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2021-115 of October 7, 2021 providing an opinion on a draft decree relating to the retention of data allowing the identification of any person who has contributed to the creation of content put online, taken pursuant to II of article 6 of law no. 2004-575 of June 21, 2004 for confidence in the digital economy (request for opinion no. 21016517) The National Commission for Computing and Liberties,

Seizure by the Secretary General of Defense and National Security (SGDSN) of a request for an opinion concerning a draft decree relating to the retention of data allowing the identification of any person having contributed to the creation of content online, taken pursuant to II of article 6 of law no. 2004-575 of June 21, 2004 on confidence in the digital economy;

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 (General Data Protection Regulation);

Considering the modified law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms; Issues the following opinion: Law No. 2021-998 of July 30, 2021 relating to the prevention of acts of terrorism and intelligence has modified the framework for the retention of connection data by electronic communications operators, service providers Internet access providers and hosts. This change was mainly intended to take into account the French Data Network and other decision of the Council of State ruling in litigation on April 21, 2021 (No. 393099, 394922, 397844, 397851, 424717, 424718). The Commission emphasizes that this decision, following a referral to the Court of Justice of the European Union (CJEU) for a preliminary ruling, raises significant issues both in terms of public freedoms, and in particular the preservation of privacy of individuals, than effectiveness of public action to guarantee the fundamental interests of the Nation, public security and the repression of offences. In its decision, the Council of State notably enjoined the Prime Minister to carry out the repeal within six months of Article R. 10-13 of the Postal and Electronic Communications Code (CPCE) as well as of Decree No. 2011-219 of February 25, 2011 relating to the storage and communication data allowing the identification of any person who contributed to the creation of online content. It is in this context that the General Secretariat for Defense and National Security (SGDSN) asked the Commission about this draft decree. The draft decree is issued pursuant to II of Article 6 of the law for confidence in the digital economy (LCEN), in its wording amended by article 17 of the aforementioned law of 30 July. It specifies the

categories of data mentioned in Article L. 34-1 of the CPCE (civil identity, information relating to payment, connection and location data) and which must be kept by the persons referred to in 1 and 2 of I of I 6 of the LCEN, namely providers of access to online public communication services and providers of online content hosting services (hereafter providers). In general, the Commission considers that the draft decree, in that it applies the legislative provisions on which it ruled in its opinion of May 3, 2021, does not call for substantial observations. If it notes that the draft decree determines the data to be kept by suppliers, in accordance with article 17 of the law of July 30, 2021, the Commission nevertheless wonders about the possibility of keeping some of them and also considers that clarifications should be provided. ments concerning some of the categories of information in order to improve the readability of the decree and to clarify the obligations incumbent on suppliers. Under these conditions, the Commission makes the following observations. General observations Article 7 of the draft decree provides that the data mentioned in articles 1 to 5 must only be kept insofar as they are collected by the persons mentioned in 1 and 2 of I of article 6 of the law of June 21, 2004 referred to above when they ensure the implementation of the services of communication to the public online, and that these data are relevant with regard to the purposes pursued by the law. services they offer, the texts not requiring them to keep data that they have not previously collected. The Commission recalls that the principle of minimization requires that this storage be limited to the data strictly necessary for the purposes laid down by law. The Commission also insists on the need to use, within the draft decree, the most precise terms possible. to regulate the data stored and this, in order to limit any risk of excessive collection. On information relating to the civil identity of the user Article L. 34-1 II bis 1°) now provides that electronic communications operators are required to keep information relating to the civil identity of the user until the expiry of a period of five years from the end of validity of his contract. Article 1 of the draft decree provides that these data are: surnames and first names or company name; the associated postal address(es); date and place of birth; the associated e-mail or account addresses and the telephone number(s). First, the Commission invites the SGDSN to modify the draft decree with regard to the associated e-mail or account addresses, in order to include, in the same way as the postal addresses and the telephone numbers, the possibility of the collection of only one of this information, if necessary. The Commission considers that such a modification would be likely to avoid the systematic retention of several data when a single one appears sufficient for the purposes pursued. It takes note of the SGDSN's commitment to amend the draft decree accordingly. Secondly, concerning the retention of the company name, the Commission takes note of the SGDSN's commitment to specify when the account is opened in the name of a company, which makes it possible to clarify the obligation

of the suppliers. On the conservation of the place of the transaction The draft decree provides that the information relating to the payment is kept by the suppliers on the occasion of each payment transaction. This information relates to the type of payment used, the payment reference, the amount and the date, time and place of the transaction. The SGDSN specified that the place of the transaction corresponds to the geographical location of the user during the subscription of the contract. If the SGDSN has undertaken to specify in the decree that this is the place in the event of a physical transaction, the Commission is in any event reserved as to the retention of this data by the operators . It notes that its retention is a new obligation introduced by the draft decree and considers that the only justification provided by the SGDSN, namely that this data could prove useful in the context of legal requisitions, for example, is not not sufficient to demonstrate the need for their conservation. Of the other information provided by the user when subscribing to a contract or creating an account In accordance with Article L. 34-1 II bis 2°) of the CPCE, the draft decree specifies the other information provided by the user when subscribing to a contract or creating an account kept by the persons referred to in 1 and 2 of I of article 6 of the LCEN . Firstly, concerning the pseudonyms used, the Commission takes note of the commitment of the SGDSN to modify the wording in this respect by specifying the pseudonym(s) used, insofar as the user does not systematically define several of them. Secondly, with regard to the data allowing the verification of the password or its modification, if necessary by means of a double user identification system, in their latest updated version, the Commission notes that this category is new and was not subject to conservation under Decree No. 2011-219 of 25 February 2011. It considers that this wording and the data it covers are not sufficiently explicit . Indeed, this wording does not allow suppliers to identify precisely the data they are required to keep. On the contrary, this notion can be confusing and lead them to keep data relating to authentication techniques, access to which could make it possible to usurp the identity of subscribers. However, the SGDSN clarified that only the communication channels declared beforehand by the person to allow the recovery of accounts (alternative email address, telephone number of a relative, etc.) were concerned. In this respect, the Commission welcomes the SGDSN's proposal to target the means provided by the user to contact him in order to verify the password or to modify it, if necessary through a dual system of identification of the user, in their latest updated version. On the technical data allowing the source of the connection to be identified or those relating to the terminal equipment used Article L. 34-1 II bis 3°) of the CPCE provides that for the purposes of the fight against crime and serious delinquency, the prevention of serious threats against public security and the safeguarding of national security, the technical data allowing the source of the connection to be identified or those relating to the equipment terminals used are

retained. The draft decree specifies the data referred to and which must be kept by the persons referred to in 1 and 2 of I of Article 6 of the LCEN. The Commission notes that the term connection identifier used in a) of 1°) of article 4 of the draft decree is not clear, and seems redundant with the term IP address assigned to the source of the connection and the associated port referred to in c) of 1° of the same article, this being a case specific login ID. The Commission invites the SGDSN to clarify the draft decree on this point, for example by grouping these wordings under the same term, making the IP address a special case of connection identifier. In this regard, while it takes note of the SGDSN's proposal to replace the notion of connection identifier with the expression identifier used, it considers that this term does not provide sufficient clarification. President Marie-Laure DENIS