Deliberation 2022-046 of April 14, 2022Commission Nationale de l'Informatique et des LibertésNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Friday April 29, 2022NOR: CNIX2212607VDeliberation No. draft decree amending decree no. 2018-383 of 23 May 2018 authorizing the processing of personal data relating to the monitoring of people in psychiatric care without consent (request for opinion no. 22005342)The National Commission for Informatics and of freedoms, Seizure by the social ministries of a request for an opinion concerning a draft decree amending decree no. 2018-383 of May 23, 2018 authorizing the processing of personal data relating to the monitoring of people in psychiatric care without consent ; 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 Directive 95/46/EC (General Data Protection Regulation); Considering the modified law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms, in particular its article 31; After having heard the report of Mrs. Sophie LAMBREMON, commissioner, and the observations of Mr. Benjamin TOUZANNE , Government Commissioner, Issues the following opinion: Law No. 2021-998 of July 30, 2021 on the prevention of acts of terrorism and intelligence created a new article L. 3211-12-7 in the Code of Public Health (CSP), which introduces a derogation from medical secrecy concerning persons subject to psychiatric care measures without consent, for the purpose of combating terrorist radicalization. More specifically, it is provided that for the sole purpose of monitoring persons who represent a serious threat to public security and order due to their radicalization of a terrorist nature, their identification data as well as those relating to their administrative situation can be communicated to the representative of the State in the department as well as to intelligence services. In this context, decree n ° 2018-383 of May 23, 2018 authorizing the processing of personal data relating to persons in psychiatric care without consent, which already provides for the linking of HOPSYWEB processing with the report processing file for the prevention of terrorist radicalization (FSPRT), is amended to specify the methods according to which these data are transmitted and extend the scope of the persons to whom this information may be communicated in accordance with the law of 30 July 2021. As a preliminary point, the Committee recalls that it ruled in its deliberations Nos. 2018-353 and 2018-354 of December 13, 2018 on this connection. In its deliberation on the HOPSYWEB processing, the Commission made certain observations. On the one hand, it considered that the procedures for exchanging information between the prefects and the regional health agencies (ARS) were not sufficiently regulated. It had, on the other hand, noted that no information specific to persons, nor relating to the erasure of data, was provided for by the text. Finally, the Commission had formulated a reservation

as to the possibility of derogating without an express legislative provision from medical secrecy, except with regard to informing the prefect of the person's place of residence. On this point, it stresses that the above-mentioned law of July 30 provided a legislative basis for the transmission of this data. In the context of this referral, the Commission reiterates some of its observations, more particularly with regard transmission of information following a match within the processing operations. It also expresses reservations about the possibilities of research within the HOPSYWEB processing operations envisaged by the Ministry within the framework of the removal of doubt. The Commission also makes comments on the modifications that could be made to the draft text for the purpose of clarifying the system. Finally, the Commission points out that the decree of 23 May 2018 constitutes a single regulatory act, in reference to which compliance commitments must be sent to the Commission prior to each implementation. Furthermore, it notes that the draft decree is intended solely to modify the conditions for linking the HOPSYWEB processing operations and the FSPRT. In accordance with the position of the Council of State (CE, March 13, 2020, Association circle of reflection and proposal of actions on psychiatry (CRPA) and others, nos 431350, 431530, 432306, 432329, 432378 and 435722), the Ministry stresses that the connection referred to constitutes an autonomous processing which is legally distinct from HOPSYWEB processing, and that this processing "comes under, in the same way as the FSPRT processing, the only provisions applicable to processing involving the security of the State and the defense ". The Ministry thus considered that the processing concerned by the project falls solely under the provisions of Titles I and IV of Law No. 78-17 of 6 January 1978 as amended and referred this amendment to the Commission on the basis of Article 31. -II of this law.Regarding the methods of transmitting information following a match ("hit")The connection between the HOPSYWEB and FSPRT processing operations is carried out when a new individual is registered in one of the two processing operations , during a new measurement on an existing file for a person already registered in HOPSYWEB and, in any case, every twenty-four hours. It is carried out from the surname, first name and date of birth of the persons concerned. This data is "hashed" and phonetized to find a match, even when the name is spelled slightly differently in the two files. say when the person is registered in the FSPRT and in HOPSYWEB (presence of a "hit"), the prefect of the hospitalization department is informed. He receives an email via the Ministry's secure networks, using a technical module developed within the FSPRT. He is the only one who can then take steps with the regional health agency (ARS) to obtain additional information and ensure the identity of the person concerned (removal of doubt). In this respect, the Commission notes that these exchanges are limited to what is provided for by the provisions of the CSP. It is only in a second step, once the removal of doubt has been carried out

and the positive "hit" confirmed, that the prefect of the place of residence as well as the intelligence services can be informed of the correspondence. The ministry has also indicated that the information communicated by the ARS to the prefectural agents in this case will be communicated via the usual transmission channels, i.e. by telephone, for example. He specified in this regard that the ARS agents likely to respond to such requests will be made aware of the confidentiality of the information transmitted. With regard to the methods of this transmission, the Commission reiterates the observations made in its previous deliberation, consisting in considering that they could be surrounded by reinforced guarantees. In particular, it calls for particular vigilance regarding the securing of procedures for clearing up doubts and collecting additional information. In addition, it considers that only the identified referent within each ARS intervening within the framework of the CPRAF (unit for the prevention of radicalization and support for families) should carry out the verification of the identity of the person and communicate additional information, at the request of the prefect of the department and in Paris, of the prefect of police. It considers that such a measure would indeed be likely to limit the risks leading to the knowledge by ARS agents of the fact that a person is registered in the FSPRT at the time of the request from the prefect of the department, and to Paris, from the Prefect of Police. These general points recalled, the Commission makes the following observations. Firstly, the Commission considers that the draft decree could be supplemented in order to specify that the additional information present in HOPSYWEB (other than that having allowed the "hit", i.e. surname, first name and date of birth) will require the prefect of the department to clear up any doubts before being sent to the representative of the State with territorial jurisdiction for monitoring the person and to the services of intelligence. The draft decree could thus mention that it is at the end of the removal of doubt that the aforementioned recipients receive communication of this data. The Commission takes note of the ministry's commitment to clarify the draft decree on this point. It also stresses that the single "hit" could not, in the absence of the removal of doubt carried out by the prefect of the department, lead to the recording of any information within other files and in particular the FSPRT. It considers that such a guarantee could also usefully be included in the draft decree. it is possible that the "hit" gives rise to one or more correspondences, which does not call for any particular observation. On the other hand, the ministry indicates that, within the framework of the removal of doubt, a more in-depth search may be requested on an ad hoc basis by the prefect at the ARS and carried out on identities qualified as neighbors. Thus, on the basis of a case-by-case assessment of the probability of finding them within a reasonable time, the ARS may search for an individual within the file, outside of the automated search procedure described above. Asked about this point, the ministry specified that the criteria

leading to requesting this search may depend on the time within which the prefect wishes to have the information, those he already has, and their proximity to the identifying data from the " hit". On the one hand, the Commission considers that the possibility of carrying out this type of research entails significant risks of breaches of the privacy of the persons concerned. Thus, it considers that the hypothesis described by the ministry is likely to generate the communication of information which would not be covered by the scope of article L. 3211-12-7 of the CSP. Such a situation is also likely to reveal a suspicion of terrorist radicalization of an individual to the ARS, even though they do not have to know about it with regard to their missions. On the other hand, the Commission recalls that the HOPSYWEB processing does not constitute identification files or risk prevention files related to the radicalization of people with mental disorders. In fact, the purpose of these processing operations is to allow the monitoring of persons undergoing psychiatric care and the general objective of which is to standardize and secure practices in terms of hospitalization without consent. In view of the foregoing as well as the purposes referred to in Article 1 of Decree No. 2018-383 of May 23, 2018, the Commission is particularly reserved as to the Ministry's desire to allow this method of research within these files.Thirdly, the Commission notes that the Ministry does not provide for any procedure relating to the updating of the information transmitted to the prefect of the department and, in Paris, to the prefect of police, as well as to the intelligence services, when this information is integrated into the FSPRT and that a care measure without consent is then declared irregular by the judge of freedoms and detention. On the nature of the data transmitted The draft article 2-1 regulates the data that can be t sent by the ARS to the representative of the State in the department and, in Paris, to the prefect of police, as well as to the services mentioned in articles L. 811-2 and L. 811-4 of the internal security code. Commission notes that the categories of data likely to be communicated do not correspond strictly to those subject to registration in the HOPSYWEB processing. It invites the ministry to ensure the exact correspondence between these categories of data. It recalls that the draft article 2-1 cannot allow the collection of data other than those whose processing is authorized by article 2 of the decree governing HOPSYWEB. Finally, the reference to articles L. 3212-5, L. 3212-8 and L. 3213-9 of the CSP and 706-135 of the Code of Criminal Procedure operated by article L. 3211-12-7 of the CSP seems to indicate that the administrative data that can be processed in this context would be: the decision admission of a person to psychiatric care; the end of the care measure; the lifting of the psychiatric care measure; the decision to admit a person to psychiatric care who has been the subject of an arrest or a judgment of declaration of criminal irresponsibility on the grounds of mental disorder. Thus, the Commission invites the Ministry to ensure that the information relating to "the form of the care" does

indeed constitute data that can be processed within the framework of the draft decree before it. between HOPSYWEB and FSPRT processing In general, the Commission recalls that in terms of interconnections, reconciliations, or other forms of linking, when the processing in question is governed by regulatory acts, the linking must comply with the provisions governing both treatments. This requires ensuring that the operation complies with the purposes, data and accessors and recipients set by the two regulatory acts (CNIL, SP, May 27, 2021, Opinion on draft decree, LRPGN, No. 2021-061 , published). In the present case, while the Commission ruled in 2018 on the principle of linking the HOPSYWEB and FSPRT files, it was not able to assess, in the context of this referral, the conformity of the changes envisaged by the ministry with regard to the texts governing the HOPSYWEB and FSPRT processing, since the decree governing the latter has not been published. The Commission invites the Ministry to ensure compliance with all of the aforementioned conditions and also recalls that it may be called upon to monitor compliance with these terms in the context of the implementation of its supervisory powers provided for in article 19 of the amended law of 6 January 1978.Concerning the transmission of information to the intelligence servicesThe draft decree regulates, in accordance with what the CSP provides, the transmission of information to the intelligence services because of their counter-terrorism missions and within the limit of their need to know. Thus, the identification data of the persons concerned and the information relating to the nature and dates of the admission decision, the form of the support, the lifting and the end of the measure, at the address of the health establishment, may be transmitted following the removal of doubts carried out by the prefect of the department of the place of hospitalization. The Commission emphasizes that the data thus transmitted to the intelligence services for the purposes provided for in Article L. 3211-12-7 of the CSP will be subject to registration in other processing operations. In general and in the same way as for the connection with the FSPRT, the Commission recalls that these operations must comply with the provisions governing other processing and that this requires ensuring that this is in accordance with the purposes, data and accessors and recipients set by the regulatory acts concerning this processing. On the rights of data subjects The Commission notes that the draft decree submitted to it does not modify the provisions in force relating to the procedures for exercising the rights of data subjects. persons concerned, even though decree no. 2018-383 of May 23, 2018 refers to former articles of the amended law of January 6, 1978, which are no longer in force. Firstly, if it regrets that the ministry initially chose not to modify the decree on this point, especially since it had made a number of observations in its deliberation no. 2018-354 of December 13, 2018, the C Commission takes note of the Ministry's commitment to update the provisions of Decree No. 2018-383 and to supplement them with the applicable rights. It also

underlines that the impact assessment relating to data protection will have to be updated. The Commission also recalls that, given the development of the legal framework applicable to the protection of personal data, it is the Ministry to ensure that the information currently issued by the ARS meets the requirements of the provisions of the GDPR. In this respect and given the issues related to the linking of HOPSYWEB and FSPRT processing, it considers that specific information should be issued to the persons concerned.Secondly, the Ministry considers that are subject to Title IV of the law of January 6, 1978 modified the data concerned by the purpose of informing the prefects and intelligence services for the purposes of monitoring a person representing a threat. This implies that in accordance with the provisions of Article 118 of this law, the rights of access, rectification and erasure of data are exercised indirectly with the Commission. The Ministry further provides that the right to information provided for in Article 116 and the right to object provided for in Article 117 of the same law do not apply to this processing. The Commission understands in this case that this implies that the person concerned may in particular ask, via the right of indirect access, whether information concerning him has been transmitted to the prefect of the place of hospitalization within the framework of this connection. If he notes that such terms are intended in particular to take account of the decision of the Council of State mentioned above, the Commission considers that these are likely to entail a certain number of practical difficulties. As has already been pointed out for related processing under separate regimes, the clarity for individuals is impacted by this duality and can harm the effective exercise of rights. In general, the Commission wonders about the identification of data likely to be targeted, as well as on the exact perimeter of the operations concerned (the base of phoneticized and "hashed" data fingerprints, the "hit", the removal of doubt, etc.). the Ministry's attention to the practical arrangements that will make it possible to implement these rights effectively, in particular insofar as the "hits" are not necessarily subject to recording and that the removal of doubt is carried out by telephone .The PresidentMarie-Laure DENIS