Deliberation 2021-116 of October 7, 2021Commission Nationale de l'Informatique et des LibertésNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Friday December 10, 2021NOR: CNIX2133368Deliberation n° 2021-116 of October 7, 2021 providing an opinion on a draft decree creating an automated processing of personal data aimed at detecting and characterizing foreign digital interference operations for the purpose of manipulating information on online platforms (request for opinion no. 21013837) National Commission for Computing and Liberties, Seizure by the Secretary General for Defense and National Security of a request for an opinion concerning a draft decree creating an automated processing of personal data aimed at detecting and characterize foreign digital interference operations for the purpose of manipulation of information on online platforms; Considering the modified law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms, in particular its article 31-II and its title IV; After having heard the report of Mrs Isabelle LATOURNARIE-WILLEMS, commissioner, and the observations of Mr. Benjamin TOUZANNE, Government Commissioner, Issues the following opinion: The purpose of the processing referred to the National Commission for Data Processing and Liberties (hereinafter the Commission) is to characterize operations of foreign digital interference likely to harm the fundamental interests of the Nation through the collection and exploitation of publicly accessible content published on the Internet by users of online platform operators. This processing is intended to be implemented by a service with national competence called the service of vigilance and protection against foreign digital interference (Viginum), created by decree n ° 2021-922 of July 13, 2021, attached to the secretary general of defense and national security (SGDSN). The Viginum service will act as data controller. Insofar as the planned processing concerns the defense and the security of the State, and that the data mentioned in I of article 6 of the law of January 6, 1978 as amended are likely to be recorded, the latter must the subject of a Conseil d'Etat decree issued after a reasoned opinion from the Commission. Viginum's activity is part of a global context of the fight against the manipulation of information. The SGDSN argues that the dissemination of false information has become widespread on online platforms, in particular with the development of social networks, and affects both election periods and other fields of public debate (news or significant social events). The legislator has strengthened the legal arsenal making it possible to fight against the publication of false information during election campaign periods, in particular with law n° 2018-1202 of December 22, 2018 relating to the fight against the manipulation of information, while that the State services have set up an interministerial coordination network (committee to fight against the manipulation of information). The Government wishes to strengthen this system by setting up an operational service intended to detect at any time digital

information threats from abroad using a computer tool that the draft decree, submitted for the opinion of the Commission, is intended to provide a framework. The processing is justified by the legitimate objective of preserving the sincerity of democratic debate and of combating attacks on the fundamental interests of the Nation. The Commission nevertheless considers that the implementation of such processing is not neutral on the exercise of public freedoms given the general economy of the processing and the consequences that this processing is likely to have on certain rights and fundamental freedoms, including freedom of expression and freedom of opinion. In addition, the Commission notes that the processing envisaged is based on permanent monitoring and, because it may concern all fields of public debate, is likely to allow massive collection of data at any time. Such attacks can only be accepted if sufficient safeguards are provided. The Commission considers that particular attention should be paid to the principle of transparency towards the general public and to the principles of data minimization and privacy by design, limiting the processing of data not relevant to of the purposes pursued and by limiting the periods during which this processing can be implemented. On the general economy of the processing of personal data envisaged The system under consideration will be broken down into several phases. First of all, a monitoring and detection phase must make it possible to monitor relevant information on current topics in order to identify the actors or events of interest with regard to the missions of the Viginum service. At this stage of the processing, the Viginum service endeavors to detect a suspicion relating to the dissemination of allegations or allegations of manifestly inaccurate or misleading facts before initiating the collection operation. This phase will lead to the drafting of so-called traceability sheets which will determine the technical elements (keywords, semantic elements such as hashtags, encrypted elements, reconciliation between profiles or groups of interest profiles, etc.) which will allow, after human validation, guide the collection operation by selecting the content necessary for the characterization mission. The collection of personal data is then activated on all the platforms identified as relevant, in particular by techniques for extracting the content of sites, via scripts or automated programs (webscraping) or the use of provision of data provided by the platforms (or API, for Application Programming Interface), for an initial period of seven days. The data thus collected is then subject to automated technical processing in order to separate the information to be kept (those which correspond to the categories of data forming the previously defined data model) from those which must be immediately deleted. The data retained at the end of this operation will then be used and analyzed in order to confirm, if necessary, the presence of a foreign digital interference operation. The data used may be extracted for the purposes of drawing up analysis notes which may be transmitted to various state services and administrations as well as to foreign counterparts. Firstly, the

Commission notes that the processing envisaged raises difficulties particular in terms of proportionality. First of all, it involves an automated collection of data published on various platforms (in particular social networks), in very large quantities and likely to occur at any time. This information is likely to reveal information on a significant number of aspects of the private life of the persons concerned, including sensitive information, such as political opinions, religious or philosophical beliefs as well as the state of health or the sexual orientation, whereas such data enjoy special protection. Thus, the envisaged processing leads a public authority to collect data relating to the activity of persons on the online platforms where they are registered, thus potentially having particularly rich and precise information on them, independently of any investigation. criminal or legal proceedings and outside the framework provided for intelligence techniques. In addition, the automated collection of a large number of data from the platforms concerned, according to certain parameters determined in advance (within the so-called traceability sheets) , involves the collection and processing of data that are not relevant to the purposes pursued.Secondly, the Commission stresses, in view of the volumes of data potentially collected, the need to ensure external control that is effective and adapted to the specific characteristics of the processing envisaged, in order to guarantee that this falls within the limits and criteria defined in arti cle 1 of the draft decree and, therefore, concerns the dissemination of allegations or allegations of facts that are manifestly inaccurate or misleading. In particular, it could be up to the ethics and scientific committee, created by decree no. 2021-922 of July 13, 2021, to effectively ensure that collection operations are only triggered in the light of sufficiently justifying elements, and for a relevant data scope. The committee's resources should be proportionate to its missions, so that it can react quickly to any traceability sheet transmitted. Thirdly, the Commission stresses that certain personal data, present in the analysis notes mentioned above, will be addressed to multiple state services and administrations as well as to foreign counterparts, under the conditions detailed below. because of the number of people concerned (potentially several hundred thousand people) and the volume of data whose collection can be triggered at any time, than the absence of external control in the project of which it has been entered. This observation guides the observations that the Commission intends to make on the guarantees that the text governing such a system should provide.On the nature of the text authorizing the creation of processingThe Commission notes that the implementation of such processing will take place de facto in the field of public freedoms. Indeed, the existence of this monitoring which, unlike the procedure set up by the law of December 22, 2018, is not limited in its duration, is likely to have consequences on the exercise of the freedom of opinion and expression of the users of the platforms concerned, since the collection of all publicly accessible data on the online platforms

of the operators mentioned in I of Article L. 111-7 of the Code of consumption is likely to modify their behavior. Some of them could, in fact, choose not to express themselves in order to avoid the collection of data concerning them. It therefore considers that a particularly serious infringement of the right to respect for private life and the protection of personal data is characterized. Such infringements can only be accepted if they appear strictly necessary for the aim pursued, and if sufficient guarantees with regard to respect for the fundamental principles of the right to the protection of personal data are provided. However, the Commission calls the attention of the Government on the fact that the legislator previously considered that it was up to him to set the rules in terms of the fight against the manipulation of information (law n ° 2018-1202 of December 22, 2018) and concerning the systems for collecting data accessible on social networks intended to be implemented, for example, by the center of expertise for digital regulation (draft law relating to the regulation and protection of access to cultural works in the era Digital), the Higher Audiovisual Council (Article 42 of Law No. 2021-1109 of August 24, 2021 confirming respect for the principles of the Republic), the tax administration and the administrative tion of customs and indirect duties (article 154 of the finance law for 2020). In view of the foregoing, the Commission considers it desirable to leave the possibility to the legislator, at the end of a democratic debate, to assess the proportionality of such a device and to set the rules by framing and limiting the use, as well as the methods of its control.In addition, the Commission wishes to make the following observations.Guarantees to be provided by the text governing the processingAs a preliminary point, the Commission recalls that the legality of the device may be controlled by the Commission within the framework of the powers of control provided for in article 19 of the modified law of January 6, 1978 (hereinafter the Data Protection Act). On the purposes of the processingThe second paragraph of Article 1 of the draft decree provides that the purpose of the processing is the collection and use of publicly accessible content on online platforms. The Commission recalls that the collection is only a means and that the purpose of the processing is described in the first paragraph of Article 1, namely the characterization of operations involving, directly or indirectly, a foreign State or an entity non-state, and aimed at the artificial or automated, massive and deliberate dissemination, by means of an online public communication service, of manifestly inaccurate or misleading allegations or imputations of facts likely to harm fundamental interests of the Nation (disorders of public order, destabilization of elections, etc.). The Commission takes note of the Government's commitment to specify the purpose in the draft text governing the processing. ; revealing a malicious intention against the fundamental interests of the Nation with the central objective of destabilization; and attributable to a supposed foreign origin, State or non-State. by a so-called traceability sheet which will determine the relevant indicators to

be followed (keywords, semantic elements such as hashtags, figures, reconciliation between profiles or groups of interest profiles, etc.). It draws the Government's attention to the need to define collection operations more precisely in the traceability sheets. It notes that the compliance of these traceability sheets with the purposes defined in Article 1 is not subject to any external control. In view of the foregoing, the Commission considers that the purpose of detecting and characterizing an operation of foreign digital interference is determined, explicit and legitimate, in accordance with 2° of article 4 of the Data Protection Act. On the different processing phases The Commission notes that the draft decree only regulates processing from the characterization phase. However, as detailed above, the characterization phase is preceded by a monitoring and detection phase, carried out using automated or human means, which involves the processing of personal data. Moreover, it appears essential that the decree provide for this operation, which aims to guarantee that a data collection operation is only triggered when there is a sufficiently substantiated suspicion of the dissemination of allegations or imputations of facts that are manifestly inaccurate or misleading. On the categories of personal data With regard to the notion of publicly accessible content and the platforms concerned Article 1 of the draft decree limits the collection of data to content publicly accessible on the online platforms of the operators concerned. Article 3 of the draft authorizes the creation of dedicated accounts on the platforms concerned as well as accounts intended to be used via APIs. The Commission notes that the reference to publicly accessible content in the draft decree excludes content subject to restricted access, in particular when it requires a prior access request or a connection validation step (for example, a closed group on a social network or an online messaging service) . However, it notes that the scope of the platforms concerned by the draft article is particularly wide. In the state of the justifications provided, it wonders about the need to target all the platforms mentioned in I of Article L. 111-7 of the Consumer Code, some of which do not seem relevant with regard to the the objective pursued (for example, with regard to online platforms for connecting several parties with a view to the sale of a good, the supply of a service). In any event, the Commission considers that the choice of the platforms concerned must be documented and justified with regard in particular to their systemic nature and the number of subscribers. In this regard, it takes note of the Government's clarification that the platforms concerned are only those exceeding a connection threshold of 5 million unique visitors per month and per platform. and in order to avoid any confusion over the term collection, the Commission draws the attention of the SGDSN to the need to differentiate, in the text authorizing the processing, the notions of collection and storage, which cover different meanings in the draft decree. Indeed, the categories of data referred to in Article 4 of the draft decree only concern those intended to be kept,

and not all the data likely to be collected. The Commission takes note of the Government's commitment to modify the draft text governing the processing on this point. The draft decree provides that the collection operation triggered from the traceability sheet may in practice lead to exceeding the categories referred to in Article 4 of the draft decree, when they are linked to the indicators previously defined in the context of these sheets. These extracted data will be immediately and automatically reprocessed to delete those which exceed the categories of article 4. Due to these technical methods of collection which would result from operational constraints and which lead to the processing of data not relevant to the purposes pursued, which will ultimately not be stored, the Commission draws the Government's attention to the need to put in place appropriate safeguards to ensure compliance with the principles of data minimization and data protection by design. the Commission considers that the monitoring and detection phase, which will make it possible to determine, within so-called traceability sheets, the elements of the collection (keywords, semantic elements such as hashtags, encrypted elements, reconciliation between profiles or group of interest profiles, etc.), must make it possible to ensure that only information relating to the themes and presumed foreign actors of interest are collected. This two-stage processing must ensure that all personal data publicly accessible on online platforms is not collected. Secondly, it emphasizes the need to ensure the effectiveness of the measures allowing, at the end of their collection, to proceed to the immediate deletion of data considered as irrelevant for the exploitation phase, in the absence of technical processes allowing to operate, upstream of the collection, a distinction as to the nature of the data collected.Thirdly, it considers that binding technical measures must be provided to guarantee that no one will access those of the data collected which will be identified as having to be immediately and automatically deleted. However, it notes that certain individually authorized administrators may have access to the data deletion tool. In this respect, it recommends that the actions of activation, modification and access to this automated process are not technically possible for agents of the Viginum service and that these accesses be subject to logging measures to guarantee the reliability of the associated traces, as well as their regular analysis in order to detect unauthorized access. In addition, article 5 of the draft decree provides that irrelevant data is immediately destroyed. The Commission considers that this wording fails to indicate the stage preceding the destruction of the data. It invites the Government to specify, in the text governing the processing, that irrelevant data must be destroyed immediately after the collection operation, thus guaranteeing that access by human operators will only be possible for the data referred to in Article 4 of the draft decree. Finally, it emerges from the draft decree that only data publicly accessible on online platforms can be collected. The decree provides that the Viginum service may use subcontractors: the data thus collected will

be on the instructions and under the responsibility of Viginum. The Commission also stresses that, if it were possible to obtain additional data from third parties, it would be desirable for this method of collection to be mentioned in the decree. The data thus obtained should then correspond to the sources and categories of data provided for by the decree, have been collected by these third parties under conditions respecting European and French regulations protecting personal data, and be processed for the purposes provided for by the decree. and in compliance with its provisions.As regards the definition of the categories of data retainedThe categories mentioned in Article 4 of the draft decree call for the following observations.Firstly, the Commission considers that the notion of characterization data of the activity and audience of the accounts does not make it possible to precisely understand the scope of this category of data. It includes exchanges with the Government that the characterization of the activity may include the collection of data contributed or relayed by the user, and not simple information describing the intensity or certain methods of use of the account. It asks it to specify the text governing the processing on this point. Secondly, the Commission invites the Government to specify, in the draft text governing the processing, that the identification data declared by the holders of accounts opened on the online platforms concern the declarative data that appear on the account, in order to avoid any confusion with the identification data defined by law n° 2004-575 of June 21, 2004 for confidence in the digital economy. The Commission takes note of the Government's commitment to complete the draft text governing processing on this point. Thirdly, the Commission considers that the collection of publications disseminated by means of the accounts and the associated audience indicators is likely to reveal important parts of the privacy of Internet users. It will therefore be particularly important that the data which would prove useless for the detection of manipulation of information of foreign origin be destroyed as soon as possible, even before the maximum duration of exploitation of four months fixed by article 9. of the draft decree. Finally, the Commission recalls that any change in the categories of data must lead to a modification of the text. With regard to the processing of special categories of personal data Article 6 of the draft decree specifies that the information collected may contain sensitive data, within the meaning of Article 6 of the Data Protection Act. The Commission notes that the collection of such data is inherent to the activity of the Viginum service. The guarantees highlighted by the Commission (immediate and automated deletion of irrelevant data, transparency, etc.) must be applied with all the more rigor in the use and storage of this data. Moreover, it considers that certain categories of data are likely to raise particular difficulties such as, for example, photographs. While it takes note of the clarifications provided, according to which no facial recognition device will be implemented, it nevertheless requests that the text governing the

processing expressly exclude the possibility of using it, to which the Government has undertaken.S Regarding the collection periods and the historical depth of the data collectedThe period during which the data can be collected, at the end of the monitoring and detection phase, is limited to seven days and can be renewed following control and human validation. The Commission considers that the text governing the processing should specify the duration of the collection and invites the SGDSN to document, in the context of the traceability sheets, the reasons for any renewals. The Commission takes note of the Government's commitment to complete the draft text governing the processing by specifying the collection period. Finally, the historical depth of data recovery may concern several years as well as only a few days depending on the subject studied. and the anteriority necessary to understand the situation (for example, the identification of so-called wake-up periods for particular events may justify a long recovery period). The data recovery period cannot therefore be uniform and predetermined. The Commission therefore invites the Government to define the data recovery period on a case-by-case basis, which must be documented in the context of the traceability sheets. On the retention period of the personal data retained Article 9 of the draft decree provides that the data collected are destroyed at the end of their exploitation and, at the latest, at the end of a period of four months from the date of their collection. The Commission takes note of the retention period adopted by the SGDSN and recalls that this is a maximum duration: data considered irrelevant for the exploitation phase must be deleted immediately, without waiting for the expiry of the four-month period.On the production of analysis notesS With regard to the preparation of analysis notes Article 10 of the draft decree provides that the data used are extracted for the purposes of the preparation of analysis notes. The SGDSN specified that the analysis notes o Its purpose is to report the results of the analyzes carried out by the Viginum service and to propose prospects for action to be implemented as part of monitoring operations. In this context, these notes are likely to contain personal data necessary for the characterization of a foreign digital interference operation and its attribution or attribution; no limitation is provided for their retention. The Commission considers that the data contained in these notes must imperatively be limited to what is strictly necessary and only concern accounts having a direct link and established with the characterization of a digital interference operation foreign: under no circumstances may these notes contain data from Internet users in good faith who have, for example, relayed false information. Their data should be destroyed at the end of the exploitation. The Commission considers that in the current state of its drafting, the draft decree does not provide enough guarantees on this point, and therefore invites the Government to specify in this sense the text framing the treatment. In addition, it recalls that a retention period must be provided for, in accordance with 5° of article 4 of the Data

Protection Act. With regard to the transmission of analysis notes Article 12 of the draft decree provides that the analysis notes may be transmitted to various state services and administrations as well as to foreign counterparts. of accounts linked to foreign interference, the Commission considers that the transfer of analysis notes to third parties should be regulated more precisely. Firstly, the Commission regrets that the list of recipients of analysis notes is imprecise. First of all, it notes that the ethics and scientific committee, created by article 5 of decree n° 2021-922 of July 13, 2021, is not mentioned in article 12 of the draft decree, whereas the SGDSN has confirmed that it will receive the analysis notes to fulfill its missions. The Commission takes note of the Government's commitment to supplement the draft text governing processing on this point. In addition, the SGDSN specified that the reference to the administrative authorities participating in the bodies for coordinating interministerial work on protection against foreign digital interference operations referred to the administrative authorities participating in the committee to fight against the manipulation of information that it steers. This committee is made up of representatives from the Ministry for Europe and Foreign Affairs, the Ministry of the Interior, the Ministry of the Armed Forces, the Ministry of Culture, the Ministry of Justice, the Ministry of National Education, the spokesperson for the Government, certain Prime Minister's services and certain intelligence services. The Commission therefore considers that the text governing the processing must mention all the recipients of the analysis notes, including the intelligence services. secondly and lastly, the Commission takes note of the possible transmission of notes to foreign counterparts of the Viginum service. It recalls, in any event, that the transfer of personal data to States not belonging to the European Union must be carried out in compliance with the conditions of Articles 123 and 124 of the Data Protection Act. On information and the rights of the persons concerned Article 13 of the draft decree regulates the procedures for exercising the rights of the persons concerned, with regard to the provisions of Title IV of the Data Protection Act. With regard to the information of the persons concerned The Commission notes that the draft excludes the right to information on the basis of Article 116 of the law but that collective information will be issued on the website of the SGDSN or that of the Viginum service. It insists on the need to deliver information understandable by the greatest number in order to allow Internet users to become aware of the precise conditions under which their personal data are likely to be collected at any time. indirect rights of access, rectification and erasure Article 13 of the draft decree provides that the rights of access, rectification and erasure will be exercised indirectly with the Commission, according to the procedure provided for in article 118 of the Data Protection Act. The Commission considers that the SGDSN has not given reasons allowing it to apply these provisions. It recalls that the exercise of the rights of individuals, and in particular the

possibility of requesting access to the data concerning them, constitutes an important guarantee with a view to preventing breaches of their privacy. It therefore considers that the rights of access, rectification and erasure should, for the sake of transparency, be exercised directly with the Viginum service in application of Article 119 of the Data Protection Act. The direct exercise of data subject rights should apply to all phases of processing. Only the data contained in the analysis notes, due to their sensitivity, could legitimately be the subject of indirect rights of access, rectification and erasure with the Commission. On the use of algorithmic processing for the Content analysis The SGDSN provides for the use of algorithmic processing to analyze the content collected, and in particular the use of image recognition techniques, in particular to assess whether or not the activity of certain accounts is authentic. Commission points out that many flaws have been identified in the use of such techniques, which have sometimes had discriminatory impacts on people. The Commission therefore recommends that, if they are used, these tools be the subject of an in-depth impact study, in particular with regard to their possible discriminatory biases. It invites the SGDSN to carry out a DPIA for each new algorithm used in the context of the envisaged processing and takes note of the Government's commitment to this effect. On the need to provide an annual report The Commission requests that an annual report on the planned treatment is carried out within a maximum period of one year from the deployment of the device. This report must be made public with the aim of transparency with regard to the persons concerned. This report should be as precise as possible on the collection operations actually carried out. It should contain at least: a summary of the traceability sheets that were used as the basis for data collection; the exhaustive list of Internet sites/sources on which the data was collected; general information on the means used to obtain the data; figures on the exercise of rights; elements on the measures security measures put in place to ensure the confidentiality and integrity of the data collected; general conclusions relating to the operation of the processing, to any difficulties encountered, both legal and technical. The President Marie-Laure DENIS