Deliberation 2020-112 of November 24, 2020 National Commission for Computing and Liberties Nature of the deliberation: Opinion Legal status: In force Date of publication on Légifrance: Friday December 11, 2020 Deliberation No. 2020-112 of November 24, 2020 providing an opinion on the article 3 of the bill confirming republican principles (request for opinion no. 20019775)

The National Commission for Computing and Liberties, Seizure by the Minister of Justice of a request for an opinion concerning article 3 of the bill confirming the republican principles; Having regard to convention n° 108 of the Council of Europe for the protection of individuals with regard to the automated processing of personal data; Having regard to the code of criminal procedure, in particular its articles 706-25-3 and following; Having regard to law n ° 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms, in particular its article 8-I-4°-a); Having regard to law n° 2014-1353 of November 13, 2014 reinforcing the provisions relating to the fight against terrorism; Having regard to the Act No. 2015-912 of July 24, 2015 relating to intelligence, in particular Article 19; Having regard to Decree No. 2015-1840 of December 29, 2015 amending the Code of Criminal Procedure and relating to the automated national judicial file of perpetrators of terrorist offenses ;Having regard to decree no. 2019-536 of May 29, 2019 as amended, taken the application of law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms, in particular its article 9-I; Having regard to deliberation n° 2015-119 of April 7, 2015 providing an opinion on draft legislative provisions aimed at creating a national file of perpetrators of terrorist offenses (FIJAIT); Having regard to deliberation no. 2015-422 of December 3, 2015 providing an opinion on a draft decree amending the code of criminal procedure and relating to the judicial file national computerized system of perpetrators of terrorist offenses (FIJAIT); After having heard Mrs. MAUGÜÉ, commissioner, in her report, and Mr. Benjamin TOUZANNE, government commissioner, in her observations, Issues the following opinion: The Commission was seized in urgency, on November 16, 2020, of article 3 of the bill confirming the republican principles (the bill), on the basis of article 8-I-4°-a) of law n° 78- 17 of January 6, 1978 amended. This article aims to modify some of the conditions of m Is implementation of the national automated judicial file of perpetrators of terrorist offenses (FIJAIT), the main characteristics of which have been set by the legislator. In particular, the Commission notes that the draft article submitted to it aims to extend the scope of this file by including new offenses linked to terrorism, to modify the conditions for registration in this file and to introduce a regime differentiated in the treatment of persons registered in this file.As a contextual element, it recalls that the FIJAIT, created by law no. 2015-912 of July 24, 2015 relating to intelligence and on which it has already ruled , constitutes a file that should

enable the competent authorities to record the identities, addresses and movements outside the country of residence of persons subject to one or more of the measures provided for in Article 706-25-4 of the Code of Criminal Procedure (CPP) and thus to prevent the recurrence of terrorism offences. listed in article

706-25-7 of the CPP, namely: justifying their address regularly, declaring any change in it within fifteen days as well as any trip abroad fifteen days at the latest before said trip and declaring any trip in France fifteen days at the latest before said trip if the person resides abroad. such treatment, it was up to him to ensure, in an effective manner, that respect for fundamental rights and freedoms was not excessively undermined. In general, it therefore considers it essential that the changes envisaged with regard to the conditions for implementing this processing by Article 3 of the draft law do not have the effect of calling into question the guarantees which make it possible to consider that a such an attack is not, in this case, characterized. As such, the Commission appears reserved on certain planned changes to FIJAIT and considers that increased vigilance should be given to the terms and conditions of application of these new provisions, determined by decree in Council of State, and on which it will also have to decide. On the planned extension of the perimeter of FIJAIT and the introduction of a differentiated regime in the treatment of persons registered in this file As a preliminary point, the Commission recalls that currently, the FIJAIT mainly concerns material offenses linked to terrorism and provided for in Articles 421-1 to 421-6 of the Criminal Code (CP) as well as:- offenses ions provided for in the last two paragraphs of Article L. 224-1 of the Internal Security Code (CSI), namely: leaving the national territory in violation of an exit ban decision in the event of risk participation in terrorist activities and the fact of evading the obligation to return identity documents in the event of such a ban; - those related to the violation of bans on leaving the territory, non-surrender of passport or national identity card, non-compliance with a measure of house arrest, violation of measures prohibiting entering into contact with certain people (article L. 225-7 of the CSI). In general, the Commission also recalls that, from the creation of this file, it considered that the follow-up of persons implicated in or convicted of such offenses constituted, in view of the particular seriousness of the latter, a specific, explicit and legit.First place, article 3 of the bill provides that the authors of the offenses defined in articles 421-2-5 (offences of apology and provocation to acts of terrorism) and 421-2-5-1 of the CC (extraction, reproduction and transmission of data provoking acts of terrorism or by making apology to hinder a procedure for blocking an online public communication service) are also registered in the FIJAIT. Such a modification is presented as having to allow a improvement of the monitoring of people who have demonstrated their adherence to ideas or acts of a terrorist nature, and presenting a danger to institutions as well as public services. Without

commenting on the nature of the offenses in question which, previously repressed by the law of July 29, 1881, which regulates freedom of expression, were incorporated into the criminal code by law no. 2014-1353 of November 13, 2014, the Commission notes that such a development seems mainly justified by the desire to allow the State administrations and services referred to in Article

706-25-9-3° of the CPP to obtain information relating to an individual when it does not appear in bulletin n°2 of the criminal record (in the context of the access provided for in article 776, 1° of the CPP), in particular with regard to persons (including minors) under investigation or whose conviction would no longer appear in the criminal record but would still be registered in the FIJAIT. It recalls, in general, that the desired extension of the perimeter of FIJAIT by including new offenses linked to terrorism, must not, with regard to the consequences that the consultation of FIJAIT may have on the persons concerned, be guided by a simple concern for convenience but by the need to have this additional information to achieve the pursued objectives. presenting a danger to public institutions and services appears legitimate.Secondly, the Commission notes that Article 3 of the bill introduces a differentiated regime in the treatment of persons registered with FIJAIT. It is thus provided that persons convicted or implicated for offenses referred to in Articles L. 224-1 and L. 225-7 of the CSI are no longer subject to the obligations of declaration and proof of address and presentation provided for in article 706-25-7 of the CPP, as well as those whose registration in FIJAIT would result from the commission of offenses provided for in article 421-2-5 of the CP (offences of apology and provocation to acts of terrorism). It notes that the perpetrators of offenses mentioned in article 421-2-5-1 of the same code are also concerned. If the Commission takes note that the envisaged amendment aims to restrict only to the most serious offences, which are in articles 421-1 et seq. of the Criminal Code (acts of terrorism), the obligations which apply pursuant to article

706-25-7 of the CPP (therefore excluding articles 421-2-5 and 421-2-5-1 of the CP and articles L. 224-1 or L. 225-7 of the CSI), it recalls that, as noted by the Conseil d'Etat in its opinion of 7 April 2015 on FIJAIT, the purposes pursued by this processing testified in particular to the Government's desire to create a security mechanism consisting of the obligation imposed on authors of these offenses to report their address, their movements between France and abroad, and to present themselves on this occasion personally, as the case may be, to the police station, the gendarmerie brigade or the French consulate (…). In view of the changes envisaged, the Commission wonders about the consistency of such changes with the purposes currently planned by FIJAIT. The establishment of such a differentiated regime in terms of the consequences of

registration with FIJAIT amounts, in the Commission's view, to adding to it, for persons registered and not subject to these obligations, a new purpose, which should that the law defines it more precisely. This purpose is no longer to ensure the follow-up of these people, but to achieve greater efficiency in the administrative investigations mentioned in article 706-25-9 of the CPP, in order to prevent the commission of terrorist acts.The Commission finally notes that Article 3 of the draft law seems to draw the consequences of such a differentiated regime with regard to the retention periods of the data appearing in the FIJAIT. This article provides that the data relating to the offenses mentioned in articles 421-2-5 and 421-2-5-1 of the CP are kept for a period identical to those relating to the offenses mentioned in articles
L. 224-1 or L. 225-7 of the CSI, i.e. five years in the case of an adult and three years in the case of a minor. On modifications to the conditions of registration in the FIJAIT Article 3 of the bill also aims to modify the article
706-25-4 of the CPP relating to the procedures for registration with FIJAIT. regarding the conditions of registration within this treatment. In the current state of the law, the registration of persons in FIJAIT is thus subject to the pronouncement of judicial decisions exhaustively listed in article 706-25-4 of the aforementioned CPP and intervenes on the express decision of the public prosecutor, the specialized trial court or common law courts depending on the nature of the offenses concerned. to a conviction, even not yet final, including a conviction by default or a declaration of guilt accompanied by a dispensation or a postponement of the sentence or an indictment are registered as of right in the file as of right, unless otherwise decided and specially motivated by the competent court. The same applies to decisions relating to a decision of criminal irresponsibility on the grounds of mental disorder (article 706-25-4-3° of the CPP) and those mentioned in 4° of this same article (specific decisions pronounced by foreign authorities) and this, unless there is a decision to the contrary and specially reasoned by the public prosecutor. considered to be particularly serious. In this context, it observes that while the automatic nature of such registration has already been judged to be in accordance with constitutional and European case law within the framework of the system relating to the automated national judicial file of the authors of sexual or violent offenses (FIJAIS) and whose conditions of implementation are similar to those of FIJAIT, it is important that appropriate safeguards are are provided for in domestic law. In this respect, it also notes that, in accordance with constitutional requirements in terms of the criminal law of minors, the changes desired in terms of registration with FIJAIT will not concern minors over the age of thirteen (the registration of minors under the age of thirteen remaining in any case excluded from this file), which constitutes a fundamental guarantee to be preserved. practices of this registration as of right. It also wonders, in the absence of specific transitional

provisions, how these changes will apply to persons already convicted and implicated and considers that the draft article could usefully be supplemented on this point. The Commission also wonders about the articulation of this registration system with the control of the magistrate in charge of the national criminal records service who is responsible, as it noted in its opinion of 3 December 2015 referred to above, for verifying the validity of this same registration, the control of which remains fundamental. In the same way, it observes that it would seem that such a modification would lead to convictions that are not yet final being able to be registered as of right in the processing, as well as indictments that ultimately led to a dismissal, in accordance with article 706-25-4-1° and 5° of the CPP. In this respect, the Commission recalls the great vigilance that will have to be shown in order to ensure that the personal data relating to the persons who have benefited from favorable follow-up are updated, that the decisions and convictions not yet final are indicated to the various recipients of FIJAIT data, and that respect for the rights of individuals is ensured in order to guarantee the proportionality of FIJAIT. bill reveals other provisions likely to have an impact on the regulations relating to the protection of personal data and for which its referral appeared, depending on the case, justified or appropriate. If it takes note of the withdrawal of the article 20 relating to the allocation of a national identifier allowing the academic authorities to ensure that no no child is deprived of his right to education, the Commission observes that it will be necessary, if necessary, to draw all the consequences of the modifications envisaged in articles 14 (which modifies the code of entry and stay of foreigners and the right to asylum with regard to the issue of residence permits), 18 and 19 (which modify the conditions of instruction), 25 (which creates a new offense of endangering the life of others by disseminating information relating to the private, family or professional life of a person), 26 (which aims to establish a procedure capable of ensuring the effectiveness of an enforceable court decision establishing the illegality of a website and ordering its blocking or delisting), 27 (which empowers the Government to proceed by way of ordinance in order to reinforce the taking into account of the objectives of social diversity in the allocation of social housing), 38 (which creates a declaratory system for advantages and resources that an association cultivates it would receive directly or indirectly from a foreign legal person or a non-resident natural person, the amount or valuation of which exceeds 10,000 euros, with the administrative authority's power of opposition) and 48 (which expands the scope of the right of opposition of the service with national jurisdiction TRACFIN), with regard to any processing of personal data that would be created or modified. The President M.-L. DENIS