Deliberation 2020-124 of December 10, 2020Commission Nationale de l'Informatique et des LibertésNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Tuesday February 16, 2021NOR: CNIX2102956VDeliberation n° 2020-124 of December 10, 2020 providing an opinion on a draft decree on the terms and conditions for the implementation by the General Directorate of Public Finances and the General Directorate of Customs and Indirect Rights of computerized and automated processing allowing the collection and use of data made public on the websites of platform operators in ligne (requests for opinion n° 2218895 and 2218896)The National Commission for Computing and Liberties, Seized by the Ministry of the Economy, Finance and Relaunch of a request for an opinion concerning a draft decree laying down the procedures for implementation by the General Directorate of Public Finance and the General Directorate of Customs and Indirect Taxes computerized and automated systems allowing the collection and use of data made public on the websites of online platform operators; Having regard to Convention No. 108 of the Council of Europe 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 (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 on the competent authorities for the purposes of prevention and detection of investigation and prosecution of criminal offences, or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA; Considering the law n° 78-17 of January 6, 1978 modified relating to data processing, files and freedoms; Considering the law n° 2019-1479 of December 28, 2019 of finances for 2020 in particular its article 154; Having regard to decree n° 2019-536 of May 29, 2019 as amended, taken for the application of law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms; Having regard to Decision No. 2019-796 DC of December 27, 2019 of the Constitutional Council; Having regard to deliberation no. 2019-114 of September 12, 2019 providing an opinion on draft article 9 of the finance bill for 2020; After having heard Mr. Philippe-Pierre CABOURDIN, auditor in his report, and Mr. Benjamin TOUZANNE , Government Commissioner, in his observations, Issues the following opinion: Article 154 of Law No. 2019-1479 of December 28, 2019 on finance for 2020 authorizes, on an experimental basis for a period of three years, tax administrations and customs authorities to collect and use freely accessible content clearly made public by users on the websites of online platform operators mentioned in 2° of I of Article L. 111-7 of the Consumer Code (hereafter after platforms and social

networks). This collection should make it possible to search for clues relating to the commission of certain offenses listed exhaustively by law. The Commission recalls that it has already ruled on the collection system envisaged in its deliberation No. above. The Commission notes that the legislator has since set certain characteristics of the planned processing, in particular the retention periods, the procedures for exercising the rights of access and opposition as well as some of the guarantees to be implemented such as the transmission of an impact assessment relating to the protection of personal data (DPIA) or the ban on using a facial recognition system. Although, in this context, the Commission therefore does not intend to go into detail on these various points, it recalls that it is expressly provided that the experiment will have to be the subject of an initial evaluation, the results of which will be transmitted as well as to Parliament no later than eighteen months before its term on the one hand, and that a final balance sheet must also be sent to them six months before its term on the other hand. It recalls that it will be particularly attentive to the content of the documents transmitted as well as to the follow-up that the ministry intends to give to the experiment carried out. The Commission refers to its deliberation No. 2019-114 referred to above with regard to the information that it wishes to be communicated to it as a minimum. On the overall presentation of the system provided for in article 154 of the finance law for 2020 In general, the system implemented will consist of two distinct phases for each of the administrations concerned: a phase of learning and design followed of a data exploitation phase. Articles 5 and 6 of the draft decree relate to the learning and design phase of the system. The processing of personal data implemented must make it possible to develop data collection and analysis tools (such as tools for identifying persons holding accounts, identifying location data or tools allowing the deletion of data), and to develop relevance criteria or indicators likely to characterize breaches and offenses sought. Articles 7 to 9 of the draft decree relate to the data exploitation phase. This involves the administrations concerned, using the indicators previously developed and the collection and analysis tools developed, to collect content likely to reveal a failure or an offense in tax or customs matters. The Commission recalls that the data thus collected by the collection mechanism cannot give rise to any automated decision by the tax and customs administrations against the persons concerned on the one hand and that these data, if they subsequently reveal a possible fraudulent behavior, may only be used in compliance with the rules relating to the control procedure mentioned in Title II of the Customs Code or in Chapter I of Title II of the first part of the Book of Tax Procedures, on the other hand. The Commission notes that the data thus collected will be transmitted to the processing of fraud targeting and valuation of requests (CFVR) of the Directorate General of Public Finances (DGFiP) and valuation of data for risk analysis of the Directorate General of Customs

and indirect rights (DGDDI). This transmission must make it possible to determine whether the data collected constitute clues characterizing a failure or an offense in tax or customs matters. Insofar as this transmission of data leads in particular to the recording of new data in the aforementioned processing CFVR and valuation of data for risk analysis, the Commission has also been asked for an opinion, concomitantly with this draft decree, on the draft amended regulatory acts governing these two processing operations. Changes to these treatments are the subject of two separate deliberations on the same day. Having recalled these general elements, the Commission intends to make the following observations. On the purposes and the applicable legal regimeFirstly, the Commission notes that the mechanism provided for in Article 154 of the Finance Law is based, in practice, on the implementation of several processing operations of personal data generally corresponding to the two phases presented above. Article 4 of the draft decree specifies in this respect that the authorized processing operations are implemented by the administrations concerned, with a view to: a) collecting data and selecting the relevant data during the phase provided for in Articles 5 and 6 and I of Articles 7, 8 and 9; b) the transfer of data for the processing referred to in II of Articles 7, 8 and 9. . The Commission considers that such wording aims more to explain the main functions of the processing implemented than their purposes. In this respect, it observes that other provisions of the draft decree submitted to it provide more details on the purposes actually pursued by the processing implemented during each phase of the system. On this point, the Commission takes note of the Ministry's commitment to amend Article 4 of the draft decree in order to explicitly show the purposes of the various processing operations implemented. Secondly, the Commission notes that the Ministry intends to apply only the provisions of the aforementioned Directive (EU) 2016/680 (hereinafter the Directive), with regard to the entire experimental system. It observes, however, that the two phases of the system initially pursue distinct objectives from which all the consequences should be drawn with regard to the applicable legal regime. The learning and design phase only has the primary objective of developing technical tools and establishing indicators. On this point, the Commission notes that at the end of the learning and design phase, all the personal data collected is deleted and that no targeting of natural or legal persons or sending of information to a control or management service is carried out by the administrations concerned. In view of these elements, the Commission considers that the learning and design phase of the system should fall under the legal regime of the European Data Protection Regulation (hereinafter the GDPR). The exploitation phase is directly aimed at researching tax and customs offences, so it falls within the scope of the Directive. The Commission notes that the Ministry intends to draw all the consequences of this distinction and modify the draft decree accordingly. On the scope of the system and the data processed

As a preliminary point, the Commission recalls that it is up to the Ministry to ensure the strict proportionality of the data collected during each of the two phases of the system implemented. On the notions of freely accessible and manifestly made public content Article 3 of the draft decree recalls that, in accordance with article 154 of the finance law for 2020, only freely accessible and manifestly made public content on the websites of online platform operators may be collected. In its decision no. 2019-796 DC of December 27, 2019, the Constitutional Council specified that […], the data likely to be collected and used must meet two cumulative conditions. On the one hand, it must be content freely accessible on an online public communication service of one of the aforementioned platforms, thus excluding content accessible only after entering a password or after registering. on the site in question. On the other hand, these contents must be clearly made public by the users of these sites. As a result, only content relating to the person who deliberately disclosed it can be collected and used. […] . The Commission considers first of all that it follows from the very terms of this decision that freely accessible content must be understood as content to which a user who is not registered or without prior enrollment (creation of an account, provision of certain information to create an identifier or any other form of registration) on a platform or a social network could have access, without prior entry of a password. In this respect, it notes from the outset that the use of assumed identities or the creation of accounts specially created for this purpose by the tax and customs administrations is indeed excluded by this draft decree. The Commission notes that it emerges from the documentation submitted that the Ministry intends to use APIs (interfaces for making site data available) offered by platforms or social networks, and/or webscraping techniques (techniques for extracting content of sites, via scripts or automated programs) to collect data from platforms and social networks. It observes that these two methods of collection, however, require the creation of a developer account in the case of APIs or a user account for webscraping. Asked about this point, the Ministry indicated that freely accessible content refers, according to its interpretation, to data published on platforms and social networks without specific privacy settings or with public privacy settings, namely data that is not not published in private mode or with restricted access to a circle of contacts, regardless of the technical methods used to collect them. The Commission considers that if the ministry can use APIs, by creating a developer account, the content accessible via these APIs must be limited to those accessible by a user who does not have an account on the platform and without prior entry of a password. Sites or platforms requiring registration as defined above or a password cannot therefore be accessed in accordance with the law as interpreted by the Constitutional Council. The decree will have to be amended accordingly. With regard to the concept of content clearly made public, the Commission notes that the draft decree allows,

under certain conditions, the collection of comments written by third parties. Asked about the nature clearly made public of the comments written by third parties on the personal page of an individual, the ministry argued the public nature – by nature – of the comments published on the commercial sites with regard to their economic model as well as the knowledge, by the users of these merchant sites, of the confidentiality settings used. With regard to social networks, the ministry considers that users also have the possibility of configuring the confidentiality settings of their pages, in the absence of specific settings, deletion of the content concerned or notification made to the platform concerned, the user deliberately discloses them. The Commission nevertheless considers, with regard to the aforementioned decision of the Constitutional Council, that in order to be manifestly made public, the content must be deliberately disclosed by the person holding the account or the page, which undoubtedly implies a voluntary action on his part. On the other hand, it considers that the simple absence of implementation of a specific confidentiality setting, for example, is not enough to characterize that a person has deliberately disclosed content. In view of the foregoing, the Commission requests that comments from third parties not be collected within the framework of the envisaged mechanism. It also insists that the decree be issued only when the ministry has identified the technical means allowing its collection to be limited to data relating only to the person concerned and to him or her alone, deliberately disclosed to make them manifestly public within the meaning of the applicable provisions. .As regards the data collected during the learning, design and operating phases, it generally notes that safeguards have been put in place. In particular, it is planned that the indicators intended to make it possible to characterize a probability of fraud, which will first be developed automatically by algorithms, will then be the subject of human analysis in order to rule out those which would involve the collection of data which despite the filters provided would have been collected or the development of technical tools allowing the automatic deletion of such data. In the same way, the use of a facial recognition system aimed at identifying people from photographs posted online is excluded by the decree. If details have been provided by the ministry on what the category of data relating to content of any kind, including broadcast in real time, covers, which indicates that this mainly covers hastags and all publications regardless of their format data processing (for example encrypted codes, algorithms, etc.) provided that they are freely accessible and clearly made public by the user of the platform, it nevertheless considers that this wording should be clarified in the draft decree. On the data collected during the learning and design phase The Commission observes that during the learning and design phase, the development of the various tools making it possible in particular to collect, analyze or even create indicators from the freely accessible and demonstrably made public content will be developed from a sample of data. It

notes that for the tax administration, the sample of data is composed of identification data of companies previously selected (for the search for hidden activity) and identification data of natural persons also previously identified (for the search for false domiciliation abroad). This sample will also be limited to about a hundred companies for the search for occult activity and to a reduced list of people for false domiciliation abroad (about ten people). Guarantees have been put in place with regard to the collection of content (writing, images, photographs, sounds, signals, videos, or content of any kind, including broadcast in real time) through, for example, a duration of limited retention of data or even the absence of targeting of individuals from the latter. Furthermore, the Commission notes that the size of the sample constituted by the customs and indirect duties administration will be limited to what is strictly necessary to develop indicators and criteria of relevance and that the data will be collected only on web pages related to tobacco. - On the data collected during the exploitation phase The Commission notes that provision is made, during the exploitation phase, for the possibility of collecting all the content listed during the learning phase (writings, video, photographs, etc.) .) corresponding to the indicators, for the search for the exercise of an occult activity or the customs offenses covered by the law, or corresponding to the tools of identification of people and the tools of geographical identification for the search of infringement to the tax domiciliation rules. It thus notes that it is only at the end of the learning and design phase, that is to say during the identification of the indicators and the configuration of the collection and analysis tools, that it will be possible to precisely determine the personal data processed in the context of the exploitation phase. The Commission considers that, if the indicators selected at the end of the learning and design phase are reasonable and effective, the data processed in the context of the exploitation phase can be considered relevant and proportionate with regard to the general purpose of the processing, namely the fight against fraud. It nevertheless notes that the government's choice to regulate in a single decree, from the outset, the processing useful for the design of the experimental device and those corresponding to the operation of the experiment itself, means that it is not possible to list precisely in the regulatory act the data collected during the operational phase, even though, rightly, to minimize the data processed, only the data corresponding to the indicators developed will be collected. Independently of the above, the Commission stresses the need to regulate the exploitation phase by a specific regulatory act. On the transmission of data to CFVR processing and valuation of data for risk analysis Articles 7 to 9 of the draft decree provide that certain data collected will be reconciled with the data recorded in the CFVR processing and data valuation for risk analysis. The Commission notes that the proposed reconciliation actually constitutes a transmission of this data followed by a comparison of this data with the data contained in CFVR and valuation of the data for the risk analysis,

which is carried out directly within this processing -this. It observes that the results of this reconciliation are not integrated into the overall system for collecting data on social networks, Article 4 b) of the draft decree only mentioning the transfer of data for the processing referred to in II of Articles 7 , 8 and 9. . The Commission therefore considers that the terminology used in Articles 7 to 9 of the draft decree should be clarified. On this point, the Commission takes note of the ministry's commitment to explain the data transfer and comparison operations in the draft decree. With regard to the methods of this reconciliation, the Commission takes note of the elements provided by the tax administration according to which only the tables of indicators associating account references (an account holder) and the presence of the indicators will be transmitted will be transmitted to CFVR, excluding raw data collected on platforms and social networks. the transfer of the data will be strictly limited to the data corresponding to the indicators, redacted of the sensitive data and the data which are not likely to contribute to the observation of the infringements and breaches referred to within the framework of article 154 of the aforementioned finance law , and that these will subsequently be selected on the basis of scoresThe Commission considers that the check carried out on the data data before their transmission must make it possible to guarantee their proportionality with regard to the objective pursued. On security measures The Commission notes that encryption solutions ensuring an adequate level of data protection and confidentiality are implemented for both the tax administration and the customs and excise administration. The Commission also observes that measures have been put in place to guarantee strict access to data and that only duly authorized persons and within the limits of the need to know will be able to access it, as indicated in Article 11 of the draft decree. With regard to the traceability of actions, the Commission notes that Article 10 of the draft decree provides that the operations of collection, modification, consultation, communication, interconnection and deletion of data are subject to logging and that this logging data can only be consulted by authorized persons. The other security measures do not call for comments from the Commission. President M.-L. DENIS