

Deliberation 2021-069 of June 3, 2021 National Commission for Computing and Liberties Nature of the deliberation: Opinion

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providing an opinion on a draft decree relating to the procedures for implementing measures aimed at protecting minors against access to sites disseminating pornographic content (Request for opinion no. culture of a request for an opinion on a draft decree relating to the procedures for implementing measures aimed at protecting minors against access to sites disseminating pornographic content; 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 and on the free movement of such data, and repealing the directive 95/46/CE; Having regard to law n° 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms; Having regard to law n° 2020-936 of July 30, 2020 aimed at protecting victims of domestic violence, in particular its article 23; After having heard the report of Mr. Christian KERT, commissioner, and the observations of Mr. Benjamin TOUZANNE, commissioner of the Government; Issues the following opinion: Taken pursuant to article 23 of the law of July 30, 2020, the draft decree aims to allow the president of the Superior council of audio-visual (CSA), initially, to address to the editors of communication services to the public who authorize, in violation of the article 227-24 of the penal code, access by minors to pornographic content, a formal notice enjoining them to take any measure likely to prevent access by minors to the incriminated content. At the end of a period of fifteen days, in the event of non-execution of this injunction and if the content remains accessible to minors, the president of the CSA can seize the president of the judicial court of Paris for the purposes in particular of ordering the suppliers internet access to terminate access to the service in question. The draft decree provides in its article 3, paragraph 1 that, to assess whether minors can access pornographic content, the president of the High Council of the audiovisual takes into account the level of reliability of the technical process implemented by [the person whose activity is to publish a communication service to the public] in order to ensure that the majority of the age of the users wishing to access the service .In addition, the 2nd paragraph of article 3 of the draft decree provides that the CSA may adopt guidelines in order to specify the reliability of the technical processes making it possible to ensure this age of majority. processes you verification of the age majority of users is likely to lead to the implementation of personal data processing. This processing, which is particularly sensitive with regard to its purpose, is subject 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. personal nature and the free movement of such data (GDPR) and fall within the competence of the CNIL. In

accordance with its article 3.2-a, the GDPR applies to the processing implemented by a publisher of communication services to the public which is not established in the EU when its processing activities are related to the provision of goods or services to persons located in the territory of the European Union. This legal framework includes in particular a principle of minimizing the data collected, information adapted to the persons concerned, a ban on misuse of purpose, a limited retention period for data as well as regularly updated security measures. The Commission of the draft decree so that it recalls the guarantees that the technical procedures for verifying the majority of age of users must respect in order to comply with the principles enshrined in the GDPR. On the scope of the obligation to implementation of the verification of the majority of age The assessment of the president of the CSA provided for in article 3 of the draft decree is intended to apply to the scope defined by law, namely the publishers of communication services to the public online. The Commission notes that this mainly covers publishers of online public communication services whose sole or main activity consists in the dissemination of pornographic content, but may extend to a large number of sites which publish pornographic content. The Commission emphasizes that the requirement to set up a system for verifying the majority of age for legitimate purposes of preserving minors cannot justify a general obligation of identification prior to consulting any site offering content. It recalls that the fact of being able in principle to benefit from online public communication services without the obligation to identify oneself or by using pseudonyms contributes to the freedom of information and the protection of the privacy of users. This is an essential element of the exercise of these freedoms on the Internet. The Commission therefore emphasizes that it is up to the competent authorities to ensure that the obligations to implement specific mechanisms for verifying majority of age for the purposes of combating access by minors to pornographic content, and controlling of these systems, are not extended beyond the scope defined by article 23 of the law of July 30, 2020 combined with article 227-24 of the penal code. On the necessary proportionality of the technical processes implemented for the purposes of verifying the majority of users' age Under Article 5.1-c of the GDPR, the processing of personal data implemented for the purposes of verifying the age of users wishing to access pornographic content must be proportionate to the purpose pursued. The European Data Protection Board (EDPS), in its guidelines 5/2020 of 4 May 2020 on consent, indicates, with regard to providers of information society services to minors, that the character reasonableness of a measure, both in terms of verifying that a user is old enough to give their own consent and that the person giving consent on behalf of a child has parental responsibility, may depend on risks linked to the processing as well as available technologies. The Commission considers that the verification of the majority of age by the publishers themselves distributing pornographic

content should not lead them to collect data that directly identifies their users. Such data collection would, in fact, present significant risks for the persons concerned since their sexual orientation – real or supposed – could be deduced from the content viewed and directly linked to their identity. However, such a collection of such sensitive information by the sites concerned would be contrary to the GDPR. In addition, the proliferation of this type of database would pose serious risks in the event of their being compromised by a third party who could use this data for its own benefit or distribute it, with a very significant impact for the users concerned. Commission notes the difficulty of reconciling the principles relating to the protection of personal data with any mechanism for controlling the age of minors requiring their prior identification. It considers it preferable to resort to mechanisms consisting of the provision of proof of majority of age. These services could, for example, be based on a trusted third-party organization which should incorporate a double anonymity mechanism preventing, on the one hand, the trusted third party from identifying the site or application at the origin of a verification request. and, on the other hand, preventing the transmission of identifying data relating to the user to the site or application offering pornographic content. The means of proof should thus be in the hand of its bearer and be limited to a single age attribute. The trusted third-party organization must also integrate all the guarantees of protection of personal data and in particular the information of the person concerned, in simple terms and adapted to each public, on the risks and rights related to the processing of their data. In any case, age majority verification devices must strictly respect the principle of data minimization. The collection of official identity documents, given the specific challenges attached to these documents and the risk of identity theft linked to their disclosure and misappropriation. The same analysis can be applied to devices intended to estimate the age of a user based on an analysis of his browsing history, without such collection also allowing a precise estimate. Finally, the Commission considers that the technical procedures aimed at verifying the majority of age cannot lead to the processing of biometric data within the meaning of Article 9 of the GDPR, given the particular nature of this data and the fact that obtaining the consent of the person concerned does not could be considered free if it conditions access to the requested content. On the role of the CSA The Commission emphasizes that the mechanism provided for in Article 5 of the draft decree, providing for a referral of users of online communication services to which access is prevented to an information page on the CSA website, should not lead the latter to collect the personal data of the Internet users concerned, and in particular their addresses IP. The Commission stresses the need to put in place systems for verifying the majority of age in accordance with data protection rules and therefore considers it necessary to continue joint work with the CSA, in a logic of inter-regulation. The President Marie-Laure

