

Deliberation 2021-047 of April 15, 2021 National Commission for Computing and Liberties Nature of the deliberation: Opinion

Legal status: In force Date of publication on Légifrance: Tuesday March 22, 2022 Deliberation n° 2021-047 of April 15, 2021 relating to a draft decree supplementing the national directory mentioned in Article R. 123-220 of the Commercial Code as part of the implementation of a digital identity for companies (request for opinion no. 20017229) The National Commission for Computing and des libertés, Seizure by the Ministry of the Economy, Finance and Recovery of a request for an opinion on a draft decree supplementing the national directory mentioned in Article R. 123-220 of the Commercial Code in the framework of the implementation of a digital corporate identity; Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data staff and to the free movement of such data, and repealing Directive 95/46/EC (general regulation on data protection); Having regard to law n° 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms , in particular its article 8-I-4°-a); On the proposal of Mr. Philippe-Pierre CABOURDIN, Commissioner, and after having heard the observations of Mr. Benjamin TOUZANNE, Government Commissioner, Issues the following opinion: Commission was seized, on October 6, 2020, on the basis of Article 8-I-4°-a) of the law of January 6, 1978 as amended, of the draft decree in Council of State supplementing the national directory mentioned in Article R. 123-220 of the Commercial Code as part of the establishment of a digital identity for companies. The directory mentioned in Article R. 123-220 of the Commercial Code is the national directory of identification of companies and establishments. Established by Articles R. 123-220 to R. 123-234 of the Commercial Code, the national directory for the identification of companies and establishments concerns more specifically natural persons independently exercising a self-employed profession, legal persons of public or private law, institutions and services of the State and local authorities, as well as their establishments, when they come under the register of commerce and companies, the directory of trades or when they employ salaried staff, are subject to tax obligations or benefit from public financial transfers. The management of this directory is entrusted to and is carried out through the Computer System for the Directory of Enterprises and Establishments (SIRENE). This directory is more commonly called "SIRENE directory". SIRENE processing is governed by different provisions found at different levels of standards. In the present case, the Commission notes that it is seized of a draft decree in Council of State supplementing the SIRENE directory in the context of the establishment of a digital identity for companies. It notes that it is seized for the first time of a decree modifying this processing since the entry into force of Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of natural persons

at with regard to the processing of personal data (GDPR). It considers that the draft decree should therefore aim in particular to bring this processing into compliance with the new regulations as regards its scope and that the provisions in A. 123-81 to A. 123-96 of the Code of commerce will also have to be updated accordingly. identification of natural persons (RNIPP) in order to verify the civil status of the natural person managers of legal persons registered in the SIRENE directory. Such a modification does not call for any comments from the Commission insofar as it is currently provided for, in 2° of F of Article 2 of Decree No. 2019-341 of April 19, 2019 relating to the implementation of processing involving the use of the RNIPP registration number or requiring the consultation of this directory, that INSEE may have access to the RNIPP for the management of the SIRENE directory. The Commission notes that the notice of the draft decree indicates that the envisaged modifications of the SIRENE directory would make it possible, among other things, to ensure the implementation of the digital identity of companies by means of "ProConnect", presented as a device similar to the "FranceConnect" teleservice, for companies. In this regard, the Commission notes that the draft decree does not include any provision to this effect and that it is not informed of the "ProConnect" teleservice. Finally, the Commission considers that the document entitled "Compliance analysis file relating to the protection of personal data - SIRENE processing" which was sent to it constitutes a data protection impact assessment (DPIA) within the meaning of Article 35 of the GDPR. Finally, the Commission notes that, according to the Ministry, the mere fact that the processing is carried out on a large scale does not justify carrying out a DPIA. However, it observes that the SIRENE processing is in particular likely to contain highly personal data. Under these conditions, the Commission considers that a DPIA should be transmitted to it in the event that it reveals high residual risks. In this context, the draft decree calls for the following observations. On the legality and new purposes of the SIRENEA processing As a preliminary point, with regard to the legal basis relating to SIRENE processing as it is planned to be modified, the Commission notes that the Ministry intends to avail itself of the legal obligation referred to in c) of 1 of article 6 of the GDPR. It considers, in general and taking into account the effects attached to the legal basis provided for by these provisions, in particular on the rights of the persons concerned, that it is up to the data controller to determine which one he intends, in this case, to prevail. The Commission considers that it follows in particular from an examination of the provisions of Articles R. 123-220 to R. 123-334 of the Commercial Code that the performance of a mission in the public interest or relating to the exercise of the public authority vested in the data controller appears to be more appropriate as a legal basis for the processing. in Article A. 123-87 of the same code. The Commission observes that Article 1 of the draft decree provides for amending the first paragraph of Article R. 123-220 of the Commercial

Code in order to add to the list of persons to be entered in the SIRENE directory "natural persons with specific tax obligations".

It takes note of the clarifications provided by the Ministry according to which this category of persons targets private employers who collect withholding tax at source and non-professional furnished rental companies. The Commission considers that this new purpose is not sufficiently precise with regard to the provisions of point b) of 1 of Article 5 of the GDPR. It therefore considers that the draft decree must be supplemented, by explicitly mentioning "individual employers collecting withholding tax and non-professional rental companies" for the purposes of the processing. It recalls that the relevant provisions of Article A. 123-87 of the Commercial Code will also have to be amended accordingly. On the data collected The current Article R. 123-222 of the Commercial Code provides in particular that only data of a personnel relating to the name, surname, first names, legal address, date and place of birth, date of any cessation of activity of natural persons registered in the SIRENE directory are collected. The draft decree plans to modify this article in order to provide for the collection of the following personal data: for natural persons independently exercising a self-employed profession and natural persons with specific tax obligations: the name, name of use if applicable, pseudonym if applicable, first names, legal address, sex, nationality, date and place of birth, date of their possible death, date of their possible cessation of activity, e-mail address and possibly mobile telephone number; for the legal representatives of legal persons governed by private law: the name, usual name if applicable, pseudonym if applicable, first names, address, sex, nationality, date and place of birth, designation of the contact person(s) with administration among the legal representatives as well as their contact e-mail address and possibly their mobile telephone number. On the one hand, the Commission notes that the collection of all of this data will be new for the legal representatives of legal persons governed by private law and for natural persons with specific tax obligations. On the other hand, it notes that the collection of data relating to the pseudonym, sex, nationality, address, date of any death, e-mail address and possibly telephone number, constitutes an extension of the data collected relating to natural persons exercising in a self-employed profession. The Commission observes that such a modification would have an impact on a large number of people insofar as the register would contain, in addition to the personal data of natural persons exercising a self-employed profession on a self-employed basis, those legal representatives of legal persons under private law as well as those of natural persons with specific tax obligations. The Commission also notes that INSEE has planned to import into the SIRENE directory the data relating to the legal representatives of companies for the period from 2012 to 2020 in order to avoid companies having to declare their legal representatives again. It was specified by the ministry that this importation will be done using data that

INSEE has already received as part of business formalities but which had not previously been subject to any other processing. clarifications provided by the Ministry that the collection of this data would aim, among other things, to have identity elements making it possible to verify and certify said identity at the RNIPP and to contact companies in a dematerialized way. However, the Commission wonders whether the collection of certain data, in particular the nationality and date of death of natural persons independently exercising a self-employed profession and natural persons with specific tax obligations, would make it possible to "limit the risk of fraud". In any event, and without commenting on the objective pursued, the Commission notes that this purpose is not provided for by the provisions relating to this processing. On the rights of the persons concerned Firstly, with regard to the measures taken to ensure the information of the persons concerned, the ministry indicated that the individual information of the persons will be ensured in particular via the CERFA forms of formalities for the creation and modification of companies, natural persons or legal persons, in very general terms. Provision is also made for general public information to be provided on the "Protection of personal data" page of the INSEE website. The Commission points out that this information must be concise, transparent, understandable, easily accessible and provided in plain and simple terms, in accordance with Article 12 of the GDPR. It also recalls the importance of ensuring that the information of the persons concerned is complete and of high quality with regard to the requirements set out in Articles 13 and 14 of the GDPR and considers that the information notices should be supplemented accordingly. secondly, the Commission notes that the rights of individuals are not mentioned in the draft decree. It notes that the ministry has indicated that the rights of individuals will be integrated into the future draft decree supplementing the SIRENE directory. However, the Commission recommends that all the rights of the persons concerned and their methods of exercise be mentioned in this draft decree insofar as the reference to the decree is limited to the "methods of their registration in the directory and allocation of a unique identity number are defined by order of the ministers concerned "according to the last paragraph of article R. 123-220 of the commercial code. Thirdly, the Commission takes note of what the ministry intends to exclude the exercise of the right of opposition, except for the online dissemination of data. It recalls that such an option must meet the conditions provided for in Article 23 of the GDPR and Article 56 of the law of January 6, 1978 as amended. The Commission recalls in particular that the exclusion of the right to object must be expressly provided for and that this exclusion should be accompanied by the necessary safeguards. Under these conditions, the Commission considers that the draft decree will have to be supplemented on this point if the Ministry intends to apply Article 23 of the GDPR and Article 56 of the law of January 6, 1978 as amended. retention of data collected The

Commission notes from the clarifications provided by the ministry that the retention period for personal data is "unlimited" going "beyond the death or the cessation of any activity of the natural person". To justify this duration, the Ministry invokes Article R. 123-227 of the Commercial Code as well as the need to establish proof of the removal of the natural person and the departure of the managers of legal persons. the Commission recalls that the provisions of e) of 1 of Article 5 of the GDPR provide that personal data must be kept for a period not exceeding that necessary for the purposes for which they are processed. In view of the foregoing, the Commission requests that a retention period for the data be determined in accordance with the regulations in force. Finally, it notes that the Ministry has specified that the retention period will appear in the same decree which will mention the rights of the persons concerned by the SIRENE processing. However, the Commission considers that the retention period of the data collected should be mentioned in this draft decree, with regard to the reference to the decree provided for by the last paragraph of Article R. 123-220 of the Commercial Code. On the dissemination of data to the public As a preliminary point, it is recalled that the SIRENE directory is part of the reference databases of the public data service set up by law n ° 2016-1321 of October 7, 2016 for a digital Republic . Article L. 321-4 of the code of relations between the public and the administration provides for the provision of reference data to the public. Although the information in the SIRENE directory must be disseminated to the public, the Commission notes that certain personal data cannot however be the subject of such dissemination, within the framework of the present processing and without prejudice to other processing aimed at bringing to public knowledge of information such as the trade and companies register in accordance with Article L. 123-1 of the Commercial Code. Firstly, the Commission notes that no personal data relating to the legal representatives of the legal persons governed by private law may not be disseminated from the SIRENE directory. Secondly, the Commission notes that if certain personal data of the above-mentioned natural persons may be disseminated, in accordance with Article A. trade, the persons concerned may request, either directly during their formalities for creating or modifying their activity, or by letter addressed to the Director General of INSEE, that the information in the directory concerning them may not be used by third parties other than the organizations authorized under Article R. 123-224 or the administrations, for prospecting purposes, in particular commercial. It considers that this option of opposition is without prejudice to the application of the right of opposition provided for in article 21 of the GDPR, except that the ministry intends to apply the provisions of article 23 of the GDPR and of the article 56 of the amended law of 6 January 1978. Finally, concerning the reference to an order of the Prime Minister for the purpose of specifying as necessary the conditions and limits of application of this provision, the Commission takes note of the

commitment of the Ministry to modify the draft decree on this point in order to clarify the conditions of application of this provision directly within Article R. 123-232 of the Commercial Code.

On security measures

The Commission notes that access to SIRENE processing is done via the HTTPS protocol, which guarantees the confidentiality of the data exchanged as well as the authentication of the data controller. Regarding the use of this protocol, the Commission recommends using the most up-to-date version of TLS. In particular, it recalls that the TLS 1.0 and TLS 1.1 versions do not have RGS-compliant cryptographic functions. Finally, the Commission recommends the implementation of all the recommendations of the National Information Systems Security Agency (ANSSI) in this area, formalized in the document "Security recommendations relating to TLS", which was updated in March 2020 with version 1.2. The Commission takes note of the implementation of application and system logging. It recalls that the processing of these data is in principle for the sole purpose of detecting and preventing illegitimate operations on the main data. The ministry distinguishes the shelf life of its technical logs from that of its application logs. The retention period for technical logs, one year, complies with the recommendations of the Commission. The Commission recommends a retention period for the logs of at least six months if the data concerned is kept for at least six months. Thus, the retention period of less than six months for the application logs does not comply with the recommendations of the Commission with regard to this type of processing. As the chosen solution binds the person acting as contact on these aspects to a personal means of authentication, the Commission stresses the importance of ensuring that the process of modifying it is as fluid as possible, in order to limit the risks relating to the departure of the contact person from the organization. The Commission recalls that, given the nature of the data processed and the risks for individuals in the event of or the availability of the data, backup measures must imperatively be put in place and tested regularly. Finally, the data concerning many people and being kept for a very long duration, particular attention must be paid to the regular reassessment of the measures relating to the confidentiality of these. Subject to the previous observations, the security measures described by the data controller seem to comply with the security requirement provided by the provisions of f) of 1 of Article 5 and Article 32 of the GDPR.

risks.

The President

Marie-Laure DENIS