Deliberation 2018-284 of June 21, 2018Commission Nationale de l'Informatique et des LibertésNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Saturday August 04, 2018NOR: CNIX1821538XDeliberation no. draft decree taken for the application of law n ° 78-17 of January 6, 1978 relating to data processing, files and freedoms, modified by law n ° 2018-493 of June 20, 2018 relating to the protection of personal data (request n° AV 18012134) The National Commission for Computing and Liberties, Seizure by the Keeper of the Seals, Minister of Justice, of a request for an opinion concerning a draft decree issued for the application of Law No. 78-17 of January 6, 1978 relating to data processing, files and freedoms, amended by Law No. 2018-493 of June 20, 2018 relating to the protection of personal data; Having regard to Convention No. 108 of the Council of Europe for the protection of sons 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 with regard to the processing of personal data personnel 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 by competent authorities for the purposes of prevention and detection of criminal offences, investigations and prosecutions in this area or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA; Having regard to Law No. 78- 17 of January 6, 1978 amended relating to data processing, files and freedoms, in particular its article 11-I-4°-a); Law No. 78-17 of January 6, 1978 relating to data processing, files and freedoms; Having regard to deliberation No. 2017-299 of November 30, 2017 providing an opinion on a bill to adapt to the right of the European Union of Law No. 78-17 of January 1978; After hearing Mrs. Isabelle FALQUE-PIERROTIN, commissioner, in her report, and Mrs. Nacima BELKACEM, Government Commissioner, in her observations, Issues the following opinion: n° 78-17 of January 6, 1978, last modified by law n° 2018-493 of June 20, 2018 relating to the protection of personal data, on the basis of article 11-I-4°-a) of this same law. Pursuant to these provisions, this opinion will be made public. ) 2016/680 referred to above (hereinafter the Directive). The adaptation of French law to the new European framework was mainly achieved through the adoption of the aforementioned law of June 20, 2018, on which the Commission ruled in its opinion dated November 17, 2017, which substantially amended the law of 6 January 1978 and in particular made use of some of the room for maneuver afforded to Member States by the Regulation. This draft decree aims to continue, at the regulatory level, this work of adaptation to Union law, mainly by amending the aforementioned decree no. 2005-1309 of October 20, 2005 referred to above, and to apply these new laws. It

only calls for the following comments from the Commission.On the provisions relating to the CommissionArticles 2 to 7 of the draft decree aim to modify Title I of Decree No. 2005-1309 of 20 October 2005 as amended, relating to the operation and missions of the Commission. In general, the Commission considers that the planned provisions usefully complete the said decree on the new missions provided for by the Regulation and the Directive, provide the necessary clarifications to the rules of procedure applicable to the new compliance tools provided for by the Regulation and provide the flexibility essential to the proper exercise of all the Commission's missions. These provisions nevertheless call for the following observations on the part of the Commission.Concerning draft article 4 of the decree of October 20, 2005, relating to the procedures for convening and sending draft deliberations to the Government Commissioner, the Commission considers that the case of urgency, which could lead to the eight-day period being waived, could usefully be expressly reserved. Article 4 of the draft decree aims to apply the provisions provided for in the last paragraph of Article 15 of amended law of January 6, 1978, by defining, in a new article 4-1 of the amended decree of October 20, 2005, the conditions and limits under which the Chairman and the Deputy Vice-Chairman of the Commission may delegate their signature. Although the Commission is in favor of the proposed system, it considers that these provisions would be usefully supplemented, in e) of 1° of I of draft article 4-1 of the amended decree of October 20, 2005, with the possibility of delegating the signing of renewals of deadlines in the event of consultation of the Commission on impact assessments relating to privacy. The mention of the deadlines provided for in draft article 110-1 of the same decree and in 2° of article 36 of the Regulation would therefore be usefully added and the reference to the provisions of IV of article 54 of the law of 6 January 1978 modified must be replaced by that of V of the same article. It also considers that the methods of publicity of the delegations - in the Official Journal or on its website - should appear in the draft decree, except where the latter expressly refers in the rules of procedure the care to specify them. 4°-a) of the amended law of 6 January 1978, to consult the Commission on any bill relating to the protection of personal data or the processing of such data. The Commission wonders about the possibility for the Government itself to invoke urgency in this last case. Article 7 of the draft decree provides for the creation of Articles 6-2 to 6-8 of the decree of 20 October 2005 as amended, relating to various requests which may be addressed to the Commission, namely complaints, requests for approval of codes of conduct, of binding corporate rules and in terms of certification. The proposed provisions lay down clear, consistent and transparent rules for users, in particular with regard to the time limits for examining requests and the consequences of the Commission's failure to respond. In this regard, it recalls that the cooperation and consistency mechanisms provided for in Articles 60 et seq. of the

Rules are likely to lengthen the processing times for certain applications and notes that these hypotheses are generally taken into account in the draft decree.Nevertheless, it observes that the procedures for referral to the Commission on these requests are not specified, with the exception of complaints. It notes in particular that referral by electronic means is not expressly provided for, unlike what the draft decree provides for prior formalities - this clarification does not appear in any event to be imperative given the application of the common law provisions of the code of relations between the public and the administration. It also considers that it would be appropriate to specify, as provided for in Article 7 of the decree of October 20, 2005 amended with regard to prior formalities, that the Commission may establish the list of documents and annexes that must, where applicable, be attached to these referrals and determine models facilitating and encouraging the use of these new tools. In any case, it should be possible to specify these elements in its rules of procedure, in accordance with II of article 13 of the amended law of January 6, 1978. With particular regard to requests for approval of binding corporate rules mentioned in draft article 6-6 of the amended decree of 20 October 2005, the Commission recalls that the deadlines provided for by the proposed provisions for referral to the European Data Protection Board (EDPS) should only apply from receipt of a complete request and when the Commission acts as lead authority. Moreover, it considers that the time limits foreseen for approving these corporate rules after receipt of the opinion of the EDPS do not allow take into account all the assumptions provided for in Articles 64 and 65 of the Rules. In particular, when the committee delivers an opinion which requires modifications to be made to the rules to be approved, the Commission will not necessarily be able to approve these rules within one month if it refuses to follow the opinion of the committee, which can then adopt a binding decision under the conditions provided for in Article 65 of the Rules. It is therefore appropriate to postpone the starting point of the period of one month until the end of the procedures provided for in Articles 64 and 65 of the Regulation. On the provisions relating to prior formalities Articles 8 to 16 of the draft decree provide for the modification Title II of the amended decree of October 20, 2005, relating to prior formalities addressed to the Commission. They aim to draw the consequences of the Regulation and the amended law of 6 January 1978, which abolish most of these formalities but nevertheless maintain some of them, and to integrate the prior consultations on the impact analyzes referred to in Articles 36 of the Regulation and 70-4 of the aforementioned law, in the general provisions applicable to these referrals to the Commission. by the same route. In this respect, the mention of the sending of an acknowledgment of receipt does not appear necessary, since it is already provided for by the code of relations between the public and the administration for referrals by electronic means. The modification of article 8 of the decree of October 20, 2005

as amended is appropriate, insofar as it will allow the Commission to require professional users to use the teleservices it makes available to them. The Commission could therefore list in its rules of procedure the mandatory teleservices for professionals excluding any other form of referral. Article 14 of the draft decree also provides that the notification of the Commission's deliberations is made electronically. This provision calls for reservations on the part of the Commission. The systematic implementation of such a method would indeed appear difficult to envisage in the short term, given the reference to the technical requirements of the Post and Electronic Communications Code, and would require at least a transitional provision. In addition, it may not correspond to the user's wishes. These two issues also explain why the code of relations between the public and the administration, on the one hand, makes this mode of notification optional and, on the other hand, makes it subject to the user's agreement (articles L. 112-15, R. 112-17 and R. 112-18). It is therefore highly desirable to refer to common law on this point. Commission. Article 12 of the draft decree also provides for the repeal of the obligation to inform the Commission of the cancellation of any processing. However, such information appears to be necessary for processing which remains subject to formalities, the list of which must be kept up to date by the Commission pursuant to the law of 6 January 1978 as amended. In addition, for processing that was the subject of formalities prior to May 25, 2018, the same list, drawn up on that date, must be made available to the public in an open and easily reusable format for a period of ten years. The Commission therefore proposes to maintain this obligation. On the processing of data in the field of health Article 17 of the draft decree aims to modify Chapter IV of Title II of Decree No. 2005-1309 of 20 October 2005 as amended , relating to the special provisions concerning the processing of data in the field of health. Taken as a whole, these provisions ensure full and adequate application of the rules laid down by the legislator and by the Regulation in this area. They only call for the following observations from the Commission. On the processing of data for the purpose of research, studies and assessments in the field of health Draft article 20 of the amended decree of October 20, 2005 provides for the the authorization application file with either the Committee for the Protection of Persons (CPP), or the single secretariat provided by the National Institute for Health Data (INDS). Insofar as the data controller must refer the matter directly to the Commission after having obtained the opinion of the CPP in the context of research involving the human person, the Commission proposes that mention be made of the filing of the file with it rather than with the said committee, without prejudice to the possibility of filing the file with the single secretariat of the INDS. Draft article 21 of the amended decree of October 20, 2005 describes the composition of the files transmitted to the INDS. The Commission suggests that the same article 21 also provides for the content of files submitted

after advice from a CPP. Indeed, the composition of the file sent for opinion to the CPP, provided for by the Public Health Code, aims to allow the examination of a research project on the scientific and ethical levels, and not with regard to the processing of data. made necessary by research. As a result, the documents provided to the CPP do not provide all of the elements necessary to allow the examination of the request addressed to the Commission. The content of this file should be similar to that of the INDS, subject to certain adjustments, for example with regard to the declaration of interests which should only concern files providing access to the National Health Data System (SNDS). The last two paragraphs of article 21 of the amended decree of October 20, 2005 will also have to be adapted to take this addition into account and would finally usefully specify that the single secretariat verifies the completeness of the files transmitted to it and that the modifications are transmitted to the single secretariat or to the Commission. The draft article 24 of the same decree specifies that the INDS renders a reasoned opinion on the public interest nature of the research, within one month of its referral. In this respect, the Commission notes that the referral to the INDS does not suspend the period of investigation available to the Commission to decide on the request and that the draft decree does not provide for the consequences of the absence of an opinion. of the INDS within this period of one month. It therefore considers that draft article 24 of the amended decree of October 20, 2005 should provide that the authorization applications concerned cannot benefit from tacit acceptance in the absence of an expressly favorable opinion from the INDS, when the latter has self-seized or has been seized pursuant to the second paragraph of Article 61 of the amended law of January 6, 1978, as provided for in V of Article 54 of the same law s regarding the opinions of the CPP or the expert committee for research, studies and assessments in the field of health (CEREES). The Commission also proposes to provide, in draft article 26 of the amended decree of 20 October 2005, the option for CEREES to enter a CPP, for example via the National Commission for Research Involving the Human Person (CNRIPH), if research not involving the human person raises ethical issues, such as the reuse of biological samples. Finally, the Commission regrets the reduction in the minimum number of CEREES meetings. Indeed, this number seems hardly compatible with the missions and prerogatives of CEREES, which has unique competence for certain categories of research. On other data processing in the field of health The draft decree does not include provisions relating to the content of requests for authorization for the processing of personal data not relating to research, studies and evaluations in the field of health. The Commission considers that this content should be defined in the amended decree of October 20, 2005 and that such applications for authorization should include at least the elements mentioned in article 16 of the said decree, relating to prior formalities, as well as, where

where appropriate, the privacy impact assessment relating to the processing concerned and any other element necessary for the Commission's examination and specific to such processing.On the audit committee of the national health data systemThe article 17 of the draft decree notably applies the provisions of the last paragraph of article 65 of the amended law of 6 January 1978, by specifying the composition of the SNDS audit committee, its operating rules and the procedures for 'audit. It provides for the creation, within Chapter IV of Title II of Decree No. 2005-1309 of October 20, 2005 as amended, of a sub-section 3 devoted to the audit committee and comprising new articles 32-1 to 32- 7. These provisions call for the following comments only from the Commission. With regard to the composition of the committee, established in draft article 32-1 of the decree of 20 October 2005, the Commission considers it useful to improve its representativeness by allowing the persons whose data are processed in the SNDS, and by particular to patients, to take part in the audit mission. It proposes that their interests should therefore also be brought to the said committee through the intermediary of the qualified persons who must be appointed thereto. modified October 2005. It is in particular provided that these audits are carried out by independent service providers, without specifying either the conditions and guarantees associated with this requirement, or the rules likely to prevent any conflict of interest in the exercise of the missions of these service providers, even though article 65 of the amended law of 6 January 1978 does not provide any clarification on this point. the CNIL provide that the latter must be authorized by the Commission, for a period limited to five years renewable, present specific guarantees, such as the absence of conviction for a correctional or criminal sentence and the absence of holding a direct or indirect interest in a controlled body, and that their authorization may be withdrawn under precisely defined conditions. Given, on the one hand, the powers of investigation devolved to the service providers responsible for carrying out the audits mentioned in draft article 32-3 of the amended decree of October 20, 2005 and, on the other hand, the decisions of public authority that may be taken in view of the results of the audit , and in particular the suspension of access by the audited body to the SNDS, the Commission considers that the draft decree appears insufficiently precise on the guarantees of independence and procedure that should surround the designation and intervention of service providers in charge of audits. Guarantees comparable to those required for Commission officials, which are the corollary of the prerogatives likely to be exercised downstream of its controls, should be provided for. or online, defined in draft article 32-3 of the amended decree of October 20, 2005, the Commission also wonders whether it is possible to provide at regulatory level for provisions similar to those in articles 20 and 44 of the law of January 6, 1978 as amended. In particular, the provisions relating to the conditions under which secrets provided for by law are or are not

enforceable against service providers during audits, particularly in the context of home visits, appear to fall within the legislative domain. The same draft article 32-3 provides for notification of the completion of the audit to the entity concerned, which must in particular indicate the deadlines and remedies available to said entity. The Commission considers that a time limit should be provided for this notification and also wonders, in the case of an audit, about the nature of the recourse open to the entity concerned. It considers that the draft decree should be supplemented on these points. Draft article 32-4 of the amended decree of October 20, 2005 provides for the procedural framework attached to audits conducted by service providers, as well as the conditions under which they may call on a doctor to make findings relating to health data. In this respect, the Commission considers that the procedural safeguards provided for could be strengthened. In particular, the identification of the person in charge of the audited entity, which is not necessarily confused with the notion of person in charge of the place where the audit is carried out, could be clarified in order to better guarantee the rights of defence. The same applies to the end-of-audit meeting and the report sent at the end of the mission, the scope and content of which appear insufficiently detailed, in particular with regard to the provisions of article 64 of the decree of October 20 2005 amended relating to the controls carried out by the CNIL. In addition, since the audited entity must respond to the report sent to it within one month, specifying an action plan and a timetable, it would be appropriate, in order to provide the body concerned with useful information, that the content of the report he audit sets out precisely the expected compliance actions. With regard to the use of a doctor for the purposes of carrying out audits, the guarantees of independence that should be attached to his appointment do not appear in the draft decree either. It is in fact only provided that the doctor is appointed by the service provider carrying out the audit. By comparison, the doctors responsible for assisting Commission officials during checks on processing involving health data are appointed, at the request of the President of the Commission, by the prefect or, as the case may be, the director General of the Regional Health Agency competent and must also provide all the guarantees required of Commission officials authorized to carry out verification missions. Finally, the Commission considers that, in view of the aforementioned legislative provisions and in the assuming that the proposed regulatory provisions are clarified in line with its observations, the Commission's opinion on the audit charter mentioned in the last paragraph of draft article 32-2 of the amended decree of October 20, 2005 would not be necessary .On the data protection officers Article 19 of the draft decree aims to substantially modify title III of the decree of 20 October 2005 as amended, in order to take account of the d disappearance of the personal data protection correspondent in favor of the data protection officer. It provides for the replacement of Articles 42 to 56 of the

said decree by four new Articles 42 to 45. In general, the Commission approves these modifications made necessary by the new legal framework and considers that the dissemination, by the Commission, of some of the contact details referred to to Articles 37.7 of the Regulation and 70-18 of the law of January 6, 1978 as amended in an open and easily reusable format constitutes a measure likely to reinforce transparency and the information of persons. The Commission nevertheless considers that the draft article 44 of the amended decree of October 20, 2005, which recalls the possibility of appointing a pooled delegate, should be supplemented to mention subcontractors. Finally, draft article 45 of the amended decree of October 20, 2005 provides that the Commission may be informed at any time by the delegate or by the data controller or the subcontractor of any difficulty encountered during the performance of the delegate's duties. As it pointed out in its opinion on the draft law, the Commission recalls that the Regulations do not provide for this option, although they precisely lay down the powers and missions of this delegate, which must be harmonized for all those responsible for treatment regardless of their location on European territory. This clarification therefore does not seem necessary to the Commission, which also recalls that the Regulation provides that the delegate cooperates with the authority and acts as a point of contact with the latter, which will allow the delegate to be able to contact the Commission to any questions.On controls and verificationsArticle 20 of the draft decree aims to modify the provisions of Chapter I of Title IV of the amended decree of 20 October 2005 relating to controls and verifications carried out by the Commission. In general, it ensures consistent application of new European and legislative provisions. It does not call for any particular comments from the Commission, with the exception of draft article 65-1 of the said decree, relating to online monitoring. The proposed provisions provide that Commission officials draw up a report of operations carried out online and under an assumed identity, of the procedures for consulting and using websites. This formulation must be replaced by the terms of these services [of communication to the public online], in order to allow the conduct of checks relating to applications offered on smartphones or tablets. On measures and sanctions Article 21 of the draft decree aims to modify the provisions of Chapter II of Title IV of the amended decree of October 20, 2005 relating to the measures and sanctions that the Commission may take in the event of failure to comply with the provisions of the Regulations and the amended law of January 6, 1978. The proposed provisions draw the consequences of the new legal framework and call for the following comments only. The draft article 73 of the amended decree of October 20, 2005 provides that formal notices specify the breach or breaches of the obligations incumbent on the controllers and under -processors under the Regulations or the law. For the sake of clarity, it should be specified that the law referred to is that of 6 January 1978 as amended. In the same

perspective, the draft article 78-1 of the same decree, which provides that the provisions relating to measures and sanctions are applicable when a body other than a data controller or a subcontractor is implicated, could be amended to specify that reference is made to certification bodies and bodies responsible for compliance with a code of conduct referred to in Article 48 of the amended law of 6 January 1978. Draft Article 75 of the decree of 20 October 2005 as amended mainly establishes the procedures according to which the body in question and the rapporteur present their observations before the restricted formation of the Commission. Firstly, the Commission considers it necessary to delete, in the last paragraph of the said draft article, the reference to a particular field of application, the provision concerned having the vocation of also applying to the processing operations covered by the Directive or the law of January 6, 1978 as amended ée.Secondly, for more details and in order to guarantee the smooth running of the debates before the restricted formation, it is proposed to modify the wording in order to recall the written nature of the procedure before this formation and that, past the deadlines which are left to them to present their observations, the body in question and the rapporteur cannot therefore present any new means of fact or law. restricted training. As a preliminary point, the Commission notes that the draft decree indicates that the third paragraph of the said article is deleted, whereas the deletion must concern the second paragraph of this article. The draft provisions provide for the possibility for the rapporteur to modify, at any time , his report. The Commission notes, on the one hand, that this option, recognized at any time during the procedure, should not appear in Article 77 of the aforementioned decree, devoted to the meeting, and could usefully be provided for in Article 75 of the said decree. On the other hand, the Commission proposes that the word in particular be inserted in the last paragraph of this article, between the words its report and in view . Indeed, the rapporteur may wish to modify his report for reasons other than the elements brought to his attention by the controller or the subcontractor. The last sentence of the last paragraph of draft article 81-4 of decree 20 amended October 2005 provides that the latter [the data controller or the processor] have one week to submit their written observations. The Commission proposes, for the sake of consistency with the wording of the last paragraph of draft Article 81-8 of the same decree, that the period mentioned cannot be less than one week. Indeed, depending on the consistency of the objections and the circumstances of the case, the time limit must sometimes be longer than one week to guarantee respect for the rights of the defence. Draft article 81-5 of the decree of October 20, 2005 relates to the decision-making process applicable following a cooperation procedure provided for in Article 60 of the Rules. The Commission considers that the proposed wording should be modified to cover all the hypotheses that may arise from this cooperation procedure. Indeed, it does not include the possibility that, at the

end of both the aforementioned cooperation procedure and the consistency mechanism provided for in Article 65 of the Rules, also applicable in this case, the corrective measure adopted may not be not one of those falling within the competence of the Restricted Committee, but remains a formal notice falling within the competence of the President of the Commission, despite the objections to which the measure may have initially been subject. It is only when the president agrees with the objections, or is not followed by the European committee, that the procedure will have to switch to the appointment of a rapporteur with a view to an examination of the case by the restricted formation. The Commission therefore proposes retaining the following wording: In the cases provided for in the previous article, the chairman of the committee shall appoint, if necessary, a rapporteur at the end of the procedures provided for in articles 60 and 65 of the (EU) regulation 2016/679 of April 27, 2016 referred to above. When the restricted committee is seized, it adopts a final decision under the conditions provided for in the following sub-section. This decision mentions, where appropriate, the exchanges between the supervisory authorities or with the European Protection Board. Draft article 82 of October 20, 2005 as amended specifies that some of the provisions of article 75 of the same decree are not applicable to the emergency procedure provided for in article 46 of the law of January 6, 1978 as amended. For the sake of readability and consistency with the provisions of Articles 75 and 76 of the said decree, the Commission proposes to expressly specify, in paragraphs 2 and 3 of draft Article 82, that it is by derogation, respectively to the second paragraph of article 75 and article 76 of the same decree, that the deadlines for the production of observations and for the summons to the meeting are provided for. Finally, the draft article 82-3 of the decree of October 20, 2005 amended specifies that certain provisions of the mutual assistance procedure provided for in Article 61 of Regulation (EU) 2016/679 of 27 April 2016 referred to above are applicable to processing falling within the scope of the Directive. The Commission wonders about the positioning of this provision within the chapter entitled Measures and sanctions and suggests including it within Title VIII (new) of the same decree, relating to processing falling within the scope of the Directive. On the rights of individuals Article 23 of the draft decree aims to modify Title VI of the amended decree of 20 October 2005, relating to the obligations of data controllers and the rights of data subjects. Insofar as, on the one hand, the provisions of the Regulation relating to the rights of data subjects are directly applicable and, on the other hand, special provisions are provided for processing that does not fall within the scope of the said Regulation, the draft decree logically provides for the deletion of most of these provisions. Nevertheless, the Commission recalls that some of the provisions in force of the amended decree of 20 October 2005 are intended to also apply to processing falling within the scope of the Directive or falling outside the scope of Union law. The

deletion of some of these provisions thus leads, indirectly, to a reduction in the rights of individuals with regard to this processing and the Commission therefore requests that the special provisions appearing in the same decree and which are applicable to them be supplemented with certain provisions repealed by article 23 of the draft decree, with regard for example to the obligation imposed on the data controller, in the event of opposition to the processing or rectification of the data, to inform any other data controller who has been made the recipient of the data concerned.Subject to this reservation, article 23 of the draft decree calls for the following comments only from the Commission.On the information of persons3° of article 23 of the draft decree aims to modify the provisions of Article 90 of Decree No. 2005-1309 of October 20, 2005 as amended, relating to the information obligation incumbent on data controllers. It provides for the deletion of most of these provisions but nevertheless maintains specific obligations when the information is communicated by posting, by requiring that this information be in this case, at the simple oral or written request of the person concerned, also provided in writing or, with the consent of the person, electronically. In this regard, the Commission notes that Articles 12 and 13 of the Regulation define the objective of transparency and the criteria for satisfying this obligation, and in particular the need to take appropriate measures to provide all information […] of a concise, transparent, understandable and easily accessible manner. The nature of these appropriate measures is not precisely defined by the Regulation, with room for maneuver being left to data controllers in identifying the means to achieve this objective of transparency. These provisions do not prescribe the practical methods to be implemented by the data controllers to inform the persons concerned, nor the specific methods of information by posting. The Commission therefore considers that the provisions of the draft decree could prove to be more prescriptive than those of the Regulation in terms of transparency and information of the persons concerned. In addition, while it considers that the procedures provided for by the draft decree effectively make it possible, in certain situations, to make this information easily accessible when it is brought to the attention of persons by posting, the Commission notes that other methods could, in practice, appear just as, or even more relevant and adapted with regard to certain processing operations. Finally, the draft decree only deals with the provision of information by display and does not address the other means by which information may be provided. In view of these elements, the Commission wonders about the maintenance of these provisions of the draft decree, which define more specific obligations than those of the Regulation, which may in certain cases provide less protection to individuals and apply only to information provided by posting. of rights 4° of article 23 of the draft decree also aims to modify the provisions of article 92 of the decree of 20 October 2005 as amended relating to the identification of applicants in the context of the exercise of

their rights with of a controller or processor. It provides that the organization may, in the event of reasonable doubt, request additional information, including an identity document, from the applicant and that, when it comes to processing carried out by the State, a photocopy of an identity document can be directly requested. the identity of the person exercising his rights, to request the additional information necessary to confirm this identity. The Commission nevertheless points out that a copy of an identity document should only be requested if it is necessary for the processing of request, in accordance with the Regulations. Indeed, the systematic solicitation of an identity document can constitute an obstacle to the exercise of the rights of individuals, particularly in the context of processing related to online activities, when it results in requiring the individuals concerned to stronger level of authentication when exercising their rights than when using the service. In addition, such a systematic requirement could lead the data controller to process excessive data in relation to the purposes pursued, in disregard of the principle of data minimization. The Commission therefore considers that the draft decree should limit the cases in which the data controller, whether or not it is the State, may require an identity document only to situations that require it. It should also mention the option for individuals to exercise their rights through the use of digital identity data when this data is considered sufficient by the data controller to authenticate its users. Article 23 6° of the draft of decree aims for its part to modify the provisions of article 94 of the decree of October 20, 2005 modified and provides in particular that the silence kept by the data controller or the subcontractor, following a request for exercise of a right and at the end of the deadlines provided for by the Regulations, constitutes a decision of refusal. While this precision makes it useful to link the dispute and bring it before the Commission or before the judge, it must not, however, be interpreted by the organizations as attenuating their obligation to respond to the request to exercise a right of which they are seized, to inform the person of the reasons for their inaction or to justify a possible refusal, in accordance with the provisions of the Regulation.On the right of opposition The 8° of article 23 of the draft decree aims to modify the provisions of the article 96 of the amended decree of October 20, 2005, relating to the right of opposition. It provides for the maintenance of specific obligations concerning the exercise of this right, which the person must be able to assert before the final validation of the answers or, in the case of oral data collection, before the end of the data collection. The Commission notes first of all that the draft decree only covers Article 21 of the Regulation. It considers that Article 38 of the amended law of 6 January 1978 should also be referred to, insofar as it is intended to apply to processing falling within the scope of the Directive and to processing which does not fall the scope of the Regulation or that of the Directive. It also emphasizes that the right to object is a fundamental right for data subjects which allows them to control the

use made of their personal data by those responsible processing, in particular with regard to prospecting. The draft decree thus usefully provides for maintaining specific provisions to specify the procedures for exercising this right. The Commission considers, however, that the draft provisions should be amended to clarify the wording of its first paragraph and to reflect the the provisions of the Regulation, article 21 of which provides that data subjects may exercise their right to object at any time. The statements before the final validation of the answers and before the end of the data collection may appear too prescriptive with regard to the said provisions. It should nevertheless be that, in the two cases referred to and in particular with regard to prospecting, commercial or not, the right of opposition can be exercised at the time of the collection of the data, which corresponds to the moment at which the persons are informed of the purposes for which their data are collected and processed as well as the rights they have, in accordance with Article 13 of the Regulation. The use of the wording of Article 21 of the Regulation will make it possible to achieve this objective. On the right of rectification The draft decree does not provide for modifying Article 100 of the amended decree of October 20, 2005, relating to the supporting documents to be produced by the heir requesting the update of personal data concerning a deceased. The Commission nevertheless recalls that the said article 100 relates only to the right of rectification and not to all the rights that the heirs can exercise after the death of the person concerned pursuant to III of article 40-1 of the law of 6 January 1978 amended. It also regrets that the implementing decree provided for by said provisions has not been adopted to date, even though these provisions were introduced into the law by law no. 2016-1321 of October 7, 2016 and that the provisions of article 40-1 are difficult to apply in the absence of this decree.On derogations from the rights of individuals applicable to processing for scientific or historical research purposes or for statistical purposesThe 10° of article 23 of the draft decree provides for the insertion of a new article 100-1 in the amended decree of October 20, 2005, relating to the derogations that may be made to the rights of individuals with regard to scientific, historical and statistical research processing. It aims to apply the new provisions provided for in the third paragraph of article 36 of the amended law of January 6, 1978, by determining under what conditions and subject to what guarantees the rights of access, rectification, limitation and opposition with regard to such processing. The general conditions under which such derogations may take place, which repeat the provisions of Article 89 of the Regulation applicable to such processing, do not call for any comments from the Commission. The same applies to the guarantees provided for in the second paragraph of draft article 100-1 of the amended decree of October 20, 2005, which also include general provisions applicable to all data processing. On the other hand, the Commission notes that the planned provisions do not provide for any distinction, with

regard to the conditions and applicable guarantees, between the different categories of data processing in question. Insofar as this processing is likely to be characterized by great heterogeneity and concern various categories of data controllers, the Commission considers that the conditions under which derogations from the rights of individuals may be provided for as well as the guarantees governing such derogations must be precisely adapted to each of these categories, by questioning for example the distinction between the different intended purposes as well as the general objectives pursued by the processing in question, which may be implemented for purposes of public interest or pursue a private or commercial interest. The draft article 100-1 of the amended decree of October 20, 2005 also specifies the conditions for the dissemination of data resulting from this processing, without these details however appearing necessary in view of the provisions of the last paragraph of article 36 of the modified law of January 6, 1978. In this respect, the Commission emphasizes that the wording of the proposed provisions, which provide for the possible dissemination without anonymisation of the data under certain conditions, do not seem compatible with those provided for in Article 89 of the Regulation, under the terms of which, under the measures to be implemented to ensure compliance with the principle of minimization of data, each time these purposes can be achieved by subsequent processing that does not or no longer allows the identification of the persons concerned, it is appropriate to proceed in this way. Anonymization must be presented, in writing, as the priority. With regard to the distribution of communicable administrative documents, the Commission also wonders about the conformity of the proposed provisions of the second paragraph of article L. 312-1-2 of the code of relations between the public and the administration. The Commission therefore considers that if express provisions concerning the dissemination of data resulting from processing carried out for scientific or historical research purposes or for statistical purposes were to be maintained, they should be substantially modified and correspond to the measures mentioned in the recitals (156) to (162) of the Regulations on the subject.On international data transfersArticle 24 of the draft decree aims to modify Title VII of the amended decree of October 20, 2005, relating to data transfers to States not not belonging to the European Union. It provides for the deletion of most of the provisions concerning these transfers, which are now directly governed by the provisions of the Regulation, and does not call for any particular comments from the Commission. Nevertheless, it considers that the draft decree could usefully provide the terms and content of the information of the CNIL and the data subject, in the context of the derogatory transfers mentioned in the last paragraph of Article 49 of the Regulation. It should also provide for informing the Commission of the categories of transfers falling under Articles 37.2 (appropriate safeguards) and 39.3 (derogating transfers) of the Directive. Indeed, these

texts provide for active information on the part of the data controller, and not the only possibility for the Commission to have access to this information by requesting the registers. At the very least, it could be provided that the Commission can edit forms indicating the information to be transmitted in each of these situations, as provided for in the decree of October 20, 2005 amended with regard to prior formalities. On processing falling within the scope of the Directive The purpose of article 25 of the draft decree is to specify the legislative provisions applicable to processing covered by Chapter XIII of the amended law of 6 January 1978, namely processing covered by the so-called Police/Justice Directive. It provides for the creation of new articles 110 to 110-6 of the amended decree of December 20, 2005, within Title VIII devoted to the provisions applicable to this processing. examination of the provisions of the bill relating to personal data a lack of ambition with regard to the transposition of the Directive into domestic law, the Commission notes that the proposed regulatory provisions most often constitute a verbatim repetition of the terms of the law or those of the Directive, without their effective application methods being the subject of the necessary clarifications, in particular on the following points.On the general provisions applicable to this processing Draft Article 110-1 of the amended decree of 20 October 2005 concerns impact analyzes relating to privacy. The proposed provisions do not call for any particular comments on the part of the Commission, with the exception of those provided for in its last paragraph, which should be amended to provide that the impact analysis relating to processing presenting high risks and not implemented on behalf of the State can also be transmitted by the subcontractor and not only by the controller. Similarly, the obligation to transmit to the Commission any other information allowing it to assess the compliance of the processing should not be limited to the controller alone. Draft article 110-3 of the amended decree of October 20, 2005 intended to govern the right to information of data subjects in the event of joint implementation by several controllers of processing falling within the scope of the Directive. It is provided that the designation of the contact point for the persons concerned is in this case mandatory, in the act establishing the processing when it is implemented on behalf of the State and in the agreement concluded between the joint data controllers when it is implemented by another competent authority. the directive. However, it wonders about the articulation of this provision with article 70-18 of the law of January 6, 1978 as amended in the event that the point of contact is the data protection officer, insofar as the making the contact details of the latter available to the persons concerned would then no longer constitute an option, as provided for in article 70-18 of the law of January 6, 1978 as amended, but an obligation. The second paragraph of draft Article 110-3 of the same decree provides that, in the context of processing which would be implemented by a competent authority on its own behalf and whose act

establishing the processing would not have specified which of the joint controllers can serve as a single point of contact for the data subject to exercise their rights, the data subjects can exercise their rights in respect of and against each of the controllers. The Commission first recalls that, in principle, in the event of joint responsibility, the designation of a contact point is mandatory. It also wonders about the scope precisely covered by this provision, insofar as, since the planned processing would not be implemented on behalf of the State, it is not possible to consider that the creation of the latter is necessarily subject to an act establishing the processing. It considers in this respect that it would be appropriate to refer not only to an act establishing the processing but also to the agreement as it could be concluded between the data controllers in accordance with Article 21.2 of the Directive. .On the general provisions relating to the rights of data subjects Draft articles 110-4 to 110-6 of the amended decree of October 20, 2005 concern the rights of data subjects with regard to processing covered by the Directive. Article 22 of the draft decree, which modifies Title V of the same decree relating to the special provisions applicable to processing under Articles 26 and 42 of the amended law of 6 January 1978, also provides for regulatory modifications relating to the right of access indirect exercised through the Commission. The Commission recalls that informing the persons concerned in the context of the implementation of processing covered by Chapter XIII of the law of January 6, 1978 as amended constitutes a particularly important step forward. It notes in this respect that, while Article 70-18 of this law provides for an obligation to make certain information available to the data subject, draft Article 110-4 provides in its first paragraph that the data controller takes reasonable measures to provide any information referred to in article 70-18 of the law of January 6, 1978 as amended. It recalls that, if the data controller has a freedom of choice as to the way in which the information in question can be provided to the data subjects, the data subjects must be informed in accordance with and under the conditions provided for in Article 70- 18 of the Data Protection Act. However, the drafting of the draft decree as provided for is likely to place data controllers under an obligation of means and not an obligation of result. The Commission therefore considers that these provisions should not refer, without further clarification, to the concept of reasonable measures. It also considers that the ability to provide this information via the website of the competent authority is likely to create ambiguity. Indeed, if this possibility is expressly mentioned in recital (42) of the Directive, it is a simple option which should not exempt the data controller from providing, by other means, the information provided for in article 70-18 of the amended law of January 6, 1978. In this respect, the Commission recalls that it is in particular the responsibility of the data controller to take into account both the purpose of the processing and the nature of the data subjects included in this processing, in order to determine the channel

which must be privileged to ensure the effectiveness of the information issued under the aforementioned Article 70-18. Finally, the Commission notes that, referring only to I of Article 70-18 of the Data Protection Act, the provisions of draft decree are likely to create a contrario with the additional information mentioned in II of this same article. In this context, it wonders about the concrete methods of making this information available, as the current wording could suggest that the information concerned could not be made available electronically, at least not through a website. Finally, the Commission regrets that the regulatory provisions referred to it are not intended to specify the specific cases in which this additional information may be issued, nor the additional information which, if necessary, may be communicated to the persons concerned . This absence is likely to deprive of useful effect the protective provisions of the law concerning the information of the persons concerned by the processing falling within the scope of the Directive. It considers that the decree could, for example, expressly target the cases in which direct collection of data is carried out directly from these persons. With regard to the exercise of the rights of persons, the draft decree aims to implement , concerning the Processing of Criminal Records (TAJ) and the GENESIS processing implemented by the prison administration, the rule laid down by law (articles 70-18 to 70-20), in accordance with the Directive, of the exercise rights directly to the controller. As a preliminary point, before examining the specific provisions of the TAJ and GENESIS, the Commission intends to make three series of general observations on the new applicable legal framework. It recalls first of all that the amended law of January 6, 1978 now provides, in accordance with the provisions of the Directive, the principle of direct exercise, by the persons concerned, of the rights available to them. These rights may be subject, under certain conditions, to restrictions by the controllers, which must be provided for in the regulatory act creating the processing in question. In this case, the person concerned has the possibility of exercising indirectly, under conditions similar to those provided for by the provisions in force before the adoption of Law No. 2018-493 of June 20, 2018. Thus, it results of these new legislative provisions that the regulatory acts establishing processing operations falling within the scope of the Directive may provide for three different systems in this area: either the direct exercise of rights by individuals, without possible restriction; either the direct exercise of rights with, in the event of a restriction imposed on an applicant by the data controller, the possibility of approaching the Commission for the purpose of exercising these rights on behalf of the persons concerned; or, under these restrictions, the indirect exercise of these rights from the outset when the nature of the processing and of the data justifies it.Secondly, the Commission emphasizes that the principle of direct exercise of rights marks a major advance, which aims to strengthen the rights of individuals with regard to the processing concerned. It nevertheless notes that, for the

regulatory acts which will be part of the new logic of an exercise of rights by direct principle with the possibility of opposing the restrictions on a case-by-case basis, this progress will only fully materialize to the extent that, in practice, data controllers do not systematically oppose a restriction to data subjects' requests. Indeed, the new system adds a step in the chain of exercise of rights before referral, in the mode of the right of indirect access, to the Commission. This results in longer processing times for requests to exercise rights, which could in some cases prove detrimental to the persons concerned, given the concrete issues, such as access to employment. With regard to these issues , the Commission notes that the draft decree does not include any general provision on this point and does not include, in particular, a transversal reading grid concerning these new methods of exercising the rights of individuals with regard to processing falling within the scope application of the Directive. The care of defining these terms and conditions is referred, in accordance with the law, to the respective regulatory acts creating the various processing operations concerned. The Commission considers that it will therefore be appropriate, for each regulatory act creating a processing operation subject to the provisions of the new Chapter XIII of the amended law of 6 January 1978, to follow the new orientation as far as possible (direct exercise of rights in principle), while taking into account the most appropriate balance for the purpose of the processing in question , the categories of data it contains and the rights of the persons concerned. It will also be necessary to evaluate the new measures, for example after a period of one year.Thirdly, the Commission considers in any event that the draft decree should at least provide for a new condition of admissibility of requests addressed to the Commission for the purposes of the indirect exercise of rights with regard to files falling within the scope of the Directive. Indeed, insofar as the draft decree implies that the Commission is no longer necessarily the primary interlocutor for persons wishing to exercise their rights with regard to certain processing operations, its competence will be subject to proof of the commitment of a prior approach with the data controller and a refusal or limitation of access, whether or not these are explained. On the provisions relating to TAJ and GENESIS processing Article 28 of the draft decree aims to modify the provisions of the Code of Criminal Procedure (CPP) concerning the TAJ and the GENESIS file. With regard to the TAJ, it repeals the current provisions of article 87-1 of the amended decree of October 20, 2005, relating to the procedure and time limits for processing requests for the right of indirect access to this processing, and incorporates all the applicable provisions in a new article R. 40-33. III of the CPP. For the TAJ, a principle of the right of direct access is provided for, together with restrictions which may be imposed on persons for particularly broad reasons (to avoid interfering with investigations, research, administrative or legal proceedings, interfere with investigations, prosecutions or the execution of criminal penalties).

For GENESIS, the same system is provided, but only for certain categories of data (dates of transfer or extraction of detainees, for example), the other data subject to a right of direct access without possible restriction by the person in charge of the processing. If, currently, the regulatory act relating to this processing provides for the exercise of rights with the Commission (indirect right of access), people will therefore be able, on the basis of the planned provisions, to initially submit a request directly from the data controller, any referral to the Commission only occurring at a later stage, in the event that the controller has opposed a restriction. As the Commission has previously pointed out, this regulatory change constitutes a significant progress for people's rights. In particular, the Commission can only be satisfied that persons who are not the subject of any registration in the TAJ can now obtain this information directly and without restriction from the controller. Persons registered solely as victims will also benefit from such an advance, provided that the proceedings concerned are judicially closed. force of the aforementioned law of June 20, 2018, on the concrete impact of the new system in certain cases, in particular with regard to persons registered as implicated in the TAJ and, on the other hand, if concerning certain data recorded in GENESIS (dates of extraction). The Commission can therefore only recall its general observations on the necessary effectiveness of the implementation of direct access rights within the framework of the planned system and, given the choice made, on the need to assess in any case finely, in the near future (one year), the new system. data controllers, as provided for in the context of the checks carried out by the Commission. It also considers that the appointment by the Ministry of the Interior of a service dedicated to this type of request could make it possible to avoid people being forced to contact the national police or gendarmerie at the same time. It also recalls that this new system requires a particular mobilization of all the actors to inform and support people in the exercise of their new rights. This education appears necessary to avoid any additional lengthening of the process for exercising rights. With regard to the transition between the current system, concerning TAJ and GENESIS, and the system provided for by the draft decree, the Commission considers that it would be desirable, for the same reasons, that it be able to continue until completion the checks initiated under the right of indirect access for all requests received before the date of publication of this decree. An express transitional provision could usefully be provided for in this regard. Finally, the Commission notes that, in the absence of any modification of the regulatory acts relating to the other files falling within the scope of the Directive, the regulatory provisions granting it competence under the right of indirect access pursuant to articles 41 or 42 of the amended law of 6 January 1978 remain applicable.On data breachesArticle 27 of the draft decree aims to apply the provisions of new III of article 40 of the law of January 6, 1978 as amended, by setting the list of processing and

processing categories authorized to derogate from the right to communication of a data breach governed by Article 34 of the Regulation, when the notification of a disclosure or unauthorized access to this data is likely to pose a risk to national security, national defense or public safety. and taking into account that the draft decree targets processing involving personal data likely to make it possible, directly or indirectly, to identify persons whose anonymity is protected under article 39 sexies of the law of July 29, 1881 on freedom of the press. Reference is thus made only to processing within which would appear the identity of officials of the national police, soldiers, civilian personnel of the Ministry of Defense or customs agents belonging to services or units designated by order of the Minister. concerned and whose missions require, for security reasons, respect for anonymity. to specialized units, the derogation envisaged is precisely delimited and appears necessary and proportionate to guarantee national security, national defense and public security. 27-2° of the draft decree, which targets the processing of administrative, financial and operational management data as well as the processing of data es of health, without further details. The Commission points out that when it comes to derogating from the obligation in principle to inform the data subjects, a strict balance must be ensured between the preservation of the rights and freedoms of the data subjects and the possible restrictions which could be made there. In this respect, it considers that the categories of processing should be clarified in order to remove any ambiguity, for example by making express reference to human resources management processing with regard to the processing of administrative, financial and operational management data. . In any event, the Commission recalls that the criterion provided for in Article 40-III of the law of 6 January 1978 as amended, according to which the notification of unauthorized disclosure or access is likely to represent a risk for national security, national defense or public security, must be interpreted strictly, in order to limit to only necessary cases the absence of information relating to violations affecting the two categories of processing concerned by the provisions The draft decree aims in this regard to specify the criteria for characterizing a risk to national security, national defense or public security, by mentioning the volume of data concerned by the violation and information relating to privacy. that they contain such as the address or the composition of the family. The Commission considers that these criteria, moreover not exhaustive, are insufficiently precise to strictly define the scope of this derogation. In any event, the Commission considers that the provisions provided for in Article 27 of the draft decree would usefully be incorporated decree of October 20, 2005 amended, in order to improve the readability of the legal framework in this area. Beyond the planned provisions, the Commission makes two series of remarks concerning data breaches. First, it wonders about the advisability of specifying the legal framework applicable to violations affecting processing under the

Directive, and not the Regulation. If a strict reading of the provisions of article 70-16 of the amended law of January 6, 1978 leads to adopting a case-by-case approach to the possibility of derogating from the principle of informing the persons concerned by such processing, it is questions the possibility of following a more general approach to such restrictions, by regulatory means. processing authorized to derogate from the data subject's right to communication, as provided for in article 27 of the draft decree concerning processing falling within the scope of the Regulation. It could also be provided, as for the restrictions made to the other rights of individuals, that the regulatory acts creating the processing operations concerned mention such an exemption. The Commission considers that, if such regulatory clarifications are made possible by the aforementioned provisions of the law, they would be usefully provided for in order to promote the clarity of the law in this area, both for the persons concerned and for the controllers. Secondly, the Commission observes that this draft decree in no way modifies the provisions provided for in articles 91-1 et seq. of the amended decree of October 20, 2005, relating to notifications, to the Commission and to the persons concerned, of violations affecting the processing implemented by electronic communications service providers. These provisions remain necessary for the transposition into domestic law of the specific obligations provided for in this area by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of the privacy in the electronic communications sector (known as e-privacy). Nevertheless, it is expected that said directive will soon be repealed by a regulation, in which there would be no specific obligation in terms of data breaches and which would refer to the common law provisions provided for by the Regulation in this area. The coexistence of these two violation notification regimes, the terms and conditions of which differ on several points, thus produces an unsatisfactory effect in terms of the clarity of the state of the law and in operational terms for professionals who have to implement the two systems concurrently. In any case, these provisions must nevertheless be modified to allow the notification of data breaches within the meaning of the Regulation by exclusively electronic means and the Commission therefore requests that Article 91-1 of the amended decree of October 20, 2005 be modified in this meaning. On the processing of data relating to criminal convictions, offenses and security measures con nexesArticle 26 of the draft decree aims to apply the provisions of 1° of article 9 of the amended law of 6 January 1978, by fixing the list of categories of legal persons under private law collaborating in the public service of the authorities authorized to carry out processing operations relating to such data. The Commission generally considers that the proposed list is adequate and proportionate, insofar as it covers the categories of legal persons governed by private law collaborating in the public service of justice known

to the Commission whose missions require the processing of data relating to offences. It nevertheless wonders about the category provided for in 3° of article 26 of the draft decree, and more specifically about the establishments and services mentioned in 2 ° of article L. 312-1 of the code of social action and families, whose missions do not necessarily appear, in the state of the elements transmitted to the Commission and under subject to additions, require the processing of such data. Conversely, the mention, in 4° of the same article 26, of the only authorized medical or medico-educational establishments mentioned in articles 15 and 16 of ordinance no. 45-174 of February 2, 1945 relating to delinquent childhood , seems to rule out the possibility for the other bodies mentioned in the same articles, and in particular private educational or vocational training institutions and establishments and suitable boarding schools for juvenile offenders of school age, to process such data, which nevertheless appear necessary in the exercise of their missions. The draft decree would therefore be usefully amended on these two points. Finally, the Commission considers that the provisions provided for in article 26 of the draft decree would usefully be incorporated into the amended decree of 20 October 2005, in order to improve the readability of the framework the matter.The PresidentI.FALQUE-PIERROTIN