

Decision MED-2023-018 of April 3, 2023 National Commission for Computing and Liberties Nature of the deliberation: Formal notice Legal status: In force Date of publication on Légifrance: Thursday April 20, 2023 Decision No. MED-2023-018 of April 3, 2023 giving formal notice to the Ministry of the Economy, Finance and Industrial and Digital SovereigntyThe President of the National Commission for Information Technology and Liberties, Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 relating to the protection of personal data and the free movement of such data; Having regard to law n° 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms, in particular its article 20; Decree No. 2019-536 of May 29, 2019 as amended, taken for the application of Law No. 78-17 of January 6, 1978 relating to data processing, files and freedoms; Having regard to deliberation No. 2013-175 of July 4, 2013 adopting the internal regulations of the National Commission for Computing and Liberties; Considering the referral to the National Commission for Computing and Liberties No. 22005568; Considering Decision No. 2022-122C of June 21, 2022 the President of the National Commission for Computing and Liberties to instruct the Secretary General to carry out or to have carried out a mission to verify the processing of data implemented by the General Directorate of Customs and Indirect Rights (DGDDI) ; Having regard to the on-site inspection report n° 2022-122/1 of August 9, 2022; Having regard to the other documents in the file; I- The context Attached to the Ministry of the Economy, Finance and Industrial and Digital Sovereignty ( hereinafter Ministry of the Economy), the General Directorate of Customs and Indirect Taxes (hereinafter "the DGDDI") is located at 11, rue des Deux-Communes, in Montreuil (93). The inspection took place on the premises of the local coastguard unit "Manche-Mer du Nord-Atlantique" (MMNA) located at 8 rue Eugène Varlin in Nantes (44), which unit belongs to the service with national competence called "Direction National Coast Guard Customs" (DNGCD). After a report dated March 18, 2022 reporting the use of the ship and crew intelligence information system (SIRENE) to identify all individuals checked at sea or at dock and on decision n°2022-122C of June 21, 2022 of the President of the National Commission for Computing and Liberties (hereinafter "CNIL"), a delegation from the CNIL carried out, on August 9, 2022, an on-site inspection mission to the security guard unit. Channel-North Sea-Atlantic customs coasts in order to monitor compliance with the provisions of the Data Protection Act of January 6, 1978 (hereinafter "Data Protection Act") and Directive 2016/680 of April 27, 2016 ( hereinafter "police justice directive"). The local coastguard unit MMNA participates in State action at sea (AEM) and mainly in customs police, fisheries police, rescue at sea and protection of the marine environment missions. It systematically registers people checked at sea or on the quay by customs in the SIRENE file without these people being informed. The DGDDI produced

additional documents on August 26 and September 27, 2022. II- On the identification of the data controllerThe National Customs Coast Guard Directorate, which uses the SIRENE file, is attached to the DGDDI. The CNIL delegation noted that a file relating to the SIRENE file was included in the register of processing activities DGDDI, which targets the latter as data controller. In addition, the DGDDI informed the delegation that it had taken steps to bring it into compliance with the GDPR, by designating an operational data controller, a contracting authority and a service responsible for process rights requests. The DGDDI also informed the CNIL that a data protection impact assessment (AIPD) was being finalized and that a draft regulatory act creating the processing had been drawn up. of the economy, to which the DGDDI is attached, must be considered responsible for processing, with regard to the SIRENE file implemented on behalf of the State and concerned by this procedure. III- On the applicable law The first paragraph of Article 87 of the Data Protection Act, first article of title III of the law, provides that: "this title applies, without prejudice to title I, to the processing of personal data implemented, to purposes of the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties, including the protection against threats to public security and the prevention of such threats, by any competent public authority or any other body or entity which has been entrusted, for the same purposes, with the exercise of public authority and the prerogatives of public power, hereinafter referred to as the competent authority". Title III of the Data Protection Act applies to the processing of personal data which meets a dual characteristic relating to their purpose, on the one hand, and the quality of the data controller, on the other [1 ]. With regard to the purposes pursued by the SIRENE file, the delegation noted that the register of processing activities identified three of them. The first purpose is to "contribute to the investigation, observation and repression of customs fraud on the maritime vector within the framework of the competences of the general directorate of customs and indirect rights in terms of protection of the national and community space". The second purpose is to "collect information relating to the risks of fraud on the maritime vector, in the presence of one or more plausible reasons to suspect the existence of a customs offence, on the basis of information collected by the customs services or checks carried out". The third purpose is to "make the integration, enrichment and conservation of maritime customs intelligence more reliable for the purpose of pooling between customs services responsible for combating fraud". The aforementioned missions thus fall within the scope of the purposes referred to in Article 87 of the Data Protection Act, in that they aim, on the one hand, to prevent or detect criminal offenses (for example, by contributing to research , detection and repression of fraud); on the other hand, to investigate or prosecute in criminal matters (for example by collecting information); finally, to ensure protection against threats to public

security and the prevention of such threats (for example by pooling customs maritime intelligence between services responsible for the fight against fraud). The delegation noted several mentions of criminal offenses in the SIRENE file, relating in particular to acts of drug trafficking, counterfeiting, concealed work, refusal to comply, sexual assault, possession of prohibited weapons, intentional homicide or assassination. With regard to the capacity of competent authority in matters of "police-justice": the national customs coastguard directorate has, within the framework of these missions, powers of maritime surveillance , pursuant to Decree No. 2019-94 of February 12, 2019, which correspond to prerogatives of public power. The decree provides that the management, attached to the deputy director of the DGDDI network, implements on the national territory "the maritime and land surveillance missions of the customs administration requiring the use of maritime and air means " and specifies that it "contributes to the action of the State at sea and to the coastguard function and participates, in this context, in national and international missions". In this regard, it emerges from the strategy of the General Directorate of Customs and Indirect Taxes for 2022-2025 that one of the objectives pursued is the fight against trafficking and organized crime. The delegation was in fact informed that the MMNA coastguard service was involved, among other things, in the fight against narcotics and the fight against illegal immigration. Consequently, the processing carried out must comply with the provisions of Title III of the Data Protection Act.

IV- Breaches with regard to the provisions of the amended law of 6 January 1978

A- On the breach relating to the lawfulness of the processing and the absence of an impact analysis

In the first place, the second paragraph of the Article 87 of the Data Protection Act provides that the processing operations referred to in Title III of the law "are only lawful if and insofar as they are necessary for the performance of a mission carried out, for one of the purposes set out in the first paragraph, by a competent authority within the meaning of the same first paragraph and where the provisions of Articles 89 and 90 are complied with. Under the terms of I of article 89 of the Data Protection Act: "If the processing is implemented on behalf of the State for at least one of the purposes set out in the first paragraph of article 87, it is provided for by a legislative or regulatory provision taken under the conditions provided for in I of Article 31 and Articles 33 to 36". Pursuant to II of the same article, "if the processing relates to data mentioned in I of Article 6, it is provided for by a legislative or regulatory provision taken under the conditions provided for in II of Article 31". Article 31 of the law requires that the processing of data in question be authorized by order of the competent minister or ministers, taken after reasoned and published opinion of the Commission and, in the case of processing of sensitive data, by decree in Council of Report taken after a reasoned and published opinion from the CNIL. customs ". The SIRENE contains the personal data of the passengers

of the ships inspected, specifically information on their marital status, their address, their profession, their function on board the ship, information relating to the ownership or rental of the ship and their geolocation. . The delegation noted the presence of minors' identity documents in the SIRENE file. In addition, no legislative or regulatory text authorizes and regulates this processing of personal data, only a draft regulatory act having been drafted by the DGDDI.Or, the SIRENE file is implemented on behalf of the State for a purpose corresponding to article 87 paragraph one, namely the prevention, detection and investigation in the context of criminal offences. It must thus be provided for by a legislative or regulatory provision taken according to the procedure of articles 31 and 33 to 36 of the Data Protection Act, which is not the case in this case. The processing of personal data, implemented without taking a regulatory act after consulting the Commission, is therefore contrary to article 89 of the LIL.Secondly, the first paragraph of article 90 of the Data Protection Act provides that: "If the processing is likely to create a high risk for the rights and freedoms of natural persons, in particular because it relates to the data mentioned in I of Article 6, the data controller carries out an analysis of impact relating to the protection of personal data. If the processing is implemented on behalf of the State, this impact analysis is sent to the National Commission for Computing and Liberties with the request for notice provided for in Article 33. ". The SIRENE file contains data relating to the geolocation of all ships as soon as their beacon signal is received. The delegation was indeed informed that the SGCD MMNA automatically had access to "many pieces of information", without specifying which, when it is near ships equipped with an AIS (automatic identification system) transponder, which is the This is the case of most commercial vessels. The delegation noted that the processing register and the draft DPIA estimated that around 24,000 natural persons were affected by the processing. The delegation was then informed that in the case of pleasure craft, if a priori only the owner is included in the SIRENE file, the agents involved in controlling the vessel can randomly include all the occupants in the said file. With regard to commercial vessels, in the event of "substantial litigation", the delegation was informed that the entire crew was included in the SIRENE file. The DGDDI transmitted the SIRENE file to the control delegation. The delegation noted that 45,793 people, including 392 minors, are included in the SIRENE file. The delegation also found that the file contained copies of 9,646 passports and 3,051 national identity cards. The CNIL found that an impact assessment project relating to the protection of personal data (AIPD ) was written by a person designated by the DGDDI. The delegation was informed that this project had not been sent to the CNIL. However, given the processing of ship geolocation data leading to almost systematic monitoring of their crew and the large number of people concerned, it must be considered that the DGDDI implements, on behalf of the State, a large-scale

processing of location data likely to create a high risk for the rights and freedoms of natural persons, which should be the subject of an impact analysis sent to the CNIL [2]. A breach of article 90 of the Data Protection Act is thus constituted. It follows from the above that the SIRENE file, implemented without having been created by a regulatory act taken after the CNIL's opinion and without carrying out a DPIA transmitted to the Commission, is unlawful under Article 87 of the LIL. The Ministry of the Economy is therefore required to take a regulatory act after consulting the CNIL and to conduct an impact analysis which will be sent to it.

**B- On the failure to clearly distinguish between personal data of different categories of data subjects**

Under article 98 of the LIL, "The data controller shall establish, as far as possible and where appropriate, a clear distinction between the personal data of different categories of data subjects, such as:

- 1° Persons in respect of whom there are serious grounds for believing that they have committed or are about to commit a criminal offence;
- 2° Persons found guilty of a criminal offence;
- 3° Victims of a criminal offence or persons against whom certain facts lead one to believe that they could be victims of a criminal offence;
- 4° Third parties to a criminal offence, such as persons who may be called upon to testify during investigations into connection with criminal offenses or subsequent criminal proceedings, persons who can provide information on criminal offenses or contacts or associates of one of the persons mentioned in 1° and 2°.

"The delegation noted that the SIRENE file contains data relating to the masters of all the vessels inspected and sometimes those of the other persons present on board. The delegation noted that if the records of natural persons on SIRENE make it possible to establish a link with a ship, no field makes it possible to distinguish the categories of persons with regard to the distinctions laid down in article 98 of the law "Informatique et Libertés". The distinction between persons suspected of an offence, culprits, victims or third parties does not

The delegation was informed that the qualification of a [...] vessel is carried out in SIRENE without however distinguishing the categories of persons on the vessel. The absence of distinction between the categories of persons constitutes a breach of Article 98 of the Data Protection Act. The Ministry of the Economy must therefore clearly distinguish the personal data of the different categories of persons registered in the SIRENE file.

**C- On the breach relating to the information of persons**

Article 104 of the Data Protection Act requires the data controller to provide data subjects with information relating to the processing of their personal data. This obligation relates in particular to the identity and contact details of the data controller and its data protection officer, the purposes pursued by the processing and the various rights available to individuals. Article 107 of the Data Protection Act provides the possibility for the data controller to restrict the rights of data subjects when this restriction is a necessary and proportionate measure. The same article requires that these restrictions be provided for by the act establishing

the processing. Furthermore, no general information is made available to the public concerning the SIRENE file, for example on the DGDDI internet portal. SIRENE file and therefore that no restriction provided for by such an act limits the right of the persons concerned to receive the information provided for in II of article 104 of the Data Protection Act. Furthermore, the persons checked and included in the SIRENE file must be able to access the information provided for in I of the same article, which is not the case here. The facts mentioned constitute a breach of Article 104 of the law of January 6, 1978 amended with regard to the obligation for the data controller to inform individuals that their personal data is being processed, as well as the principle set out in article 107 of the law by virtue of which a data controller processing can only restrict the rights of individuals under the conditions provided for in the act establishing the processing. The Ministry of the Economy will therefore have to guarantee the information of individuals. Consequently, the Ministry of the Economy, Finance and industrial and digital sovereignty, located at 139, rue de Bercy in Paris (75572 Cedex 12), is given formal notice within a period of 6 (six) months from the notification of this decision and subject to the measures it could have already adopted, to: enact a legislative or regulatory act after consulting the CNIL creating the SIRENE; failing this, stop processing the data in question; subject to the lawfulness of the SIRENE file, distinguish the data of the different categories of persons registered there; subject to the lawfulness of the SIRENE file, inform the persons registered there, under the conditions provided for in chapter III of title III of the Data Protection Act and Freedoms; justify to the CNIL that all of the aforementioned requests have been complied with, and this within the time limit. At the end of this period, if the Ministry of the Economy has complied with this remains, it will be considered that this procedure is closed and a letter will be sent to it to this effect. Conversely, if the Ministry of the Economy has not complied with this formal notice, it is recalled that a rapporteur may be appointed to request that the restricted committee pronounce one of the corrective measures provided for in article 20 of the amended law of January 6, 1978.

President Marie-Laure DENIS[1] Deliberation SAN-2021-003 of January 12 January 2021 and Deliberation SAN-2021-016 of September 24, 2021[2] See CNIL deliberation n°2018-327 of October 11, 2018 adopting the list of types of processing operations for which a relative impact analysis to data protection is required