

Deliberation 2021-011 of January 26, 2021 Commission Nationale de l'Informatique et des Libertés Nature of the deliberation: Opinion Legal status: In force Date of publication on Légifrance: Saturday February 20, 2021 Deliberation n° 2021-011 of January 26, 2021 providing an opinion on a proposal for law relating to global security The National Commission for Computing and Liberties, Seizure by the President of the Commission for Constitutional Laws, Legislation, Universal Suffrage, Regulations and General Administration of the Senate of a request for opinion on a bill relating to global security; 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 and to the free movement of such data, and repealing Directive 95/46/EC (GDPR); Having regard to Directive 2016/680 of the European Parliament and of the Council of April 27, 2016 relating to the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties, and the free circulation of these data and repealing framework decision 2008/977/JHA of the Council; Having regard to the internal security code, in particular titles IV and V of book II; 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); After having heard Mrs. Marie-Laure DENIS, president, in her report and Mr. Benjamin TOUZANNE, government commissioner, in his observations, Issues the following opinion: The National Commission for Data Processing and Liberties (hereinafter the Commission) was seized, on December 2, 2020, of the bill relating to global security (hereinafter the bill of law) by the president of the commission of the laws cons regulations, legislation, universal suffrage, regulations and general administration of the Senate, some of its provisions directly relating to the protection of personal data. This referral, addressed on the basis of article 8-I-4°a) of the amended law of January 6, 1978, demonstrates the desire to take into account the significant issues on certain provisions of the proposed law, in particular in the field of video. This bill aims to allow a large number of actors, both public and private, to be associated with the implementation of security policy on national territory, by modifying the prerogatives and missions that entrusted to them. It is part of a movement observed for many years aimed at increasing the use of video devices, in particular on the public highway and using increasingly efficient surveillance technologies. The Commission regrets, however, that the effectiveness of these systems with regard to the legitimate objectives of public order and security has never been rigorously assessed globally, and therefore considers that a mechanism for independent assessment of the relevance and the effectiveness of these systems is more necessary than ever, given the risks of infringement of individual freedoms. new, major stage of this movement. Beyond the

legal issues arising from this trend, the Commission underlines the ethical issues attached to the deployment, on the national territory, of tools inherently presenting risks for the privacy of individuals. The use of such mechanisms induces societal choices to which Parliament should pay particular attention and the consequences of which are not, in the medium or long term, fully identified at this time. For many years, the Commission has light – or even alerted – to the particular privacy issues raised by the use of drones, cameras on vehicles or people and so-called intelligent video or assisted video devices, while highlighting the weaknesses of the framework existing legal system. These questions, which are as complex as they are fundamental for our society, need to be tackled collectively, calmly and in a fully informed manner. The Commission recalls the need to ensure in all circumstances a fair balance between, on the one hand, the security of property and people and the essential efficiency of the action of the security forces in this regard and, on the other hand, the protection n privacy and personal data. It notes that several provisions of the bill aim to adapt the use of tools made available to security forces such as video protection devices, the recording of image or individual cameras, as well as to create a legal regime for capturing images by airborne means. The Commission underlines that such provisions constitute, for some, an improvement of the legal framework of measures sometimes already implemented. sufficiently protective of people's rights in terms of video surveillance. Indeed, many provisions of the Internal Security Code (CSI), which constitutes the general legal framework in this area, are obsolete since the evolution of the regulations on the protection of personal data in 2018. They do not therefore do not allow data controllers to know the actual status of their obligations in this area or data subjects to know how to exercise their rights. and nature of the devices used, which justifies a strict framework by the legislator, particularly with regard to devices allowing people to be identified. This is the case with the use of drones, for which the Commission had raised, as early as 2014, the risks to public freedoms and privacy inherent in the generalization of the use of devices that are inherently mobile and discreet. It therefore recalls the vigilance which must be exercised in order to ensure that the invasions of privacy which would be caused by the use of these various devices, once their necessity has been established, are strictly proportionate with regard to the aims pursued and that the necessary guarantees , both legal and technical, are made. It is this delicate balance that should be preserved. If such legislative provisions were to be adopted, the Commission will be vigilant as to the actual conditions for the implementation of this processing of personal data, when examining regulatory provisions which will be submitted to it then by the use of its powers of control. On the provisions relating to airborne cameras Article 22 of the bill aims to integrate a chapter relating to airborne cameras within the CSI in order to regulate their use, and in particular that of drones

(aircraft circulating without anyone on board), by law enforcement. This article determines the purposes and the conditions under which the State services contributing to internal security and national defence, the fire and rescue services, the military civil security formations, the fire brigade of Paris as well as the battalion of marine firefighters of Marseille can process images (capture, recording and transmission) from these devices. The provisions of the bill are not intended to regulate the use of civilian drones, which are subject to specific regulations. To date, and as the Commission has pointed out for several years (for example in its 2015 annual report), the legal framework for video does not allow such use by law enforcement. The urgent applications judge of the Council of State (order of May 18, 2020, req. no. 440442, 440445 and decision of December 20, 2020, req. no. 446155) thus ruled that it was not possible, in the lack of legislative or regulatory provision, to use drones to ensure compliance with the health rules in force during the deconfinement period or to monitor demonstrations on the public highway. The Commission, for its part, sanctioned the Ministry of the Interior for having unlawfully used drones equipped with cameras, and ordered it to resort to capturing personal data from drones only if a normative framework authorizing the implementation of such processing has been adopted. For several years now, the development and multiplication of these devices by public authorities have undoubtedly raised new and substantial issues in terms of privacy. The Commission thus solemnly draws the attention of the legislator to the change in nature and scope of this type of device compared to conventional video protection: it is not a question of implementing new fixed or static devices but of allowing the use of mobile devices, discreet by nature and whose elevated position allows them to film places that have hitherto been difficult to access or even prohibited for conventional cameras. The capture of images that they allow is therefore considerably expanded and, above all, can be individualized, by allowing the monitoring of people in their movements, without their knowledge and over a period that can be long. In addition, more than the cameras currently used, these surveillance devices are likely to influence the exercise by citizens of other fundamental freedoms (right to demonstrate, freedom of worship, freedom of expression). This paradigm shift, in terms of image capture by public authorities, should not be underestimated in the context of the rise, within our democracy, of a debate around the establishment of a so-called monitoring company. These new techniques for capturing images, until now symbols of the imaginations of a robotized world, are as fascinating as their use is worrying because of their specificities and their use in the public sphere. with regard to the purposes authorizing the use of this type of camera by public authorities in order to determine precisely – and necessarily very restrictively – the cases of use justifying the use of these devices. For these reasons, the Commission considers it highly desirable that the legislator makes the use of airborne cameras conditional

on prior experimentation, the duration of which would be limited in time and from which all the consequences should be drawn in a report which would be transmitted to Parliament and of which it would also be the recipient. cause, insofar as the use of airborne cameras or drones leads to the implementation of trafficking personal data, the Commission recalls that these devices must present strong guarantees with regard to the regulations provided for by the GDPR, directive 2016/680 of April 27, 2016 and the amended law of January 6, 1978. Indeed, even if processes are implemented to reduce the risk of identifying individuals (in particular through blurring processes), these processing operations relate, in principle, to personal data, insofar as the people filmed can be easily identified or that image analysis techniques (denoising, etc.) make it possible to restore an image close to the original one. Similarly, given the conditions of use envisaged, it cannot be excluded that they may, in certain specific cases, relate to sensitive data within the meaning of the texts relating to data protection, which implies very particular vigilance. as to their conditions of implementation. In the light of the foregoing, these provisions call for the following observations from the Commission. Firstly, the Commission observes that the purposes which would justify the use of airborne cameras by these services appear at very wide, diverse and of unequal importance. Thus, provision is made for the possibility of using this type of device to prevent breaches of the security of property and people in places particularly exposed to the risk of aggression, to prevent acts of terrorism, to record offenses and allow the prosecution of their perpetrators by collecting evidence or to protect public buildings, regulate transport flows, monitor coastlines, rescue people or even prevent natural or technological risks. In general, the Commission recalls that the use of these devices can only be accepted subject to two cumulative reservations: the strict necessity of their use with regard to the legitimate objectives pursued and the proportionality of the conditions for implementing these devices. on the one hand, compliance with the requirement of necessity requires in particular that the reflection carried out on the matter goes beyond the question of the sole operational interest of these devices and leads to a strict framework for their use. The addition of purposes and services that may involve the use of drones and other airborne cameras can also lead to trivializing their use, which must on the contrary be limited to certain purposes and missions precisely defined by law, for which less intrusive devices have proved to be insufficient. With regard to the purposes provided for in the bill, the Commission considers it necessary for the legislator (or the regulatory power governed by the law) to define precisely the list of offenses likely to require the use of airborne cameras. Such use cannot, according to the Commission, be authorized, in general, to enable infringements to be established and the perpetrators to be prosecuted by collecting evidence, even though, on the one hand, the fight against numerous infringements does not seem to require the use

of drones and that, on the other hand, this use must be reserved for the fight against offenses of a high degree of seriousness.

As regards gatherings of people on the public highway, the Commission emphasizes that the use of airborne cameras falls within the scope of the exercise of other fundamental public freedoms and that it is therefore particularly imperative to ensure that the infringement of them is limited to what is strictly necessary. In this respect, it notes that, although a condition of risk of serious disturbance to public order is provided for to allow the implementation of these measures during demonstrations, this criterion is not included with regard to operations maintaining or restoring public order in the context of these gatherings. to drones for this purpose and, where appropriate, to restrict the use of airborne cameras to types of serious risk situations in which the circumstances of the intervention justify it (for example to access places that are difficult to access or presenting a particular danger). Finally, it considers at this stage that the justified nature of the use of drones in order to allow, in a generic way, the protection of public buildings and installations and their surroundings and the rescue of people has not been demonstrated and that the formulations could be restricted to situations or risks characterized by a high degree of seriousness.

Finally, with regard to the surveillance of coasts and border areas, the Commission considers that it is appropriate not to limit oneself to defining the purpose by any type of surveillance over a geographical area but to indicate for what purposes this surveillance by drone at the borders could be deployed. On the other hand, the Commission considers that, for the purposes for which it will be deemed necessary to use airborne cameras, it is important to ensure that the precise circumstances of the missions carried out justify the use of these devices, and this for a period adapted to these circumstances. These principles could usefully be recalled in the draft legislative provisions, and declined in the regulatory provisions of application, in order to specify, where possible, the categories of places or situations concerned for each of the purposes defined by the law. Aware of the difficulty that there may be in listing in advance, in the law or in a decree, all the scenarios, the Commission considers that the details necessarily provided in these standards should be supplemented by publication by the Ministry of a doctrine for the use of drones, the transmission of regular public reports, outside of the desired experimental nature, as well as raising awareness and maintaining specialization training for the law enforcement agencies concerned. In the absence of provision for a control or supervision mechanism a priori for the use of these systems, which the Commission regrets, it considers it essential to provide the services concerned with guidelines making it possible to determine precisely, for each of the purposes mentioned in the law, the cases and modalities in which it is proportionate to use drones. It would also make it possible to regulate the intensity, in time and space, of the use of drones by the competent services, since some of the purposes, taken in

themselves, could theoretically authorize permanent surveillance and over a large territory (particularly with regard to border surveillance). It is in the light of such a doctrine, the principle of which should appear in the legislative provisions in question, that the use of drones could be considered justified and proportionate. Secondly, if certain guarantees are provided for governing the use of these devices (prohibition to operate them permanently, to view images of the interior of homes or their entrances), these seem to need to be supplemented and, above all, difficult to implement in practice with regard to the operation of airborne camera systems. The Commission notes that the on-site inspections it is carrying out demonstrate the difficulty, for existing fixed camera systems, of complying with the ban on filming the interior or entrances of buildings in housing: the technical measures put in place are often insufficient or even ineffective. It can therefore only wonder about the effective nature of the technical guarantees provided for by the bill with regard to mobile devices. In any case, reflections should be carried out, for example on the possibility of blocking the images according to certain flight characteristics of the aircraft device (altitude, zoom level, area overflown, etc.) or even on the characteristics of the storage of the images implemented (possibility or not of using an internal storage memory, to insert a removable storage device, etc.). Specific rules should be provided for at the regulatory level, in order to ensure, from a technical point of view, the absence of the possibility of identification or registration for certain uses which do not require the collection or the processing of personal data. This framework would constitute an essential guarantee, given the multiplicity of data collection devices in the context of passenger travel. Similarly, in the absence of mention in the bill of the possibility of carrying out a sound in addition to the recording of images, the Commission considers that such processing is, in principle, prohibited, as is the possibility of combining the use of these devices with other video processing devices (in particular facial recognition) or to implement interconnections, comparisons or links with other processing of personal data. Finally, the Commission considers it essential that the legislative guarantees provided for (prohibition to operate them on a permanent basis, to view images of the interior of homes or their entrances) be supplemented at the regulatory level, in particular to specify the conditions under which the rights of individuals will be implemented (in particular the information issued to the public, which must be effective, comprehensible and complete, taking into account the specificities of the devices in question). On the provisions relating to individual cameras Article 21 of the bill relates to the conditions for the implementation of individual camera devices for law enforcement. The Commission recalls that it has had the opportunity to examine these measures on numerous occasions in recent years and after the legislator, through its intervention, precisely framed their implementation, as it called for Firstly, the Commission recalls that the use of

individual cameras was initially intended to meet a need for physical and legal security of the interventions of the agents who are equipped with them. It notes that the provisions of the bill henceforth aim to allow national police and gendarmerie officers as well as municipal police officers to use individual cameras in order to ensure that the public is informed of circumstances of the intervention carried out. While this information must be provided with respect for the protection of the privacy of the individuals filmed by the agents and can contribute to greater transparency, the Commission considers that it would be appropriate to specify, at the level regulations, the reasons and circumstances which will justify the disclosure of the images to the general public. blurring techniques. It recalls that it is only on the basis of these guarantees that a fair balance can be found between the public's right to information and respect for the privacy of those filmed. Secondly, the Commission notes that it is now provided that national police and gendarmerie officers and municipal police officers to whom individual cameras are provided may, in the exercise of their missions of preventing breaches of public order and protecting the security of persons and property as well as their judicial police missions, have direct access to the recordings they make in the context of legal proceedings or interventions. Such a modification appears legitimate, in particular in the context of legal proceedings in order, for example, to establish the most precise report possible. However, this possibility, offered during any intervention, calls for the following reservations. The Commission recalls in this respect that the current implementation of individual camera systems is in particular subject to the fact that the personnel to whom they are entrusted cannot have direct access to the records they make. Although the Commission has always considered that this was an important guarantee, particularly in order to guarantee the integrity of the recordings made, it does not intend to call into question the very principle of such a development, which seems mainly justified by operational needs, the legitimacy of which is not contested since it is limited to certain precisely identified missions which require direct access to recordings. The implementing decree for these provisions should therefore specify the missions and the circumstances justifying this access. security of the recordings made and in particular their integrity, and to ensure that these will not be subject to viewing without legitimate reason, nor to modification or deletion. In this respect, if article 21 of the bill expressly provides that the cameras are equipped with technical devices making it possible to guarantee the integrity of the recordings when they are consulted within the framework of the intervention, the Commission will not fail to use its supervisory powers to ensure that this is indeed the case. In general, the Commission also points out that the possibility of using individual cameras is offered to other agents, such as firefighters -firefighters, prison administration surveillance staff or agents of the internal security services of the SNCF and the RATP, and that it would be

desirable for an overall reflection to be carried out on the conditions for implementation of individual camera devices in order to anticipate the developments that could result from this bill on these other devices and thus to standardize the guarantees put in place implemented. In this respect, it recalls the importance of drawing up a public employment doctrine relating to the use of these devices with a view to harmonizing their conditions of use, in particular with regard to the way in which they can be triggered and the conditions under which the persons filmed can exercise their rights. On the provisions relating to video protection

Several articles of the bill aim to modify, in a substantial way, the provisions relating to video protection as framed by the CSI. In the first place, viewing and access to images from cameras installed on public roads or in places open to the public is permitted for individually designated and authorized agents of the municipal police services, agents of the city of Paris responsible for a police service, controllers from the Prefecture of police and Paris surveillance agents as well as by municipal police officers exercised in their functions on the territory of the city of Paris, on an ad hoc basis and under certain conditions. Without calling into question at this stage the very principle of such access, the Commission notes that the evolution of the provisions of the CSI on this point leads to the images collected by means of video protection devices being viewed by a large number of people. It therefore recalls that it is important on the one hand that strong guarantees be implemented so that only duly authorized personnel can actually view these images in the strict need of their mission and that, on the other hand, adequate security are implemented, particularly in terms of access traceability.

Secondly, article 20 bis of the bill aims to modify article L. 126 1-1 of the construction and housing which specifies the way in which the transmission to the services responsible for maintaining order of the images taken with a view to protecting the common areas of apartment buildings for residential use in specific circumstances is carried out. The Commission, which questions the shortcomings of the current system leading to such a modification and consequently to its extension, notes that the text as amended only provides for this transmission, which will always take place in time real, or limited to the time necessary for the intervention of the national police or gendarmerie services or, where applicable, municipal police officers. It also observes that such transmission will no longer be limited to circumstances giving rise to fear of the imminent commission of serious harm to property or persons, but will be possible in the event of occupation by persons who impede access to and the free movement of inhabitants or prevent the proper functioning of safety and security devices or harm the tranquility of the premises. While the Commission considers that the new use case thus defined appears to be more precise, it notes that the extension of the transmission methods is, on the other hand, no longer subject to a certain level of severity of the events encountered. In particular, the notion of nuisance to the



tranquility of the place appears very broad and able to cross-check very different hypotheses and it therefore seems desirable to narrow the formulation to cases where this transmission is really justified. In addition, in order to prevent the common parts of dwellings from being placed under continuous surveillance in practice, it should be ensured that the duration of the transmission does not exceed that actually necessary to allow the intervention of the forces of the security forces. order and the doors of the apartments nor the balconies, terraces or windows of the latter are not filmed. Thirdly, article 20 ter of the bill includes a new article within the transport code in order agents of the internal security services of the SNCF and the Régie Autonome des Transports Parisiens, when they are assigned to information and command rooms belonging to the State and under the control of agents of the national police or soldiers of the national gendarmerie, to view the images of the video protection systems transmitted in real time in these rooms, for the sole purpose of facilitating the interventions of their services within the vehicles and premises of the public passenger transport concerned . Without commenting at this stage on the conditions under which these agents view the recorded images (compliance with the need-to-know principle), the Commission considers that the purpose pursued in this context (for the sole purpose of facilitating [...] ) appears insufficiently defined. It considers that the real-time transmission of these images, outside of any legal requisition, should only be justified in precisely defined cases presenting a sufficient degree of seriousness. Finally, article 20 bis A of the bill aims to allow, on the one hand, the pooling of equipment and personnel (urban supervision centers) up to the departmental level and, on the other hand, the viewing of video surveillance images of public roads by all approved personnel municipal, inter-municipal or joint syndicate level. While the Commission notes that this pooling aims to meet operational needs, it recalls that the pooling of resources must not lead to a lowering of the level of protection granted to data at personal character processed. The Commission thus considers that this pooling, which must be the subject of a concerted approach which could result in duly approved agreements, must be accompanied by the implementation of guarantees, in particular technical guarantees (through, for example, 'strict compartmentalization of access to viewing stations), in order to ensure that only duly authorized persons have access to the images which they actually need to know with regard to their missions. On the provisions relating to the implementation of on-board cameras in certain vehiclesThe Commission observes that the provisions of the bill aim to create a new legal regime applicable to cameras on board by public authorities in a means of transport allowing the capture, recording and transmission of images on public roads or in places open to the public. These provisions provide for certain essential characteristics of the processing envisaged data, such as the purposes pursued, the data controllers, the possibility of

transmitting the images in real time to the command post, the methods of information and the retention period of the recordings. The Commission generally refers to the observations and recommendations it has made with regard to drones and individual cameras and specifies that it will be particularly attentive to the conditions for the effective implementation of these devices when they are submitted to it for opinion. It is also planned to modify the provisions of the transport code in order to integrate a new article allowing, on an experimental basis, public passenger transport operators to implement the transmission and recording of images taken on the public roads and in places and establishments open to the public, by means of front cameras on board the rolling stock they operate (article 28 bis). In the absence of details, the Commission wonders about the conditions which led to the conclusion that the experiment carried out should allow permanent recording even though the subsequent use of the images collected by these systems is only authorized for the purposes of ensure the prevention and analysis of transport accidents. In particular, it notes that it is provided that the processing implemented has the exclusive purpose of improving knowledge of railway accidents as well as that of guided transport and transport accidents, the prevention of the occurrence or reiteration of transport accidents as well as the training of driving personnel and their superiors. The Commission, which will have to decide for the first time on this type of device allowing continuous recording, emphasizes the need to take into account, from the design of such a system, compliance with the regulations relating to data protection at personal nature and to adapt the guarantees implemented according to the actual characteristics of the devices. It thus draws the attention of the legislator to the need to strengthen the guarantees surrounding the processing of data from these devices by excluding, in principle, the capture of sound recordings. Similarly, it notes that it is planned to use anonymization processes in order to allow the reuse of images for the purpose of informing the reports of investigations or analyzes of transport accidents. Beyond the particularly strict technical conditions to be met in order to achieve anonymization within the meaning of the GDPR, i.e. complete and irreversible, of the data (and not a single pseudonymization), the Commission wonders about the way of which such data, once they are effectively anonymized, will make it possible to inform these various reports. Finally, article 28 ter of the bill amends the provisions of the transport code relating to the transmission to the police images produced for the protection of vehicles and property rights of way for public passenger transport. In view of the changes envisaged, the Commission wonders about the possibility of guaranteeing that the images likely to be transmitted - in real time and without this transmission remaining strictly limited to the time necessary for the intervention of the police or of the national gendarmerie or, where applicable, municipal police officers - do not in fact concern either the entrance

to private dwellings or public roads. It therefore refers to the general observations previously made in the context of the planned amendments to the Housing and Construction Code. On the other provisions of the bill Firstly, certain provisions of this bill aim to modify the missions entrusted to municipal police officers, country guards and the National Council for Private Security Activities (CNAPS) (Articles 1 to 8). Without commenting on the legitimacy of such developments, the Commission recalls that they are likely to result in the modification of the conditions for the implementation of existing processing or the possible creation of new processing of personal data. It thus recalls the vigilance that must be exercised in order to ensure that the possible enlargement of accessors or recipients of certain data processing operations is precisely framed and limited to what is strictly necessary with regard to compliance with the need to know. In the same way, it considers that the modifications made to the CNAPS should not lead, in the absence of specific justifications, to allowing in principle access to more files than what is currently authorized to it, in particular when it is It is a question of carrying out administrative investigations, and that the creation and visible affixing of an identification number for private security agents must be understood as a processing of personal data implemented in compliance with the applicable regulations .Secondly, article 24 of the bill deals with the penalization of the dissemination of images of the police with the manifest aim that it is harmed their physical or mental integrity. This provision is, as it stands, mainly viewed from an angle which is not that of data protection, but from the point of view of the infringement of freedom of expression. For what falls within its competence, with regard to the articulation of this provision with the Data Protection legislation, the Commission recalls that the recording and dissemination of images of the face or of any other element identifying the forces of the order constitute processing of personal data to which applies, except for processing carried out by natural persons for the exercise of strictly personal or domestic activities, all the regulations relating to the protection personal data. In this case, the Commission emphasizes that the use or reuse of these recordings for the sole purpose of harming law enforcement cannot constitute processing for a legitimate purpose within the meaning of the GDPR and are therefore likely to be punished. , both on the basis of the amended law of 6 January 1978 and on that of the provisions of the criminal code relating to violations of human rights resulting from files or computer processing. The President Marie-Laure DENIS