article 44 of the Grand-Ducal regulation of 24 March 1989 concerning

the administration and the internal regime of penitentiary establishments, which will be repealed by the

draft Grand-Ducal regulation, provides that the personal file of the detainee "includes the

documents relating to the physical and mental health of the detainee kept in a separate file

to the infirmary" and that "The medical part of the file is sent in a sealed envelope to the doctor of

the establishment of destination".

Insofar as the aforementioned provisions of Article 44 of the Grand-Ducal Regulation of 24 March

1989 concerning the administration and the internal regime of penitentiary establishments are not

not taken up by the draft Grand-Ducal regulation, the CNPD considers that such measures

should be included in the legal device under notice and remain applicable.

Thus, the National Commission wonders whether the "information contained in the balance sheets

psychological, psychosocial and psychotherapeutic follow-up of detainees" must both feature

in the individual file and in the social integration file, which are two different registers,

one held at the registry of the penitentiary center and the other held at the psycho-social and socio-

educative.

Would it not be relevant, given the nature of the data in question, that such

information appears only in the detainee's medical file and is in the hands of the concerned health professional?

C. On the "information contained in the prisoner's criminal record"

Article 127, paragraph (1), point 14° of the draft Grand-Ducal regulation provides that the prison administration can process "the information contained in the criminal record of the detained ".

For a better understanding of the data covered by the aforementioned provisions, it is should specify which bulletin number is concerned and refer expressly to one of the bulletins covered by the amended law of 29 March 2013 relating to the organization of the criminal record, whereas in the Luxembourg legal order the communication of information relating to court decisions is made by issuing extracts from the criminal record in accordance with the said law.

10 Parliamentary document n°7042/00, Ad article 18, page 33.

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In addition, it would be advisable to ensure the good articulation between the provisions under opinion with those of article 17, paragraph (2), of the law of July 20, 2018 reforming the administration prison.

Indeed, said article provides that "Without derogation from article 6 of the amended law of 29 March 2013 relating to the organization of the criminal record, bulletin n°1 of the criminal record is issued on reasoned request to the prison administration for all prisoners. Concerning the prisoners who are nationals of another Member State of the European Union or of a third country, the prison administration may send a reasoned request to the State Attorney General in with a view to obtaining an extract from the criminal record of the competent authority of the Member State whose

the detainee concerned has the nationality.

On reasoned request, the prison administration may ask the public prosecutor of State copies of rulings and judgments previously rendered in criminal matters with regard to a held by the national courts, as well as by the courts of another Member State of the European Union or a third country. ".

11.

On the registers covered by the draft Grand-Ducal regulation

As stated above in point 1.1. of this opinion, the draft Grand-Ducal regulation provides for the keeping of 6 registers, namely:

the admission register;

the individual file;

the social integration file;

the register of excavations;

the register referred to in Article 123 of the draft Grand-Ducal regulation; and

the register of visits.

The authors of the draft Grand-Ducal regulation are to be congratulated for having specified for each of the registers what personal data would appear therein.

Just as the authors of the bill should be commended for having specified in Articles 128 and 129 that the admission register as well as the individual file of each detainee are kept at the registry of the penitentiary center.

Article 130 specifies that the social integration file of each detainee is kept at the psychosocial and socio-educational.

Such details would also deserve to be provided for the register of excavations, the register referred to in article 123 of the draft Grand-Ducal regulation as well as the register of visits.

Furthermore, it is further specified that the admissions register, the individual file and the file of social integration mentioned above are likely to be kept in electronic form". In this regard,

the authors of the draft Grand-Ducal regulation specify in particular that these registers may

11 See Articles 128, paragraph (3), 129, paragraph (2) and 130, paragraph (2) of the draft Grand-Ducal regulation.

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be kept in electronic form in order "to make optimal use of new technologies

available".

In the absence of any clarification in the draft Grand-Ducal regulation and in the comments of the

articles as to the procedures for keeping such electronic registers, the National Commission

is not in a position to assess the possible problems relating to the protection of

data that could, if necessary, arise in this context.

Finally, in the absence of details on this subject in the device under opinion, it is necessary to ask

whether such measures would apply, where appropriate, to the register of excavations, to the register referred to in

article 123 of the draft Grand-Ducal regulation as well as in the register of visits.

111.

On access to data collected by the prison administration and on the

processing security

In accordance with the principle of integrity and confidentiality, data must be treated

"in such a way as to ensure appropriate security of personal data, including the

protection against unauthorized or unlawful processing and against loss, destruction or damage

of accidental origin, using appropriate technical or organizational measures.

The controller and the processor must implement the technical measures and organizational measures to ensure a level of security appropriate to the risk¹³, in particular with regard to the processing of special categories of data – character person¹⁴.

Such measures must be implemented in order to avoid in particular unauthorized access data, data leaks or unwanted changes.

The authors of the draft Grand-Ducal regulation are to be congratulated for having provided in article 127, paragraph (2) of the draft Grand-Ducal regulation that "the access of members of the administration prison to the personal data referred to in paragraph 1 is strictly limited to those who justify a professional interest requiring them to process this data in order to carry out the missions provided for in article 3 of the law of 20 July 2018 reforming the administration".

Indeed, the National Commission considers it important that only people who need it in the performance of their professional duties and tasks are entitled to have access to the necessary data. In this context, it is strongly recommended to define a access management policy, in order to be able to identify the person or service from the start competent person who would have access to the data, and to what specific data this person or service would have access. All the more so insofar as special categories of data would have to be processed.

12 Article 5, paragraph (1), letter f) of the GDPR and article 3, paragraph (1), letter f) of the law of August 5, 2018 of August 1, 2018 relating the protection of individuals with regard to the processing of personal data in criminal matters and in matters of national security.

Article 32 of the GDPR and Article 28, paragraph (1) of the law of August 2018 on the protection of natural persons with regard to the processing of personal data in criminal matters and in matters of national security.

14 Article 28, paragraph (1) of the law of 1 August 2018 on the protection of natural persons with regard to the processing of personal data in criminal matters as well as in matters of national security.

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The data controller must therefore put in place such measures in order to ensure the confidentiality and security of such data, including in particular a logging system (i.e. a recording in "log files" or "logs") of the activities of the users, anomalies and security-related events.

Furthermore, if electronic records were to be kept, and if such processing falls within the scope of the law of August 1, 2018 relating to data processing in terms of criminal as well as national security matters, the controller should ensure the compliance with the provisions of Article 28, paragraph (2) and Article 24 of the aforementioned law.

Article 24 of the aforementioned law requires in particular that the data controller defines the profiles and methods of access and carry out regular checks of the logs for the purposes, in particular, "self-monitoring [and] guaranteeing the integrity and security of data of a personal character". In such cases, the data controller should therefore proceed to regular and proactive log reviews, particularly in relation to measures and procedures to be put in place to regularly test, analyze and evaluate the effectiveness of the measures technical and organizational to ensure the security of the processing in accordance with Article 28 of said law.

IV.

On the data retention period

In accordance with the principle of limitation of storage, personal data

must be kept "in a form allowing the identification of the persons concerned

for a period not exceeding that necessary with regard to the purposes for which they

are processed"15.

If the authors of the draft Grand-Ducal regulation are to be congratulated for having provided in article 132

that "[ä] the release of the detainee, the files provided for in articles 129 and 130 are filed in the

records of the registry to be kept there for a maximum period of thirty years" and that in "case

of new detention occurring within the period referred to in paragraph 1, the files are

reproduced to be continued. In the absence of a new detention within this period, the data

are destroyed or anonymized to be used for statistical or historical purposes".

However, it regrets that the criteria justifying such a duration are not specified in the

commentary on the articles, so that it is not in a position to assess whether such a duration

appears proportionate in the present case.

15 Article 5, paragraph (1), letter e) of the GDPR and article 3, paragraph (1), letter e) of the law of 1 August 2018 on the protection

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Thus decided in Belvaux on October 1, 2021.

The National Data Protection Commission

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