Deliberation 2020-064 of June 25, 2020Commission Nationale de l'Informatique et des LibertésNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Friday December 18, 2020NOR: CNIX2033708VDeliberation n° 2020-064 of June 25, 2020 providing an opinion on a draft decree modifying the provisions of the internal security code relating to the processing of personal data called "Prevention of attacks on public security" (request for opinion no. 19013316)The National Commission for Computing and Liberties,

Seizure by the Minister of the Interior of a request for an opinion concerning a draft decree amending the provisions of the internal security code relating to the processing of personal data called Prevention of attacks on public security;

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 Directive (EU) 2016/680 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 by competent authorities for the purposes of prevention and detection of criminal offences, investigation and prosecution thereof or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA;

Having regard to the internal security code, in particular its articles R. 236-11 et seq.;

Considering the law n° 78-17 of January 6, 1978 modified relating to data processing, files and freedoms;

Having regard to decree n° 2019-536 of May 29, 2019 as amended, taken for the application of law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms;

Having regard to deliberation no. 2010-427 of November 25, 2010 giving an opinion on a draft decree in Council of State amending decrees no. 2009-1249 and no. 2009-1250 of October 16, 2009 creating personal nature respectively relating to the prevention of breaches of public security (PASP) and to administrative investigations related to public security (EASP);

Having regard to deliberation no. 2017-153 of 18 May 2017 giving an opinion on a draft decree modifying several automated processing of personal data of the internal security code; After hearing Mrs. Sophie LAMBREMON, commissioner, in her report, and Mrs. Nacima BELKACEM, Government Commissioner, in her observations, Issues the following opinion:

The Prevention of Attacks on Public Security (PASP) processing, implemented by the General Directorate of the National Police, allows the collection, storage and analysis of information concerning persons whose individual or collective activity indicates that they may affect public security, and may in particular relate to persons likely to take part in terrorist activities or to

be involved in acts of collective violence, in particular in urban areas or during demonstrations sports.

The Commission recalls that the creation of this processing took place within the framework of the reform of the intelligence services carried out in 2008 and that it was led to rule on several occasions on the methods of implementation of the PASP processing, framed by the articles R. 236-11 and following of the internal security code (CSI).

The draft decree submitted to the Commission for its opinion aims to make it possible to take into account the evolution of certain practices in the use of this processing and, in doing so, to regularize them. In particular, the draft provides for modifying the purposes of processing in order to include threats to State security and to the integrity of the territory or the institutions of the Republic, to expand the data that may object of collection and in particular to mention the recording of data from third-party files as well as to extend the list of persons likely to access the processing or to have communication of information recorded there. Finally, the draft decree modifies the provisions relating to the exercise of the rights of the persons concerned, in order to take into account the evolution of the regulations concerning the protection of personal data.

The Commission takes note of the information provided by the Ministry according to which the PASP processing, implemented for the purposes of preventing threats to public security within the meaning of the aforementioned Directive 2016/680, also partly concerns State security . It follows from the evolution of the legal framework relating to the protection of personal data that the provisions applicable to the processing of data appearing within this system and concerning State security, are excluded from the scope of application of the directive 2016/680 and fall specifically under articles 1 to 41 and 115 to 124 of the law of 6 January 1978 as amended. Finally, insofar as the data mentioned in I of article 6 of this same law are likely to be recorded, the modification of the PASP processing must be the subject of a decree in Council of State, taken after opinion reasoned and published by the Commission.

The draft decree submitted for opinion to the Commission calls for the following observations.On the extension of the scope of the processingIn the first place, article 1 of the draft decree aims to extend the scope of the harms that the processing aims to prevent, to those relating to state security. It also provides that the processing may in particular concern persons likely to undermine the integrity of the territory or the institutions of the Republic.

According to the ministry, this modification aims to take into account, more precisely, the missions carried out by the central territorial intelligence service (SCRT), and in particular those relating to the prevention of radicalization and terrorism. The Commission considers, both in view of the evolution of the missions of the Intelligence Directorate of the Prefecture of Police,

and the change in threats likely to undermine State security, that the planned modifications are justified.

It nevertheless notes that the PASP processing aims to prevent attacks of a very diverse nature which may relate to actions or individuals not necessarily being likely to undermine State security. It stresses in this respect that the processing only partly and residually concerns State security.

Under these conditions, the Commission considers it essential that measures be implemented in order to make it possible to distinguish precisely the data intended to be processed for purposes relating to State security. In this regard, it takes note of the clarifications provided by the Ministry according to which information relating to State security will be clearly identified, depending on the reason for recording. The ministry also specified that it considers that the security of the State is of interest to everything relating to the continuity and integrity of the institutions of the Republic and its public services, and by extension, to the prevention of behavior that threatens this integrity. In this context, only these reasons, provided for each record recorded in the processing, will come under Title IV of the amended law of 6 January 1978. Secondly, article 1 of the draft decree provides that persons likely to be registered in the processing can be natural persons, legal persons, as well as groups.

Although the Commission notes that this distinction does not appear in the current provisions of the CSI, it takes note of the justifications provided by the Ministry on the relevance of the collection of such data with regard to the risk to public security or the safety of the State that legal persons and groups may represent, or resulting from the link maintained with a person presenting himself a risk. In this context, it considers that this expansion does not call for any particular observation. On the collection of data from other files and planned reconciliations Article 2 of the draft decree provides for the collection of new categories of data and in particular, the registration of information resulting from the query or consultation of other files as well as the addition of the mention of the registration of the person concerned in another treatment.

The Commission thus notes that a distinction is made between the information recorded under a category of data and the mention of the registration of a person within a processing operation (for example, person known to the TAJ). It notes that this precision results from the fact that the registration or not of a person in a processing operation constitutes information in itself.

Firstly, the Commission notes that many categories of data such as the situation with regard to the regulations of entry and stay in France , arms and related titles , means of travel , incarceration measures or even search sheets will be manually fed by other processing. These files are: the application for managing the computerized directory of weapon owners and possessors (AGRIPPA), the application for managing the files of foreign nationals in France (AGDREF), the processing of data

relating to passenger information (system API-PNR), the national driving license system (SNPC), the vehicle registration system (SIV), the processing of criminal records (TAJ) and the file of wanted persons (FPR), the Schengen Information (SIS II), File of Stolen Objects and Vehicles (FOVeS), Processing of Information Management and Prevention of Attacks on Public Security (GIPASP), Processing of Information Management and Prevention of breaches of public security (GEDRET), the automated processing of personal data known as FSPRT, the national file of prohibitions on the acquisition and possession of weapons (FINIADA), the processing relating to administrative investigations l related to public security (EASP), the computerized processing system for travel documents and clearances in the civil aviation sector and a portal for filing dematerialized applications (STITCH).Secondly, the article 2 of the draft decree provides that the indication of the registration or not of the person in the following processing may be subject to collection in the processing […]:

- the processing of criminal records (TAJ);
- the Schengen Information System (N-SIS II);
- processing information management and prevention of breaches of public security (GIPASP);
- the file of wanted persons (FPR);
- the automated processing of personal data called FSPRT;
- file of stolen objects and vehicles (FOVeS).

At the outset, the Commission takes note of the clarifications provided by the Ministry, according to which access to the files consulted is by expressly and individually authorized territorial intelligence agents, and this according to the subject matter. All of these files are not interconnected with the PASP process, and the results of querying these files cannot be queried within the process.

In general, it recalls that it is important to ensure that only processing operations containing relevant, adequate and necessary data with regard to the purposes of PASP processing are consulted. In the same way, the Commission considers that particular attention must absolutely be paid to the methods of data collection, which are likely to entail particular risks for the persons concerned, due for example to the erroneous collection of data concerning them and this, due to their manual registration in the treatment.

In addition, it considers that, given the particularly sensitive nature of some of these processing operations, a fortiori those exempted from publication or involving State security, measures must imperatively be developed in order to ensure the

effective updating of data stored in this way.

Without calling into question the need to collect data allowing the prevention of attacks on public security, State security, or even the monitoring of persons likely to take part in terrorist activities and, to this end, to consult the processing thus referred to, the Commission considers that it would have been highly desirable to modify the regulatory acts governing the files concerned in order to explicitly mention that they can be reconciled with PASP processing.

In the same way, if all the categories which are intended to be supplied by this processing are mentioned exhaustively in article 2 of the draft decree, the Commission considers that the draft act could also have explicitly mentioned the files actually consulted allowing to feed these categories. Insofar as the processing operations concerned have been identified exhaustively and in order to avoid, in practice, the use of other processing operations, it invites the Ministry to supplement the draft decree on this point. On the collection of data relating to victims and persons in regular and non-accidental contact with the person or group monitored As a preliminary point, the Commission notes that Article R. 236-12 of the CSI already provides for the collection of data relating to persons maintaining or having maintained direct and non-fortuitous relations with the person concerned. Article 2 of the draft decree intends to specify the data that may be collected in this respect and limit the cases in which they may be recorded.

Article 2 of the draft decree also provides that data relating to the victims of the actions of the person likely to harm public security or the security of the State, may, in certain limited cases, be subject to of a collection within the processing.

The draft decree exhaustively lists the data likely to be recorded in the processing. In this respect, the Commission takes note of the clarifications provided by the Ministry according to which each piece of information will be collected strictly insofar as it is necessary for the follow-up of the person and more particularly for the motivation of the registration in the treatment of the person making subject to follow-up. The Ministry has also clarified that the relevance of the collection of this data will result solely from the reason for monitoring the person and not from the fact that the person concerned may himself constitute a risk of harm to public security or safety. of State. Finally, the information relating to these people will be mentioned in the information notes appended to the individual files and will not be the subject of their own files.

The Commission notes that the draft decree expressly limits the collection of data relating to these persons to certain categories of information, and that furthermore, a search within the processing operation on the basis of this data or the identity of these people is not possible.

In this context, it considers that it is essential that the criteria relating to the need for the collection of these categories of data, as described by the ministry, be strictly respected. Under these conditions only, the Commission considers that the collection of this information is legitimate, with regard to the purposes of the processing, and in accordance with article 4-3° of the law of January 6, 1978 as amended. It also recalls that it may be called upon to check compliance with these terms of implementation.

Insofar as these data are intended to be kept for the same duration as the information relating to the person being monitored, it underlines the importance of ensuring strict control of these durations and, more specifically, in the event of the collection of information relating to minors. It recalls in this respect the importance of the mission carried out by the national referent who, in accordance with the provisions of article R. 236-15 of the CSI, ensures the control of the deletion of data, at the end of the three-year period for data concerning minors as well as the relevance of keeping this data.

It also recalls the obligation imposed on the Director General of the National Police to present to the Commission each year a report on his activities for checking, updating and erasing the data recorded in the processing, in particular those relating to minors . The Commission considers that these safeguards are important measures making it possible to contribute to compliance with the principles relating to data protection. On the possibility of carrying out a search based on the photograph Article 2 of the draft decree provides that a search may be made from photographs relating to individuals, recorded in the processing.

In this respect, the Commission notes that, in the state of the developments communicated by the Ministry, the questioning by photograph must constitute a new possibility of questioning the processing (like the name), which has not intended to replace the methods of consultation of the treatment currently implemented. It takes note of the clarifications made according to which this device must only allow querying of the PASP processing for the purpose of determining whether the person whose photograph is submitted is already included in the processing, thus constituting only an aid to the identification of the nobody. The result of the query will be cross-checked with other elements in the possession of the service, making it possible to confirm the identity of the individual (such as, for example, the particular physical signs known) and may serve as a basis for further research by the agents. territorial intelligence. A positive result will in no way be sufficient on its own to base a decision with regard to the person, and no direct consequences will affect the person concerned.

It also emphasizes that the draft decree explicitly excludes this possibility with regard to persons maintaining or having

maintained a link with persons likely to undermine public security or the security of the State, as well as the victims, the treatment not allowing it.

While the Commission takes note of all the clarifications provided by the Ministry, it notes however that this functionality has not yet been developed in the application, and that it is only a project. Without questioning the principle of the implementation of such a device, it wonders, in the absence of details on this point, about the technical characteristics of the future device and about the data that will be necessary for its operation. It considers in particular that, in the event that the device uses a biometric template, this would in itself constitute data falling within a category distinct from those listed in the draft decree. In this case, the deployment of this method of querying the file would therefore require the modification of article R. 236-12 of the internal security code, after referral to the Commission, under the conditions provided for in article 31 of the law of January 6, 1978 as amended.

In any case, it asks to be made the recipient of any element allowing to assess the methods, in particular technical, of implementation of this functionality, as well as the impact analysis relating to the private life of the data made available. up to date, before its effective implementation. It recalls that it will not fail to make use, if necessary, of its powers of control, pursuant to article 19 of the law of January 6, 1978 as amended.On the rights of the persons concernedIn the first place, article 8 of the draft decree specifies that the rights of individuals are exercised differently depending on whether or not the data is of interest to State security. The character of a mixed file, concurrently coming under Titles III and IV of the law of January 6, 1978 as amended, leads to a particular complexity in the procedures for exercising rights. However, the Commission recalls that the exercise of the rights of individuals, and in particular the possibility of requesting access to the data concerning them, constitutes an important guarantee with a view to preventing breaches of their privacy.

In the present case, on the one hand, for data considered to be of interest to State security, the rights of access, rectification and erasure of recorded data are exercised with the Commission, under the conditions laid down in article 118 of the law of January 6, 1978 as amended.

On the other hand, for other data, the rights of information, access, rectification, erasure and limitation are exercised directly with the general management of the national police.

The Commission notes that these rights may be subject to restrictions, in order to avoid hampering investigations, research or administrative or judicial proceedings, to avoid harming the prevention or detection of criminal offences, investigations or

prosecutions in this area or the execution of criminal sanctions or to protect public security and national security, pursuant to 2° and 3° of II and III of article 107 of the law of January 6, 1978 modified. Given the purpose of the processing, the limitation of these rights, which are exercised in this case with the Commission under the conditions provided for in Article 108 of the same law, does not call for any particular observation.

On the other hand, the Commission considers that the proposed provisions do not make it possible to link the data concerned exclusively to the purpose for which they are processed. Consequently, these provisions do not allow the persons concerned to determine with certainty the methods according to which they can exercise their rights.

In this respect, it notes that the Ministry has assured it that the data covered by the specific regime for processing involving State security will be identified as such in the file. The Commission considers that the implementation of specific markers, or an equivalent device, should make it possible to precisely determine the data considered to be of interest to State security, on the basis of precise criteria. Such identification is likely to allow the data controller to whom a request for the exercise of rights is made on the basis of Title III of the amended law of 6 January 1978 to exclude from his response only the data identified in advance, and on the basis of specific criteria, as falling under the Title IV regime. Since this is an essential method of exercising rights in the presence of a file falling under both Title III and Title IV of the law, the Commission considers that the decree should specify that the Title IV data are identified as such in the file.

In any case, it considers that in the absence of provisions or measures allowing an objective identification of the data excluded from the right of direct access, the application of the provisions of title III of the modified law of January 6, 1978 must prevail. It also stresses that, in the case of victims as well as persons maintaining or having maintained relations with the persons being monitored, the processing methods make it particularly difficult in practice to exercise their rights. Indeed, insofar as the information concerning them is contained in information notices for which the full-text search is impossible, concerning for example the victims, the determination, upstream, of the author of the attack of which the plaintiff was a victim, is a prerequisite for the exercise of these rights. Considering these elements, the Commission takes note of the ministry's commitment, at its request, to initiate a reflection on the effectiveness of the exercise of these rights. It considers it essential that these people can exercise their rights effectively, in accordance with the applicable provisions.Secondly, article 8 of the draft decree provides that the right of opposition does not apply to this processing, which does not call for comment. Thirdly, it is emphasized that the jurisdiction competent to deal with litigation related to the exercise of rights differs depending on whether or not the data is of

interest to State security. Article 7 of the draft decree therefore modifies the provisions of article R. 841-2 of the CSI in order to provide for the competence of the Council of State for data concerning State security. With regard to other data, and without the text having to provide for it, jurisdiction lies with the administrative court of Paris. The Commission draws the Ministry's attention to the complexity of this distribution and considers that an overall reflection could be carried out in order to clarify the distribution of litigation between the Council of State and the Paris administrative tribunal. On the changes made to the other conditions for implementing the processingOn the data collectedAs a preliminary point, the Commission notes that the wording of certain categories of data is particularly broad. While it does not question the difficulty of specifying exhaustively all the data that may be collected in this respect, particularly with regard to the operational requirements specific to each situation, it nevertheless considers that in certain respects, the draft decree could be clarified in order to define more precisely what these categories overlap. Firstly, article 3 of the draft decree provides that health data revealing a particular danger or vulnerability may be collected . As such, data relating to known or reported psychological or psychiatric disorders insofar as these data are strictly necessary for the assessment of the dangerousness may be collected.

In this respect, the Commission notes that the information thus collected is limited to the description of the disorders and the possible psychiatric follow-up of a person, to the exclusion of any data provided by a health professional subject to medical secrecy. As such, they are most often provided by relatives, family or the person concerned.

It nevertheless recalls that the mention of this information is of a sensitive nature. Indeed, this information constitutes health data within the meaning of the regulations applicable to the protection of personal data, which must be subject to increased vigilance. If the collection of this data does not call for any particular observation, it emphasizes that any information which would be covered by medical secrecy should, in addition, benefit, unless otherwise provided, from the protection provided for in Article L. 1110- 4 of the public health code. Secondly, article 2 of the draft decree provides that the identifiers used on social networks or activities on social networks may be the subject of collection within the processing.

In this respect, the Commission takes note of the clarifications provided by the Ministry according to which all social networks are concerned in the context of open source research, and that the data are therefore collected on pages or accounts opened, excluding any interaction with the data subject. Furthermore, the identifiers used correspond, for example, to the pseudonym of the person concerned, to the exclusion of the associated password. It also notes that data may also be collected under the conditions provided for in Article L. 863-1 of the CSI.

The ministry also clarified that the information collected will mainly relate to comments posted on social networks and photos or illustrations posted online, these elements being considered relevant in the context of the prevention of attacks on public safety or security. of State. In this regard, the Commission recalls that, with regard to the collection of photographs, in the absence of details on this point, any search device based on these elements should be excluded.

Finally, it underlines that if data concerning other people can be collected in this respect, it notes that it can only be recorded in the event that their mention is essential to characterize an infringement. to public security or State security, and within the limits of what is provided for in the draft decree with regard to the collection of data relating to victims or persons maintaining a link with the person or group monitored.

Without calling into question the details provided by the Ministry, the Commission considers that the provisions of the draft decree do not allow a clear and precise understanding of the nature of the data likely to be recorded in this respect, nor of the methods of this collection, which may, for example, refer to different realities depending on the confidentiality policy of the network concerned. It asks that the draft decree be clarified in this sense, and considers that it should also explicitly exclude the possibility of automated collection of this data.

Subject to these reservations, the Commission considers that the collection of this data is relevant with regard to the purposes of the processing, and in accordance with article 4-3° of the law of January 6, 1978 as amended. Thirdly, article 2 of the draft decree provides that the actions likely to receive a criminal qualification, the legal consequences as well as the legal history (nature of the facts and date) could be the subject of a recording within the treatment.

The Commission takes note of the clarifications provided by the Ministry according to which the information likely to be collected in this respect may relate, for example, to attacks independently of any complaint or criminal investigation, to facts, or may make it possible to know whether the person concerned is subject to judicial review.

In this regard, the Commission recalls that the collection of data relating to the aforementioned categories may in no case relate to judgments or convictions, in accordance with the provisions of Article 777-3 of the Code of Criminal Procedure. About the recipients

Article 6 of the draft decree provides for extending the list of persons who may have communication of information recorded in the processing. It provides that, within the limits of the need to know, the recipients of the data recorded in the processing may be:

- the persons having authority over the services or unit having access to the data recorded in the processing, in accordance with the provisions in force of article R. 236-16 of the CSI;

- public prosecutors;

- the agents of a national police service or a national gendarmerie unit in charge of an intelligence mission and the agents of the services mentioned in articles R. 811-1 and R. 811-2 of the CSI, with authorization express;

- the personnel of the national police or the soldiers of the national gendarmerie who are not in charge of an intelligence mission on express request, specifying the identity of the applicant, the object and the reasons for the consultation.

Although the possibility of transmitting the information resulting from the processing to all of these people is justified with regard to both the missions of these services and the purposes of the PASP processing, the Commission nevertheless considers that the draft decree could have detailed specify more precisely the data that can actually be transmitted to them and in particular with regard to those relating to the victims. In this regard, the Ministry specified that the processing manager does not transmit data that is not related to the request made, in strict compliance with the right to know (leading to the absence of communication of data relating to victims for example), and undertakes to mention this point in the treatment use doctrine.

Finally, it considers, with regard to personnel of the national police or soldiers of the national gendarmerie who are not in charge of an intelligence mission, that the use of the term consultation appearing in the draft decree seems to infer that they have direct access to treatment. It takes note of the ministry's commitment to modify the draft decree on this point. On security measures

The Commission notes that the production of the processing is carried out in a secure environment. However, it considers that, given the nature of the data, and for reasons of defense in depth, encryption measures in accordance with appendix B1 of the general security reference system must be implemented, both at the level of the databases active, communications, log data, backups. In addition, to guarantee the partitioning put in place between the PASP operating network and the Internet, the Commission recommends stopping the use of administrator workstations accessing both the processing administration network and the Internet, given the risk that this use is likely to represent.

With regard to the authentication methods, the Commission notes the use of an agent card associated with a PIN code as well as the ministry's commitment to ensure a level of security that meets the standards or benchmarks of strong authentication. It

also recommends following up on its deliberation 2017-012 of January 19, 2017 on the adoption of a recommendation relating to passwords.

It also takes note of the data quality control measures carried out by the DDVT and the DRPP on their respective sheets.

Article 7 of the draft decree provides that the operations of collection, modification, consultation, communication, transfer, interconnection and deletion of personal data and information are subject to recording, and that these data are kept for a period of six years.

As a preliminary point, the Commission underlines that insofar as the processing is not the subject of interconnections but only reconciliations, under the conditions previously developed, the Ministry has undertaken to modify the provisions of the draft decree in meaning, for the sake of clarity of the device.

With regard to the retention period for log data, the Commission recalls that the sole purpose of collecting this data is the detection and/or prevention of illegitimate operations on the data. The duration of storage of these traces must be fixed in a manner proportionate to this sole purpose. In addition, it emphasizes that these data must not under any circumstances provide information on data whose retention period has expired.

Finally, the Commission takes note of the implementation of measures to ensure the integrity of the processing data. In this respect, it recommends that a fingerprint of the processing data with a hash function in accordance with appendix B1 of the general security reference system be used.

The other security measures do not call for comments from the Commission.

The president,

M. L. Denis