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2021-114 of October 7, 2021 providing an opinion on a draft decree relating to the categories of data kept by electronic communications operators, issued pursuant to Article L. 34-1 of the Post and Electronic Communications Code (request for opinion no. 21016517) The National Commission for information technology and freedoms,

Seizure by the Secretary General for Defense and National Security (SGDSN) of a request for an opinion concerning a draft decree relating to the categories of data kept by electronic communication operators, issued pursuant to Article L. 34-1 of the post and electronic communications code;

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 making it possible to identify any person who has contributed to the creation of content put online. Thus, article 17 of the aforementioned law of July 30 specifies the purposes for which different categories of data must be kept ed (civil identity, payment information, connection and location data) by electronic communication operators (hereinafter the operators). It also provides that a Conseil d'Etat decree, taken after consulting the National Commission for Computing and Liberties [...], determines, according to the activity of the operators and

the nature of the communications, the information and categories of data kept pursuant to II bis and III [of article L. 34-1 of the CPCE] . It is in this context that the Commission was informed by the General Secretariat for Defense and National Security (SGDSN) of this draft decree. 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 comments. It nevertheless recalls that Article L. 34-1 of the CPCE lays down a principle of anonymization and deletion of data relating to electronic communications, the exceptions of which are strictly framed and must be surrounded by appropriate guarantees, taking into account the issues in terms of the privacy of the persons concerned that their retention involves. If it notes that the draft decree determines the data to be retained by the operators, in accordance with article 17 of the law of July 30, 2021, the Commission nevertheless questions the need to store certain data with regard to the purposes of this storage and also considers that clarifications should be made concerning some of the categories of information, in order to improve the readability of the decree and to clarify the obligations incumbent to operators. General comments Article R. 10-12 of the CPCE provides that the data kept by operators means information made available by electronic communication processes, likely to be recorded by the operator on the occasion of the electronic communications which it ensures the transmission and which are relevant with regard to the purposes pursued by the law. The obligations of the operators therefore relate on the retention of certain categories of data, the texts not being intended to require them to retain data beyond those necessary for the electronic communications which they ensure the transmission. Insofar as the retention of this data constitutes an exception to the general principle of erasure and anonymization provided for in Article L. 34-1 II of the CPCE, the Commission recalls that the principle of minimization requires that such retention be limited to data strictly necessary with regard to the purposes laid down by law. The Commission considers that the current wording of the draft decree may lead electronic communications operators to deduce from the obligation to store data, an obligation, to collect this data or , at least, a strong incentive for this collection. However, it is not certain that the operators collect all the data listed by article 2 of the draft decree (for example, the pseudonym). Consequently, it invites the SGDSN to specify within the draft decree that the data listed therein should only be kept insofar as they have been previously collected by the operators in the context of the provision of electronic communications services. It also insists on the need to use the most precise terms possible to define the data kept, in order to limit any risk of excessive collection. These general elements recalled, the different categories of data kept by the operators call for the following observations. On the conservation of the place of the transaction The draft decree provides that information relating to the payment can be kept

by the operators when the subscription of the contract or the creation of an account is chargeable and for 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. In this respect, the SGDSN specified that the place of the transaction corresponds to the physical place of subscription of the contract. that gave rise to the transaction. 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, is not sufficient to demonstrate the need to keep them. 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 2 of the draft decree provides that these data are: surnames and first names or company name; the associated postal addresses; date and place of birth; the associated e-mail or account addresses and telephone numbers. First, the SGDSN clarified that the associated e-mail or account addresses and telephone numbers are used to contact people and that their conservation therefore appears useful for national or public security purposes. The Commission notes that the retention of the associated postal addresses also falls within this justification. does not appear justified insofar as the user will most of the time have a single postal or electronic address and a single telephone number, and that the multiplication of data does not appear necessary with regard to the purposes pursued. If it takes note of the SGDSN's commitment to retain the use of the singular concerning the retention of the user's postal address, it also invites it to modify the draft decree with regard to e-mail addresses or associated accounts as well only telephone numbers, in order to include the possibility of collecting only one of these pieces of information. The Commission considers that such a modification would be likely to allow operators to identify precisely the obligation imposed on them and thus to avoid the systematic retention of several data when only one appears sufficient with regard to 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, making it possible to clarify the obligation of the operators. On 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 operators. connection identifier , the SGDSN specified that it corresponds to that linked to the account, which can sometimes differ from an email address or a pseudonym (for example the account number generated by the operator). The Commission considers nevertheless that by linking this identifier to the notion of connection, which is already covered by article R. 10-13 III, the draft decree is not sufficiently precise. It also considers that the SGDSN's proposal to replace the notion of connection identifier by the expression identifier used does not provide sufficient clarification. Commission to refer to the identifier provided by or for the user, at the time of the creation of the account in the draft decree. Secondly, with regard to the data making it possible to verify the password or to modify it, the where appropriate through a dual user identification system, in their latest updated version the Commission considers that this wording and the data it covers are not sufficiently explicit. It considers that this wording does not allow operators to precisely identify the data they are required to keep. On the contrary, this concept can lead to confusion and lead operators 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 user identification, in their latest updated version. Finally, with regard to 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. techniques and categories of traffic and location data Article L. 34-1 II bis 3°) of the CPCE provides that for the purposes of the fight against crime and serious crime, the prevention of serious threats to the security public and safeguarding national security, the technical data enabling the source of the connection to be identified or those relating to the terminal equipment used are kept by the operators. The draft decree specifies the data concerned. The Commission notes that this data includes the user's identification number, the identification number of the terminal or the data making it possible to identify the recipient(s) of the communication. However, it appears from the details provided by the SGDSN that these data correspond to technical identifiers specific to mobile telephony (respectively the IMSI, the IMEI and the MSISDN). In this respect, the Commission invites the SGDSN to mention the identifiers concerned by way of example. The President Marie-Laure DENIS