

Deliberation 2019-154 of December 12, 2019 National Commission for Computing and Liberties Nature of the deliberation:

Opinion Legal status: In force Date of publication on Légifrance: Saturday August 01, 2020 Deliberation n° 2019-154 of

December 12, 2019 providing an opinion on the draft ordinance transposing Directive (EU) 2015/849 of the European

Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money

laundering or terrorist financing, amended by Directive (EU ) 2018/843 of the European Parliament and of the Council of May

30, 2018 (request for opinion no. 19020584)

The National Commission for Computing and Liberties, Seizure by the Ministry of Economy and Finance of a request for an

opinion concerning a draft order transposing Directive (EU) 2015/849 of the European Parliament and of the Council of May

20, 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

amended by Directive (EU) 2018/843 of the European Parliament and of the Council of May 30, 2018; No. 108 of the Council

of Europe for the protection of individuals with regard to automatic processing of personal data; Having regard to the Charter of

Fundamental Rights of the European Union; 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; 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

the competent authorities for the purposes prevention, investigation, detection and prosecution of criminal offenses or the

execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision

2008/977/JHA; Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive

(EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

as well than the directions ves 2009/138/EC and 2013/36/EU (Text of interest for the EEA); Having regard to the Monetary and

Financial Code, Having regard to Law No. 78-17 of 6 January 1978 as amended relating to data processing , files and

freedoms; Considering the decree n ° 2019-536 of May 29, 2019 taken for the application of the law n ° 78-17 of January 6,

1978 relating to data processing, files and freedoms, in particular its article 9; After having heard Mr. Philippe-Pierre

Cabourdin, commissioner, in his report, and Mrs. Nacima BELKACEM, government commissioner, in her observations. Issues

the following opinion: The Commission has been seized in application of article 9 of the Decree No. 2019-536 of May 29, 2019

referred to above of a request for an opinion by the Ministry of Economy and Finance on a draft order transposing Directive

(EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018. carried out by the public authorities, such as the TRACFIN intelligence unit, other French intelligence services or INSEE. are likely to fall within several legal fields, namely 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 circulation of these data (hereafter GDPR), and of the law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms, in particular in its title III transposing the directive of 27 April 2016 on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offenses or enforcement of criminal penalties, and on the free movement of such data, as well as in Title IV relating to processing involving State security and defence.

1- On the extension of subject activities (Article 2 of the draft ordinance) Article 561-3-I-3° of the Monetary and Financial Code (hereinafter referred to as CMF) as amended by article 2 of the draft ordinance provides for the subjection of tax advisory activities carried out by lawyers, notaries, commissioners of justice, judicial administrators and judicial agents, to the obligations imposed by the CMF in the fight against money laundering and the financing of terrorism (hereinafter called LCB-FT) , including at x declarations of suspicion and information to the TRACFIN intelligence unit. This provision entails a legal obligation to implement the processing of personal data for the purposes of the fight against money laundering likely to have significant impacts on the rights and freedoms of the persons concerned. It is therefore important that the framework and the conditions calling for the performance of such processing be clearly determined in order to collect only relevant data and limited to what is necessary with regard to the purposes for which they are processed, in accordance with Article 5 of the GDPR.

2- On the greater possibilities given to obliged entities to share information relating to suspicious transaction reports within a group (art. 4 of the draft order) Article L. 561-20 of the CMF , as amended by article 4 of the draft ordinance, provides, under certain conditions, the obligation for group companies, including subsidiaries and branches, to mutually inform each other of the existence and content of declarations of suspicion and information made pursuant to article L.561-15 of the CMF to TRACFIN. This same article specifies that the processing of information carried out must guarantee a sufficient level of protection of privacy and the fundamental rights and freedoms of individuals in accordance with Articles (68 and 69) [122 and 123] of Law No. 78-17 of January 6, 1978. The Commission first of all wonders about the reference made to Articles 122 and 123 of the Data Protection

Act, which only apply to processing involving State security and defense carried out on behalf of the State (Art. 115 of the Data Protection Act). The application of these provisions would imply considering that the sharing of information contained in suspicious transaction reports within a group is carried out on behalf of the State. However, in general, the obligations provided for by the anti-money laundering mechanism do not seem to ask companies to act on behalf of the State, but to make them responsible, by requiring them to put in place procedures aimed at to detect any possible offenses of which they are the vectors, and to bring to the attention of TRACFIN any doubts arising in this context. The sharing of information contained in suspicious transaction reports within a group therefore constitutes processing that does not fall under the provisions relating to transfers and subcontracting provided for in Articles 122 and 123 of the Data Protection Act, but to the provisions of Chapter V of the GDPR (entitled Data transfers to third countries), the reference of which should be included in Article L. 561-20 of the CMF as amended by the order. In any event, given the impact that the dissemination of such information within a group is likely to have for the data subject, the Commission observes that safeguards must be put in place. These must in particular ensure the security and confidentiality of this data, and supervise their transfers, in particular to States that do not belong to the European Union or to recipients established in States that do not belong to the European Union. These guarantees must be defined by the data controller, in accordance with the principle of accountability laid down by the GDPR.

3- On increasing the transparency of information relating to the beneficial owners (art.8 of the draft ordinance) Article 8 of the draft ordinance provides public access to information relating to the beneficial owners of the companies mentioned in Article L. 561-45-1 of the CMF (in particular commercial companies, economic interest groups, under the conditions provided for in Article L123-1 of the Commercial Code): Information relating to the beneficial owner bearing on the name, the usual name, the pseudonym, the first names, the month, the year of birth, the country of residence and the nationality of the beneficial owner, as well as the nature and the extent of the beneficial interests held are brought known to the public. (art. L.561-46 CMF). This obligation is also provided for by the 5th Directive 2018/843 of May 30, 2018, in its article 30 on the grounds that: Public access to information on the beneficial owners allows a control increased information from civil society, including the press or civil society organizations, and helps maintain confidence in the integrity of business transactions and the financial system. (Cons.30 5th Directive relating to LCB-FT). It appears that the publication of the list of beneficial owners aims to dissuade these persons from having recourse to legal arrangements likely to be used for the purposes of combating money laundering and terrorist financing, by publicly linking these arrangements to their identity. concerned, the Commission considers that the

publicity and accessibility of such a list to the public must be assessed in the light of the right to respect for private and family life laid down in Article 7 of the Charter of Fundamental Rights of the European Union providing that: Everyone has the right to respect for his private and family life, his home and his communications. es on the matter (mentioned in particular in the decision of the Constitutional Council n°2016-591 QPC of October 21, 2016): The Commission considers that it is therefore important in the present case that access to data, revealing in particular the year of birth, place of residence, nature and extent of the beneficial interests held by the beneficial owners, be strictly regulated taking into account the case law of the Constitutional Council, so as not to cause a disproportionate invasion of privacy in relation to the purpose pursued. Access to the register of beneficial owners must therefore be accompanied by guarantees aimed at protecting the right to respect for the privacy of the persons concerned, by ensuring the effective exercise of the rights of the persons concerned, in particular at least in terms of rectification and the right to information. Finally, Article 8 of the draft order provides for full access to the register of beneficial owners at the National Institute of Economic Studies Statistics (INSEE). The Commission takes note of the Government's commitment to remove the provision corresponding to INSEE's full access to the register of beneficial owners.

4- On the transmission and reception of information by TRACFIN Article 5 of the draft ordinance modifies the section of the CMF relating to the national financial intelligence unit, the service with national competence called TRACFIN (intelligence processing and action against clandestine financial circuits). The changes made aim to strengthen the confidentiality of TRACFIN's right to object, to strengthen TRACFIN's ability to exchange with its foreign counterparts and to enable it to exchange information with other national intelligence services. The Commission observes that the list of services that can make TRACFIN the recipient of information and vice versa, the list of possible recipients of TRACFIN information, is extended to the intelligence services mentioned in article L. 811-4 of the internal security code (CSI) in addition to the specialized intelligence services provided for by article L. 811-2 of the same code, respectively listed in articles R. 811-1 and R. 811-2 of the same code. Such transmissions are only possible for information relating to facts which concern the purposes mentioned in Article

L. 811-3 of the CSI specific to each service concerned for each transmission, (information relating to the defense and promotion of the fundamental interests of the Nation such as the major economic, industrial and scientific interests of France; the prevention of terrorism, prevention of crime and organized delinquency, etc.). These purposes may potentially fall under titles II, III and IV of the law of January 6, 1978. The planned extension concerns articles L. 561-27 and L. 561-31 of the CMF.

It is thus envisaged that in addition to the judicial authority, the financial courts and the judicial police officers, all of the aforementioned intelligence services may make TRACFIN the recipient of any information necessary for the accomplishment of its mission (article L. 561-27 of the CMF). It is envisaged that TRACFIN may transmit to all of the aforementioned intelligence services information relating to facts concerning the purposes pursued by Article L. 811-3 of the Internal Security Code. Currently, these transmissions are limited to specialized intelligence services. The other recipients of the transmissions provided for in Article L. 561-31 (for example, the High Authority for the Transparency of Public Life, the judicial authorities or the customs administration) are unchanged. The Commission considers that the planned modifications constitute a significant broadening of recipients and issuers, taking into account in particular the scope of the services listed in Article R. 811-2 of the CSI. The Commission particularly draws the attention of data controllers to the mobilization of these bases, and in particular, of the purpose provided for in c) of 5° of Article L. 811-3 of the CSI. If the Commission considers legitimate the transmission by the TRACFIN service to other authorities and services, information within the framework of its intelligence missions, it considers that these transmissions raise significant risks of infringement of the right to respect for the privacy of the persons concerned, especially since the information communicated by TRACFIN and at the origin of this monitoring, may not result from proven facts but from the existence of a simple suspicion. The Commission therefore recalls that the principle of proportionality excludes that information collected by TRACFIN can be transmitted to other authorities or services without such transmission being strictly justified by the specific missions of the recipient structure. It is also envisaged that the transmissions provided for in article L.561-31 of the CMF will not include a mention on the origin of the information. The Commission wonders about the exact scope of the transfers covered by the twelve subparagraphs of the paragraph concerned. The Commission asks that TRACFIN specify the status (judgment, verified information, suspicion, etc.) of the information it will disseminate. It will be up to the data controller to ensure compliance with the applicable regulations, in particular with the principles of transparency and the obligation of accuracy and updating of data, in accordance with 1° and 4° of Article 4 of Law No. 78-17 of 6 January 1978. The Commission recalls that the derogations permitted by the regulations, in particular with regard to the rights of individuals, will have to be analyzed by the data controller according to the specificities of each legal field applicable to the planned processing. The Commission recalls that it will also be up to the data controllers to ensure that the conditions of effective implementation of processing comply with the data protection regulations specific to each applicable legal regime. More specifically, the Commission recalls that in accordance with Article 35 of Law No. 78-17 of January 6, 1978, the acts

creating the processing concerned by this extension of the recipients of the data must be modified accordingly. The Commission finally observes that the draft ordinance transposes the provisions of 35) and 36) of Article 1 of the Fifth Directive by providing for cooperation between TRACFIN and foreign financial intelligence units with a view to ensuring the transmission of information to the competent authorities. The Commission reminds this respect that Titles III and IV of Law No. 78-17 of January 6, 1978 strictly regulate international transfers outside the European Union, without prejudice to the effective implementation of the planned processing. The President Marie-Laure DENIS