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n° 2018-357 of December 13, 2018 providing an opinion on a draft decree in Council of State relating to the exchange of information and data between administrations within the framework of administrative procedures and the experimentation provided for by article 40 of law n ° 2018-727 of August 10, 2018 for a State at the service of a society of trust (request for opinion n° 18011056)The National Commission for Information Technology and Liberties, Seized by the Interministerial Directorate for Digital and State Information Systems (DINSIC) d a request for an opinion on a draft decree from the Council of State relating to the exchange of information and data between administrations within the framework of administrative procedures and the experimentation provided for in article 40 of the has law

No. 2018-727 of August 10, 2018 for a State serving a trust society; Having regard to Convention No. 108 of the Council of Europe for the protection of individuals with regard to automatic processing of personal data ;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 on the free movement of such data, and repealing the Directive 95/46/EC; Having regard to Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by the competent authorities for the purposes prevention, investigation, detection and prosecution of criminal offences, or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHA; relations between the public and the administration, in particular its articles

L. 114-8, L. 114-9 and L. 113-13; Having regard to the criminal code, in particular its article 413-9; Having regard to the public health code, in particular its article L. 1110-4; Having regard to the law no. 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms; Having regard to law no. 2011-525 of May 17, 2011 on the simplification and improvement of the quality of law; ° 2018-727 of August 10, 2018 for a State at the service of a trust company, in particular its article 40; Considering the ordinance n ° 2005-1516 of December 2005 relating to electronic exchanges between users and administrative authorities and between the administrative authorities; Having regard to Decree No. 2005-1309 of October 20, 2005 as amended, taken for the application of Law No. 78-17 of January 6, 1978 relating to data processing, files and freedoms; After having heard Mr Philippe LEMOINE, commissioner, in his report, and Mrs. Nacima BELKACEM, government

commissioner, in her observations, Issues the following opinion: The Commission was seized, in application of the provisions of article L. 114-9 of the code of relations between the public and the administration (CRPA) and of article 40 of law n° 2018-727 of August 10, 2018 for a State in the service of a trust company (hereinafter the "ESSOC" law) by the Interministerial Department of State Information and Communication Systems (DINSIC) of a draft decree in Council of State relating to the exchange of information and data between administrations within the framework of the administrative procedures and the experimentation provided for in the aforementioned article 40. In accordance with the provisions of article 11-I-4°-a) of the law of January 6, 1978 as amended, the Commission recalls that this deliberation must be published at the same time as the adopted decree. As a preliminary point, the Commission stresses that the draft decree is part of a general context of simplification of administrative procedures and declarations by allowing in particular exchanges between authorities. In this respect, it notes that the draft decree submitted to it aims first of all to provide for the procedures for the exchange of information or data between administrations provided for in Article L. 114-8 of the CRPA. The Commission observes that in accordance with the provisions of Article L. 114-9 of the CRPA, it is particularly a question of determining: the areas and procedures concerned by the exchange of information or data; the list of administrations with which the request for communication is made according to the type of information or data; the security and confidentiality criteria necessary to guarantee the quality and reliability of the exchanges; the information or data which, by reason of their nature, in particular because that they relate to medical secrecy and national defense secrecy, cannot be the subject of these exchanges between administrations; the retention period for information and data applicable to each exchange system. The Commission also notes that the this draft decree also aims to set the conditions for implementing the aforementioned experiment. It recalls in this regard that Article 40 of Law No. 2018-727 of August 10, 2018 referred to above provides that "without prejudice to Article L. 114-8 of the Code of Relations between the Public and the Administration, On an experimental basis and for a period of three years from the publication of the decree in Council of State provided for in the third paragraph of this article, persons registered in the directory of companies and their establishments, who consent thereto, are not required to communicate to an administration information that the latter already holds in automated processing or that can be obtained from another administration through such processing When it obtains information through automated processing, the administration informs the person concerned It ensures the confidentiality and protection of this information in order to prevent it from being distorted or damaged or from unauthorized third parties having access to it (...)". This article also

provides that a Conseil d'Etat decree taken after consulting the National Commission for Computing and Liberties, specifies the methods of application of this article, in particular the list of automated processing operations falling within the scope of experimentation as well as, for each processing operation, the list of available data. In general, the Commission recalls that the simplification of administrative procedures and the improvement of relations between citizens and administrations constitute legitimate objectives. It nevertheless recalls that the implementation of data exchanges in this context must be limited to strictly necessary data and must guarantee respect for the rights of individuals as well as the security and confidentiality of their personal data. These elements recalled and without prejudice of the conditions for implementing the processing which must, in any case, comply with the applicable data protection regulations, the draft decree calls for the following observations from the Commission. On the provisions relating to the application of article L. 114-9 of the CRPA The Commission recalls that the exchange of information or data between administrations as provided for in article L. 114-8 of the CRPA must allow the latter to simplify the procedures for administered by exempting them from providing the same supporting documents on several occasions. It notes that the objective pursued through these exchanges between administrations is to make the solicitation of the user an exception, in accordance with the provisions of Article L. 113-12 of the CRPA which provides that "a person submitting a request or producing a declaration [...] may not be required to produce information or data that it has already produced with the same administration or with another administration participating in the same data exchange system". Commission recalls that given its purpose, the draft decree is not intended to draw up a detailed list of data that may be exchanged between administrations. It notes that the categories of information appearing in draft articles R. 114-9-1, R. 114-9-2 and R. 114-9-4 correspond to data regularly requested by the administrations from companies, associations and individuals within the framework of the procedures mentioned in draft articles R. 114-9-3 and R. 114-9-5 and that, in any event, the exchange of information between administrations will be limited to only data strictly necessary to process a request submitted by the public or a declaration transmitted by the latter pursuant to a legal provision in accordance with Article L. 114-8 of the CRPA. The Commission also notes that Article 1 of the draft decree excludes from exchanges between administrations information which would be covered by medical secrecy within the meaning of article L. 1110-4 of the public health code as well as information presenting a nature of national defense secret within the meaning of article 413-9 of the c Penal Code. While these provisions are in accordance with the provisions of 4° of Article L. 114-9 of the CRPA, the Commission nevertheless observes that by using the term "in particular" the legislator did not intend to limit this exclusion only

to information or data relating to medical secrecy and national defense secrecy. In this respect, it considers that the draft decree must exclude from its scope all categories of data which, due to their particular sensitivity or their nature, should not be able to be the subject of direct communication between administrations. . The Commission therefore requests that the draft decree be clarified on this point. In addition, the Commission notes that draft 7° of Article R. 114-9-5 includes within the scope of exchanges procedures relating to "insurance and banking". In this respect, the Commission recalls that the draft decree must exclusively concern the exchange of data between administrations in the context of administrative procedures. The exchanges of information provided for in the framework of the procedures relating to "insurance and banks" should only cover administrative procedures such as, for example, those relating to indebtedness undertaken with the Banque de France.

Subject to these reservations, the Commission considers that the data falling within the scope of the draft decree are adequate, relevant and limited to what is necessary with regard to the procedures concerned by the exchanges. Secondly, the Commission notes that, contrary to what is provided for in 5° of article L. 114-9 of the CRPA, the draft decree does not specify the retention period for the information and data applicable to each exchange system. Questioned on this point, the DINSIC departments specified that the technical devices data exchanges are not intended to store the data exchanged, which is deleted immediately after transit. Given these details, the Commission considers that the draft decree should be amended to provide that the data exchanged will not be retained by the exchange systems implemented. It also notes that draft Article R. 114-9-8 provides that data relating to the traceability of exchanges will be kept for a period of

thirty-six (36) months, "without prejudice to the retention obligations incumbent on the administrations receiving the information exchanged". The Commission recalls that, unless justified by special features or express legal provisions, the retention period for traces in the active database is set, in principle, at six (6) months. This period is sufficient to identify a posteriori fraudulent access to personal data, misuse of such data or to determine the origin of a technical incident in the exchange system. It therefore requests that the draft decree be amended in order to reduce the retention period of traceability data to six (6) months. It also considers that the draft decree should be explained in order to specify the "retention obligations" referred to.

Thirdly, the Commission recalls that, in accordance with the provisions of Article L. 113-12 of the CRPA , "a person presenting a request or producing a declaration within the framework of a procedure covered by Article L. 114-9 cannot be required to produce information or data that he has already produced with the same administration or another administration participating in the same data exchange system as defined in Article L. 114-8. consent of the persons who must as such have control and a

real choice concerning the acceptance or refusal of the conditions offered or the possibility of refusing them without suffering any prejudice. To be valid, the consent in question must be free, specific, informed and unambiguous in accordance with Article 4-11) of the GDPR. In this respect, the Commission considers, in accordance with the position adopted by the working group of Article 29 ("G29") and taken up by the European Data Protection Board (EDPB) as part of its guidelines on consent that, in the event that the provision of a service is subject to consent to the processing of personal data, this consent is only free if the processing of this data is strictly necessary for the provision of the service requested by the person, or if an alternative is actually offered by the data controller to the person concerned. Commission therefore considers that the administrations must ensure the maintenance of an alternative procedure for the supply of the supporting documents necessary for the examination of the procedures and that this procedure must allow access, under similar conditions, to the same provision of public service. The Commission also stresses the importance of the quality of the information that must be provided to people before they consent. It recalls in this regard that Article 12-1 of the GDPR specifies that information must be transmitted "in a concise, transparent, understandable and easily accessible manner, in clear and simple terms". It therefore recommends that standard information notices, written in clear, complete and educational terms, be made easily accessible to people when they carry out their administrative procedures. In addition to the mandatory information provided for in Article 13 of the GDPR, the information provided must also, in order to maintain the optional nature of the proposed data exchange, indicate the alternative methods for carrying out a procedure without benefiting from these simplifications. Finally, the Commission notes that the draft article R. 114-9-7 provides on the one hand that the exchanges of information must be carried out in compliance with the security functions provided for by the general security reference system (RGS) mentioned in article 9 of the ordinance n°2005-156 of December 8, 2005 and that, on the other hand, "the appropriate levels of security" must be determined by the organizations in charge of the exchanges "according to the sensitivity of the data exchanged". Furthermore, the Commission recalls that each exchange system must enable the administrations to which communication requests are addressed to ensure, on the one hand, that the requesting administration does indeed have the right of access to the information or data requested in application of a legislative or regulatory provision and that, on the other hand, the latter will be used in the context of a procedure initiated by a citizen. In this regard, the Commission notes that draft Article R. 114-9-7 provides that the organizations responsible for carrying out the exchanges "implement in particular the functions of identifying the requesting administration". The Commission recommends the use of the term "authorization" in order to include the notion

of essential management of the rights of access to information. In order to specify the minimum measures required for any exchange, regardless of the sensitivity of the information exchanged, the Commission recommends that the draft decree be amended so that the formulation "at a minimum and, in all cases, the mutual authentication of the organizations and channel encryption are ensured" be added. While the Commission notes that the provisions of draft Article R. 114-9-7 constitute a technical and organizational framework in accordance with Article 32 of the GDPR, it nevertheless considers that the practical arrangements governing the exchange of information could usefully be detailed in additional documents such as an application circular or a specific guide. With regard to traceability data, the Commission recommends carrying out trace checks automatically, in order to detect abnormal behavior and generate alerts if necessary. In addition, it recommends that measures be implemented to ensure the integrity of these traces. The Commission recalls that the traceability data are only intended to be used for the purpose of detecting or preventing illegitimate operations on the data. Finally, the Commission recalls that, should the administrations responsible for carrying out the data exchange consider that the processing relating to the exchanges is likely to create a high risk for the rights and freedoms of natural persons, it will be their responsibility to carry out an impact analysis relating to the protection of personal data (AIPD) and, if necessary, to send it to him before the implementation of this processing. On the provisions relating to the experimentation provided for in Article 40 of the "ESSOC" law As a preliminary point, the Commission recalls that Article 40 of the aforementioned law no. are not required to communicate to an administration information that the latter already holds in automated processing or that can be obtained from another administration by such processing (...). It also recalls that the experimental nature of the planned system, expressly provided for by the legislator for a period of three years, in no way prejudices the sustainability of such an approach. In this respect, the Commission considers that this experiment will have to be the subject of a rigorous evaluation before considering whether or not to maintain such a system. While it observes that the aforementioned article expressly provides that "the experiment is subject to an assessment, in particular of its impact on administrative delays, the results of which are transmitted to Parliament", it asks that a report be sent to it. also addressed at the end of these three years. The Commission considers that this evaluation report should mention at least: figures on the number of exchanges carried out, the number of companies and administrations concerned, the flows involved; figures on the impact on the deadlines administrative documents; a description of the conditions for the technical and operational implementation of the tested system; general conclusions relating to the operation of the tested system and any difficulties encountered, both legal and technical. It also

recalls that the aforementioned Article 40 does not draw up an exhaustive list of the provisions to be included in this draft decree, which must "in particular" specify "the list of automated processing operations falling within the scope of the experimentation as well as, for each processing operation, the list of available data "In this context, the Commission observes that the provisions submitted to it are intended to specify the regions concerned by the experiment, the administrative procedures as well as the administrations concerned, the programming interface used, called "Company API", the data likely to be transmitted as well as the conditions of security and traceability of the exchanges. In this respect, it notes that the planned experiment aims to lighten the formalities of persons registered in the business directory and their establishments in the context of their administrative procedures as well as to demonstrate the relevance of a mechanism for the exchange of information between administrations via a single application programming interface (API) implemented by DINSIC, rather than exchanges from administration to administration. provided for in article 6 of the draft decree transmitted does not make it possible to understand the overall architecture of the system envisaged. In particular, it considers that it is not in a position to comment on the way in which an administration will be able to obtain the data via the programming interface called "API entreprises" from another French administration. The Commission therefore considers that the draft decree should be clarified to this effect. have the technical possibility of receiving information through automated processing ", on the one hand the local authorities with more than 3500 inhabitants, on the other hand the other administrations mentioned in 1° of Article L. 100-3 of the CRPA, the number of agents or employees of which, expressed in full-time equivalent, is equal to or greater than fifty. -8 of the CRPA with regard to the strict need to know in order to process the request or the declaration presented by the data subject. The same goes for the non-opposability of professional secrecy, since these administrations are, within the framework of their legal missions, authorized to know information or data thus exchanged. Article 7 of the draft decree specifies other apart from the information that can be obtained via the programming interface called "Companies API" by making a reference to Articles R. 114-9-1 and R. 114-9-2 of the CRPA. The Commission observes that this last article relates to "information relating to associations, their statutes and their leaders", whereas article 3 of the draft decree relating to experimentation only concerns "companies". that the scope of the experiment should be more precisely defined in order to determine whether the associations are also concerned by the system. It therefore considers that the draft decree should be amended in order to make the provisions of Articles 3 and 7 consistent. Secondly, Article 4 of the draft decree specifies the procedures concerned by the experiment. The Commission notes that public contracts (1°), public aid (2°) as well as classified installations and

establishments open to the public (3°) are concerned. It notes that it seems to follow from this provision that Article 4-1° relates to the procedures referred to in Article R. 114-9-3, 7° of the draft decree. "public aid". Assuming that this concept refers exclusively to the public aid referred to in Article R. 114-9-3, 8° of the same draft, this clarification could usefully be mentioned. Thirdly, the Commission notes that Article 6 of the draft of decree provides that the administration participating in the experiment informs the person concerned under the conditions provided for by the second and third paragraphs of article L. 114-8 of the CRPA of the information it obtains. Under these conditions, it refers to the general observations previously formulated within the framework of the examination of the provisions relating to the application of article L. 114-9 of this same code. It considers, however, that the draft decree should be completed in order to detail the procedures for obtaining the consent of identified or identifiable natural persons listed in the directory of companies and their establishments to participate in the experiment, the possible withdrawal of said consent as well as the right to information of said persons in case of information obtained by an administration through automated processing. Finally, the Commission notes that with regard to retention periods and security measures, Article 7 of the draft decree refers to draft Articles R. 114-9-7 and R. 114-9-8 taken within the framework of the provisions relating to article L. 114-9 of the CRPA. In these circumstances, it therefore refers to the observations previously made in the context of the examination of these provisions. The President!.

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