Deliberation 2021-078 of July 8, 2021 National Commission for Computing and Liberties Nature of the deliberation: Opinion Legal status: In force Date of publication on Légifrance: Wednesday August 25, 2021 Deliberation No. 2021-078 of July 8, 2021 providing an opinion on a draft law relating to criminal liability and internal security (request for opinion no. 21012005) The National Commission for Computing and Liberties,Request by the Minister of the Interior of a request for an opinion concerning a draft law on criminal liability and internal security; 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 to the free movement of such data, and repealing Directive 95/46/EC (RGPD); Having regard to Law No. 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms, in particular its articles 8 -I-4°a) po on articles 7 to 10 of the bill and 8-I-2°e) for article 16 of the bill; Having regard to law n° 2021-646 of 25 May 2021 for global security preserving freedoms; Decision No. 2021-817 DC of May 20, 2021 of the Constitutional Council relating to the law for comprehensive security preserving freedoms; After hearing the report by Mrs. Sophie LAMBREMON, Commissioner, and the observations of Mr. Benjamin TOUZANNE, Commissioner of Government, Issues the following opinion: The National Commission for Computing and Liberties (hereinafter the Commission) was seized, urgently, on June 15, 2021, by the Ministry of the Interior, of several provisions of the draft Criminal Accountability and Homeland Security Bill (hereinafter the Bill). Title III of the bill includes several provisions relating to the capture of images, which aim to draw the consequences of the decision of the Constitutional Council relating to the law for comprehensive security preserving freedoms (Constitutional Council, decision n° 2021- 817 DC of May 20, 2021). Other provisions of the bill, relating to the national file of persons prohibited from acquiring and possessing weapons (FINIADA) and the implementation of forced identification records, also concern the protection of personal data.A As a preliminary point, with regard to the provisions relating to airborne and on-board cameras, the Commission recalls that it has already ruled, in its deliberation No. 2021-011 of January 26, 2021, on provisions having the same purpose. It is once again called upon to rule on such arrangements, which should be examined with regard to data protection regulations and in the light of the aforementioned decision of the Constitutional Council. In general, the Commission notes that this draft law takes up the guarantees provided in the context of parliamentary work on the aforementioned law for global security, in particular in the light of its observations and those that the Constitutional Council deemed necessary. As such, this draft law makes it possible to specify the use of image capture devices and to strengthen their legal framework. Nevertheless, the Commission considers that this draft law does not exhaust the issues relating to the framework video

protection law. It recalls that many provisions of the Internal Security Code (CSI), which constitutes the general legal framework in this area, are obsolete since the evolution of the regulations on the protection of personal data which took place in 2018, and that they therefore do not allow data controllers to know the actual status of their obligations in this area or data subjects to know how to exercise their rights. The Commission therefore draws the Government's attention to the need to supplement the legal framework governing these mechanisms. In any event, the provisions of the bill submitted to it call for the following observations by the Commission. to airborne camerasArticle 8 of the draft law aims to create a legal framework allowing public authorities to use cameras installed on aircraft. aircraft traveling without anyone on board (in particular drones), but will also concern other aircraft equipped with a camera (tethered balloons, airplanes, helicopters and other aircraft). The Commission therefore notes that the capture of images permitted by these aircraft will be extended, insofar as it will concern all the airborne means used by the national police and gendarmerie services as well as by the services entrusted with security missions. Firstly, while noting the will of the legislator to use such mechanisms, the Commission recalls that, in its deliberation No. 2021-011 mentioned above, it solemnly drew the attention of the legislator to the change of nature and extent of this type of device compared to conventional video protection . It reiterates its proposal to condition the use of airborne cameras on prior experimentation, the duration of which would be limited, in order to ensure that these devices are necessary and always proportionate with regard to the determined purposes. Even outside of an experimental framework, the publication of a report evaluating the effectiveness and proportionality of these devices by the police forces would also be relevant, after an initial period of use.Secondly, with regard to the purposes for which the use of airborne cameras would be made, the Commission notes that their use is greatly reduced compared to article 47 of the law for global security preserving freedoms. Indeed, this article generally authorized, with the authorization of the public prosecutor or the investigating judge, the use of drones to observe, research or prosecute all crimes and misdemeanors punishable by more than five years' imprisonment and all other offences, including all fines, provided that it is particularly difficult to proceed with the search or finding by other means. The draft text submitted to the Commission no longer provides for these purposes and the Commission deduces from this that the use of airborne cameras, for judicial police purposes, will only be possible under the conditions of the ordinary law of criminal investigations, governed by the Code of Criminal Procedure (CPP), under the supervision of the public prosecutor or the investigating judge. On the other hand, the draft text retains the purposes relating to the administrative police. In general, the draft text requires that the use of cameras be strictly necessary for the exercise of the missions concerned and adapted to the

circumstances of each intervention. It cannot be permanent, which the Commission considers satisfactory. With regard in particular to the uses of airborne cameras for the administrative police, it is also provided that their use can only be authorized when the service concerned is unable to achieve the purpose pursued by other means or when the use of these other means would be likely to lead to serious threats to the physical integrity of the agents. This necessity will have to be assessed on a case-by-case basis, with regard both to the principle of using airborne cameras and to the determination of the geographical and temporal scope of these authorizations. Beyond this condition of necessity, it is advisable to s ensure that each purpose constitutes a proportionate use of airborne cameras, given the invasion of people's privacy. Thus, the use of airborne cameras would be authorized in particular for the prevention of attacks on the security of persons and property and would be limited to places particularly exposed to the risk of aggression, theft or trafficking in arms, human beings or narcotics. The Commission considers that the use of these devices should be reserved for the fight against offenses of a high degree of seriousness and that the draft law should be clarified with regard to the qualification of the risks of theft, which can be interpreted very broadly with regard to the wording used. As regards gatherings of people on the public highway or in places open to the public, the Commission recalls that it has emphasized that it is particularly imperative to ensure that the interference with the exercise of other fundamental public freedoms is limited to what is strictly necessary. It notes, in this regard, that a condition of risk of serious disturbance to public order is provided for in order to allow the implementation of these measures. Finally, the Commission observes that certain purposes are stated in a general manner for less imperative objectives of public security. On this point, it recalls that it had considered, in its aforementioned deliberation No. 2021-011, that the proportionate nature of the use of drones in order to allow, in general, the regulation of transport flows and the protection of buildings and public installations and their immediate surroundings, when they are particularly exposed to risks of intrusion or degradation, was not demonstrated. Although it observes that additional safeguards have been added to the bill, it considers that this observation remains relevant These purposes may in fact allow, in theory, the circulation of a large number of airborne cameras for long periods, for objectives that do not focus on the most serious breaches of public order. On the other hand, it considers that, in the light of the decision of the Constitutional Council and the guarantees provided, the purpose of helping people can be accepted. As regards the places concerned for the implementation of these purposes, the Commission observes that they could be places open to the public as well as private places. In the absence of details on the private places concerned, in particular with regard to homes, it considers that the draft law should more strictly restrict the perimeter of the places

concerned and, in particular, limit the private places concerned only to uncovered places, with the exception of purposes for which entering a building is really relevant and proportionate (such as rescuing people). It invites the government to further specify the cases and conditions allowing airborne cameras to film private parties. Thirdly, with regard to the guarantees governing the use of airborne cameras, the Commission points out that such devices must be subject to guarantees with regard to the provisions of the GDPR and directive 2016/680 of April 27, 2016. It underlines that following its opinion no. had been submitted, to better regulate the use of drones by State services contributing to internal security and national defence. Thus, a prohibition of sound recording, automatic analysis or facial recognition, as well as any form of automated connection had been provided; issuing guidelines in accordance with the recommendation of the Commission; a duration for erasing the images after thirty days set at the legislative level; a judicial or prefectural authorization mechanism depending on the purpose; details on the procedures for informing the public. It notes in particular that the following are planned: a double quota on the number of airborne cameras, both at department level by ministerial decree and in each prefectural authorization issued; a ban on sound recording and automated facial recognition processing; a ban on carrying out automated comparisons, interconnections or links with other processing of personal data; a ban on operating them permanently; a ban on viewing images from inside homes or their entrances. The Commission approves the principle of a quota at departmental level, which is likely to quantitatively limit the intensity of surveillance by all types of video instruments available to the police and gendarmerie, apart from individual cameras controlled by other provisions of the CSI or the on-board cameras discussed below. It welcomes the fact that the legal retention period for recordings, when they are not added to a procedure, has been lowered to ten days. However, it makes the following observations. The Commission recalls that it had considered that the details provided in the legislative and regulatory standards should be supplemented by the publication, by the Ministry, of a doctrine for the use of airborne cameras. This act of flexible law could make it possible to specify the main cases of use relevant for each of the purposes, the methods of use according to these cases of use (number and duration) and the practical precautions to be taken. It notes that the Ministry has specified that it is planned to update the various employment doctrines on this point. As regards the duration of the authorization, it is issued for a maximum duration of six months, renewable under the same conditions. For the purpose relating to the safety of gatherings of people on the public highway or in places open to the public, the authorization is only issued for the duration of the gathering concerned. The Commission does not have any information to justify such a duration with regard to all the purposes provided for by the bill. It requests, on the one hand, that

provision be made for the need for the authorization to be re-examined when it is possibly renewed and, on the other hand, that an authorization must be revoked as soon as it appears, after a sufficient time, that the risk is no longer proven. The relevant durations being variable according to the purposes, the doctrine of use could also make it possible to refine the relevant durations, according to the cases, within the limit of this maximum duration of six months. The draft article L. 242-5 of the CSI further provides that when they are implemented on public roads, these devices are used in such a way that they do not display images of the interior of homes or, specifically, those of their entrances. The Commission points out that the checks it carries out demonstrate the difficulty, for existing fixed camera systems, of complying with the ban on filming the interior or entrances of residential buildings: the technical measures put in place are often insufficient , or even inoperative. It can therefore only wonder about the effective nature of the technical guarantees provided for by the draft law with regard to mobile devices. 242-3 of the CSI that the public is informed by any appropriate means of the implementation of airborne image capture devices and of the responsible authority, except when circumstances prohibit it or when this information would conflict with the objectives pursued. General public information on the use of airborne image capture devices is also organized by the Minister of the Interior. While the Commission observes that this provision is not amended by this draft law, it nevertheless observes that such exceptions make it possible to derogate very widely from the obligation to inform persons and considers, therefore, that they should be specified by regulation.On the provisions relating to on-board camerasArticle 9 of the bill aims to create a legal framework for the capture of images by means of video devices installed in the various means of transport used by the services of the State (on-board cameras). At the outset and in general, the Commission refers to the observations and recommendations it has made with regard to airborne cameras and to the recommendation that prior experimentation be carried out. It notes that the purposes provided for by this specific system are considerably reduced compared to the law of May 25, 2021 for overall security preserving freedoms, since their use is limited to the sole purpose of ensuring the security of their interventions […] when an incident occurs or is likely to occur, given the circumstances or the behavior of the persons concerned and that the general purposes of finding and prosecuting any type of offense, surveillance of coasts, borders and internal waters are no longer provided for , etc. Recording is not permanent and must be triggered when it appears relevant. Among the guarantees provided is the indication, by a specific visual or sound signal, that the camera is recording. This regime strongly brings this device closer to the individual cameras that the police and gendarmes can wear. The Commission notes that some of the deleted purposes may be pursued by using cameras inside aircraft driven by a pilot, according to the regime

and the restrictions set out above, but not in a land vehicle. It refers to its observations on airborne cameras and makes the following additional observations. Firstly, the bill provides that the public authorities mentioned in Articles L. 242-5 and L. 242-6 of the CSI may be authorized to proceed, by means of onboard cameras, to a recording of their interventions when an incident occurs or is likely to occur, having regard to the circumstances or the behavior of the persons. The Commission asks the Government that, either the law or the implementing decree provided for by these provisions, specify the conditions of use, as has been done for the individual cameras of police and gendarmerie officers. Secondly, with regard to the information of the persons concerned, it is planned that the public be informed by specific signage affixed to the means of transport, of its equipment by a camera, except in the case of vehicles benefiting from a exemption from identification, with regard to the nature of the assignments . General information for the public on the use of on-board cameras is also organized by the Minister of the Interior. regrets not having been provided with more information on this subject. It notes that this wording will be clarified to indicate that these will be vehicles not comprising specific equipment or signaling devices and assigned to missions implying the absence of identification of the service concerned. In addition, the bill mentions that a specific visual or sound signal indicates whether the camera is recording, unless the circumstances of the intervention prevent it. The Commission asks the Government to specify, in regulatory provisions, the hypotheses justifying an exemption from information and to reduce them as much as possible.On the provisions relating to the implementation of video surveillance systems within police custody cellsL Article 7 of the bill aims to create a legal framework dedicated to video surveillance devices in police custody cells, placed under the responsibility of the national police and gendarmerie services. Unlike article 41 of the law for comprehensive security preserving freedoms, which was censured by the Constitutional Council in its aforementioned decision no. 2021-817 DC, the planned provisions do not cover video surveillance in the bedrooms of isolation of administrative detention centres. The Commission recalls that, in its aforementioned deliberation giving an opinion on a bill relating to global security, it did not comment on this legal framework, the provisions of which were added after it has delivered its opinion. As a preliminary point, the Commission notes that such systems, which allow permanent surveillance, by their nature seriously infringe the right to respect for private life and to the protection of personal data of individuals already subjected to measures restricting freedoms. Such an attack can therefore only be accepted if it appears strictly necessary for the aim pursued and if strong guarantees are provided, such as to ensure the proportionality of the measures implemented. It also stresses that the development of this type of device is likely to lead to their use becoming commonplace and to replace human surveillance

resources. Firstly, the Commission observes that it is planned that the police services and the national gendarmerie will be authorized to implement video surveillance systems within police custody cells when there are serious reasons to believe that a person placed in police custody could attempt to escape or represent a threat to themselves or others. According to the Ministry, these video surveillance devices in police custody facilities will complement, without replacing them, the human means of surveillance of persons in police custody and are intended to ensure the safety of those in police custody, both vis-à-vis themselves (for example, risk of suicide or self-harm) than vis-à-vis other people when it comes to collective custody cells. In addition, the Ministry indicates that these devices are intended to help prevent the risk of escape for persons in custody. The Commission regrets that it has not received any information relating to the number of escapes or attempts to escape from custody. It considers that the use of this type of video surveillance should only be of a subsidiary nature. Subject to this reservation, it notes that the purposes as specified above by the Ministry appear legitimate.Secondly, the Commission recalls that the use of such intrusive systems can only be accepted subject to the strict necessity of their use. with regard to the objectives pursued and the proportionality of their conditions of implementation. In this respect, compliance with the requirement of necessity requires in particular that recourse to less intrusive alternative solutions does not make it possible to achieve the same objectives. services in order to determine the practical methods of using video surveillance as well as the role of personnel in charge of viewing, in addition to direct surveillance. In this respect, it considers that the clarifications provided in the standards should be supplemented by the publication by the Ministry of guidelines making it possible to determine precisely the cases in which it is necessary to use such video surveillance devices.Thirdly, concerning the proportionality of the planned devices, the Commission notes that certain guarantees have been provided for in the draft law, namely that no biometric or sound recording device is coupled with these video surveillance processing operations. Furthermore, it considers that the bill should be supplemented in order, in particular, to provide for the absence of recourse to automated image analysis algorithms. It also considers it desirable that the bill be supplemented or clarified on the points developed below. On the one hand, with regard to the duration of the placement of the person in custody under video surveillance, which cannot exceed four hours, the Commission considers that this duration does not appear manifestly excessive in view of the purposes of this placement under video surveillance. It also notes that, beyond this period of twenty-four hours, the placement of the person under video surveillance can only be extended with the agreement of the competent judicial authority and for periods of the same duration, until 'on the lifting of police custody. In addition, if the

Commission notes that, unlike article 41 of the law for comprehensive security preserving freedoms, this bill does not refer to the opinion of the doctor that can be obtained, in particular before any decision to renew the measure, it notes that the provisions of the CPP provide that this opinion can be requested when the decision to place them is taken and then each time the police custody is extended (article 63-3). It also notes that this doctor's opinion is compulsory for the placement in police custody of minors and for any police custody exceeding forty-eight hours. The Commission considers, however, that a compulsory doctor's opinion could be added, as a guarantee, in certain cases, in particular for the extension of the use of these devices for the purposes of preventing the risk of suicide. On the other hand, the draft of law indicates that the images from the video surveillance system, including in real time, may be consulted by the head of department or his individually designated and specially authorized representative. The Commission considers that this wording is particularly broad and does not make it possible to limit the consultation of the images to what is strictly necessary. Given the fact that projected video-surveillance devices will be particularly intrusive in that they will be able to film places of intimacy, it considers that it would be useful to specify the cases in which the images may be consulted and, in particular , to provide specific guarantees for minors. The Commission considers that the draft law should expressly indicate the sole purposes for which such consultation of images may be carried out. The Commission also stresses the importance of raising awareness and training the personnel concerned. Finally, the methods of use of the data collected must be specified by decree in Council of State, issued after consulting the National Commission for the computing and freedoms. This decree must determine the technical measures implemented to guarantee the security of the recordings and ensure the traceability of access to the images. The Commission considers that this decree should also provide for other safeguards such as, for example, the prohibition on these devices being able to carry out automated comparisons, interconnections or links with other processing of personal data or even the characteristics screens intended to guarantee the privacy of the person while allowing the reproduction of opacified images. On the planned modifications of the national file of persons prohibited from acquiring and possessing weapons (FINIADA)Title IV of the bill includes several provisions relating to the strengthening of arms and explosives controls, which relate in particular to the methods of implementation of FINIADA. Firstly, article 10 of the bill amends article L. 312- 3 of the CSI in order to complete the list of persons prohibited from acquiring and possessing arms, ammunition and their elements by adding the persons nt the object of such a ban on the acquisition and possession of weapons within the framework of a judicial control, house arrest with electronic monitoring or any other decision pronounced by the judicial authority. This provision aims in particular to extend the

scope of FINIADA to pre-sentence decisions such as judicial review measures that may be taken by an investigating judge (articles 138 (14°) and 139 of the CCP), and to post-sentence measures such as security measures (for example, pursuant to articles 723-29 and 723-30 of the CPP). The Commission notes that these are therefore not convictions handed down by criminal courts or measures decided by the civil court or by the administrative authority. Without calling into question the appropriateness of such a modification, however, the Commission considers that the terms or any other decision pronounced by the judicial authority are particularly broad and should be specified, taking into account the preceding elements.Secondly, the Commission observes that Article 10 of the draft law provides to derogate from article 777-3 of the CPP in order to allow the interconnection between the national automated criminal record and FINIADA, to ensure the registration in the file mentioned in article L. 312-16 of persons prohibited from acquisition and possession of arms, ammunition and their components of categories A, B and C pursuant to 1° of article L. 312-3. With regard to the practical arrangements envisaged, the Commission also takes note of the clarifications provided by the Ministry according to which the personal data covered by this interconnection would concern data relating to the civil status of the convicted person (in particular his surname, first name, date and place of birth, nationality) as well as information relating to the conviction (in particular the category or type of weapon and ammunition the acquisition, possession and carrying of which are prohibited or the confiscation of which has been pronounced, the dates of the court decision and its meaning, the period of prohibition, etc.). The envisaged flow is one-way (from the criminal record to FINIADA) and automated. The Commission considers the planned interconnection to be relevant and proportionate with regard to the purpose pursued. However, it recalls that technical and operational details will have to be provided. Thirdly, with regard to the duration of registration with FINIADA, draft article L. 312-16-2 of the CSI provides that registration is pronounced for a period of five years at most and that it can be maintained for the same period, by the representative of the State in the department in consideration of the behavior of the applicant or his state of health or for reasons of public order or personal safety. With regard to the duration of registration with FINIADA, the Commission notes that it may be for a maximum of five years when the registration results from a decision ordering the confiscation of war materials, weapons, ammunition and their components in accordance with 2° of Article L. 312-3. It notes that this provision does not concern the other measures listed in 2° of Article L. 312-3 of the CSI, in particular pre-sentence and post-sentence measures. It nevertheless considers, in the light of these details, that the drafting of the bill could be clarified on this point. It considers, in any event, that the duration of registration should be strictly proportionate and that care should be taken to ensure that the data

is properly updated. On article 16 of the bill on descriptive records forcedInserted in Title VI (miscellaneous provisions relating to criminal matters), this article, referred to the Commission for an opinion under Article 8-I-2° e) of the law of 6 January 1978 as amended, aims to improve the identification of persons suspected of having committed offenses by making it possible, despite the refusal of the person concerned, to take their fingerprints or palm prints or to take a photograph, when they are suspected of 'having committed a crime or misdemeanor punishable by at least three years' imprisonment. The bill also provides for the addition of a section within the code of criminal justice for minors. It appears from the provisions envisaged that the forced statement may concern minors and that, in this case, the use of coercion will only be possible for the minor who appears to be at least thirteen years old and if the offense with which he is charged constitutes a felony or misdemeanor punishable by at least five years' imprisonment. The Commission observes that it is now provided that the refusal, by a person against whom there are one or to suspect that he has committed or attempted to commit an offence, to submit to these operations of identifying records ordered by the judicial police officer, is an offense punishable by a sentence of one year's imprisonment and 15,000 fine euros (articles 55-1, 76-2 and 154-1 of the CPP). According to the Ministry, this offence, which currently constitutes the only possibility of inciting a defendant who refuses to give his identity to submit to the operations of identification records, remains insufficient insofar as the courts and the investigation services are still confronted significant difficulties in identifying the persons implicated. This identification would nevertheless be essential in order to make it possible, in particular, to make connections with unsolved facts, to become aware of the possible criminal record of the person in question and to adapt, if necessary, the criminal response, as well as to apply to the person in question the penal system corresponding to his identity and his age. As a preliminary point, the Commission stresses that the provisions concerned, which allow the forced taking of both fingerprints and palm prints as well as photographs, present important issues in terms of civil liberties which go beyond the sole considerations of the protection of personal data. While it will be up to Parliament to decide on the advisability of such a principle, it considers that this possibility cannot be allowed without the implementation of strong guarantees, in particular for minors. In this respect, the Commission regrets that it has not been provided with all the information enabling it to make an informed decision, in particular with regard to the methods of implementing this forced statement, the means of constraint envisaged and the reality of the need for such a device. In this respect, compliance with the requirement of necessity requires in particular that the use of less intrusive alternative solutions does not achieve the same objectives. Firstly, the Commission notes that the data collected will be intended to be recorded in the automated fingerprint file

(FAED), for fingerprints and palm prints, and in the processing of criminal records (TAJ) for photographs. The Commission observes that these categories of data are already recorded in the FAED and the TAJ.Secondly, the Commission notes that this operation may concern minors, on the condition that this operation constitutes the only means of identifying the minor who refuses to prove his identity or provides clearly inaccurate identity elements, that the minor appears to be at least thirteen years old and that the offense with which he is accused constitutes a crime or misdemeanor punishable by at least five years imprisonment. In general, the Commission recalls that minors must be the subject of special protection. In addition, insofar as sensitive data, namely biometric data, will be collected, it recalls that the processing of such data is authorized only in the event of absolute necessity, subject to appropriate safeguards for the rights and freedoms of the person concerned. .In this respect, the Commission notes that it is provided that the constraint can only be carried out in a strictly necessary and proportionate manner, after prior notification of the minor's lawyer and his legal representatives or the appropriate adult. It also takes note of the clarifications provided by the Ministry that the age of thirteen will be assessed by the investigator on the basis of apparent and objective physical characteristics. The assessment will be made in concreto, on the basis of a range of clues, from the general attitude of the respondent, the construction of the speech, his pace. In case of doubt, the situation will benefit the questioned, and no coercion will be used. Without disregarding the competence of the officer or judicial police officer responsible for assessing the apparent age of the minor authorizing the forced impression taking, the Commission suggests that, in situations where the minor's apparent age appears to be close to thirteen, either seek the advice of a doctor or any other professional with detailed knowledge of the physical, morphological and mental characteristics of an adolescent of at least thirteen years old.The PresidentMarie-Laure DENIS