Deliberation 2020-036 of March 12, 2020 National Commission for Computing and Liberties Nature of the deliberation: Opinion Legal status: In force Date of publication on Légifrance: Saturday June 27, 2020 NOR: CNIX2015399 Deliberation No. 2020-036 of March 12, 2020 providing an opinion on a draft decree creating an automated processing of personal data called "digital criminal file" (Request for opinion no. 19020069)The National Commission for Computing and Liberties,

Seizure by the Ministry of Justice of a request for an opinion concerning a draft decree creating an automated processing of personal data called a digital criminal file;

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 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 competent authorities for the purposes of the prevention and detection of crime criminal proceedings, investigation and prosecution in this area 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 Code of Criminal Procedure, in particular its article 801-1;

Having regard to Ordinance No. 45-174 of February 2, 1945 relating to delinquent childhood, in particular its article 5-2;

Considering the law n° 78-17 of January 6, 1978 modified relating to data processing, files and freedoms, in particular its articles 31-II and 89-II;

Having regard to Law No. 2019-222 of March 23, 2019 on programming 2018-2022 and reform for justice, in particular its article 50;

Having regard to Decree No. 2014-472 of May 9, 2014 taken for the application of Article 5-2 of Ordinance No. 45-174 of February 2, 1945 relating to delinquent childhood relating to the single personality file;

Having regard to Decree No. 2019-341 of April 19, 2019 relating to the implementation of processing involving the use of the registration number in the national identification directory of natural persons or requiring consultation of this directory;

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 the decree of January 16, 2008 as amended creating an automated processing of personal data called digitization of criminal proceedings;

Having regard to deliberation no. 2007-390 of December 20, 2007 providing an opinion on a draft order establishing a processing operation for the digitization of criminal proceedings;

Having regard to deliberation no. 2010-411 of November 9, 2010 providing an opinion on a draft decree amending the decree of January 16, 2008 establishing a processing of personal data called digitization of criminal proceedings;

Having heard Mrs. Christine MAUGÜE, commissioner, in her report, and Mrs. Nacima BELKACEM, government commissioner, in her observations, Issues the following opinion:

1. The purpose of the draft decree submitted to the Commission for an opinion is to repeal the digitization of criminal proceedings (NPP), currently governed by the decree of 16 January 2008 referred to above, in order to take into account the possibility introduced by article 50 of the law n° 2019-222 of March 23, 2019 of programming 2018-222 and of reform for justice to preserve entirely in digital format the file of the procedure without the need for a paper support and that, for documents kept in this form which need to be signed, to use a single signature in digital form. It also aims to dematerialize the single personality file (DUP) relating to minors and minute registers in a global context aimed at providing magistrates and members of the registry with digital tools.

2. Insofar as the processing of digital criminal files (DPN) is implemented for the purpose of facilitating and improving the processing of criminal files by magistrates, clerks and persons authorized to assist them as well as to streamline exchanges information and access to procedural files for this purpose, it falls within the scope of the aforementioned Directive (EU) 2016/680 of 27 April 2016 (hereinafter the Directive) and must be examined in the light of the provisions of articles 87 and following of the modified law of January 6, 1978. On the general conditions for implementing the system

3. The Commission notes first of all that Article R. 249-9 of the Code of Criminal Procedure (CPP) as amended provides that the processing of digital criminal files will be implemented in each jurisdiction. In this respect, it notes that the scope of the planned processing will be identical to that of the NPP processing and that it will thus be implemented in the courts, the courts of appeal and the Court of Cassation.

4. The Commission also observes that a first stage of the planned processing will consist of the deployment of natively digital criminal proceedings, without any document in paper format, which will initially be limited to the courts of Blois and Amiens, before be widely deployed. It appears from the data protection impact assessment (DPIA) submitted that other stages of this gradual deployment will consist of the use of an electronic signature tool in the two aforementioned sites as well as in the

dematerialized provision, in certain jurisdictions, of the procedural file to lawyers.

5. This draft decree is intended to cover both the initial phases of this progressive deployment and the generalization phase of the system.

The Commission notes, however, that many technical methods are still being designed and are likely to be subject to further development, depending in particular on feedback from the first two jurisdictions concerned, including, for example, the electronic signature and the provision of the procedural file to lawyers.

6. In view of the foregoing, the Commission would like a report on the various phases of the progressive deployment of processing to be sent to it before generalization and, in any event, within twelve months of the implementation. of these. This report should include items relating to the implementation of technical bricks relating to the following functionalities: access control, archiving, encryption, as well as the results of the audit report that will be produced, and in general updates on all the developments referred to in the submitted DPIA.

7. Without calling into question the legitimacy of the creation of such processing, the Commission nevertheless considers, with regard to the extent of the processing and its conditions of implementation, that the draft decree transmitted calls for various observations, in particular :

- the need to explain certain purposes in the draft decree;
- with regard to the data collected, the category of persons subject to the procedure should be modified and clarified;
- the quality of the persons who assist the magistrates of the seat and the prosecution in their functions and benefit from access to the salary should be mentioned;
- the linking of different processing operations with DPN must not have the effect of expanding the list of persons who may receive communication of the data recorded in the processing operation;
- the date of deployment of several of the planned technical blocks is not specified although they are often essential to the security of the proposed system and the security measures do not appear, as they stand, not to comply with the Commission's recommendations in this matter. On the purposes of the processing

8. Article 1 of the draft decree amending Article R. 249-9 of the CPP specifies that DPN processing has two purposes:

- facilitate and improve the processing of criminal cases by magistrates, clerks and persons authorized to assist them;
- streamline the exchange of information and access to the procedural file.9. In general, the Commission recalls the

importance, with regard to the details provided by the Ministry, of explaining each of these purposes and of modifying the draft decree on the following points.

10. It notes that, with regard to the first of these, it is a question of allowing the use of dematerialized documents from the digital criminal file, from the single personality file relating to minors and from the minutes register.

11. In addition, the planned processing intended to allow the use of new research, analysis and work methods by magistrates through a new operating tool called NOE which will allow magistrates to carry out a study personalized of their file in a totally digital way, the Commission requests that the draft decree be supplemented in this sense.

12. With regard to the second objective pursued, which aims to streamline the exchange of information, if the Commission takes note of the clarifications provided by the Ministry according to which third parties within the meaning of Article R. 156 may be concerned, for example of the CPP and not only the persons mentioned in article A1 of the CPP, it regrets not having been provided with the exhaustive list of the provisions concerned and considers that the draft decree deserves to be clarified on this point.

13. Subject to these reservations, it considers that the intended purposes are determined, explicit and legitimate in accordance with article 4-2° of the law of January 6, 1978 as amended.On the data collected

14. As a preliminary point, the Committee observes that the DPN treatment may be linked to different treatments, with a view to its feeding:

- software for drafting police and national gendarmerie procedures (called LRPPN and LRPGN);
- the automated processing of personal data called CASSIOPEE and the automated management system for criminal proceedings relating to public prosecutors and investigating judges, criminal and civil proceedings for juvenile judges as well as other cases, apart from civil and criminal matters, falling within the competence of public prosecutors (called WINEURS) for the entry into DPN of the history of judicial decisions relating to minors;
- the national criminal record;
- the processing of criminal records (TAJ);
- the automated fingerprint file (FAED);
- the national genetic fingerprint file (FNAEG).15. The Commission takes note of the guarantees surrounding these connections, namely:

- the absence of automatic linking of DPN processing with CASSIOPEE and WINEURS processing, the only interconnection planned, according to the ministry, being that of DPN with LRP processing for the procedures called "small x", i.e. - say business without prosecution;

- the absence of inter-application exchanges between the DPN processing and the TAJ, criminal record, FAED and FNAEG processing: only the results of the query of these files can be linked with DPN, without the possibility of accessing the raw data from them;

- the absence of extension of the list of users and recipients of DPN processing compared to what currently already exists in the context of manual connections.16. Without calling into question the legitimacy of these links, the Commission recalls that the various processing operations mentioned above must, if necessary, be modified in order to expressly provide for interconnections and/or links with DPN processing.

17. Article R. 249-11 of the CPP as amended lists the categories of personal data that may be recorded in the processing according to the categories of persons concerned by it: the persons subject to the procedure , lawyers, experts and qualified persons, personnel from the Ministry of Justice, members of investigative services and units.

18. In addition to these categories of data, the draft decree provides that the magistrate's free comments may also be recorded in the processing. In this respect, the Commission notes that all the operating procedures relating to the NOE module are reminded of the need to enter only objective data in these free comment areas and that this is also reiterated during training at the 'tool.

19. Firstly, with regard to the persons who are the subject of the procedure, the Commission notes that this category, formulated broadly, includes:

- victims, who have directly or indirectly suffered harm in connection with the commission of a criminal offence;

- witnesses ;

- the defendants, in particular the persons heard under the regime of police custody or in free hearing as well as the persons subject to a warrant of arrest, search, arrest, etc. ;

- the persons under investigation;

- assisted witnesses;

- persons prosecuted or sentenced;

- the persons subject to an investigation in search of the causes of death or injuries provided for by article 74 of the CPP, or following a worrying disappearance provided for by article 74-1 of the CPP. 20. In view of these clarifications, the Commission considers that the notion of persons subject to the procedure could be clarified, so that the text expressly covers all the persons appearing in the procedure. Consequently, it asks that the draft decree be modified on this point and takes note of the commitment of the ministry in this direction.

21. With regard to the collection of sensitive data, the Commission recalls that in accordance with Article 88 of the law of 6 January 1978, the processing of such data is only possible in the event of absolute necessity, subject to the appropriate safeguards for the rights and freedoms of the data subject. In this respect, it takes note of the clarifications provided by the Ministry according to which the information and data collected during an investigation or an investigation must be necessary for the investigations and that they correspond strictly to the data contained in the paper criminal file. , the register of paper minutes, the minor paper DUP, and this, in compliance with the provisions of the CPP.

22. With regard to biometric and/or genetic data, the Commission notes that the results of fingerprint and genetic identification analyzes may appear in a case file. These data may be collected during a direct sample from the person or during data recovery by the investigators, in compliance with the provisions of the CPP.

23. With regard to the registration number in the national identification directory for natural persons (NIR), the Commission takes note of the clarifications provided by the Ministry according to which this data may appear on exhibits and documents in the criminal proceedings but that no scope of DPN processing does not allow it to be collected and that it is never used as an identifier for natural persons. It recalls that Decree No. 2019-341 of April 19, 2019 referred to above provides that the services of the Ministry of Justice are authorized to implement processing operations including this data for the management of legal proceedings, when the mention of the registration number of persons in the national directory for the identification of natural persons or the intervention of social security bodies in the procedures are provided for by the texts in force.

24. The Commission notes that it is also stated that the processing may contain photographs relating in particular to natural persons, but that it does not include a facial recognition device based on them. It notes that these photographs may relate to the injuries of a person who is the subject of a procedure, to video surveillance or video protection devices, or even come from the TAJ, from an identification session of the suspects , identity documents or surveillance carried out by the investigators. It observes that these photographs may either come from voluntary payment by a party to the proceedings, or be taken or

obtained by the investigating services.

25. Secondly, the Commission observes that it appears from the DPIA transmitted that data relating to traces may be collected with regard to the staff of the Ministry of the Interior or judicial customs as well as for magistrates and staff of the Ministry of Justice. Although it notes that the draft decree does not mention the collection of this data for these categories of people, it takes note of the ministry's commitment to insert a specific provision concerning traceability measures.

26. Subject to the foregoing, the Commission considers that the data processed are adequate, relevant and not excessive with regard to the purposes pursued, in accordance with article 4-3° of the law of January 6, 1978 as amended. and the recipients

27. The draft decree introduces a new article R. 249-13 in the CPP which details the list of accessors and recipients of DPN processing.

28. Firstly, the draft decree provides that access to treatment may be granted, on the one hand, to sitting and public prosecutors exercising functions in all jurisdictions, first instance, appeal and cassation and , on the other hand, the people who assist them in their functions .

The Commission notes that the persons covered by this provision may be assistant lawyers within the meaning of Article L. 123-4 of the Code of Judicial Organization, judicial auditors, court clerks or trainee court clerks, justice as well as specialized assistants. It considers that the draft decree should be amended in order to expressly mention the status of the persons making up the category of persons who assist them in their duties.

29. Secondly, the following may be recipients of all or part of the information recorded in the processing:

- the persons participating in the procedure within the meaning of article 11 of the CPP, the lawyers and the parties with regard to the procedural file and the minutes;
- the lawyers of the minor, of his father and mother, guardian or legal representative and of the civil party, the professionals of the judicial protection of youth, the personnel of the service or the establishment of the authorized associative sector, with regard to the single procedural file relating to the minor concerned;
- any administration, establishment, authority or public or private person authorized to receive all or part of a criminal file or a decision.30. In general and in the current state of the texts in force, the Commission recalls that the linking of the various processing operations mentioned above with the DPN should not have the effect of widening the list of persons who may receive communication of the data which are recorded in these treatments.

31. The Commission notes that it is provided by article 5-2 of the aforementioned order of 2 February 1945 that if the information contained in the single personality file can only be issued to lawyers, these may transmit a reproduction of the copies to the minor prosecuted if he is capable of discernment, to his father and mother, guardian or legal representative. It is however indicated that the magistrate seized of the procedure may, by a reasoned decision, oppose the handing over of all or part of these reproductions when this handing over would cause serious physical or moral danger to the minor, to a party or to a third .

32. The Commission observes, with regard to the last category of recipients, that the authorized bodies that can obtain information relating to ongoing proceedings within the meaning of Article 11-1 of the CPP are those listed in Article A1 of the CPP, the agents of these organizations being bound by professional secrecy with regard to this information. In addition, article 11-2 of the CCP provides that the public prosecutor may inform the administration of certain decisions rendered against a person he employs, including on a voluntary basis.

33. Subject to these reservations, the Commission considers that the consultation of the data by the persons mentioned in the new article R. 249-13 of the CPP appears justified and proportionate. On security measures

34. In general, the Commission notes that the information system underlying the project is changing rapidly, with the addition of numerous technical blocks and the preparation for the deactivation of other blocks that have become obsolete. The blocks currently being deployed relate in particular to access control, archiving and encryption. The commission recalls that in any event, the security blocks essential to satisfying the personal data security requirement must be implemented before the deployment of the functional blocks.

35. The Commission takes note of the supervision of service providers by specific administrative clauses (CCAP) including compliance with recommendation no. 901/DISSI/SCSSI. The Commission asks the Ministry to put in place procedures to verify compliance with these rules as well as with the other obligations contained in these CCAPs.

36. While the Commission regrets the postponement of the ISS and GDPR review of the PPN, it notes that an architecture and security audit campaign on the various bricks of NPP will be carried out.

37. The Commission notes that the password policy provided by the data controller does not comply with its deliberation No. 2017-012 of 19 January 2017 adopting a recommendation relating to passwords, whether in terms of how the password is transmitted (it can be sent by e-mail), the possibility of using shared accounts, the renewal policy and the length and

complexity of passwords. However, it takes note of the future development, in the first half of 2020, of a solution integrating these recommendations.

38. The Commission takes note of the measures for encrypting individual posts. It reminds that access to workstations must require the user to log in to a named account, that sessions must be automatically locked after a reasonable period of inactivity, for example 15 minutes. The Commission also recalls that the workstations must have a firewall, and that the software and operating systems installed must be updated. It emphasizes the importance of taking technical and organizational measures to ensure that documents downloaded via OEPN/NOE do not leave these secure terminals. In addition, the Commission considers that the nature of the data requires that it be subject to encryption measures in accordance with appendix B1 of the general security reference system both at the level of active databases, log data, and backups.

39. In order to guarantee the efficiency of the security measures provided by the data controller, the Commission requests that the users authorized to access the processing be informed of these measures through an IT charter.

40. The Commission also recommends that an integrity check be carried out on the stored data, for example by calculating a fingerprint of the data with a hash function in accordance with appendix B1 of the general security reference system. It recalls that this control is a measure independent of access control and acknowledges the implementation of technical blocks.

41. In any event, the Commission recalls that it must be kept informed and referred to, under the conditions provided for in Article 33-II of the law of 6 January 1978 as amended, of any substantial modification affecting the characteristics of the processing . In the same way, it recalls that the impact analysis relating to data protection (AIPD) which was transmitted to it, under the conditions provided for in Article 90 of the aforementioned law, must be the subject of a update.

42. The other security measures do not call for any observations on the part of the Commission. On the other conditions for implementing the planned processing (retention period and rights of individuals)

43. Article R. 249-12 of the CPP provides for the retention periods for the information recorded in the DPN processing, which are determined as follows:

- until the last court has ruled definitively by a decision rendered on the merits and, at the latest, until the end of the execution of the sentences pronounced in the file concerned;
- until the extinction of the public action in the event of a decision to close without further action and dismissal of the case as

well as for the procedures not giving rise to registration in the treatment provided for in article 48-1 of the CPP;

- until the decision is final in the event of a decision of release and acquittal;

- the minutes of judgments and judgments are kept for a period of eight years;

- the single personality file is kept in accordance with the provisions of Decree No. 2014-472 of 9 May 2014 referred to above, namely until the court seised has ruled definitively by a decision rendered on the merits. It may also be kept after the majority of the person concerned until the end of the follow-up of an educational measure or an educational sanction ordered pursuant to article 2 of the aforementioned ordinance as well as when the juvenile judge exercises the functions devolved to the sentencing judge pursuant to Article 20-9 of the order of 2 February 1945 referred to above.44. The Commission notes that it appears from the DPIA that the retention period for the minutes was set at eight years in view of the most common limitation period for the sentence, namely 6 years, to which it appeared necessary to add a period reasonable additional charge, assessed at two years, in particular due to certain formalities which may extend the limitation period .

45. Under these conditions, the Commission considers that the data are kept for a period not exceeding that necessary with regard to the purposes for which they are processed, in accordance with article 4-5° of the law of January 6, 1978 as amended

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46. At the end of these retention periods, provision is made for retention of the data and documents in an active database for their duration of administrative usefulness, according to the rules applicable to the intermediate archiving of court files.

47. It appears from the details provided by the Ministry that the current archiving methods described in the AIPD are being put in place and that these methods are intended to be replaced during the implementation of a new current solution. 2021. In this context, the Commission recalls that the management of archives must be rigorously supervised, in particular by providing for documented procedures, specific authorization management, appropriate integrity and confidentiality protection measures. It also emphasizes that the archiving procedures must also take into account any procedures for reviewing criminal proceedings or even rehabilitation procedures which may be introduced subsequently.

48. 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, these traceability data should under no circumstances provide information on data whose retention period has expired.

49. With regard to the rights of individuals, the Commission notes that an information notice specifying all the information provided for in Article 104 of the law of 6 January 1978 as amended will be inserted on the website justice.fr .

50. The Commission notes that the Ministry will not provide individualized information to the persons concerned but that it plans to provide specific information for the staff of the Ministry of Justice who use the processing.

51. Without calling into question the procedures for exercising the rights of persons as provided for by the Ministry, the Commission recalls that it is up to the Ministry to provide for specific measures with regard to minors, in order to provide them with information in appropriate ways.

52. The other methods of exercising rights do not call for any particular comments.

The president,

M. L. Denis