Deliberation 2019-114 of September 12, 2019National Commission for Computing and LibertiesNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Thursday October 03, 2019Deliberation n° 2019-114 of September 12, 2019 providing an opinion on the draft Article 9 of the finance bill for 2020 (request for opinion no. 19015685)The National Commission for Computing and Liberties,Request for an opinion relating to the draft article 9 of the bill Finances for 2020; Having regard to the Charter of Fundamental Rights of the European Union, in particular its Articles 7 and 8; Having regard to Convention No. 108 of the Council of Europe for the protection of individuals with regard to automatic processing of personal data of a personal nature; 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 abr ogling Directive 95/46/EC; 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 competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties, and the free movement of such data, and repealing Framework Decision 2008/977/JHA of Council; Having regard to the consumer code, in particular its article L. 111-7; Having regard to the general tax code; Having regard to the customs code; Having regard to the book of tax procedures, in particular its article L. 103; Having regard to law no. 78-17 of January 6, 1978 amended relating to data processing, files and freedoms, in particular its article 8-I-4°-a); Considering law n° 2017-55 of January 20, 2017 on the general status administrative authorities and independent public authorities, in particular its article 22; t 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; After hearing Mr. Philippe-Pierre CABOURDIN, Commissioner in its report, and Mrs Nacima BELKACEM, Government Commissioner, in her observations, Issues the following opinion: ), on the basis of article 8-I-4°-a) of law n° 78-17 of 6 January 1978 as amended. Pursuant to Article 22 of Law No. 2017-55 of January 20, 2017 on the general status of independent administrative authorities and independent public authorities, this opinion will be made public. This draft article provides for the possibility for the administration as well as for the administration of customs and indirect rights, on an experimental basis and for a period of three years, to collect and exploit by means of computerized processing, the freely accessible content published on the Internet by the users of the operators of online platforms mentioned in Article L. 111-7-I-2° of the Consumer Code. made public on social networks as well as on electronic networking platforms in order to allow the search for offenses relating to tax and customs breaches considered considered the most serious by these

administrations. It notes straightaway that the implementation of this type of processing, of a new kind compared to what the Commission has had to deal with up to now, testifies to a significant change of scale within the framework of the prerogatives entrusted to these administrations for the exercise of their missions. The implementation of such a system also reflects a form of reversal of the working methods of the administrations concerned as well as the processing they use to fight against fraud. It is based on a prior general collection of data relating to all persons making content accessible on the online platforms concerned, with a view to targeting subsequent control actions when the processing of this data has raised doubts, and not on a logic of targeted processing of such data when there is a pre-existing doubt or suspicion of the commission of an offence. In this regard, it considers that, as a matter of principle, great caution should be exercised with regard to the development of computerized processing allowing the collection of freely accessible content published on the Internet, which raises new questions in terms of the protection of personal data. The Commission emphasizes that it is up to the legislator to assess the advisability of such a system and, if necessary, to set the rules with regard to the fundamental guarantees granted to citizens for the exercise public freedoms. It specifies in this respect that it intends to carry out a detailed examination of this system without this prejudging, on the one hand, its analysis as to the possibility of resorting to processing of this nature in the context of other public policies and for purposes other than those mentioned in Article 9 of the draft law or, on the other hand, of its assessment of compliance with the principles relating to the protection of personal data with regard to the effective conditions of implementation processing in other hypotheses. online platforms and the substantial impacts on the privacy of data subjects that result. On the principle laid down in Article 9 of the 2020 finance bill claims that the mere fact that the data is accessible on the Internet, and that people may be aware that there is a potential risk of their data being sucked in, is not enough for the administrations wishing to use them to be exempt from the obligation to collect this data in a fair and lawful manner. As such, it will be particularly vigilant as to the methods of informing the persons concerned. It also underlines that the voluntary creation of profiles on online platforms does not, in principle, entail the possibility of their aspiration as well as their redistribution on other media not controlled by the persons concerned. Indeed, if people decide of their own free will to make public a certain amount of information on the platforms of their choice, these necessarily have control of their profiles and can at any time rectify or delete their data. combating tax evasion constitutes an objective with constitutional value and without calling into question the operational need to develop effective mechanisms in this regard, the Commission considers that the planned processing operations are, by their nature, likely to infringe the rights and freedoms of individuals concerned. It notes that the

implementation of such processing will take place de facto, well beyond the scope of data likely to have an impact in tax and customs matters, in the field of public freedoms of citizens being likely to infringe , for example, to their freedom of opinion and expression. The Commission thus observes that the collection of all freely accessible content published on the Internet is likely to significantly modify the behavior of Internet users who may then no longer be able to express themselves freely on the networks and platforms concerned. and, consequently, to retroactively affect the exercise of their freedoms. It further considers that, given the scale of the planned system, both in terms of the number of people concerned and the volume of data collected, that a particularly significant breach of the right to respect for private life and the protection of personal data is likely to be characterized. The Commission recalls that such an attack can only be accepted if it appears strictly necessary and proportionate to the aim pursued and that it presents sufficient guarantees with regard to compliance with the fundamental principles of the right to the protection of personal data. In this respect , the Commission considers that one of the major challenges associated with the collection of freely accessible content published on the Internet will be based on the need to be able to guarantee the strict proportionality of the data collected with regard to the purpose pursued by the processing implemented as well as of the system as a whole, without this being guaranteed at this stage. The Commission notes that the draft law refers in its article 9 to freely accessible content published on the internet. It observes that the Internet is a network that allows the operation of a number of services, including the web, allowing consultation through a browser of sites offering various services. The Commission therefore interprets the reference to content published on the internet as referring to content published on the web. It also notes the need to have a clear understanding of the concept of freely accessible content published on the internet referred to in the insofar as, in practice, this notion may refer to different realities depending on the privacy policy of the online platform concerned. The Commission also considers that this notion leads to the exclusion, for example, of the collection of data by means of assumed identities or by accounts specially created by the administration for this purpose. If the principle of such collection were fixed by the legislator, the Commission recalls that suitable legal and technical measures must be provided for in order to ensure a high level of data protection. In this respect, if the Commission notes that the draft article submitted to it specifies that the terms of application of this article are set by decree in the Council of State, it recalls the need to refer to it, in accordance with the provisions of the law of January 6, 1978 as amended and under conditions allowing it to effectively issue an informed opinion, of the implementing decree which will be necessary for the effective implementation of the processing operations allowing the collection and use of the personal data mentioned in draft

article 9. Without prejudice to the general reservations formulated on the development of this type of processing, the Commission, which considers that the scope of the system, the nature of the data processed, as well as the desire to automate the detection of the fraud are likely to increase the risks in terms of invasion of the privacy of the persons concerned, considers that an impact analysis relating to the protection of personal data nnel (AIPD) must be carried out and transmitted, under the conditions provided for by the applicable regulations. It recalls from now on that it will be necessary to exercise particularly high vigilance with regard to the security and confidentiality measures implemented in order to mitigate as much as possible the occurrence of risks linked to a data breach.In any case Of cause, the Commission, moreover reserved as regards the efficiency as well as the technical feasibility of such a device, recalls that the use on an experimental basis of computerized processing, which is based on the massive collection of data published on the platforms, must be accompanied by strong guarantees provided for by the legislator, and must be the subject of rigorous evaluation, commensurate with the challenges raised by this type of system, in particular if sustainability was envisaged. Compliance with the higher texts of a permanent system would necessarily call for a new examination, in view of the results of this assessment. Having recalled these general elements, the Commission intends to make the following observations. On the duration of the experiment and the nature of the fraud concerned draft article 9 provides that the collection and use of freely accessible content published on the Internet may be carried out on an experimental basis and for a period of three years, for the purposes of researching the offenses mentioned in b and c of 1 of article 1728, articles 1729, 1791, 1791 ter, 3°, 8° and 10° of article 1810 of the general tax code, as well as articles 411, 412, 414, 414-2 and 415 of the customs code. Without commenting on the reasons which led the Ministry to adopt such a duration as well as the aforementioned perimeter of offences, the Commission regrets not having been provided with the elements allowing it to be justified and thus enable it to apprehend the device in its wholeness. In this respect, if the duration of the experiment does not seem to it, in principle, disproportionate, in particular with regard to the technical developments to be carried out, the Commission is more reserved on the scope of some of the infringements concerned. In particular, the Commission questions, given the stated purpose of the device (for the purposes of researching offenses (…)), the relevance of targeting taxpayers who have already received a formal notice from the tax administration for default production of elements on the basis of article 1728-1)-b) of the general tax code (CGI) insofar as, in this case, the offense will have already been characterized. It notes, moreover, that the processing envisaged is intended to target a population, according to the Government, unknown to the tax authorities, in respect of which no proceedings are in progress.

Similarly, if some of the offenses referred to in draft article 9 seem to correspond to tax breaches considered serious by the administration insofar as they are liable to a significant increase, it wonders about the relevance of using such a system for the offenses referred to in Article 1791 of the CGI insofar as this article governs all violations of the tax regime for indirect contributions regardless of a particular level of seriousness. exclude from the scope of the measure the search for intentional or fraudulent behavior that is not covered by the articles of incrimination and sancti On specific terms, it considers that the legitimacy of using such a device for all the offenses referred to in article 1791 of the CGI, does not appear to be demonstrated at this stage. It considers, in any event, that recourse to the entire scope of these offenses should be specified in the decree implementing the draft article. Finally, with regard to customs administration, the Commission considers that the implementation of such collection, which is particularly intrusive, leading to the collection of a very large amount of data, does not appear at this stage to be precisely justified for offenses relating to second and third class fines (Articles 411 and 412 of the customs code). However, it takes note of the clarifications provided by the Ministry according to which these articles, although aimed at contraventional offences, provide for high-level sanctions. On the platform operators targeted and the nature of the processing envisaged Firstly, the draft article 9 provides that the content, freely accessible, published on the internet by the users of the operators of the online platforms mentioned in 2° of I of article L. 111-7 of the consumer code. While the proposed wording bears witness in particular to the evolution of the working methods of the tax administration as it has been encouraged since 2012 by the public authorities in support of a legitimate purpose, the Commission is wondering about certain methods which will allow this collection as well as the content specifically targeted, which calls for the following observations on its part. provision of a service or the exchange or sharing of content, goods or services. The Commission observes that the scope of the platforms concerned by the draft article is particularly wide. In view of the inherently intrusive nature of the planned system and the risks of surveillance of persons it generates, the Commission wonders, in the state of the justifications provided and from the experimental stage, on the need to aim for the all the platforms mentioned in article L. 111-7-I-2° of the consumer code. In any event, it recalls that particular vigilance is required with regard to the investigation methods that will be implemented based on the information collected on these platforms. On this point, the Commission considers it essential, as for all authorized processing for the purpose of combating fraud, that the implementation of the planned processing does not lead to the programming of automatic checks but is only an indicator making it possible to better guide investigators in the performance of their duties. It takes note of the Ministry's commitment not to carry out any automatic control based on the

processing implemented. Secondly, draft article 9 provides for the collection of freely accessible content published on the internet by means of computerized processing. The Commission observes that the terminology used is likely to cover both manual operations based on computerized means and automated algorithmic processing, forming part, where appropriate, of a logic of self-learning. It notes that the use of this latter category computerized processing (self-learning type algorithms) raises particular issues from the point of view of data protection insofar as their implementation will be based, during the experiment, on a learning phase which will lead to collect a large volume of data in order to identify the indicators characterizing the fraud sought before searching, from these indicators, for the data corresponding to the previously identified behaviors (production phase) and, if necessary, transmitting them to the agents of the services of the administrations concerned. The Commission observes that the necessary two-stage implementation of this type of processing leads to a reservation in principle as to the possibility for the administrations concerned to determine the precise methods of designing and implementing the algorithms that could be used and thus the main characteristics of the processing that would be implemented. It will pay particular attention, in this respect, to the precision of the regulatory texts that will be adopted for the application of the draft article. the draft article should provide for the transmission of an interim report at the end of the learning phase, which would be transmitted to it and to Parliament. On the nature of the data collected The Commission notes that it results from the characteristics processing that can be implemented in accordance with the draft article, that the latter are likely to allow the collection and processing of data not relevant to the purposes pursued, in particular if they were to be implemented by means of self-learning algorithms for example (see above, § 30 to 32). Although the Commission will have to know the precise conditions for the implementation of the planned processing within the framework of the examination of the decree implementing this provision, it already recalls the need to carry out an in-depth reflection, upstream of the implementation of this processing, on the means implemented to ensure compliance with the principles of data minimization and privacy by design. At this stage, the Commission notes that the draft article does not contain any details on the person who published the data collected (a particular individual or third parties may be called upon to comment on the latter) or on the nature of these data when they appear in content that is freely accessible and published on the internet. It considers that the indiscriminate collection of this data raises particular difficulties in terms of the proportionality of the system, a fortiori if it concerns sensitive data. The Commission thus considers that only the data published by the persons registered on the platforms concerned and concerning them should be collected, and that guarantees aimed at limiting the recording of sensitive data, the collection of

which is in principle prohibited, to what is strictly necessary for the purposes pursued by devices of this nature must imperatively be implemented. stresses, at the very least, the imperative need to consider and implement measures allowing, at the end of their collection, the immediate deletion of data considered to be irrelevant.Finally, the Commission considers that certain categories of data are likely to raise specific issues such as, for example, photographs. In this context, if it notes that no processing aimed at implementing facial recognition devices will be implemented, it requests that the possibility of using them be expressly excluded. The Commission considers that the implementation of such systems would be likely to disproportionately affect the rights of data subjects with regard to the objectives pursued by this processing. On the retention period of data The draft article provides that these data are destroyed at the latest after a period of one year from their collection. Without calling into question, in principle, the duration thus adopted, the Commission regrets that it did not have any information allowing it to assess the relevance and the need to keep the data recorded in the processing for such a duration.Account given the large volume of data likely to be collected and more particularly, information potentially proving to be unnecessary for the purposes pursued by the processing, it requests that the data considered irrelevant be deleted immediately at the end of their collection and that the storage period be significantly reduced unless the need for storage for one year is demonstrated. On the report transmitted The draft article 9 provides that the experiment is subject to an evaluation, the results of which are transmitted to Parliament no later than six months before its term. While the Commission can only reiterate the need to produce such a report, it considers that it should also be sent to it. In view of the stakes attached to the implementation of this type of system, it considers that the principle of such transmission should be expressly provided for by the legislator, as for its request for an interim report at the end of the phase (see above, § 33) and therefore asks that draft Article 9 be modified accordingly. of these reports, which must – with regard to the general economy of the planned system which will be based on the exploitation of data by means of computerized processing – include at least: a description of the technical and operational implementation conditions of the processing created on this basis; the precise list of data categories, indicators and information used; the exhaustive list of websites/internet sources on which the data will have been collected; details of any algorithms implemented, their configuration and their operation; the quantified results obtained, including in particular the estimated revenue and the costs incurred resulting from the system implemented; a description of the evaluation protocol implemented for the assessment of the quality of the method; figures on the exercise of rights; the security measures put in place to ensure the confidentiality and integrity of the data collected; general conclusions relating to the operation of the

processing, any difficulties encountered, both ethical, legal and technical. The President M-L.DENIS