Deliberation 2020-021 of February 6, 2020 National Commission for Computing and Liberties Nature of the deliberation: Opinion Legal status: In force Date of publication on Légifrance: Saturday July 11, 2020 Deliberation No. 2020-021 of February 6, 2020 providing an opinion on a draft decree relating to the public availability of the decisions of the judicial and administrative jurisdictions (request for opinion n° 19022713) The National Commission for Computing and Liberties,Request for an opinion requested by the Ministry of Justice concerning a draft decree on making decisions of judicial and administrative courts available to the public; Having regard to Convention No. 108 of the Council of Europe for the protection of individuals with regard to automatic processing of personal data personnel; 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 personal character and the free movement of such data, and repealing Directive 95/46/EC; Having regard to the code of administrative justice; Having regard to the code of judicial organization; Having regard to law n° 78-17 of 6 January 1978 as amended relating to data processing, files and freedoms; Having regard to law n° 2016-1321 of October 7, 2016 for a digital Republic, in particular its articles 20 and 21; Having regard to law n ° 2019-222 of March 23, 2019 on programming 2018-2022 and reform for justice, in particular its article 33; Considering the decree n ° 2019-536 of May 29, 2019 modified taken for the application of the law n ° 78-17 of January 6, 1978 relating to data processing , files and freedoms; After having heard Mrs. Christine MAUGÜE, commissioner in her report, and Mrs. Nacima BELKACEM, government commissioner, in her observations, Issues the following opinion: The draft decree submitted for opinion to the Commission provides, pursuant to article 33 of law no. 2019-222 of March 23, 2019 referred to above, the Public access to court decisions. First of all, the Commission recalls that, in 2001, it issued a recommendation on the dissemination of court decisions on the Internet in order to ensure the protection of the data of the persons concerned by these decisions. during their dissemination. The legislator has, since 2016 and in order to allow widespread dissemination of court decisions, provided in positive law the obligation to implement the recommendations of the Commission with regard to the concealment of directly identifying elements. If initially this concealment mainly concerned the first and last names of the parties, taking into account the specific issues raised by the availability of court decisions led to consider a finer granularity. In a general context of digital transformation of the Ministry of justice, article 33 of the justice programming and reform law provides for access to court decisions and their publicity. This article also specifies the conditions for issuing copies of court decisions to third parties, while indicating that the methods of application for making available to the public first instance, appeal or cassation decisions as well as the issue of copying to

third parties are determined by decree in Council of State. The Commission therefore considers it essential that strict safeguards be implemented in order to preserve the delicate balance between access to the law and protection of privacy. Preserving this balance requires that particular attention be paid to the precise methods of making these decisions available, to the concealment carried out as well as to the conditions under which third parties may obtain a copy. In this respect, the Commission regrets that both the system as a whole and the draft decree submitted to it do not make it possible to ensure the implementation of all the guarantees necessary for this dissemination. Under these conditions and beyond this opinion, the Commission will provide its expertise to the public authorities, in particular as regards the procedures for implementing the entire concealment system. Having recalled these elements, it notes that this draft decree is intended, according to the ministry, to establish a framework decree whose purpose is to determine the conditions for making court decisions available to the public . In this respect, it is particularly indicated that the precise procedures for making decisions available as well as the procedures for exercising the rights of individuals will be governed by the regulatory provisions relating to the processing concerned. It follows from the foregoing that many technical methods are still being designed and are likely to be the subject of further developments, including for example the precise mechanism for materialization of the concealment decision by the judge, the transmission of this decision to the supreme courts or even the mechanism for informing the courts of concealment carried out in the context of making available to the public with a view to issuing copies to third parties. arrested, it regrets not being in a position, at this stage, to comment on all of the actual conditions of making available to the public the decisions of the judicial and administrative jurisdictions. Without prejudice to its questioning as to the possibility of making such referrals in this case, it stresses that it may, where appropriate, be called upon to assess these terms through, for example, its association with the work of the ministry or transmission of an impact analysis on data protection.Finally, it recalls that if the planned online dissemination is likely to contribute to the transparency of the decisions rendered and thus to facilitate access to case law, the publication massive amount of personal data naturally has the effect of increasing the potential risks for the persons concerned, which can be amplified in particular when this data is indexed by external search engines. In view of these elements, the Commission intends to pay particular attention to the conditions under which the planned dissemination will be made possible. On the general conditions for implementing the system The Commission notes that the provision of court decisions will be made via the website web justice.fr and placed under the responsibility of the Keeper of the Seals, Minister of Justice, as well as via the sites of the Court of Cassation and the Council of State. This provision will be made gradually with

first of all an implementation on several pilot sites before a more general deployment of the device, without further details having been provided. The first decisions made public in their entirety are thus intended to be disseminated by the year 2021 and will be those rendered by industrial tribunals. The Commission was told that the court decisions disseminated by the through this portal may be indexed by search engines if they are accessible in text format, the precise technical methods retained remain to be defined. Without calling into question the advisability of the choice to allow indexation of court decisions, the Commission recalls that particular vigilance must be taken to ensure that such indexation does not lead to risks being posed to the privacy of individuals. concerned. Indeed, it cannot be ruled out that the publication of information contained in administrative and judicial decisions could, by way of cross-checking, lead to the re-identification of natural persons from other information made public. The Commission also notes that certain court decisions will be excluded from public availability or may not be issued to third parties, such as: decisions rendered by criminal courts for minors, in accordance with Articles R. 111-10 of the code of judicial organization (COJ) and R. 156 of the code of criminal procedure (CPP); the decisions rendered by the juvenile judge, due to the specific provisions provided for in article 1189 of the code of civil procedure (CPC); decisions rendered by the family court judge, pursuant to article 1074 of the CPC; decisions rendered by the guardianship judge, pursuant to article 1226 of the CPC. that in criminal matters, only final decisions will be posted online, in accordance with Articles R. 156-III of the CPP and R. 111-10-I of the COJ. Finally, it observes that the disciplinary litigation of the specialized courts when the decisions are subject to cassation review by the Council of State, as well as disputes relating to administrative sanctions likely to be pronounced against natural persons, are governed by the provisions of the CJA. The Commission therefore deduces that they are intended to be governed by this draft decree. As this draft does not expressly mention the rules applicable to this type of litigation, it considers it essential that specific reflection be carried out on this point to take into account the specificities of these disputes which, without being of a criminal nature in domestic law, but which may participate in criminal matters within the meaning of the European Convention on Human Rights, are likely to raise certain similar questions for the persons concerned. Having recalled these elements, the draft decree transmitted calls for the following observations from the Commission. On the concealment of decisions Article 33 of Law No. 2019-222 of March 23, 2019 provides that, with regard to decisions judicial and administrative proceedings, the surnames and first names of the natural persons mentioned in the judgment or in the decision, when they are parties or third parties, are concealed before they are made available to the public. As a preliminary point, the Commission notes that the draft decree provides for the only

concealment of information allowing the identification of natural persons, to the exclusion of legal persons. Although this restriction, in accordance with the letter of the law, does not, in principle, call for any particular reservations, it nevertheless draws the attention of the Ministry to the risk of re-identification of natural persons liable to intervene, for example, through the name of a company. The draft decree specifies, in accordance with the provisions of the aforementioned law that, when the disclosure is likely to infringe the security or respect for the privacy of these persons or their entourage, any element enabling the identification of the parties, third parties as well as the magistrates and the members of the registry is also concealed. In this respect, the Commission notes from the outset that the rules relating to the concealment of the surnames and first names of magistrates and members of the registry in the context of making court decisions available to the public in electronic form differ from those concerning the delivery of copies of decisions to third parties, which is not without raising certain some questions. This distinction in regime could lead to misuse of the possibility offered by the legislator of having a copy of the decision delivered to him, in which the name of the magistrate would not be obscured and considers it essential that guarantees be provided, since the copies thus issued are, in fact, likely to be disseminated online, later, on the initiative of third parties. or the member of the Council of State or the magistrate who rendered the decision concerned with regard to the parties and third parties mentioned in an administrative decision; the president of the litigation section of the Council of State, the president of the administrative court of appeal or the president of the administrative tribunal, in the case of members of the Council of State, magistrates, court clerks or the entourage of these persons; the president the court formation or the magistrate who rendered the decision concerned for the parties, third parties, the sitting magistrates and the members of the registry mentioned in the judicial decisions; the public prosecutor or the public prosecutor at the court which rendered the court decision concerned, with regard to public prosecutors. Firstly, while the Commission does not question the difficulty of defining the nature of the information that may be concealed in this case, it notes that, on this point, the decree, which limits itself to reproducing the terms of the law, does not provide any details enabling the perimeter of the concealment obligation to be delimited more precisely. It notes, however, that a reflection is underway regarding the advisability of establishing guidelines for the courts in order to support the magistrates who will have to decide on additional concealment. In general and with regard to the issues associated with making the decisions of the administrative and judicial courts available to the public, the Commission considers it essential that a doctrine be developed in order to allow harmonization of the additional concealment carried out. Indeed, it observes that in the absence of clarifications at the regulatory level, there are, in the state of the planned

system, significant risks of disparity in the concealment of decisions, both between the two levels of jurisdiction and between the various court formations called upon to rule.Secondly, the Commission notes that, with regard to administrative decisions, the personnel in charge of concealment are documentalists or registry officers and that the occultation will, in principle, be carried out automatically by computerized processing. It notes, however, that in certain cases (in case of doubt or error, or when additional concealment is necessary), this concealment may be carried out manually on a dedicated application. As regards court decisions, if the ministry has clarified that the concealment will be carried out automatically, via the ministry's information systems deployed gradually, the Commission notes that the concealment process remains to be designed, both for natively digital decisions rendered after the entry into force defined successively by decree, than for those issued previously. to exercise particular vigilance with regard to the conditions for the effective implementation of oc automatic processing, in particular if it is planned to use algorithmic processing. The Committee recalls that in such a case, particular attention should be paid to the principles of vigilance and loyalty throughout the development of this processing. Finally, it recalls that the risk of re-identification of individuals and the impact on the life privacy should be assessed taking into account the entire data processing chain, from the drafting of the court decision to the reuse of this decision, including the actual provision of the decision. of availability The draft article R. 741-13-I paragraph 2 of the CJA provides that the jurisdictional decisions rendered by the Council of State, the administrative courts of appeal and the administrative tribunals, are made available to the public within two months of their date. The Commission takes note of the clarifications provided by the Ministry according to which this period constitutes a ceiling and that, if necessary, the decision may be made available within a shorter period. article R. 111-10-III of the COJ that the draft decree intends to introduce, provides that they are, in principle, made available to the public within a period not exceeding six months from their publication. disposal at the court registry. The Commission notes that the provision of all decisions (judicial and administrative) is intended to intervene independently of any appeal brought against them, with the exception of criminal matters. It follows from the foregoing that in practice, a court decision could be posted online even though, depending on the case, the means of appeal have not been exhausted or a request for concealment has been made. In this context and insofar as a massive re-use of these data, which are by nature not definitive, could be carried out, the Commission considers that specific measures should be taken in order to limit the harm to the persons concerned to what is strictly necessary. Furthermore, it considers that, in the event of the submission of a request for concealment before the decision concerned is made available to the public, provision should be made for the possibility of delaying the publication

of this decision, in order to limit the risk of breaches of the security and privacy of the persons concerned. The Commission considers that the draft decree should be amended accordingly.On requests for concealment and lifting of concealmentArticle 1 of the draft decree provides for the insertion in the CJA of the provision according to which any interested person may introduce at any time […] a request for concealment or lifting of concealment of the identification elements mentioned in the third paragraph of article L. 10 . Draft article R. 111-11-I of the COJ provides that any interested person may submit at any time, to the President of the Chamber at the Court of Cassation, director of the documentation and studies department of the Court of Cassation, a request for concealment or lifting of concealment of the identification elements mentioned in the second paragraph of Article L. 111-3. The Commission notes that the provisions submitted to it do not provide for any particular formalism with regard to a request for or lifting of concealment. It follows that any interested person, without any particular condition, may make such requests, the member of the Council of State designated by the vice-president, or the President of the chamber at the Court of Cassation, director of the documentation service, studies and the report, having two months to decide. Although the precise conditions which could lead to a concealment decision have not been brought to its attention, the Commission takes note of the clarifications provided according to which the assessment criteria will potentially be the same as for the additional concealment carried out by the judges. having rendered the decision, with the difference that, in this case, the procedure is centralized. In this respect, the ministry specified that the requests for additional concealment and lifting of concealment, entrusted for each order to a single decision-making body must allow harmonization. However, it regrets that no additional information has been communicated to it at this stage, insofar as such a procedure is likely to ensure that specific situations are taken into account which would lead to additional concealment. , Articles 1 and 4 of the draft decree provide that abusive requests are not granted, in particular by their number, their repetitive or systematic nature. In this respect, the Constitutional Council indicated, in its decision n° 2019-778 of March 21, 2019, that this limitation, resulting from article 33 of the lawn° 2019-222 was likely to obstruct requests intended to disrupt the proper functioning of the requested court or which would have the effect of imposing on it a burden, in particular of anonymisation, disproportionate to the means of which it provides .Under these conditions, these provisions do not call for any additional comments on the part of the Commission.On the issue of copies to third parties Firstly, the draft decree provides, in accordance with article 33 of the law of 23 March 2019 cited above, that third parties may obtain a copy of court decisions. The Commission thus observes, for decisions rendered in administrative matters, that draft article R. 751-7 of the CJA indicates that third parties may to be issued, under the conditions

provided for in Article L. 10-1, a simple copy of the precisely identified decisions. With regard to decisions rendered in civil matters, draft article 1440 of the CPC states that a copy u an extract is delivered to the applicant provided that the decision is precisely identified. decision and that the impossibility of identifying a decision rendered will lead to a refusal to issue it. Finally, in criminal matters, article R. 156 of the CPP as amended indicates that, may be freely issued to third , at their expense, the complete copy of the judgments of the Court of Cassation as well as the decisions of the trial courts of the first or second degree, when they are final and have been rendered publicly following a public debate. Commission notes that guarantees are provided in the draft decree with regard to decisions rendered in criminal matters. In this respect, article 6 of the draft decree amends the provisions of article R. 156 of the CPP, by providing that the public prosecutor or the public prosecutor may oppose the issue of a copy of a decision: whether it is a conviction expunged by amnesty, pardon or review; whether it is a statute-barred conviction; whether this copy is likely to be used for the purpose of harm. With regard to this last hypothesis, the Commission notes that it can only apply if the public prosecutor's office has identified that a request for a copy is made with the intention of harming and that, failing that, it cannot will not be possible to object to the delivery of the copy of the court decision. It notes that all other decisions, acts or documents emanating from criminal proceedings can only be issued with the prior authorization of the public prosecutor and the public prosecutor, at the request of a third party justifying a legitimate reason. . If the request is not justified by a legitimate reason, or if the delivery undermines the effectiveness of the investigation, the presumption of innocence or falls within the aforementioned cases in which the public prosecutor or the public prosecutor may object to the issuance of a court copy, authorization may be refused. Under these conditions, these provisions do not call for comment. Secondly, the Commission notes that the draft decree specifies, in accordance in article 33 of the aforementioned law of March 23, 2019, the information that may be obscured when copies of court decisions are issued to third parties. Article R. 751-7 of the CJA as amended thus provides that the elements making it possible to identify the natural persons mentioned in the decision, when they are parties or third parties, are first concealed if their disclosure is likely to harm safety or respect for the lives of these people or those around them. Although this provision does not specify who will be responsible for concealing these identification elements, the Commission notes that in practice, this concealment will be carried out by the chief clerk or at the Council of State, by the secretary of litigation. Similarly, article 1441 of the CPC as amended indicates that prior to the delivery of the decision, the clerks proceed to the concealment elements allowing the identification of natural persons, when they are parties or third parties, if their disclosure is likely to infringe the security or respect for the privacy of these persons or

those of their entourage. mission notes that, for decisions rendered in criminal matters, the public prosecutor or the public prosecutor may also decide, by reasoned decision, to grant the issue of a copy only after concealment or deletion of all or part of the reasons for the decision when the communication of these elements is likely to infringe the security or respect for the privacy of the persons mentioned in the decision or their entourage as well as the fundamental interests of the nation, medical secrecy or commercial and industrial secrets. The Commission notes that the provisions relating to the issue of copies to third parties are not as precise as those relating to the making available to the public. In particular, no details are provided on the person who will be responsible for deciding which identification information should be concealed. The draft decree thus limits itself to indicating that in civil matters, the clerks will carry out this concealment. It considers that the draft decree should be clarified on this point, in particular in order to expressly mention the person behind the concealment decision, including for the other jurisdictions. The Commission notes that the criteria for applying these provisions (risk of breach of security or respect for private life, perimeter of the surroundings, nature of the concealed elements in particular) should a priori be the same as those used to proceed with the concealment of identification elements in terms of made available to the public and that these concepts cannot be the subject of an exhaustive definition. It considers that these criteria should indeed be identical, in order to ensure that the decisions available to third parties who may subsequently rebroadcast them, benefit from the same protection as the decisions made available by the Ministry. , the Commission notes that Articles R. 751-7 of the CJA, 1441 of the CPC and R. 156-VIII of the CPP as amended provide that when the decision has been the subject of concealment of the identification elements in the framework of its being made available to the public or following a request for concealment, the copy delivered to third parties includes the same concealment with the exception of the elements making it possible to identify the magistrates and the members of the registry. observes that in criminal matters, draft article R. 156-VII of the CPP also provides for the concealment of certain identification elements when decisions are issued to third parties: concealment of the identity of jurors for copies of decisions rendered by the Assize Courts; the concealment of the identity of the assessors for the copies of the decisions rendered by the juvenile courts; the concealment of the identity of the two assessors responsible for associations for the copies of the decisions rendered by the sentence enforcement chambers of the courts of appeal. It is also provided that an order of the Minister of Justice establishes the list of crimes and misdemeanors for which copies of decisions rendered in proceedings concerning these offenses cannot be issued to third parties only after deletion of the particulars relating to the identity of the persons who participated in the proceedings, with the exception of those relating to the identity of

magistrates, clerks and lawyers. In general, if the Commission notes that the legislator has not expressly provided for the optional concealment of the names of magistrates and clerks in the event of the issue of a copy of a court decision to the courts third parties, it notes that the provision of such information, by right, can prove problematic if its disclosure was really likely to undermine their security or respect for their privacy. The Commission considers it essential that consideration be given to this matter, which should in particular take into account the risks associated with the possibility of obtaining more information in the context of requests for copies of decisions made by third parties, given the possible subsequent reuses and redistributions already mentioned. On the rights of the persons concerned Firstly, with regard to the information of the persons concerned, the Commission notes that the Ministry intends to apply Article 14-5.b) of the GDPR, which provides for the possibility of derogating from this right if the provision of this information would require disproportionate effort. of the contact details of these, the Commission takes note that it is planned that general information be issued. In the absence of details on its content, it recalls that this information must meet the requirements set by the GDPR and requests, in any event, that the draft decree be supplemented on this point. In general, it issues reservations about the impossibility of providing this information, individually, to the parties. In particular, the Commission considers that individual information could, for example, be considered when notifying them of court decisions.Secondly, Article 8 of the draft decree sets out the rights that data subjects can assert with the department of the Council of State and the Court of Cassation in charge of making court decisions available to the public (rights of access, rectification and erasure). Commission regrets that it has not been provided with the final version of the draft decree and, consequently, that it is only partially able to comment on this provision which, according to the details provided by the Ministry, is likely to be subject to modifications editorial.Under these conditions, it can only take note of the details according to which the procedures for exercising these rights will be specified in the regulatory provisions which will eation of the processing operations actually carried out and recalling that, except in duly justified exceptions with regard to the applicable regulations, which it will be up to the Commission to assess, if necessary, the data controller must guarantee, in principle, the effectiveness of the of the rights of the persons concerned by the processing implemented. The President M-L. DENIS