Deliberation 2022-028 of March 3, 2022 National Commission for Computing and Liberties Nature of the deliberation: Opinion Legal status: In force Date of publication on Légifrance: Friday April 15, 2022 Deliberation No. 2022-028 of March 3, 2022 providing an opinion on a draft orientation and programming law of the Ministry of the Interior (LOPMI) (request for opinion no. 22003455) The National Commission for Computing and Liberties, Seizure by the Minister of the Interior of a request for opinion concerning a draft orientation and programming law of the Ministry of the Interior (LOPMI); Having regard to law n ° 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms, and in particular its article 8-I-4° a); After having heard the report of Mrs Sophie LAMBREMON, Commissioner, and the observations of Mr Benjamin TOUZANNE, Government Commissioner, Issues the following opinion: The National Commission for Computing and Liberties (hereinafter "the Commission") was seized on February 14, 2022, as a matter of urgency, on the basis of article 8-I-4° a) of the amended law of January 6, 1978, articles 13 and 31 of a draft orientation and programming law for the Ministry of the Interior (hereinafter "the bill"). Draft article 13 aims to amend law no. 2018-697 of 3 August 2018 on the harmonization of the use of mobile cameras by public security authorities with a view, in particular, to perpetuating the possibility for personnel the prison administration to use mobile cameras. The draft article 31 aims to modify articles L. 232-1 and following of the internal security code (CSI) concerning the automated processing of data collected at the occasion of international travel, to allow the processing of travel data relating to "crew members", "on-board personnel", and "seafarers". The Commission regrets having to rule under urgent conditions on such developments, taking into account in particular the issues associated with the sustainability of the system provided for by the aforementioned law of 3 August 2018 and the extension of the categories of persons whose the data may be subject to processing on the basis of the provisions of the aforementioned CSI, and in particular of the impact on the privacy of the persons concerned which could result therefrom. More generally, and independently of the two articles to which it is seized, the Commission recalls the need to quickly provide a coherent, complete and sufficiently protective legal framework for the rights of individuals in the field of video surveillance. Indeed, many provisions of the CSI, which constitute the general legal framework in this area, are obsolete since the evolution of the regulations on the protection of personal data in 2018. They therefore do not allow data controllers to know the actual state of their obligations in this area or to the persons concerned to know how to exercise their rights. the use of mobile cameras by public security authorities (article 13 of the bill)Law n° 2018-697 of August 3, 2018 opens up, in its article 2, the possibility for prison administration personnel to use mobile cameras on an experimental basis. The conditions for this three-year experiment were

set by decree no. 2019-1427 of December 23, 2019 relating to the conditions for experimenting with the use of individual cameras by the surveillance personnel of the prison administration within the framework of their missions, taken after consulting the Commission. In the continuity of this experiment, the bill before the Commission intends to: perpetuate the device deployed on an experimental basis; specify that "the cameras are equipped technical devices making it possible to guarantee the integrity of the recordings until their deletion and the traceability of the consultations when they are carried out within the framework of the intervention ", which constitutes an additional legal guarantee; andreduce the retention period for recordings, set at six months in the context of the experiment, to three months. "permanent system providing for the other characteristics of the processing will be adopted after consulting the Commission. On the sustainability of the system Firstly, the Commission emphasizes that, in order to be able to decide on the sustainability of an experimental processing of personal data, it is necessary to have with the referral an assessment of the benefits derived from the experimental device, to compare them to the invasion of privacy implied by a generalization of the device. In this case, at its request, the Ministry sent an evaluation report of the experiment. This report must thus make it possible to assess whether the processing implemented on an experimental basis has made it possible to meet the purposes set by law. , namely "the prevention of incidents and escapes, the observation of offenses and the prosecution of their perpetrators by collecting evidence as well as the training and education of agents", and to assess the proportionality of the system. , the Commission observes that this experiment took place within the framework of surveillance missions for detainees placed in specific quarters (such as quarters for minors), interventions in prison establishments, hospital units and missions outside the penitentiary establishments. The Commission recalls having taken note, in its deliberation n° 2019-140 of December 5, 2019 providing an opinion on a draft decree relating to the implementation of the tr experimental treatment, that establishments for minors were excluded from the experiment. It thus stresses that the processing of data relating to minors must be the subject of specific justifications and precautions, be strictly necessary for the objectives pursued and accompanied by guarantees, and regrets that it has no indication to this effect.Secondly , the Commission notes that the report sent to Parliament for Parliament gives a mixed picture of the experiment conducted between October 2020 and July 2021. During this period, individual cameras were handed over 64,478 times to volunteer agents, 2,564 triggers were counted, and only 30 videos were used for the purposes of disciplinary or legal proceedings and for educational purposes. On the one hand, and without calling into question the competence of the personalities chosen to compose the evaluation committee, the Commission observes that it could have been enriched by the

presence of other profiles, which would have been likely to allow a more c of the system. On the other hand, it appears that the assessment of the experiment was partly established on the basis of questionnaires given to the agents, with a view to appreciating the feelings of the latter with regard to so many material aspects (breakdown rate, for example) and the effectiveness of the system in preventing incidents. In this regard, the Commission wonders about the reasons that led to not including, among the indicators retained, the evaluation of the perception of the system by detainees. It regrets this choice insofar as such an approach would have made it possible to better measure the dissuasive effect of the scheme. as facilitating the exercise of their missions. The use of the device does not seem, with regard to the feelings of the users, not to have a positive impact on the resolution of the incident or the situation which justifies starting the recording. On the other hand, the system has demonstrated its usefulness when proceedings are initiated following the incident (for evidentiary purposes in particular), as well as in terms of training officers and pedagogy. of the report that the effectiveness of the system would be diminished by the lack of acculturation of the agents concerned. While noting that training and awareness-raising actions have accompanied the deployment of the system, the Commission invites the Ministry, in the event that the processing is permanent, to adapt the content of these actions so as to raise the awareness of operators the risks and benefits of using mobile cameras. Finally, the Commission notes that of the thirty recordings used during the experiment, twenty-four were used for educational purposes. It thus notes that the recording of images and sounds allow the development of innovative educational materials and, thus, to meet the purposes set by law. Finally, the Commission observes that the planned processing is accompanied by guarantees, if acting in particular on the information of people. It nevertheless emphasizes that Article 2 of the aforementioned law provides that "a specific visual signal indicates whether the camera is recording" and that "the triggering of the recording is the subject of information to the persons recorded, except if the circumstances prohibit it". At the same time, article L. 241-1 of the CSI provides for a similar system with regard to the audiovisual recording, by means of individual cameras, of the interventions of national police officers and soldiers of the national gendarmerie. However, the Constitutional Council, in its decision n° 2021-817 DC of May 20, 2021, noted that if the aforementioned provision allows the triggering of the recording to be able, by exception, not to be the subject of this information when " the circumstances prohibit it", these circumstances cover the only cases where this information is "made impossible for purely material reasons and independent of the reasons for the intervention". Under these conditions, the Commission invites the Ministry to limit the cases in which the recording can be carried out without the knowledge of the person concerned to only cases in conformity with the

aforementioned decision. In this context, the Commission notes that if the device finds its usefulness for certain purposes (in particular for educational and training purposes, for the purpose of establishing offenses and prosecuting their perpetrators), it nevertheless recalls that, when the processing is likely to relate to data relating to minors, it will be necessary to provide appropriate safeguards, in particular with regard to information, in simple and appropriate terms, of the person concerned. On the retention period of recordings The bill reduces the retention period of audiovisual recordings by six to three months. The Commission recalls that, for the analogous device constituted by the use of individual cameras by national police officers and soldiers of the national gendarmerie, law n° 2022-52 of 24 January 2022 relating to criminal liability and internal security has reduced the retention period for recordings to one month. While the Commission initially wondered about the three-month period chosen by the ministry, it takes note of the clarifications provided relating to the operating requirements of penitentiary establishments, for in particular, to ensure the conduct and regularity of disciplinary procedures initiated against detainees. Under these conditions, it considers that this duration is not excessive with regard to the purposes pursued. On the modification of the legislative provisions of the CSI relating to the automated processing of data collected during international travel (article 31 of the bill) Articles L. 232-1 to L. 232-7-1 of the CSI currently in force authorize the implementation of various automated processing of personal data of passengers, collected during international travel: in order to " improving border control and combating illegal immigration", "preventing and repressing acts of terrorism as well as attacks on the fundamental interests of the Nation" with regard to the air, sea and rail sectors (for concerns the processing mentioned in Articles L.232-1 to L.232-6, on the basis of which the SETRADER file was created);"for the purposes of prevention and observation of certain offences, the collection of evidence of these offenses and the search for their perpetrators" with regard to the air sectors (articles L.232-7, on this basis of which the "API-PNR France" file was created) and shipping (article L.232-7-1) As a preliminary point, the Commission recalls that articles L. 232-1 to L. 232-7 of the CSI transpose Council Directive 2004/82/EC of 29 April 2004 concerning the obligation for carriers to communicate data relating to passengers (hereinafter "the API Directive") as well as Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offenses and serious crime (hereafter "the PNR Directive"). The API Directive, which only provides for the processing of data relating to passengers, specifies in one of its recitals that its provisions do not affect the freedom of Member States to impose additional obligations on carriers. The PNR Directive, which also provides for the processing of data relating to passengers only, does

not, on the other hand, contain any provisions expressly excluding the processing of data relating to other categories of persons, such as those relating to crew members The amendment envisaged by article 31 of the bill intends to extend the processing in question to data relating to "crew members", "on-board personnel" and "seafarers". The same would apply to the processing provided for in Article L. 232-7-1 of the CSI (maritime sector). While acknowledging that the scope of the processing authorized by Articles L. 232-1 to L. 232-7 of the CSI is broader than those imposed by the aforementioned directives, the Commission notes that the planned modifications would lead to a change in the nature of the processing already authorized on the basis of the legal provisions in force. The processing implemented in application of the CSI is in fact intended to use API data ("Advance Passenger Information", which corresponds to check-in and boarding data) and PNR data ("Passenger Name Record", which covers the data provided by travelers at the commercial reservation stage) of passengers collected by carriers during international travel. The addition of the processing of data relating to "crew members", "on-board personnel" and "seafarers" presents different characteristics of passengers: if the persons concerned are much fewer in number, and if their movements are are part of their professional activity, the journeys in question are particularly frequent (sometimes daily) and the data collected on these people will therefore be structurally more numerous and precise than for a passenger. With this in mind, the Commission points out that the planned changes of the aforementioned processing, of which it has already noted the extent and the damage that they could cause to the right to respect for private life and to the protection of personal data (see for example deliberation no. 2014-308 of July 17 2014 giving an opinion on a draft decree relating to the creation of a processing of personal data called "API-PNR France system"), are likely increase the volume of data processed and the number of data subjects and therefore create additional risks for the protection of rights and freedoms. Such an extension of the scope of processing can therefore only be accepted if it appears strictly necessary for the purposes of articles L. 232-1 et seq. of the CSI and that it provides sufficient guarantees with regard to compliance with the fundamental principles of the right to the protection of personal data. On the modification of articles L. 232-1 and L. 232-4 of the CSI (provisions on which SETRADER processing is based) The bill amends Articles L. 232-1 and L. 232-4 of the CSI relating to the transmission and processing of data relating to passengers in the air, rail and maritime sectors. This processing can be implemented with a view to improving border control and combating illegal immigration, as well as for the purposes of preventing and repressing acts of terrorism and attacks on the fundamental interests of the Nation. As regards, firstly, the need to process data relating to "crew members", "on-board personnel" and "seafarers" for the purposes of preventing and repressing acts of terrorism and

attacks to the fundamental interests of the Nation, the Commission notes that the proposed modification responds, according to the Ministry, to an operational need of the internal security forces with regard to proven cases of crew members presenting a risk to public security following radicalization , and which would be the same for all modes of transport. In view of the evidence produced, it does not call this assessment into question.Secondly, with regard to the processing of data relating to crew members, shipboard personnel and seafarers with a view to improving border control and fight against illegal immigration, the ministry argues that the declarations containing the data relating to the crew, transmitted upstream of the journeys, should allow, by linking with other databases having similar purposes, to identify suspected cases. It emphasizes that these people are subject to simplified checks, in particular pursuant to Regulation (EU) 2016/399 of 9 March 2016 concerning a Union code relating to the system of border crossings by persons (Schengen Borders Code) . The Commission does not call into question the operational interest of the proposed system but emphasizes that both European and international standards allow the processing, in certain cases, of data relating to crew members and seafarers. the ministry to ensure that there is no redundancy in the systems put in place and to ensure that the principle of data minimization is well respected. In view of the time allotted to it to issue its opinion, it was unable to carry out this examination. all the data relating to the movements of the persons concerned are processed, whether or not these movements are part of their professional activity. It therefore invites the Ministry to regularly ensure the proportionality of such a system, which depends on the demonstration that there is indeed a proven operational need with regard to the cases of attacks that have occurred or been foiled on the one hand, and the improvement of border controls and the fight against irregular immigration on the other hand.Fourthly, the Commission considers that data relating to crew members, shipboard personnel and seafarers should not be processed in the same way as data relating to passengers, in particular with regard to retention periods and categories of data processed. On the amendment of Articles L. 232-7 and L. 237-7-1 of the CSI Articles L. 232-7 and L. 232-7-1 of the CSI authorize the Minister of the Interior, the Minister of Defence, the Minister responsible for transport and the Minister responsible for customs to implement automated processing of personal data relating to passengers from air carriers (L. 232-7) or maritime (L. 232-7-1) "for the purposes of preventing and establishing certain offences, gathering evidence of these offenses and searching for their perpetrators". The draft law modifies these provisions in order to allow the transmission and processing of registration data relating to crew members and seafarers. The scope of offenses covered by these articles is however unchanged. considers that the processing can only appear necessary and proportionate if an operational need justifies such a change and only in the

event that security checks carried out in the context of the exercise of the professional activity of the crew members and people sea, are not sufficient to meet the aforementioned purposes. the search for their authors, the processing of data relating to crew members or seafarers. If these personnel are already likely to f area subject to security checks within the framework of their professional activity, with regard for example to the administrative investigations provided for by articles L. 114-2 of the CSI and L. 6342-3 of the transport code, the ministry emphasizes that there is no comparable insurance for personnel employed by foreign carriers, who would not be directly subject to these provisions. The Commission also takes note of the details provided on the provisions under which crew members are already subject to the collection of personal data for security measures and the issue of clearances and tickets for certain airport areas. With regard to these elements, without calling into question the operational usefulness of the system, it invites the Ministry to regularly assess the additional benefits that may be provided by the planned extension, with a view to meeting the purposes abovementioned.In addition to the amendments provided for by the draft law, the Commission finally recalls that it must, if necessary, be seized of the draft decree in Council of State issued pursuant to Article L.232-7-1 of the CSI.On the practical methods of implementing the processingThe Commission observes that the planned modifications will lead, for the categories of persons covered by the bill, to the processing of e their data, on the one hand in their capacity as crew members, on-board personnel or seafarers during business trips, and, on the other hand, as passengers on the occasion of international trips made outside of the exercise of their functions. The Commission is therefore wondering about the measures to be taken so that a request for rectification or erasure can be taken into account with regard to the data collected under these two different titles. It invites the Ministry to take the necessary measures to ensure full respect for people's rights. In view of the above observations, the Commission considers that if the Ministry intended to ratify the planned changes, specific regulatory provisions should be created to take into account the particular nature of the movements of the categories of data subjects and provide for appropriate safeguards with a view to ensuring a balance between the objectives sought and the protection of the privacy of the data subjects, for example by differentiating the durations or methods of data retention. If such special processing methods will have to be defined by regulation, the Commission considers that the draft law should provide for the principle. President Marie-Laure DENIS