Deliberation 2020-101 of October 1, 2020Commission Nationale de l'Informatique et des LibertésNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Tuesday October 12, 2021NOR: CNIX2129369VDeliberation No. 2020-101 of October 1, 2020 providing an opinion on a draft decree creating a processing of personal data called "Census of terrorist affairs" (RECAT) (request for opinion no. 20003753) The National Commission for Computing and Freedoms, Seized by the Minister justice of a request for an opinion concerning a draft decree establishing a processing of personal data called Census of Terrorist Affairs (RECAT); Having regard to Convention No. 108 of the Council of Europe for the Protection of Persons with regard to the 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 persons of natural persons 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 the execution of criminal penalties, and to the free circulation of these data and repealing Council Framework Decision 2008/977/JHA; Having regard to Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Judicial Cooperation in criminal matters; Having regard to the Criminal Code, in particular its articles 421-1 to 421-8, 422-1 to 422-7; Having regard to the Code of Criminal Procedure, in particular its articles 695-8-1, 695-8-2 and 706-16 et seq; Having regard to Law No. 2019-222 of March 23, 2019 on programming 2018-2022 and reform for justice; Having regard to Law No. 78-17 of January 6, 1978 as amended relating to information technology, files and freedoms, in particular its articles 31-II and 89-II; Considering the decree n ° 2019-536 of May 29, 2019 modified taken for the applicati on Law No. 78-17 of January 6, 1978 relating to data processing, files and freedoms; Having regard to deliberation No. 2017-349 of December 21, 2017 providing an opinion on a draft decree creating a processing automated collection of personal data known as the census of terrorist individuals (RECIT); After having heard Mrs. Christine MAUGÜÉ, Commissioner in her report, and Mr. Benjamin TOUZANNE, Government Commissioner, in her observations, Issues the following opinion: The draft decree submitted to the Commission for an opinion should allow the public prosecutor's office in Paris and the national anti-terrorist prosecutor's office (PNAT) to identify all the legal procedures followed under a terrorist qualification as well as all the persons implicated in these cases. It thus aims to provide the Ministry of Justice with an exhaustive database relating to these procedures and to make it possible to carry out certain useful cross-checks for the exercise and conduct of public action as well as to extract reliable statistical data. The Commission notes that such a project is justified by the development of litigation handled by the judicial unit specializing in the fight against terrorism and set up in

Paris (National Anti-Terrorist Public Prosecutor, Investigation Unit , Paris Criminal Court, Paris Assize Court) having, pursuant to Article 706-17 of the Code of Criminal Procedure (CPP), jurisdiction concurrent with that devolved to ordinary courts for prosecution, the investigation and judgment of acts of terrorism and related offenses mentioned in article 706-16 of the same code. This concurrent competence translates in practice into the exclusive national competence of the anti-terrorist prosecutor's office and the anti-terrorist investigating magistrates of Paris for the treatment of the most serious terrorist crimes and offences, it being specified that this centralization continues at the stage of the execution of the sadness. This processing must enable the ministry to have sufficiently precise and detailed figures concerning the judicial processing of terrorist litigation, which the other databases of the ministry would not allow. The Commission observes that this draft decree aims to take into account a certain number of observations formulated within the framework of its deliberation n° 2017-349 of December 21, 2017 referred to above, in particular with regard to the name of the project which appeared to be inappropriate with regard to the purposes of the processing insofar as , contrary to what the terms census of terrorist individuals seemed to indicate, the processing must bring together information relating to all the persons implicated in the context of a procedure, including when the procedure has resulted in a classification without further action, a dismissal, an acquittal or a release. It also aims to adapt the regulatory text to new developments, in particular those related to the need to change the processing to make it accessible to Eurojust. Insofar as the RECAT processing is implemented in particular for the purpose of facilitating the monitoring by the PNAT and the Paris General Prosecutor's Office of legal proceedings involving an offense qualified as terrorist, to ensure the cross-checking of information within the framework of the direction of investigations and to make data and information sharing more reliable with the directorates of the Ministry of Justice and the French office of Eurojust, it falls within the scope of Directive (EU) 2016/680 of 27 April 2016 referred to above (hereafter the directive) and must be examined with regard to the provisions of articles 87 et seq. of the law of January 6, 1978 as amended. -II of the amended law of 6 January 1978, of any substantial modification affecting the characteristics of the processing.On the general conditions for implementing the systemFirstly, the Commission underlines that it had considered in its aforementioned deliberation No. 2017-349 that, with regard to the purposes of the processing, the responsibility for it should be expressly entrusted to the Paris public prosecutor's office and not to the Department of Criminal Affairs and Pardons (DACG) of the Ministry of Justice. It takes note of the clarifications provided by the Ministry according to which responsibility for RECAT processing is entrusted to the DAGC and not to the PNAT and that this organization does not call into question the prerogatives attached to the status of

public prosecutors insofar as if the public prosecutor of the Anti-Terrorist Republic ensures the setting in motion and the exercise of public action in the terrorist procedures concerned by the RECAT treatment, it implements the criminal policy defined by the general instructions of the Ministry of Justice, which are drawn up by the DACG. The Ministry also indicates that the working group behind the creation of the treatment was initiated by the DACG which decided on the general architecture of the treatment and its characteristics and that the PNAT is only the user of the treatment. Secondly, the Commission takes note of the clarifications provided by the Ministry according to which a check is carried out by the IT and freedoms referent of the DACG so that he can ensure that the information recorded in RECAT is relevant with regard to the purposes assigned to the treatment and that he has, for this purpose, access to all the data of the treatment in consultation. If necessary, he may ask the PNAT or the Paris General Prosecutor's Office to erase irrelevant data. He will also be responsible for verifying that the authorizations issued by the PNAT or the Paris public prosecutor's office to personnel who no longer have the right to know the information contained in the processing have indeed been deleted. It also notes that this IT and Freedoms referent will not exercise any control over the exercise, by the magistrates of the general prosecutor's office or the PNAT, of their missions or over the follow-up of investigations, of which he is not informed. It considers that the existence of the control missions of the IT and Freedoms referent, which constitutes a guarantee participating in the compliance of the RECAT processing with the requirements in terms of protection of personal data, could be usefully mentioned in the draft decree and takes note of the ministry's commitment to amend the draft decree in order to include it in this text. Thirdly, the Commission notes that data relating to minors may be recorded in the RECAT processing. It considers that specific measures should be implemented by the Ministry to ensure that the processing of data relating to minors, which may be sensitive data, is subject to appropriate safeguards for the rights and freedoms of these last. Indeed, it recalls that, in accordance with the provisions of article 88 of the law of January 6, 1978 as amended, the processing of this data is possible only in the event of absolute necessity, subject to appropriate guarantees for the rights and freedoms of the concerned person . On the purposes of the processing The purposes assigned to the processing and set out in Article 1 of the draft decree are as follows: to facilitate the monitoring of terrorist procedures by the PNAT and the Paris public prosecutor's office; to ensure the cross-checking of information within the framework of the investigation department; make data and information sharing more reliable with the departments of the Ministry of Justice, without replacing public action reports, as well as with the French office of Eurojust in order to facilitate judicial cooperation in matters the fight against terrorism between the Member States of the European Union; ensuring the

feedback of statistical information. The processing will enable the DACG to assess the criminal policy instructions it gives as well as the development of criminal policy and the adaptation of resources dedicated to terrorism. within the framework of the direction of the investigations, the Commission notes that these cross-checks must allow the public prosecutor's office to direct the investigations as well as possible but that, with regard in particular to the acquitted persons, no legal consequences are drawn (nor more administrative) of the elements recorded in the processing. It also acknowledges that RECAT processing does not make it possible to establish links or behaviors within the meaning of serial analysis files. Thus, for the DACG, the only method of cross-checking relates to the search by name or by prosecution number and, if these searches make it possible to identify, as a corollary, cases or related persons, they cannot relate to the fields free from treatment. For the magistrates of the PNAT, the Commission notes that the search criteria are identical but that they can also carry out a search from the free fields. In view of these details, the Commission considers that the draft decree should be supplemented in order to expressly indicate that the RECAT processing does not make it possible to establish cross-checks on the basis of links or behaviors within the meaning of serial analysis files. (articles 230-12 to 230-18 of the Code of Criminal Procedure) and takes note of the ministry's commitment to modify the draft decree on this point. Subject to the foregoing, the Commission 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 collectedArticle 2 of the draft decree lists the persons concerned by the processing: the persons implicated, indicted, placed under the status of assisted witness and prosecuted, whether they are subsequently convicted, released or acquitted; the victims, when this information is necessary the identification of the case, within the framework of the criminal proceedings carried out by the PNAT in anti-terrorism matters. The Commission considers that if the ministry intends to collect data relating to people who have been the subject a decision of dismissal, who are not persons implicated, indicted, placed under the status of witnesses and prosecuted, then the draft decree should be modified in order to provide for it r expressly. This provision also details the categories of personal data and information recorded in the processing with regard to these categories of persons as well as the magistrates in charge of the cases. The Commission notes that, subject to the recording of connection and consultation traces, data relating to the clerks in charge of the procedure will not be processed and that no data relating to witnesses will be recorded in the processing .As a preliminary point, the Commission notes that the case management system (CMS)/the European judicial network (EJN) of Eurojust will be linked to the RECAT processing in the form of an extraction of the useful data from RECAT which will then be entered manually into the CMS (surname, first

name, date of birth, city of birth, country of birth, unique identifier of the person, alias, offense and prosecution number). It notes that the Ministry is considering a semi-automatic import process for RJE/CMS processing as well as interconnection with the processing of personal data relating to the national management of persons detained in penitentiary establishments (GENESIS). In this respect, the Commission recalls that it must be informed and, if necessary, informed of any substantial modification affecting the RECAT processing and justifying a modification of the decree. Firstly, the Commission notes that the processing may record sensitive data within the meaning of I of article 6 of the law of January 6, 1978 amended insofar as this recording is necessary for the purpose assigned to it. This data may be recorded in the free fields by the PNAT or in certain processing items. In this respect, it recalls that, in accordance with article 88 of the law of January 6, 1978, the processing of such data is only possible in the event of absolute necessity, subject to the appropriate guarantees for the rights and freedoms of the data subject. It considers that it would be appropriate to pre-fill these free fields with information relating to the way in which they should be filled in and acknowledges that such information will be inserted. It recalls that strict control must be ensured in this respect. that identification data (surname, first name, alias, sex, date and place of birth, nationality) will be recorded in the processing. Insofar as the purpose of the processing is precisely to allow the centralization of information relating to the aforementioned procedures and to the persons who are the subject of them, the recording of these identification data seems relevant to the Commission. However, it appears from the details provided by the Ministry in the impact analysis relating to data protection (AIPD) that, under this category of data, the date of death, the region, the department of origin and the major/minor mention. She considers that if the ministry intends to collect this additional data, then the draft decree should be supplemented in order to mention them expressly. It takes note of the ministry's commitment to modify the draft decree in order to include the collection of this data. The Commission notes that information relating to investigations, offences, convictions or security measures may also be provided in the processing. It acknowledges that this data will be entered manually by the magistrate or the clerk from the procedural file and that there will be no documents imported into RECAT. The Commission notes that, as data relating to the judgement, registration in the national automated judicial file of perpetrators of terrorist offenses (FIJAIT) may be recorded. It notes that this registration will be mentioned by means of a checkbox. This provision also indicates that the administrative decision taken against the person concerned on the grounds of a threat to security or order may be collected. audience . In this regard, the Commission notes that the joint circular from the Ministry of Justice and the Ministry of the Interior of 5 November 2016 relating to the coordination of administrative measures and judicial

measures in the fight against terrorism and the prevention of radicalization has made it possible to set the framework for exchanges between the prefects and the public prosecutors with regard to the taking of administrative measures that may prove to be incompatible or contradictory with judicial measures. It also notes that these data will be integrated into the processing in the form of a drop-down menu with checkboxes and that they in no way cover any administrative inquiries. in addition, the criminal records related to the offenses referred to in Articles 421-1 to 421-6 of the Criminal Code must also be recorded in the processing. The Commission notes that this information will be completed by means of a tick box signifying that the person concerned has previously been implicated in a terrorist case, regardless of the legal action taken, and that he may be added any other information on the nature of the antecedent in question or on the legal action taken. Given these details and insofar as this information will appear on the profile sheet of the persons concerned, the Commission considers that a distinction should be made between the persons implicated and those found guilty in order to prevent this category of data may be misinterpreted with regard to the use of the term criminal record. Thirdly, identification data (surname, first name) relating to the victims may be recorded in the processing. The Commission notes that if the processing is not intended to process data relating to victims, this data may be mentioned from time to time in the free fields or in the name given to the case in order to better identify the procedure in question. acts and will be limited to civil status data only. It acknowledges that the processing will not make it possible to establish lists of victims via drop-down menus. In view of the risks of confusion which may arise from such use of this data, it considers that, as far as possible, civil status data relating to victims should not be used for the naming of cases or, default, in a way that makes clear the victim status of the person named. The other categories of personal data collected do not call for any additional observation by the Commission. Subject to the above, the Commission considers that the data processed are adequate, relevant and not excessive in relation to the purposes pursued. .On the data retention periodsIn the first place, article 3 of the draft decree provides that the retention period for the information and data recorded in the processing is ten years from the last update recorded. In the event of conviction, this period is increased to thirty years in criminal matters and to twenty years in tort matters, from the last update recorded. The Commission notes that the last update recorded, which is the point of departure taken into account for the calculation of the data retention period, means any modification of the information relating to a case or a person at the procedural stage such as, for example, the recording of the decision to classify without follow-up or, in in the event of conviction, the issuance of a warrant if the person is absent. It also notes that a reconciliation between two cases is not an update likely to cause this period to run again.

These retention periods are justified by the Ministry by the desire to align the retention periods of the data with the limitation period of the public action, in the event of discontinuation or dismissal, and with the limitation period of the sentence, in the event of a decision of acquittal, acquittal or conviction. He also specified that these retention periods were aligned with those retained for the processing called CASSIOPEE. Regarding more specifically the retention periods of data relating to acquitted persons and the absence of the possibility of erasure at the request of the person concerned, he indicated that RECAT processing is not a processing of antecedents legal proceedings and that no legal consequences are drawn from the recorded elements. With regard to individuals who have not been convicted or whose sentence has been fully served, it was specified that the retention of data is of fundamental interest to the PNAT in the context of its investigations, in particular if the persons are again involved in proceedings. . Finally, there are no plans to modulate these retention periods for minors. The Commission takes note of this but considers, given the purposes of the RECAT processing and the fact that it is not a processing judicial authorities, that the clarifications provided by the Ministry do not justify the particularly long retention periods provided for by the draft decree. retention provided for by the draft decree, the data will already have been retained for all the time necessary for the completion of the procedure, which may itself be relatively long, even if this retention period is only implicitly provided for by the draft decree. It also notes that the retention periods provided for by the draft decree are much longer than those defined for other processing operations used in the context of legal proceedings, in particular in the event of a favorable decision, and further emphasizes that there is no provision for the possibility of proceeding to an early erasure of the data. to that of minors and that the period during which the access of central administration agents to the data is authorized must be restricted. In view of the foregoing, the Commission considers that the retention periods provided for by the draft decree can only be regarded as excessive.Secondly, the Commission notes that there is currently no mechanism for automatically erasing the data recorded in the e processing and that these must be deleted manually. Although it notes that a periodic check will be carried out by the IT and Freedoms referent, it considers that the manual measurement of data deletion carried out at the end of the retention period is insufficient to ensure the systematic deletion of the data, at the end of the retention period, and therefore recommends that additional measures be put in place.On accessors and recipientsArticle 4 of the draft decree lists the persons who can directly access the information and personal data recorded in the processing, on the basis of of their functions or for the needs of the service and for the reasons strictly necessary for the exercise of their attributions. On a preliminary basis, with regard to the great sensitivity of the data which can be recorded in the processing, the

Commission calls the attention of the Ministry on the need to manage with the greatest vigilance the authorizations of the personnel concerned , in order to limit to what is strictly necessary the persons who may have direct access to the data. These general elements recalled, article 4 of the draft decree calls for the following observations. Firstly, the Commission notes that the magistrates, civil servants and agents individually duly authorized persons of the DACG will have a right of consultation but that they will not be able to consult the free fields and the data relating to the persons in question who are not the subject of a search or arrest warrant. It acknowledges that the following will be able to access processing: the director of criminal affairs and pardons; the deputy director, head of service; the office for the fight against organized crime, terrorism and money laundering (BULCO) and the office of the Execution of Sentences and Pardons (BEPG) for the purpose of monitoring public action in particular; the Deputy Director of Specialized Criminal Justice who is the hierarchical authority of BULCO; the Deputy Director of General Criminal Justice who is the hierarchical authority of the BEPG; the criminal policy evaluation unit (PEPP) for the purpose of evaluating criminal policies. The IT and Freedoms referent of the DACG will also have access to all the data , for consultation only, in order to be able to fulfill its control missions. If the Commission takes note of the clarifications provided by the Ministry according to which access to processing for the DACG is justified by the purposes of monitoring public action that and evaluation of criminal policies, it nevertheless wonders about the need to make access to the data and information contained in the processing all the aforementioned personnel. In particular, it considers that, with regard to its missions, the PEPP could only have communication of the data and information necessary for the exercise of its missions and not be granted a right of access to processing. It takes note of the ministry's commitment to no longer give PEPP staff access to directly identifying data, with the exception of the date of birth, which is necessary for statistical studies. It also observes that the access of the BEPG to the identifying data of the persons concerned, in particular those relating to the victims when they make it possible to identify the case, is justified by its missions, the latter being in particular responsible for monitor the individual situation of each person convicted of acts of terrorism.Secondly, the Commission notes that the director of the prison administration as well as the magistrates, civil servants and individually designated agents will have a right of consultation. It notes that this access will be reserved for the central level of the national prison intelligence service (SNRP) and that these personnel will only be able to complete the information contained in the processing to enter the place of detention and the date of release. Thirdly, the Director of Judicial Protection of Youth as well as the magistrates, civil servants and agents individually designated and duly authorized by him will also have access to treatment in consultation. The Commission notes that apart

from the access of the director and the deputy director, this will be limited to the members of the national monitoring and information mission (head of mission and his deputy) in order to compare the statistical data available to them with those carried out by the DACG and to members of the Department of Judicial Protection of Youth (DPJJ) to enable them to report to the DACG any proceedings concerning a minor at the time of the events but who would not have not been presented to the educational unit at the court and would therefore not have been recorded by the PJJ. It also notes that no interconnection of the RECAT processing is envisaged with the processing implemented by the DPJJ. leads the Ministry to recognize to its members, by default, a right to consult all the data relating to people who are entitled, in view of their minority at the time, to be followed by the services of the PJJ. Given these elements, it invites the ministry to define more strictly the data to which the members of this mission can access, or even to make them only recipients of certain information necessary with regard to their missions. It takes note of the ministry's commitment to modify the draft decree in order to no longer give access to processing to members of the national monitoring and information mission. Fourthly, the Commission observes that direct access to processing is national representative to Eurojust, as well as the magistrates, civil servants and agents individually designated and duly authorized by him. It notes that this access is recognized pursuant to Article 9 of Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Judicial Cooperation in Criminal Matters and Article 695-8-1 of the CPP which provides that the national member of the Eurojust unit has access, under the same conditions as public prosecutors, to the data contained in any automated processing of personal data. In view of the foregoing, the Commission generally considers that consideration should be given to the need to give certain DAGC and DPJJ staff access to processing, in order to regulate more strictly the categories of data to which these various personnel can access or may have communication. On the rights of the persons concerned Article 5 of the draft decree specifies the procedures for exercising the rights of the persons concerned. Firstly, with regard to the information of the data subjects, the Commission notes that it is provided, in accordance with the provisions of Article 107-II-1° of the law of 6 January 1978 as amended, that this right be limited to the information provided for in I of Article 104 of the said law. In this respect, the Commission wondered about the reasons justifying the choice to make use of the restriction provided for by the aforementioned Article 107-II-1° for the additional information listed in Article 104-II of the said law. It notes that the ministry waives the right to avail itself of this restriction and that the draft decree will be modified on this point. It also acknowledges that the information will be published on the justice.fr website. In addition, the Commission recalls that the Ministry should provide

for specific measures with regard to minors, in order to provide them with information according to appropriate procedures and takes note of the Ministry's commitment on this point.Secondly , the Commission notes that, in accordance with the provisions of Article 111 of the law of 6 January 1978 as amended, the rights of access, rectification and erasure are governed by the provisions of the CPP for: identification data and information relating to investigations, offences, convictions or security measures concerning persons implicated, indicted, placed under the status of assisted witness and prosecuted; identification data relating to victims. For other categories of data, the rights of access, rectification and erasure are exercised directly with the DACG. The rights of access and rectification are exercised directly with the hierarchical authority having issued him his authorization for the data relating to the magistrates in charge of the cases. The Commission notes that the investigating judges will exercise their rights of access and rectification with the anti-terrorism public prosecutor. access, rectification and deletion may be subject to restrictions, pursuant to 2° and 3° of II and III of article 107 of the law of January 6, 1978 as amended in order to avoid hindering investigations, research and legal proceedings and to interfere with the detection, investigation and prosecution of criminal offenses or the execution of criminal penalties. The person affected by these restrictions must then exercise their rights with the Commission under the conditions provided for in Article 108 of the said law. It notes that these methods of exercising rights will be specified on the website of the Ministry of Justice.Thirdly, the draft decree provides that the right of opposition does not apply to this processing, which does not No comments are called for. On security measures The Commission points out that access to data is limited to duly authorized users by virtue of their duties and within the limits of the need to know. These users will be authenticated via an identifier and password pair. It also notes the use of application profiles by entities restricting access, as well as the possibilities of action, to authorized data only. January 2017 adopting a recommendation on passwords, in terms of length, complexity and detection of fraudulent attempts to connect to processing. Given the nature of the processing, the Commission nevertheless recommends the implementation of a strong authentication mechanism for persons authorized to access the processing. It takes note of the ministry's commitment to set up such a mechanism once the renewal of the agent card has been carried out. Article 7 of the draft decree provides that the consultations, creations, modifications or deletions of data are the object of a recording including the identification and the function of their author as well as the date, the hour and the object of the operation. This information is kept for a period of one year. While welcoming the significant reduction in the retention period of traces compared to the durations usually appearing in the draft texts of the Ministry of Justice, the Commission considers that the justifications provided by the Ministry on the fact of

keeping, for the purposes of security, these traces for a period exceeding six months are insufficient as they stand. The Commission notes in particular that due to the lack of complexity of the processing, on the one hand, and the small number of people having access to the processing, on the other hand, a duration exceeding six months cannot be justified, an anomaly analysis may be carried out over this period. The Commission notes that the data processed will not be encrypted, but will be stored in specific premises subject to high-level physical protection measures. It also notes that the processing data will not be archived initially and recalls that the archiving mechanisms put in place must be able to ensure the high level of security necessary given the nature of the processing. .The other security measures do not call for comments from the Commission. However, it recalls that the security requirements provided for in Article 99 of the amended law of January 6, 1978 require the updating of the AIPD and its security measures with regard to the regular reassessment of the risks.The President M.

-L.DENIS