

Deliberation 2022-066 of June 9, 2022 Commission Nationale de l'Informatique et des Libertés Nature of the deliberation:

Opinion Legal status: In force Date of publication on Légifrance: Thursday August 18, 2022 NOR: CNIX2222087V Deliberation n° 2022-066 of June 9, 2022 providing an opinion on a draft decree creating an automated processing of personal data called "pre-registration device" and amending the internal security code (request for opinion no. 22008678) The National Commission for Computing and Liberties , Seizure by the Minister of the Interior of a request for an opinion concerning a draft decree in Council of State creating an automated processing of personal data called a pre-registration device and modifying the code of the internal security; 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 personal nature and the free movement of such data, and repealing Directive 95/46/EC (GDPR); Having regard to Regulation (EU) 2017/2225 of the European Parliament and of the Council of 30 November 2017 amending Regulation (EU) 2016/399 as regards the use of the entry/exit system; Having regard to Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to record data relating to entries, exits and refusals of entry concerning third-country nationals crossing the external borders of the Member States and determining the conditions of access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and the (EC) Regulations 767/2008 and (EU) 1077/2011; Considering the modified law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms, in particular its article 32; After having heard the report of Mr. François PELLEGRINI, commissioner, and the observations of Mr. Damien MILIC, Deputy Government Commissioner, Issues the following opinion: The National Commission for Computing and Freedoms (hereinafter the Commission) was seized urgently on May 4, 2022 by the Ministry of the Interior of a project decree in Council of State creating an automated processing of personal data called pre-registration system and modifying the internal security code. The creation of this processing is part of the perspective of the entry into force service of the European entry-exit system (EES), scheduled for the end of November 2022, and a preliminary test phase to be held from the summer. Created by the regulation (EU) 2017/2226 of November 30, 2017 (hereinafter, the EE Regulation S), the EES processing will allow the electronic recording of entries, exits and refusal of entry of third-country nationals admitted for a short stay on the territory of the Member States or for whom entry has been refused and to calculate the authorized length of stay. The EES, which is intended to replace the current system of stamping passports, will therefore also make it possible to detect people who have exceeded their authorized duration of stay. As soon as the system comes into service, an

individual file, an entry form, an exit form, and/or an entry refusal form will be created for each person, eligible for the EES, crossing an external border. . To this end, the border authorities of the Member States must collect alphanumeric and biometric data (facial image and fingerprints) of the person concerned.) 2016/399 (or Schengen Borders Code) to offer Member States the possibility of using self-service systems to carry out pre-registrations in the EES, as well as all or part of border checks. whether or not to use a self-service system, and thus to offer travelers the option of pre-registering themselves in the EES, the border authorities of the Member States will retain the obligation to collect data alphanumeric and biometric cards covered by the EES regulation. The Ministry intends to take advantage of the possibility offered by the aforementioned Regulation (EU) 2017/2225 by creating, via this draft decree, a processing of personal data allowing the use of a self-service system carrying out border checks and used for pre-registration of data in the EES. Thus, this processing, referred to as the pre-registration system, will have the purpose, for travelers by air, sea, road and rail, of volunteering to improve and facilitate checks at the external borders (Article 1 of the draft decree). The planned processing, which will allow third-country nationals subject to the provisions of the EES Regulation to pre-register from kiosks or mobile devices, will be based on voluntary participation only. The Commission observes that a person choosing to use a pre-registration device will then have to go to a booth dedicated to border checks, where a border guard will carry out, among other operations, a visual check of the consistency between the face of the person and the photo collected within the device, if necessary to the verification of the fingerprints of this person, and to the validation of the EES file and the entry/exit form. Taking into account the purposes pursued by the planned processing, which fall within the scope of the GDPR, and insofar as the processing is implemented on behalf of the State acting in the exercise of its prerogatives of public power, that it bears on biometric data necessary for the authentication or the control of the identity of the persons, it must be authorized by a decree in Council of State, taken after reasoned and published opinion of the Commission in accordance with article 32 of the modified law of January 6, 1978. The responsibility for processing will be exercised by the Minister of the Interior. On the general conditions for implementing the processing: Firstly, the Commission observes that, with regard to the chronology of the deployment of the system, the generalized implementation of this processing to feed the EES will be preceded by an experimental phase aimed at testing the functional and operational compliance of the pre-registration systems in real conditions, before the entry into service of the European information system. Although the Commission observes that neither the draft decree nor the data protection impact assessment (DPIA) sent to it distinguish between the two processing phases, it notes that the DPIA will be updated to include

the experimentation phase. It recalls that it must, if necessary, be informed in the event of a modification of the conditions for implementing the processing, in accordance with article 33 of the law of January 6, 1978 as amended, and consulted on any modification of the text. Secondly, the Commission notes that the planned processing is likely to be implemented in parallel with other processing operations pursuing similar purposes in the context of border checks. It appears in particular that certain third-country nationals subject to the provisions of the EES regulation and who can thus use the pre-registration system are also eligible for the PARAFE airlock. Indeed, Decree No. 2020-1735 of December 29, 2020 amended the provisions of the Internal Security Code governing PARAFE processing, in order to extend to nationals of eight third countries the scope of persons eligible for the system. According to the details provided by the Ministry, the use of the PARAFE airlock will be subject to prior pre-registration in the EES, so that the kiosk will fulfill a pre-registration function and that passing through the PARAFE airlock will play that of control at the borders. The Commission recalls that although it is carried out in an automated manner, the control to which PARAFE processing falls takes place under the supervision of a border guard, located in a booth, who authorizes or not the crossing of borders. Finally, the Commission notes that the DPIA relating to PARAFE processing will be updated and recalls that it must also be consulted if a modification of the framework act for this processing proves necessary.

On the categories of data: As a preliminary point, the Commission observes that the data recorded in the processing corresponds to the data, listed by the aforementioned EES regulation, which must be collected and recorded in the EES processing, as well as to other data necessary for carrying out the checks borders provided for by the Schengen Borders Code. With regard to the data intended to feed the EES, it nevertheless emerges from the provisions of the regulation establishing this latter system that the categories of data recorded for the purpose of creating a file differ according to the situation of the person concerned, and this on the following points. Firstly, the images of the fingerprints of four fingers of the right hand or, failing that, of the left hand placed flat of the bearer of the travel document as well as the digitized image of the face of the bearer of the travel document taken when using the pre-registration device may be recorded in the processing. On the one hand, the Commission observes that the digitized image of the fingerprints of third-country nationals not subject to the obligation visa will be recorded in the processing pre-registration device to feed the EES file of the person concerned.

Regarding the fingerprints of third-country nationals subject to the visa requirement, these data will only be collected and recorded in the pre-registration system for verification purposes, by comparison with the fingerprint data already present within the system. Visa Information System (VIS), consulted via the EES. The interconnection of VIS and EES processing is

provided for this purpose by the EES Regulation. The Commission takes note that the fingerprints collected for verification will be removed from the processing of the pre-registration device after consultation of the VIS via the EES, and that the VIS will only be consulted via the intermediary of the EES. In view of the various elements provided by the Ministry, the Commission nevertheless has questions concerning the articulation of the various data flows between the pre-registration system, the EES and the VIS, which make it necessary to keep the fingerprints of nationals from third countries not subject to the visa requirement in the national system, as well as on the storage in the EES, even temporarily, of this data. The draft decree also provides that minors under the age of twelve are not subject to the collection of digitized images of their fingerprints. The Commission nevertheless observes that, according to the provisions of Article 17-4 of the EES Regulation, persons whose fingerprints it is physically impossible to take are also exempted from the obligation to provide their fingerprints, and wonders about the reasons why this exemption is not expressly provided for by the draft decree governing the pre-registration system. On the other hand, the draft decree provides for the recording of the digitized image of the face. According to the details provided by the ministry, a photograph will be taken to verify that the person concerned corresponds to the bearer of the travel document and, if necessary, to feed the EES file of this person. This image will then be used by a facial recognition process aimed at authenticating the person concerned. With regard to the templates from the photographs, the ministry specifies that this data is generated by a separate functionality of the pre-registration device and will not be recorded. in the planned treatment. The Commission recalls in this respect that the template constitutes data falling within a separate category from those listed in the draft decree, as it had indicated in its deliberation on the PASP processing (deliberation n° 2020-064 of June 25 2020 providing an opinion on a draft decree amending the provisions of the internal security code relating to the processing of personal data called Prevention of breaches of public security). It thus considers that, as soon as templates are generated and thus subject to processing, and even if the corresponding processing operations are carried out by a subcontractor, the template should be mentioned in the draft decree among the given categories processed as part of the pre-registration system. In any event, it stresses that in the absence of a definition of the concept of digitized image of the face, the latter cannot be understood as covering the photograph combined with the biometric template. It therefore requests that the draft decree be supplemented accordingly. Secondly, with regard to the procedures for collecting data relating to minors, the Commission takes note of the guarantees provided based on the support of minors by the agents facilitation, with particular attention being paid to unaccompanied children, who will be redirected by officials to border guards. Frontex are accessors to treatment. Following the

last exchanges with the Ministry, the draft decree was amended to provide that these persons correspond to the operational staff members of the permanent corps of the European Border and Coast Guard mentioned in Article 54 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019, deployed as part of the teams assigned to border management during joint operations at the external borders with the agents or soldiers mentioned in 1° of same draft article. The Commission notes that the scope of the agents concerned is wider than that initially provided for by the draft decree. It thus regrets not having been able, in these emergency conditions, to assess the relevance of this extension, and wonders about the reasons which led to modifying the draft decree in this direction. On the use of a video surveillance device :Regulation (EU) 2017/2225 amends the Schengen Borders Code to provide that self-service systems operate under the supervision of a border guard who is responsible for detecting any inappropriate, fraudulent or abnormal use of the self-service system. service (art. 8bis-7 and art. 8ter-8 created by Regulation (EU) 2017/2225). Recital 9 of the same regulation specifies that in the context of this supervision, border guards should, in addition, pay particular attention to minors and be able to identify persons in need of protection. In this context, the draft decree provides that the use of the pre-recording device may be subject to a video surveillance device and that the images captured during the use of this latter device are transmitted in real time to the checkpoint. Firstly, the Ministry has chosen supervision by means of a video surveillance device to which only border guards have access for the kiosks, and physical supervision by a border guard for regarding the use of mobile pre-registration equipment. The Commission recalls that, in accordance with recital 9 of Regulation (EU) 2017/2225, measures will have to be put in place to ensure that, within the carried out by means of video surveillance, border guards will be able to pay particular attention to minors and identify people in need of protection. Secondly, the images captured during the use of the video surveillance device will be kept for twenty-four hours. According to the details provided by the ministry, this duration would make it possible to cover situations in which an attempt at kiosk fraud would have been detected during delayed viewing of images. The Commission nevertheless considers that, since these images can be viewed in real time, the planned retention is not sufficiently justified. Thus, the images should only be viewed in real time, as provided for in Article R. 232-7 of the Internal Security Code for PARAFE processing, which pursues similar purposes. relationship with other processing: The AIPD transmitted by the Ministry specifies that the planned processing will be linked to the file of wanted persons (FPR 2), the visa information system VIS , the Schengen information system (through the national N-SIS II database), the EES and the Stolen and Lost Travel Documents File of Interpol. This processing will be queried based on data collected by the pre-registration

system. As a preliminary point, the Commission recalls that each connection must comply with the regulations relating to the protection of personal data, which requires in particular that the data be collected for specified, explicit and legitimate purposes and cannot be further processed in a manner incompatible with those purposes. In addition, with regard to processing governed by regulatory acts, the links must comply with the purposes, data and accessors and recipients set by them (see in this sense deliberation No. 2021-061 of the May 27, 2021 issuing an opinion on a draft decree amending decree no. 2011-111 of January 27, 2011 authorizing the implementation by the Ministry of the Interior - General Directorate of the National Gendarmerie - of automated data processing assistance in writing procedures, LRPNG). Firstly, the pre-registration device processing will be interconnected with the VIS processing. It appears from the details provided by the Ministry that the pre-registration device will interrogate the VIS via the EES processing, so that the border guard can compare the fingerprints collected from the aforementioned device with those contained in the VIS. The Commission indeed observes that Article 8 of the EES Regulation provides for an interconnection between the EES and the VIS , making it possible in particular to extract data relating to visas directly from the VIS and to import them into the EES , to check the authenticity and validity of the visa, or to verify the identity of a visa holder by comparing the fingerprints of the visa holder with the fingerprints recorded in the VIS. The Commission notes that the planned interconnection will be carried out solely through the intermediary of the EES , which does not call for any particular comment. Secondly, it appears from the exchanges with the Ministry that the pre-registration will be linked to Interpol processing, SLTD processing, which involves a transfer of data to an international organization within the meaning of Chapter V of the GDPR. The Commission recalls that such transfers can only be made subject to compliance with the conditions set out in Articles 45 et seq. of the GDPR. In the absence of an adequacy decision adopted by the European Commission, these transfers can only be carried out subject to appropriate safeguards being implemented in accordance with Article 46 of the GDPR, taking into account the circumstances of the transfer as well as that the recommendations of the European Data Protection Board on the measures that complement the transfer tools to guarantee compliance with the level of protection of personal data of the European Union.

On the rights of data subjects: The draft decree provides that the rights of access, rectification, limitation and opposition are exercised with the Directorate General for Foreigners in France (DGEF). The Commission recalls that Article 35 of Law No. 78-17 of January 6, 1978 as amended provides that the draft act authorizing the creation of processing specifies the service with which the right of access is exercised. It underlines that with regard to the text of Article 35, as well as with a view to the effectiveness of the right of

access, the Ministry should identify a more specific interlocutor, within the DGEF, for the exercise of rights, and indicate this interlocutor at least on its website and in the information notices intended for the persons concerned. In this respect, it appears from the latest clarifications provided by the Ministry that two points of contact, namely the legal adviser to the Director General for Foreigners in France and the ministerial delegate for data protection, with whom the persons concerned can exercise their rights, will be indicated on the Ministry's website and on the information notices intended for the persons concerned. With regard to the right to information, the Commission notes that the managers of airport, road, port or railways will be required, within the framework of an agreement binding them to the administration, to deploy communication media upstream of the border line, and that ministerial information on the devices will be provided on the ministry's websites of the Interior and the Ministry of Economy, Finance and Recovery. The information provided will also be adapted to minors. If, moreover, the Commission takes note of the details provided that a communication campaign on the EES system will be organized by the European Commission, thus making it possible to provide information to nationals of third countries eligible for the EES prior to their journey, it nevertheless considers that this information will relate exclusively to the EES, which constitutes a treatment distinct from the planned national treatment. It also considers that, with regard to the optional nature of the system, it is necessary to provide specific information to people on this point. Finally, the Commission considers that the processing operations resulting from the installation of a video surveillance device must be the subject of specific information. In this regard, it takes note that the aforementioned websites will mention the video stream and that specific information relating to the video surveillance system will be integrated into the device of the pre-registration kiosks. On security measures: First place, the Commission notes that the Ministry has initiated a security accreditation process for the information system implemented in the context of the processing. It reminds the Ministry of the need to publish the certificate of approval at the end of this process. It notes that data exchanges are carried out via encrypted communication channels between servers mutually authenticated by certificate. Filtering measures aimed at restricting the transmission and reception of network flows to identified and authorized machines are also implemented. Finally, remote access is secured via an encrypted virtual private network. In addition, measures are planned to ensure the partitioning of processing. Data transfers are secured by the use of isolated and compartmentalized networks. The stored data is encrypted with algorithms and key management procedures in accordance with appendix B1 of the general security reference system. The integrity of transmitted and stored data is checked. The integrity of the software used as part of the processing is also ensured. Logical access control of authorized personnel is

implemented. Maintenance interventions are subject to traceability and are framed by the employment doctrine of the digital department of the ministry as well as by contractual provisions. Application tracing is set up in order to assess the functional aspects relating to the use of the devices constituting the processing as well as the technical aspects relating to their operation. The Commission notes that the Ministry considers that these traces cannot be considered as personal data, since they only concern information relating to the functionalities of the device, the operations carried out or any technical errors observed. A retention period of three months is planned. The President, M.-L. Denis