

Deliberation 2019-152 of December 12, 2019 National Commission for Computing and Liberties Nature of the deliberation:

Opinion Legal status: In force Date of publication on Légifrance: Tuesday August 04, 2020 Deliberation No. 2019-152 of December 12, 2019 providing an opinion on a draft decree implementing article 50 of law n° 2019-222 of March 23, 2019 on programming 2018-2022 and justice reform

(request for opinion no. 19020389)

The National Commission for Computing and Liberties, Seizure by the Ministry of Justice of a request for an opinion concerning a draft decree implementing Article 50 of Law No. 2019-222 of March 23, 2019 of 2018-2022 programming and justice reform; Having regard to Council of Europe Convention No. 108 for the protection of individuals with regard to automatic processing of personal data; Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC; Having regard to Directive 2016/680 of 27 April 2016 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the competent authorities for the purposes of prevention and detection of criminal offenses, investigations and for proceedings in this area or the execution of criminal penalties, and 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 Articles 15-4, 63, 63-1, 64, 64-1, 77-2 and D. 15-6; Considering the modified law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms, in particular its article 8 .I-4°, a); Having regard to law n° 2019-222 of March 23, 2019 on programming 2018-2022 and reform for justice, in particular its article 50-II; Having regard to decree n° 2019-536 of 29 May 2019 taken for the application of law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms, in particular its article 9; Considering the decree of April 14, 2008 fixing the technical methods of the means audiovisual recording of the interrogations of persons placed in police custody or under investigation; On the proposal of Ms Christine MAUGÜE, commissioner, and after having heard the observations of Ms Nacima BELKACEM, co Government Commissioner, Issuing the following opinion: Law n° 2019-222 of March 23, 2019 referred to above has, in its article 50-II, opened up the possibility, on an experimental basis, from January 1, 2019 and until January 1, January 2022, in judicial police services or units jointly designated by the Minister of Justice and the Minister of the Interior, to proceed with the sound or audiovisual recording of the formalities providing, for persons heard, arrested or placed in custody on sight, notification of their rights. recordings, their methods of conservation, storage and destruction as well as the methods

of consultation by the lawyer of the person during police custody or in the event of criminal proceedings. This same provision provides that the methods of application of this system will be specified by regulation. Without prejudice to the conditions for the effective implementation of the processing of personal data carried out within the framework of this experiment, the draft decree calls for the following observations.

of II of Article 50 of the aforementioned Law No. 2019-222, Article 1 of the draft decree indicates that, on an experimental basis, the sound or audiovisual recording may be carried out with formalities providing, for persons placed in police custody pursuant to Article 63 of the Code of Criminal Procedure (CPP), the notification of their rights provided for in 3° of Article 63-1 of the same code. The Commission notes that Article 3 of the draft decree provides for leaving the choice to the judicial police officers of the designated services or units to determine the procedures in which this recording is carried out, which does not call for any observation. particular.

On the procedures for exercising the mechanism envisaged

Firstly, as regards the types of recording that can be used, the Commission notes that it is clear from Article 2 of the draft decree that the mechanism of audiovisual recording provided for by articles 64-1 and D. 15-6 of the CPP for the hearings of persons placed in police custody for a crime, the technical terms of which are determined by the decree of April 14, 2008 referred to above, or to any other sound or audiovisual recording device whose terms techniques are specified by joint decree of the Minister of Justice and the Minister of the Interior. Secondly, article 4 of the draft decree specifies that, when this recording has been carried out, the investigators are not required to include the notification of the rights in the minutes provided for by the penultimate paragraph of article 63-1 and by article 64 of the CPP. In this case, it will be indicated that the notification of the rights has the subject of a sound or audiovisual recording and the agent or judicial police officer who made the notification must identify himself during the recording or on this report, if necessary according to the procedures provided for by Article 15-4 of the CPP, namely by means identification by an administrative registration number. The Commission observes that while the second paragraph of Article 4 of the draft decree provides certain information as to the methods of identification which may be used by the agent or officer of the judicial police when it proceeds to the notification of rights by referring to article 15-4 of the CPP, the latter do not make it possible to determine precisely the possible other methods which could be used, in particular when the agent or the officer of the judicial police who made the notification chooses to identify itself during registration. It recommends that the draft decree be clarified on this point.

In addition, the Commission considers that the draft decree should provide for authentication of the agent or officer concerned, in order to guarantee the reality of the identity of the agent initiating the procedure. It recommends that the methods of this

authentication be precisely defined by the ministry in order to guarantee the application of a homogeneous and reliable procedure. registered persons, which seems likely to raise problems when using this type of registration. In view of the above, the Commission considers that the draft decree should thus be supplemented in order to specify, where , whether other identification methods may be used by the agent or the judicial police officer who made the notification, as well as the defined authentication methods.

On the methods of consulting the recordingsAs a preliminary point, the Commission recalls that under the terms of II of Article 50 of the aforementioned Law No. 2019-222, in the event of a dispute, this registration may be consulted té on simple request. In this respect, article 5 of the draft decree specifies the methods of this consultation by distinguishing two hypotheses: during police custody, it is provided that the lawyer of the person can, if he disputes the existence of the notification of rights, consult this recording; if the person is the subject of proceedings, it is specified that this recording may be consulted by his lawyer, in the event of a dispute which may give rise to the filing of a request for nullity or when article 77-2 of the CCP is applied, on simple request made by this lawyer to the public prosecutor. In the absence of details, the Commission wonders about the choice which was operated to limit the consultation of the recording to the sole person of the lawyer insofar as the aforementioned article 77-2 allows, for example, any person against whom there are one or more plausible reasons to suspect that he has committed or attempted to commit an offense n punished by a custodial sentence [...] to consult the file of the proceedings in order to formulate his observations. It also observes that the person concerned may, in the procedures covered by this draft decree, choose not to be assisted by a lawyer. The Commission therefore considers that the draft decree should be amended in order to allow the person who has waived the assistance of a lawyer and contests the existence of the notification of the rights to be able, if necessary, to also consult this recording .

On the security measures surrounding the envisaged deviceIn the first place, article 2 of the draft decree specifies that the technical methods of the various recording devices which can be used will be specified by joint order of the Minister of Justice and the Minister of the interior. Secondly, it is clear from article 6 of the draft decree that the original of the recordings made is placed under closed seal and that a copy is placed in the file. The Commission recalls that security measures allowing to guarantee the confidentiality, integrity and availability of records must be implemented. Given the nature of the data, these measures must be capable of guaranteeing a very high level of security, and must apply to both originals and copies. It notes that this provision also indicates that, on the instructions of the public prosecutor the Republic or the Attorney General, the recordings are destroyed within one month by the court registry at the end of a period of five years from the date of the extinction of the

public action, which does not call for any particular comment. In this respect, the Commission recommends that the destruction of the recordings be carried out by means of physical destruction of the storage media, in order to guarantee the effectiveness of this destruction. For the President , the Deputy Vice-PresidentS. LAMBREMON