

Deliberation 2018-325 of October 11, 2018 National Commission for Computing and Liberties Nature of the deliberation:

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Deliberation n° 2018-325 of October 11, 2018 providing an opinion a draft decree amending the provisions of the Defense

Code relating to the security of the processing of personal data whose purpose is based on military status (request for opinion no. 18019310)

The National Commission for Computing and Liberties,

Seizure by the Minister for the Armed Forces of a request for an opinion concerning a draft decree amending the provisions of the Defense Code relating to the security of the processing of personal data whose purpose is based on military status;

Having regard to Convention No. 108 of the Council of Europe for the protection of individuals with regard to automatic processing of personal data;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC;

Having regard to Directive (EU) 2016/680 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 by competent authorities for the purposes of prevention and detection of criminal offences, investigation and prosecution thereof or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA;

Having regard to the Defense Code, in particular its article L. 4123-9-1;

Considering the law n° 78-17 of January 6, 1978 modified relating to data processing, files and freedoms, in particular its article 11;

Having regard to Law No. 2016-731 of 3 June 2016 strengthening the fight against organized crime, terrorism and their financing, and improving the efficiency and guarantees of criminal procedure, in particular its article 117;

Having regard to law n° 2018-493 of June 20, 2018 relating to the protection of personal data, in particular its article 18;

Considering the decree n° 2005-1309 of October 20, 2005 modified taken for the application of the law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms;

Having regard to deliberation no. 2016-388 of December 8, 2016 providing an opinion on a draft decree implementing Article L.

4123-9-1 of the Defense Code;

Having regard to deliberation no. 2018-284 of June 21, 2018 providing an opinion on a draft decree issued for the application of law no. 78-17 of January 6, 1978 relating to data processing, freedoms, amended by law no. ° 2018-493 of June 20, 2018 relating to the protection of personal data; On the proposal of Mr. Jean-François CARREZ, Commissioner, and after hearing the observations of Mrs. Nacima BELKACEM, Government Commissioner, Issues the following opinion:

The committee received a request from the Minister for the Armed Forces for an opinion on a draft decree amending the provisions of the Defense Code relating to the security of the processing of personal data, the purpose of which is based on the quality law n° 2016-731 of June 3, 2016 referred to above inserted an article L. 4123-9-1 within the fourth part of the defense code, which aims to define the conditions under which the aforementioned processing, automated or not, can be implemented. In its initial wording, this article provided, under these same conditions, for the fulfillment of a request for authorization from the National Commission for Computing and Liberties, the systematic carrying out of an administrative investigation into the person responsible of processing as well as on the persons having access to said processing and the possibility of imposing compliance with specific technical requirements. This article also provided that a decree in the Conseil d'Etat, taken after consulting the National Commission for Computing and Liberties, determines its methods of application. a draft decree implementing Article L. 4123-9-1 of the Defense Code in its deliberation No. 2016-388 of December 8, 2016. of the legal framework relating to the protection of personal data and, in particular, of the entry into force of the general regulation on the protection of personal data (GDPR). In this context, it notes that Law No. 2018 -493 of June 20, 2018 amended Article L. 4123-9-1 of the Defense Code, which no longer refers to either the authorization regime or the possibility of imposing compliance with specific technical requirements. Similarly, in its current wording, this article now provides for the performance, optionally, of an administrative inquiry only with regard to the persons who can access the data and this, for the sole purpose of identifying whether these persons constitute a threat to the safety of the soldiers concerned. It also maintains the procedure for requesting an opinion from the National Commission for Computing and Liberties on the decree in Council of State which must specify its methods of application. The commission recalls that this notice, pursuant to article 11-4° a of the amended law of 6 January 1978, must be published. On the scope of the processing concerned:

Article 1 of the draft decree aims to modify Article R. 4123-45 of the Defense Code by removing from the scope of the device concerned, the processing which required in addition to the collection of personal identification data and the collection of at

least one piece of data revealing, by reading it alone, the status of soldier, the collection of at least one item of information relating to private life such as the address or the composition of the family.

The committee notes that now only processing operations are concerned, the purpose of which requires, in addition to the collection of personal identification data, the collection of at least one piece of data revealing, on its face, military status. If it notes that this new wording aims to recall that a data controller may only keep the mention of the military status of the persons whose data are processed if this is strictly necessary for one of the purposes pursued by the processing implemented, in accordance with the provisions of Article 5 of the GDPR, the commission notes that it does not provide any details on the processing actually targeted. Given the extremely large number of files potentially concerned, it reiterates the reservations made in the context of its previous deliberation on this point. The commission insists all the more on the need to clarify the criteria defining the scope of processing covered by this system since the first paragraph of Article L. 4123-9-1 (I) of the Defense Code aims to determine the general regime applicable to the processing of personal data whose purpose is based on military status without being limited to processing that would fall within the scope of the GDPR. On the amendment of Articles R. 4123-46 to R. 4123-51 from the defense code:

Article 1 of the draft decree also aims to modify the provisions of Articles R. 4123-46 to R. 4123-51 of the Defense Code. Firstly, the Commission recalls that, in its initial wording, Article L. 4123-9-1 of the Defense Code provided that processing operations whose purpose is based on military status be subject to request for authorization which would be addressed to him. It also provided that prior to its authorisation, the National Commission for Computing and Liberties could obtain the opinion of the competent minister, this opinion being given following an administrative inquiry. Article R. 4123-46 of the Defense Code thus related to the conditions under which this opinion was given. However, the commission notes that, in its current wording, Article L. 4123-9-1 of the the defense provides that data controllers inform the competent minister of the implementation of processing involving military status. It also provides that an administrative inquiry may be carried out only with regard to persons accessing the personal data of soldiers. Under these conditions, Article R. 4123-46 as envisaged by this draft decree aims to specify the contours of this information obligation.

The Commission thus notes that it is planned that information be sent without delay to the Defense Intelligence and Security Directorate (DRSD) by the data controller. The committee observes that the DRSD is the intelligence service available to the Ministry of Defense to assume its responsibilities in terms of the security of personnel, information, equipment and sensitive

installations in accordance with the provisions of Article D. 3126-5 of the defense code. It also notes that if, with regard to the missions entrusted to the DRSD, the principle of information sent by the data controller does not call for any particular observation, there is no detail to determine the staff who will actually receive it. The committee therefore considers that the draft decree should be amended so that mention is made of the fact that only the persons responsible for collecting this information, with regard to their missions and within the limits of the need to know, can be informed by the data controllers of the implementation of personal data processing whose purpose is based on military status. The commission also notes that this information to the DRSD must be accompanied by a description of the main characteristics of the planned processing, namely the purposes pursued, the categories of data collected, the possible recipients of the data collected, the technical and organizational measures envisaged as well as the number of people accessing the data collected relating to soldiers, which does not call for no particular comment. However, it considers that this information should be supplemented by the name of the service with which the persons concerned are likely to exercise their rights and considers that the draft decree should be supplemented accordingly. Secondly, it is provided that persons accessing personal data of soldiers are informed of the possibility of being the subject of an administrative investigation by the DRSD and, as such, of the possible consultation by specially authorized and individually designated agents of data processing falling within the scope of the Article 26 of the amended law of 6 January 1978 (new article R. 4123-47 of the defense code). The commission recalls that, in its current wording, article L. 4123-9-1 of the defense states that persons accessing the personal data of military personnel may be subject to an administrative investigation for the sole purpose of identifying whether they constitute a threat to the security of soldiers. concerned. It thus notes that, contrary to the provisions initially applicable, it is not specified whether the administrative investigation in question will necessarily be carried out prior to this access nor the reasons which could lead to such an investigation being carried out. The commission considers that the draft decree should be amended accordingly. the administrative inquiry reveals the existence of a threat to the security of the soldiers concerned. When the administrative inquiry reveals the existence of such a threat, the data controller shall immediately justify to the Defense Intelligence and Security Department that he has taken the necessary measures to ensure that the person concerned does not have more access to personal data. This modification does not call for any particular comment. Thirdly, this draft decree provides that in the event of unauthorized disclosure or access to processing containing data including the mention of military status, the responsible for processing shall notify the DRSD without delay so that the competent services of the Ministry of Defense

assess whether the notification of this disclosure or this unauthorized access is likely to represent a risk for national security, defense or public safety (new article R. 4123-48 of the defense code).

This same article provides that the National Commission for Computing and Liberties is kept informed of this risk assessment by the Data Protection Officer of the Ministry of Defence. drafting of Article L. 4123-9-1 of the Defense Code which states that without prejudice to 1 of Article 33 of Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 relating to the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, in the event of unauthorized disclosure of or access to data from the processing operations mentioned in I of this article, the data controller shall notify the competent minister without delay. It recalls that, in its initial wording, this article provided for the National Commission for Computing and Liberties to be informed without delay by the data controller, who proceeded to inform the competent minister.

The committee notes that it is now provided that, in addition to compliance with the common law rules provided for in Article 33 of the GDPR, relating to the notification to the supervisory authority of a breach of personal data, the data controller informs the DRSD of unauthorized disclosure or access to processing whose purpose is based on military status. It also notes that this article no longer provides for the obligation to inform the competent minister by the National Commission for Computing and Liberties when the latter is informed, directly by the controller, of a disclosure or unauthorized access to processing data. The committee also notes that Article R. 4123-48 as envisaged by the draft decree provides that the competent departments of the Ministry of Defense assess whether the notification of the disclosure or unauthorized access is likely to pose a risk to national security, national defense or public safety. In this respect, it recalls that this criterion must be interpreted strictly, in order to limit the absence of information to the data subjects to only necessary cases. The committee notes that the processing of personal data whose the purpose is based on military status are not, as such, authorized to derogate from the right to communication of a data breach. It recalls that the provisions of article 91-2-1 of decree n° 2005-1309 of October 20, 2005 referred to above provide that are authorized to derogate from the right to communication of a data breach, under the conditions provided in III of article 40 of the law of January 6, 1978 as amended by article 24 of law no. 2018-493 of June 20, 2018, processing involving personal data likely to allow, directly or indirectly , to identify people whose anonymity is protected under article 39 sexies of the law of July 29, 1881 on the freedom of the press. The committee recalls that these persons include only soldiers belonging to services or units designated by order of the minister concerned and whose missions require, for security reasons, respect

for anonymity. Under these conditions, the committee considers that in order to ensure better readability of the planned system, the draft decree could usefully specify the scope of this derogation from the right to communication of a violation as well as its articulation with the various aforementioned provisions as well as the criteria making it possible to characterize a risk to national security, national defense or public security. Finally, the committee notes that it is expected to be kept informed of the risk assessment that will be carried out by the data protection officer of the ministry of the defence, without further details. It notes that, at its request, the draft decree will be amended in order to expressly provide that this information is provided without delay by the data protection officer. However, the commission considers that this information must also be accompanied by the transmission of any useful document to enable it to assess the risk assessment carried out by the data protection officer. It requests that this draft decree be amended accordingly. On the date of entry into force of this draft decree: The committee notes that the provisions of this draft decree are expected to enter into force on 1 April 2019. It recalls that, until the modification of the regulatory provisions of the Defense Code, the provisions as currently provided for in article R. 4123-51, remain applicable, without prejudice in particular to the application of the provisions resulting from the GDPR. It follows in particular from the foregoing that, pending the entry into force of the provisions provided for by this draft decree, the commission will continue to inform the competent minister when it is informed, directly by the head of the processing or within the framework of its controls, disclosure or unauthorized access to the processing of personal data whose purpose is based on military status. Where applicable, it will also remind the data controller of his legal obligation to inform the competent minister in the event that the latter has not been informed, in accordance with the provisions of Article L. 4123-9-1 of the Code of defense.

For the President:

Deputy Vice-President,

M.-F. Mazars