Deliberation 2020-002 of January 9, 2020National Commission for Computing and LibertiesNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Tuesday March 31, 2020NOR: CNIX2008724Deliberation No. 2020-002 of January 09, 2020 providing an opinion on a draft decree in Conseil d'Etat creating an automated processing of personal data called "DataJust" (request for opinion no. 19020148) The National Commission for Computing and Liberties, Seizure, November 7, 2019 , by the Minister of Justice of a request for an opinion concerning a draft decree creating an automated processing of personal data called DataJust; 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 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons at the ard of the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC; Having regard to the code of administrative justice, in particular its article L. 10; Having regard to the code of judicial organization, in particular its article L. 111-13; Considering the modified law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms, in particular its article 6-III; Considering the decree n° 2019-536 of May 29, 2019 taken for the application of law n ° 78-17 of January 6, 1978 relating to data processing, files and freedoms; Having regard to deliberation n ° 2019-078 of June 13, 2019 providing an opinion on a draft decree creating an automated processing of personal data called DataJust relating to compensation for bodily injury and the assessment of civil liability regimes; Considering the file and its supplements; After hearing Mrs. Christine MAUGÜE, commissioner, in her report and Ms. Nacima BELKACEM, Government Commissioner t, in its observations, Issues the following opinion: The DataJust processing aims to develop, for a period of two years, an algorithmic system making it possible to identify, by type of damage, the amounts requested and offered by the parties to a dispute as well as than the amounts allocated to victims in compensation for their bodily injury in court decisions rendered on appeal by the administrative courts and the civil formations of the courts. automatically, data contained in court decisions and their use. It observes that, in the long term, Datajust processing also aims to constitute a tool for restoring and disseminating these amounts relating to compensation for the bodily injury of victims. The Commission considers that the planned processing, the purposes of which are in particular the development of algorithmic processing in order to draw up an indicative benchmark for compensation for bodily injury as well as the performance of evaluations prior to the drafting of standards and retrospective evaluations of public policies in the field of civil liability, falls within the scope of application of Regulation (EU) 2016/679 of April 27, 2016 referred to above (hereinafter GDPR). Insofar as sensitive data is likely to be collected and processed, it must be the subject of a Conseil

d'Etat decree, taken after a reasoned and published opinion from the Commission in accordance with the provisions of Articles 6-III and 31-II of the amended law of January 6, 1978. It observes that this draft decree aims to take into account a certain number of observations made within the framework of deliberation no. 2019-078 of June 13, 2019 referred to above, in particular with regard to the need to first of all specifically supervise the first phase of development of the algorithm used. The Commission thus notes that, depending on the results obtained during this development phase, it is planned to implement a second processing operation, the purpose of which will be to make available the indicative benchmark for compensation for bodily injury to the public. Commission recalls, in any case, that it must be kept informed and seized, under the conditions provided for in Article 33-II of the law of January 6, 1978 as amended, of any substantial modification affecting the characteristics of the processing as well as of the draft text framing the permanent phase of this treatment. In the same way, it recalls that the impact analysis sent to it, under the conditions provided for in Article 62 of the aforementioned law, must be updated and reassessed on a regular basis. . On the general conditions for implementing the planned processingThe Commission notes that the planned processing will be carried out from the collection of appeal decisions relating to compensation for bodily injury for the last three years (2017, 2018 and 2019) present in the databases of the Court of Cassation (JuriCA) and the Council of State (Ariane). It notes that it is also planned, during the development phase of the algorithmic processing, to integrate the new decisions rendered by the appeal courts in matters of compensation for bodily injury and this, on a quarterly basis. In general, the Commission recalls that, given the particular sensitivity of the information likely to be processed, relating to both adults and minors, as well as the particularly wide scope of the planned processing, particular attention should be paid to the planned changes to the algorithm and more particularly to the presence of any biases (discriminatory practices linked for example to ethnic origin, gender or geographic location). It notes that it is planned that the ministry will benefit from specific support on this subject, without however the terms and expectations of this support having yet been precisely defined. The Commission thus invites the Ministry to clearly define these methods as well as the objectives expected by it before any implementation of the planned processing and recalls that particular attention must be paid to the cardinal principles of vigilance and loyalty throughout the development of this treatment. It asks that these elements be brought to its attention. In the event that, after its development, this system is made permanent – in particular for the purpose of making a reference system available to the public – the Commission is wondering , on the need to provide a specific legislative framework. Given the novel nature and the importance of the planned mechanism, it would make it possible to reconcile the

imperatives of the proper administration of justice and the preservation of fundamental rights and freedoms. The Commission notes that the legislative basis for a national indicative benchmark for compensation for non-patrimonial damage was envisaged in the civil liability reform project made public on 13 March 2017. Insofar as, in the long term, the ministry intends to establish long-term such a system, the Commission had requested, in its deliberation No. 2019-078 mentioned above, that a report be sent to it. In this respect, it notes that the Ministry undertakes to provide the Commission, within a maximum period of one year following the end of the development phase, with a report which will include the following information: on the presence of any biases in the algorithm identified and the corrective measures envisaged and/or applied as a result; the precise list of the categories of data and information identified as necessary with regard to the purposes of the DataJust processing as well as the nature of the data to which each category of recipients will be able to access; the description of the additional pseudonymisation processes that will be applied. a second treatment. It also asks that it also be provided, on the occasion of this assessment, with a detailed description of the algorithms, the methods implemented as well as the performance indicators used, the results obtained with these and the methods of auditing the algorithm used. These elements recalled, the transmitted draft decree calls for the following observations from the Commission. On the purposes of the processing Article 1 of the draft decree specifies that the DataJust processing will have as its purpose the development of a algorithm to be used for: the performance of evaluations prior to the drafting of standards and retrospective evaluations of public policies in matters of civil liability by the Department of Civil Affairs and the Seal of the Ministry of Justice; the development of a indicative benchmark for compensation for bodily injury; informing the parties and helping to pre-calculate the compensation to which the victims p may claim in order to promote transactions with insurers or other entities in charge of settling damages; decision-making assistance for judges called upon to rule on claims for compensation for bodily injury. The Commission notes that the purposes of the DataJust processing should allow for better administration of justice and the provision of litigants with a tool allowing them to make choices in a more informed manner as to whether or not to initiate litigation or whether or not to accept compensation offers offered by insurers. It also takes note of the details according to which this system will only constitute a decision-making aid tool. Although, in general, these purposes do not call for any particular observation, the Commission nevertheless considers that the first purpose deserves to be be made explicit. Indeed, the ministry indicated that this refers to the possibility of carrying out prospective and retrospective evaluations of public policies, for example when it is envisaged to modify the contours of a civil liability regime, and that the analyzes carried out in

this context would be likely to enrich and improve the quality of impact studies. Given these details, it requests that the draft decree be amended to incorporate these explanations. Subject to this reservation, it considers that the intended purposes are determined, explicit and legitimate, in accordance with Article 5-1.b) of the GDPR.On the data collectedArticle 2 of the draft decree details the categories of personal data and information recorded in the DataJust processing. The Commission recalls that this data will be extracted from court decisions rendered on appeal by the administrative courts and the civil formations of the courts in the only disputes relating to compensation for bodily injury. These categories of data are the following: the names and first names of the natural persons mentioned in the court decisions, with the exception of those of the parties; the other elements of identification of the natural persons; the data and information relating to the damages suffered; the data relating to the professional life and the situation financial and economic data; data relating to criminal offenses and convictions; the number of court decisions. As a preliminary point, the Commission notes that the draft decree does not explicitly specify the categories of persons whose data may be collected . Although it takes note of the elements communicated by the ministry according to which an exhaustive list cannot be drawn up, it nevertheless considers that it would be appropriate to distinguish within article 2 of the draft decree the categories of data relating to the all natural persons from those which will only be collected for certain categories of natural persons such as, for example, victims or even legal professionals. The Commission also recalls that it is essential that guarantees are implemented so that only data which is linked to compensation for the damage suffered is actually processed and, in this respect, it considers that particular vigilance should be exercised with respect to sensitive data within the meaning of the law of January 6, 1978 amended (data relating to health and/or sex life) which may be collected under the category of data and information relating to damage firstly, with regard to the collection of the surnames and first names of natural persons mentioned in court decisions, the Commission notes that the decisions which will be forwarded by the Court of Cassation and the Council of State will in principle subject to partial pseudonymization before transmission to the Ministry. The surnames and first names of the natural persons party to the bodies concerned will thus be concealed before this transmission and cannot be recorded in the processing.Secondly, article 2 of the draft decree indicates that other elements of identification of natural persons may be collected, in particular the date of birth and the family relationship. The Commission notes that the wording of this article allows the collection of other data under this category. Independently of the observation made above on the need to ensure that only the data strictly necessary for the purposes pursued by the processing are collected and processed, it requests that the draft decree be clarified on this point and takes

note of the commitment of the ministry to modify this provision in order to mention, under this category, only the collection of the date of birth, gender, relationship and place of residence.Thirdly, article 2 of the draft decree provides that data relating to criminal offenses and convictions may be collected. Although the collection of data relating to offenses does not call for any particular observation with regard to the nature of the information appearing in the decisions of the courts, the Commission wonders, however, about the nature of the data that will be collected as data relating to criminal convictions. In this respect, it notes that the mention of criminal convictions may in particular be collected, for example in cases in which the Guarantee Fund for victims of acts of terrorism and other offenses (FGTI) exercises its subrogatory recourse against the person responsible facts referred to in Article 706-3 of the Code of Criminal Procedure after a criminal decision. The Commission notes, however, that it appears from the data protection impact assessment (DPIA) submitted that, under this generic category, data may be processed which characterizes faults likely to take on a criminal qualification, even if they have not given rise to criminal proceedings or sanctions, such as the characterization of a fault on the part of the person responsible or of the victim who can be penalized. It follows from these clarifications that data relating to criminal convictions as such will not be processed, but data relating to the findings made by the judicial judge prior to the possible pronouncement of a criminal conviction and being likely to characterize faults of a civil nature. Although the Commission takes note of the modification of the draft decree to be made in order to distinguish the collection of data relating to civil faults likely to receive a criminal qualification from those relating to criminal convictions, it nevertheless questions the relevance of including within this generic category of data concerning civil wrongdoing when these relate neither to criminal offenses nor to criminal convictions. The other categories of data do not call for any particular comments on the part of the Commission .Subject to the foregoing, the Commission considers that the data processed are adequate, relevant and not excessive with regard to the purposes pursued, in accordance with the provisions of Article 4-3° of the law of January 1978 as amended.On the recipientsL Article 3 of the draft decree lists the recipients who have access to all or part of the personal data and information recorded in the processing, by reason of their attributions and within the limits of the need to know: the agents of the Ministry of Justice assigned to the service responsible for IT developments of the General Secretariat of the Ministry of Justice, individually designated by the Secretary general; the agents of the obligations office individually designated by the director of civil affairs and the seal. The Commission notes that the access of the agents of the obligations office to the processing is justified by their participation in the development of the tool. It considers that, once the development phase of the algorithmic processing allows it, the Ministry

should determine more precisely the data necessary for each category of recipients in order to avoid the establishment of general and undifferentiated access to all data recorded in the processing for the benefit of all identified recipients. Indeed, since the categories of recipients are intended to be extended during the sustainability phase of the system, a more precise determination of the data necessary for the categories of recipients must be carried out in the draft text relating to this phase. On the retention period dataArticle 4 of the draft decree provides that the data will be kept for the duration necessary for the development of the algorithm. At the end of this period, they will be erased in a secure manner. The Commission notes that this provision provides that, in any case, the data retention period may not exceed two years from the publication of this decree. , it notes that the Ministry is considering the possibility of erasing data before the complete expiry of this period in the event that it is of no interest for the development of the algorithm. Under these conditions, the Commission considers that the data retention period appears proportionate with regard to the purposes assigned to the processing. Article 5 of the draft decree provides that the updating, deletion and consultation operations will be the subject of a recording comprising identification of the user, date, time and nature of the intervention in the processing. This information will be kept for a period of two years, which does not call for any specific comments from the Commission. On the rights of the persons concerned Firstly, with regard to the information of the persons concerned, the Commission notes that the ministry intends to apply article 14-5.b) of the GDPR which provides for the possibility of derogating from this right when the provision of such information would require disproportionate effort. While it notes that providing individual information to the persons concerned would require disproportionate efforts due to the pseudonymisation of the names and surnames of the parties, it observes that it is planned that general information be provided through the intermediary of the ministry's website. of Justice. It considers that the draft decree should be amended in order to specify that general information will be issued by the Ministry. delivered in clear and simple terms that they can easily understand, in accordance with Article 12-1° of the GDPR. It takes note of the ministry's commitment to issue specific information to this category of people. a priori of the persons potentially concerned does not seem to be conceivable, in particular because of the large number of decisions which could be concerned, it notes that the Ministry plans to specify instructions to all the clerks on the information to be inserted in the documents transmitted a priori to the Secondly, Article 6 of the draft decree provides that the rights of access, rectification and limitation are exercised with the Ministry of Justice under the conditions provided for respectively in Articles 15, 16 and 18 of the same rules. With regard to the exercise of these rights, the Commission takes note of the clarifications provided by the Ministry according to which, for the

parties to the dispute whose identity was pseudonymized before the transmission of the decision to the Ministry, the exercise of the rights can only be done by the communication, by the person concerned, of the number of the decision of which it was the object. It also notes that the draft decree provides that the right of opposition will not apply to the DataJust processing pursuant to Article 23 of the GDPR, in order to guarantee the general objective of general interest of accessibility of the law. Given this clarification, the planned limitation does not call for any particular comments from the Commission. On the security measures With regard to the security measures described in the impact assessment, the Commission notes that profiles of authorization are provided in order to manage for each user the authorized functions or the categories of accessible information. It recalls that access permissions must be removed for any user who is no longer authorized and that an overall review of authorizations must also be carried out on a regular basis. The Commission notes that the Ministry plans to implement a password policy in accordance with deliberation no. 2017-012 of 19 January 2017 adopting a recommendation relating to passwords. It also notes that DataJust processing is deployed within the justice virtual private network (RPVJ) of the Ministry and hosted on its servers and that measures are planned to ensure its compartmentalization. This network is subject to filtering measures aimed at restricting the transmission and reception of network flows to identified and authorized machines. The Commission observes that it is planned that the stored data be encrypted. In this regard, it recalls the need to use key management algorithms and procedures that comply with appendix B1 of the general security reference system. As regards the pseudonymization mechanisms implemented, these being evolve according to the data that will be considered relevant to allow the processing to be carried out while satisfying the requirement of data minimization, the Commission recalls that it will be necessary to document the modifications made to these tools and to present them in the report which will be provided to him at the end of the DataJust processing development phase. The Commission also notes that logging of data consultation, creation and modification operations has been put in place. In this respect, it recommends that measures be implemented to ensure the integrity of the logs and that any administrator able to consult the logs of accesses does not access DataJust data. With regard to the use of the services of subcontractors called upon to process personal data, the Commission observes that the Ministry has planned to supervise the operations entrusted to them by means of a contract setting security and ensuring that they have the skills and capacities necessary to achieve them. The contract also specifies that the subcontractor can only act on the orders and on behalf of the data controller, and details the procedures for restoring or destroying the data at the end of the contract. Finally, the Commission considers that it It appears essential that the level of

safety provided be high enough to limit the likelihood of an incident occurring. This includes, in particular, the drafting and implementation of an effective update policy for the solutions used at least with regard to security updates and the implementation of compensatory measures to prevent a workstation from with administrator rights cannot be used as a database attack vector. Subject to the consideration of the preceding remarks and their correct implementation, the Commission considers that the security measures chosen by the controller comply with the security requirements provided for in articles 5-1.f) and 32 of the GDPR. The Commission recalls in any case that this obligation requires the updating of the DPIA and its security measures on a regular basis in order to take into account the evolution of the state of the art.The PresidentM.-L. DENIS