Deliberation 2022-029 of March 10, 2022Commission Nationale de l'Informatique et des LibertésNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Tuesday April 12, 2022NOR: CNIX2210832XDeliberation n° 2022-029 of March 10, 2022 providing an opinion on a draft decree amending decree no. 2019-536 of May 29, 2019 taken for the application of law no. 78-17 of January 6, 1978 relating to data processing, files and freedoms (request for opinion no. 22005257)The National Commission for Computing and Liberties,Seizure by the Ministry of Justice of a request for an opinion concerning a draft decree amending decree no. 2019-536 of May 29, 2019 issued for the application of Law No. 78-17 of January 6, 1978 relating to data processing, files and freedoms; Having regard to Convention No. 108 of the Council of Europe for the protection of individuals with regard to the automatic processing of personal data personal character; Having regard to Regulation (EU) 2016/679 of the Parliament 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 (general regulation on the protection data); Having regard to Directive (EU) 2016/680 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 by the competent authorities for the purposes of prevention and detection, investigation and prosecution of criminal offenses or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA; n° 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms, in particular its articles 8, 10 and 20 to 29; Having regard to law n° 2017-55 of January 20, 2017 on the general status of the authorities independent administrative and auto independent public authorities; Having regard to law n° 2022-52 of January 24, 2022 relating to criminal liability and internal security, in particular its article 33; Having regard to decree n° 2018-232 of March 30, 2018 adopted for the application to the National Commission for Computing and Liberties of Law No. 2017-55 of January 20, 2017 on the general status of independent administrative authorities and independent public authorities; Having regard to Decree No. 2019-536 of May 29, 2019 issued for the 78-17 of January 6, 1978 relating to data processing, files and freedoms; After having heard the report of Mrs Marie-Laure DENIS, president, and the observations of Mr Benjamin TOUZANNE, commissioner of the Government, Issues the following opinion: The National Commission for Computing and Liberties (hereinafter "the Commission") has been asked by the Ministry of Justice for an opinion on a draft decree amending decree no. 2019-536 of May 29, 2019 made for law enforcement n° 78-17 of January 6, 1978 relating to data processing, files and freedoms (hereinafter "IT and freedoms" law), as amended by article 33 of law n ° 2022-52 of 24 January 2022 relating to

criminal liability and internal security. The amendments made to the "IT and freedoms" law by article 33 of law n ° 2022-52 of January 24, 2022 relating to criminal liability and internal security are part of an objective of simplifying and clarifying the procedures available to the Commission to pronounce corrective measures in the event of a breach of the provisions of the general regulation on data protection (EU regulation 2016/679 of April 27, 2016, or GDPR) and the law "Informatique et Libertés" or other provisions whose control falls within its competence (in particular Article L. 34-5 of the Post and Electronic Communications Code). In particular, the law has created, alongside the current procedure for pronouncing a corrective measure, now called "ordinary procedure", a "simplified procedure" characterized by the fact that the measure is pronounced by a single commissioner from the restricted formation and in principle without a hearing. The Commission considers that such an adjustment was necessary to allow a satisfactory investigation of the complaints it receives, in a context of constant and substantial increase in the volume of complaints addressed to it, and therefore contributes to a better guarantee of the rights of data subjects with regard to the processing of personal data. extremely varied types of breaches, while it received only 7,700 the year the GDPR was adopted. The current sanction procedure was no longer suitable for processing such a volume of complaints and did not allow the Commission to carry out its task of investigating all the complaints referred to it. The Commission therefore very favorably welcomes this change in the procedural framework of its repressive action, as well as its implementation methods proposed by the draft decree. In addition to the introduction of a simplified sanction procedure, for the least complex cases and of low severity, the amendments made to the "IT and Freedoms" law also come, on the one hand, to specify and clarify the powers of the President of the Commission by explaining his ability to recall a data controller or a -processor to its legal obligations, which is an expression of the power to "call a controller or processor to order when the processing operations have led to a violation of the provisions of the Regulation", referred to in Article 58(2)(b) of the GDPR and, on the other hand, allow a formal notice to be issued against a controller or a processor without necessarily having to demand er on their part to justify their compliance within the time limit and to proceed with the examination of the supporting documents provided following the delivery of this formal notice. On these two points, the Commission considers that the law is sufficient in itself and therefore approves that the decree does not contain implementing provisions. ending the six-month limit on the time allowed for a controller or processor to comply. The Commission had in fact noted that certain formal notices require a long period of compliance, without it appearing necessary at this stage to seize the restricted committee. Finally, the decree specifies that in the event of a formal notice, the identity of a complainant must not be communicated to the data

controller or to the subcontractor concerned by the formal notice, unless this is necessary to end breaches noted, in particular when the complaint relates to the exercise of a right. the procedures for implementing the procedures before the restricted CNIL, in particular those introduced by the legislative amendments, by modifying in particular section 3 of decree no. 2019-536 of May 29, 2019, relating to corrective measures, sanctions and penalties. These amendments more specifically call for the following observations from the Commission.On the amendments relating to the ordinary sanction procedureFirstly, the Commission notes that the proposed amendments to Articles 39 and 40 of Decree No. 2019-536 of May 29, 2019 are intended to simplify and make the ordinary sanction procedure more flexible, by introducing more flexibility into it. The current sanction procedure, which provides for a single procedural framework with two written adversarial rounds, within one month and then fifteen days, appeared to be ill-suited to the variety of cases investigated with a view to the pronouncement of a corrective measure , for which a continuation of the exchanges could sometimes have proved necessary. In this sense, the Commission welcomes the fact that the conduct of this written procedure prior to the holding of the meeting is now entrusted to the rapporteur, who determines the number of adversarial rounds necessary for the investigation of the file and, when he judges the file as it stands, informs the respondent and the president of the restricted formation so that the latter registers the file on the order of the day of a session. Similarly, the removal of the current period of fifteen days given to the rapporteur and then to the respondent during the second round of adversarial proceedings is necessary, because this period appears in practice to be particularly unsuitable for complex cases. Thus, the rapporteur and the respondent will now benefit from an identical period of one month to produce their respective submissions throughout the written adversarial procedure, and this period may be extended at the request of the rapporteur or the respondent, addressed to the president of the restricted formation. The decree also specifies that the rapporteur can close the sanction procedure at any time, in particular if he considers the breaches to be unconstitutional or if the respondent no longer exists. legal. These clarifications appear useful in view of the Commission's practice and the debates to which these provisions may have given rise.Secondly, the Commission welcomes the amendments made to decree no. different procedural steps applicable. This concerns in particular the conduct of the investigation by the rapporteur appointed from among the members of the Commission within the framework of the ordinary sanction procedure, and in particular the possibility reserved for this commissioner, pursuant to g of 2° of I of l article 8 of the law of January 6, 1978, to carry out the checks and controls necessary for the establishment of its investigation report. The draft decree also provides for the possibility for the President of the Commission to designate, in the event of resignation or

unavailability of the rapporteur, a new rapporteur who can continue the procedure already initiated and take over the investigation work carried out by the rapporteur initially appointed, without it being necessary to repeat the procedural acts carried out previously. The Commission considers that these precisions and clarifications are likely to reinforce the legal certainty of the procedures initiated, when a measure provided for in III of article 20 of the "data-processing and freedoms" law is likely to be pronounced, while guaranteeing their operational nature.Thirdly, the modifications made to article 41 of the decree, which allow the rapporteur to enlist the assistance of people outside the Commission, must contribute to increasing the capacity to instruct and bring before the restricted committee a larger number of cases that could be remedied. This support of external persons, designated by the President of the Commission, in particular among magistrates and members of the administrative jurisdiction, and having to meet the same requirements in terms of ethics and conflict of interest as permanent agents, will contribute to the strengthening of resources of the Commission in order to carry out its missions for the benefit of the protection of individuals. The Commission notes that several independent administrative authorities, such as the Competition Authority or the Financial Markets Authority, already benefit from this possibility. These people will indeed constitute "Commission agents" within the meaning of the law of January 6, 1978, for the processing of the files which will be entrusted to them. Beyond the assistance of these external persons, the Commission recalls the need to benefit from sufficient means and resources to carry out all of its missions. On the modifications relating to the simplified sanction procedure The Commission recalls that the modifications made to the "computing and liberties" law, which introduces the simplified sanction procedure, already specifies the framework and the applicable procedural elements. The simplified sanction procedure thus established makes it possible to entrust the handling of the least complex cases to the chairman of the restricted formation alone or to a member of this formation designated by him, who will decide on the basis of a report drawn up by a the Commission, in principle without an oral meeting. The corrective measures likely to be pronounced in this context are adapted to the nature of the cases to which this simplified sanction procedure is intended to apply, which present, on the one hand, a low level of seriousness and, on the other hand , a simplicity of the questions of fact or law that they raise. The measures that can be pronounced are thus limited to a call to order, an injunction under penalty within the limit of 100 euros per day of delay and a fine not exceeding 20,000 euros. The Commission points out that these measures cannot be made public. Firstly, the Commission considers it relevant that the draft decree refers to the provisions of the ordinary procedure for the other methods of implementing the simplified procedure. The Commission also notes the useful clarifications provided by the draft decree to

the conditions and procedures for authorizing agents and external persons who may be appointed as rapporteurs under the simplified procedure, whose assistance will also make it possible to increase the capacity of the Commission to examine the cases concerned by this simplified sanction procedure.Secondly, the Commission welcomes the methods specified in the draft decree making it possible to ensure that the President of the Commission and the respondent are informed of the follow-up given to recourse to the simplified procedure, which the draft decree specifies. In particular, when the Chairman of the Restricted Committee, or the member he has appointed for this purpose, considers that it is not appropriate to use the simplified procedure or interrupts this procedure, the Chairman of the Commission may appoint a rapporteur among its members and the investigation may continue according to the ordinary procedure, all the previous documents remaining in the file, thus ensuring the continuity of the procedure.On the other powers of the president of the restricted committeeLaw no. ° 2022-52 of January 24, 2022 intended to simplify the handling of cases in which a data controller or a subcontractor has not responded to a prior formal notice, by introducing an injunction to produce procedure, accompanied by there is a daily fine, which may, if necessary, be liquidated by decision of the chairman of the restricted committee alone. The decree makes this procedure an autonomous procedure, which the Commission approves. The measure will be preceded by a contradictory procedure within fifteen days, without a meeting. This procedural simplification will significantly lighten the procedure previously applicable, which required the appointment of a rapporteur from among the members of the Commission, who was to the adversarial written procedure according to the procedures and deadlines applicable to the ordinary sanction procedure before presenting his report to the restricted committee during a session at which the defendant was able to attend, even though the absence response from the controller or subcontractor following the prior formal notice could be easily and objectively ascertained. it comes under the ordinary procedure. It follows from the economy of the decree that this faculty finds to apply when the rapporteur has completed his investigation and seized the president of the restricted formation so that he registers the file at a meeting. It will now be possible to note the dismissal without organizing a meeting.On the amendments relating to cooperationFirstly, the Commission welcomes the proposed amendments to Article 53 of Decree No. 2019-536 of May 29, 2019 which mainly allow the provisions relating to to European cooperation in the implementation of the new simplified sanction procedure. The Commission considers that the new simplified sanction procedure is capable of facilitating the investigation of cross-border cases when the Commission acts as the authority of lead control within the meaning of Article 56 of the GDPR for procedures characterized by a low level of severity and not presenting any particular difficulties authorities, by

enabling it to present draft decisions more quickly to the authorities concerned and to adapt its draft decisions if necessary following any relevant and reasoned objections formulated by the authorities concerned.Secondly, and in the same perspective facilitation of European cooperation procedures, the Commission notes with satisfaction that the proposed amendments also provide for the possibility that the relevant and reasoned objections of the supervisory authorities concerned would lead to a review of the draft corrective measure proposed in such a way that the case does not could no longer meet the fine and penalty payment ceilings applicable to the simplified procedure, by usefully allowing the chairman of the restricted committee to interrupt the simplified procedure, so that the ordinary sanction procedure can be activated, all the documents remaining on file.Third, the proposed amendments in the draft decree will also make it possible to extend to one month the deadline for transmission to the supervisory authorities concerned of the sanction report and the useful information mentioned in Article 27 of the "Informatique et Libertés" law, whereas this deadline was currently only one week, which could cause difficulties in obtaining the translation of these documents within this timeframe. The President Marie-Laure DENIS