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## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**An article L. 4139-9-1 is created in the defense code, codifying the FP device. Article 37 of Law No. 2013-1168 is repealed on January 1 ,** 2030.

**The provisions of Law No. 2013-1168 governing the PMID are amended. Thus, article 36 is amended to take account of the creation of article L. 4139-9-1.**

#### 4.1.2. Articulation with international law and European Union law

**None.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

**None.**

#### 4.2.1. Macroeconomic impacts

**None.**

#### 4.2.2. Business impacts

**None.**

#### 4.2.3. Budgetary impacts

**The functional promotion (PF) and flexible departure incentive allowance (PMID) schemes are subject to quotas by interministerial order.**

**Functional Promotion**

**The departure of beneficiaries of a PF and of a right to a retirement pension with immediate enjoyment, does not generate any need for additional financing on Title 2 of the Ministry of the Armed Forces, excluding the “Pensions” special allocation account. These promotions are in fact pronounced within the limit of the ceilings of the authorized staff for each grade and each body fixed annually with the ministry in charge of the budget. From the departure of the soldier, the State saves the payment of the salary which was due until the age limit as well as the social security contributions "employers" (title 2).**

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**In 2022, the Ministry of the Armed Forces had a contingent of 50 PF103. The possibility introduced in article 18 of this bill to assign two postings to general officers under functional promotion will probably involve doubling this quota.**
**However, as explained *above,* there will be no additional cost.**

**Flexible departure incentive pay**

**The departure with the benefit of the pension allows the State to save the pay which should have been paid until the age limit of the soldier. The cost of paying a pension and a pension is in fact lower than the cost of paying a full salary and a more substantial pension if the soldier had remained until his age limit. The additional budgetary cost induced by the extension of the PMID system until 2030 is therefore nil.**

**In addition, the fact of reducing, for general officers, from three to one year the eligibility condition linked to the duration of service remaining to be performed before reaching the age limit will be accompanied by a reduction, proportionally, the amount of the savings paid in this situation104. This aspect of the measure provided for in this provision therefore does not give rise to any need for additional funding.**

**The foreseeable additional budgetary cost of the measure relating to the PMID is entirely due to the fact that the renovation of the system involves increasing the quota of savings over the period 2024-2030. The Ministry of the Armed Forces had a quota of 223 PMID for 2022. This quota is set annually at 235 for the years 2023 to 2025105 .**

**This need to revise this quota upwards is linked to several factors. On the one hand, the pension scheme relating to the higher grade (PAGS) will end in 2025106 . skills that are obsolete or about to become so. Finally, given the HR flow model of the Ministry of the Armed Forces, it is essential to offer up to an advanced stage of the career prospects for advancement and progression for staff with potential and/or with skills essential to the conduct of the missions of the armies and therefore to be able to send part of the resource (consequence of the quota constraint). The Ministry of the Armed Forces thus estimates its need for the period 2024-2030 at 275 PMID per year. The associated additional cost is estimated at €5 million.**

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**[103] Order of November 17, 2021 pursuant to Article 37 of Law No. 2013-1168 of December 18, 2013 as amended relating to military programming for the years 2014 to 2019 and containing various provisions concerning defense and national security.**

**[104] As a reminder, the amount of the PMID is set by regulation.**

**[105] See art. 3 and 4 of the decree of September 23, 2022 taken pursuant to articles 36 and 38 of law n° 2013-1168 of December 18, 2013 as amended relating to military programming for the years 2014 to 2019 and laying down various provisions concerning defense and national security.**

**[106] The PAGS quota is set at 90 for 2022, 70 for 2023 and 30 in 2024 (cf. art. 2 of the decree of September 23, 2022 taken in application of articles 36 and 38 of law n° 2013-1168 of 18 December 2013 relating to military programming for the years 2014 to 2019 and containing various provisions concerning defense and national security.**

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### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**None.**

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**None.**

### 4.5. IMPACTS ON THE ARMIES

**The management of the human resources of the armed forces and related formations and their adaptation to the transformation of the armies will be facilitated by the maintenance of the two starting levers that constitute the FP and the PMID.**

### 4.6. SOCIAL IMPACTS

#### 4.6.1. Impacts on society

**None.**

#### 4.6.2. Impacts on people with disabilities

**None.**

#### 4.6.3. Impacts on equality between women and men

**None.**

#### 4.6.4. Impacts on youth

**None.**

#### 4.6.5. Impacts on regulated professions

**None.**

### 4.7. IMPACTS ON INDIVIDUALS

**The measures proposed make it possible to promote the professional transitions of the military, whose age limits are lower than those of civil servants and earlier than those**

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**employees. They make it possible to initiate them earlier, promoting a second career for those concerned.**

#### 4.8. ENVIRONMENTAL IMPACTS

**None.**

### 5. CONSULTATIONS AND TERMS OF APPLICATION

#### 5.1. CONSULTATIONS CONDUCTED

**The measure received a favorable opinion from the Superior Council for the Military Service (CSFM), during the session of March 9, 2023, as provided for in article L. 4124-1 and 2° of article R. 4124 - 1 of the Defense Code.**

## 5.2. TERMS OF APPLICATION

##### 5.2.1. Application over time

**The application will be permanent from the day following the publication of this law in the *Official Journal* of the French Republic.**

##### 5.2.2. Application in space

**This article is applicable throughout the territory of the French Republic. The provisions created are integrated into the general status of the military, which is automatically applicable throughout the national territory. It is also automatically applicable in the overseas departments and regions, as well as in the overseas collectivities and territories and in New Caledonia.**

##### 5.2.3. Application texts

**Decree No. 2021-962 of July 20, 2021 currently governs FP. It will be replaced by a new decree in Council of State which will define the conditions under which general officers, officers, non-commissioned officers and petty officers may be promoted to a higher rank.**

**Decree No. 2019-1294 of December 4, 2019 sets the terms for payment of the PMID. He will be replaced by a new simple decree which will specify in particular the categories of eligible soldiers, the conditions of attribution, the methods of calculation and, if necessary, the conditions of reimbursement of the savings.**

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# CHAPTER II – INTELLIGENCE AND COUNTERINGERENCE

## Article 19: Allowing intelligence services access to criminal records for administrative security investigations

### 1. STATE OF PLAY

#### 1.1. GENERAL FRAMEWORK

**The National Service for Administrative Security Investigations of the Ministry of the Interior (SNEAS), the General Directorate for Internal Security (DGSI), the Directorate for Intelligence and Defense Security (DRSD) and the General Directorate for Security (DGSE) are competent to carry out administrative inquiries prior to decisions on recruitment, assignment, tenure, authorisation, approval or security clearance.**

**These investigations are carried out on the basis of Article L. 114-1 of the Internal Security Code, which provides that: "** ***Administrative decisions on recruitment, assignment, tenure, authorization, approval or authorization, provided for by legislative or regulatory provisions, concerning either public jobs involved in the exercise of State sovereignty missions, or public or private jobs in the field of security or defence, or jobs private or regulated private activities in the fields of gaming, betting and racing, either access to protected areas because of the activity carried out there, or the use of materials or products of a dangerous nature, may be preceded by administrative inquiries intended to verify that the behavior of the natural or legal persons concerned is not incompatible with the exercise of the functions or missions envisaged.***

***These surveys may give rise to the consultation of automated processing of personal data covered by Article 31 of Law No. 78-17 of January 6, 1978 relating to data processing, files and freedoms, with the exception identification files. The conditions under which interested persons are informed of this consultation are specified by decree. (…)*** **".**

**The list of decisions that may give rise to these administrative inquiries is then set out in Articles R. 114-1 to R. 114-5 of the same code.**

**In this context, it is up to the services to assess the degree of trust that can be granted to the person concerned as well as the vulnerabilities that they present. As such, his honesty, even his probity, can be assessed in particular according to his judicial past.**

**However, administrative investigations carried out on the basis of Article L. 114-1 of the Internal Security Code, unlike those carried out on the basis of Article L. 114-2 of the**

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**same code (surveys prior to recruitment and assignments to " *jobs directly related to the safety of persons and property within a public passenger transport company or a dangerous goods transport company subject to the obligation of 'adopt a security plan or an infrastructure manager* '), cannot be preceded by consulting bulletin number 2 of the criminal record.**

**The criminal record is the list of judicial and administrative decisions concerning a natural or legal person. It is divided into 3 bulletins. B1 contains all the sanctions imposed on a person by the courts or by the administrative authorities. It is reserved for judicial services. B2 contains only part of these decisions. It is issued to administrations and certain employers. The B3 contains the convictions most serious.**

**Article 775 of the Code of Criminal Procedure provides that: " *Bulletin no. 2 is a summary of the criminal record sheets applicable to the same person, excluding those concerning the following decisions: / 1° Convictions, convictions accompanied by an exemption from sentence or an exemption from educational measures or a declaration of educational success, the penal compositions and the educational measures pronounced at the stage of the sanction with regard to a minor; / 2° Convictions whose mention in bulletin n° 2 has been expressly excluded pursuant to article 775-1; / 3° Convictions pronounced for police offences; / 4° Sentences accompanied by the benefit of a suspended sentence, with or without probation, when they must be considered void; however, if the socio-judicial follow-up provided for by article 131-36-1 of the penal code or the penalty of prohibition to exercise a professional or voluntary activity involving habitual contact with minors has been pronounced, the decision continues to apply. appear in bulletin no. 2 for the duration of the measure. The same applies to prohibitions, incapacities or disqualifications pronounced, as an additional penalty, on a definitive basis as well as the additional penalty of ineligibility provided for in 2° of article 131-26 and in articles 131-26-1 and 131 -26-2 of the same code, for the duration of the measurement; / 5° Convictions that have been the subject of automatic or judicial rehabilitation; / 6° Sentences to which the provisions of Article L. 263-4 of the Code of Military Justice are applicable; / (…) 9° The provisions pronouncing the forfeiture of parental authority; / 10° Expulsion orders repealed or reported; / 11° Convictions pronounced without suspension pursuant to Articles 131-5 to 131-11 of the Penal Code, at the end of a period of five years from the day on which they be The period is three years in the case of a sentence of day-fine. / However, if the duration of the prohibition, forfeiture or incapacity, pronounced pursuant to Articles 131-10 and 131-11, is greater than five years, the conviction remains mentioned in Bulletin No. 2 for the same duration; / 12° Statements of guilt accompanied by an exemption from sentence or a postponement of the pronouncement thereof; / 13° Sentences pronounced by foreign courts concerning a minor or whose use for purposes other than criminal proceedings has been expressly excluded by the sentencing court; / 14° The penal compositions mentioned in article 768; / 15° Unless otherwise decided by the judge, with special reasons, the convictions pronounced for the offenses**

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***IV of the Commercial Code; / 16° The fixed fines mentioned in 11° of article 768 of this code. (…)*** **"**

**Thus, if access to the processing of criminal records (TAJ), which the services competent to carry out administrative investigations already have, constitutes a valuable source of information on the legal cases in which the data subject has been involved, this processing does not contains no information on any convictions or acquittals pronounced; thus, it does not make it possible to know the legal consequences following a possible questioning of the person concerned, which does not put the investigating services in a position to make a perfectly informed assessment of his probity.**

### 1.2. CONSTITUTIONAL FRAMEWORK

**On the one hand, the freedom proclaimed by article 2 of the Declaration of the Rights of Man and of the Citizen of 1789 implies the right to respect for private life. Consequently, the consultation of bulletin number 2 of the criminal record must be justified by a reason of general interest and implemented in a way that is adequate and proportionate to this objective[107]. It is also up to the legislator to set out precisely the reasons for the consultations as well as the restrictions and precautions with which these consultations are accompanied, such as the purposes of the administrative inquiry or the information of the person concerned[108] .**

**In addition, the system provided for in Article L. 114-1 of the Internal Security Code can be compared to that of Article L. 114-2 of the same code, authorizing the performance of an administrative investigation prior to a "** ***recruitment and assignment decision concerning jobs directly related to the safety of persons and property within a public passenger transport company or a dangerous goods transport company subject to the obligation of adopt a safety plan or an infrastructure manager*** **".**

**However, in this context, the Council of State, in its decision of** June **1 , 2018, No. 412161, at the Tables, considered that these provisions do not excessively affect the right to respect for private and family life by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and that "** ***the possibility of carrying out, for security reasons, the administrative inquiries provided for in Article L. 114 -2 of the Internal Security Code does not constitute a sanction having the character of a punishment in respect of which article 16 of the Declaration of the Rights of Man and of the Citizen could be invoked;[…]*** **" .**

**On the other hand, article 9 of the Declaration of 1789 protects the presumption of innocence. This constitutional principle is not disregarded by the sole consultation of the processing of personal data as long as it is carried out to the strict extent required by the defense of the interests**

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[107] **Decision no. 2012-652 DC of March 22, 2012, Law relating to the protection of identity**

[108] **Decision no. 2003-467 DC of March 13, 2003, Law for internal security**

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**fundamentals of the nation. Furthermore, any person registered in the file may exercise their right to access and rectify the data concerning them109. The principle of the presumption of innocence is not violated by the retention of data, unless otherwise decided by the judicial authority, in the event of dismissal or classification without further action since these decisions may result from the congestion of justice or the difficulty of collecting proofs.**

### 1.3. CONVENTIONAL FRAME

**The European Court of Human Rights rules that, in order not to violate the right to privacy guaranteed by Article 8, the collection of personal data must pursue a legitimate aim and be proportionate to the identified aim110. This is indeed the case of the proposed measure which allows the competent services to know the follow-up given to a legal case.**

### 1.4. ELEMENTS OF COMPARATIVE LAW

**Not applicable.**

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**Pursuant to article L. 114-1, the competent State services are authorized to consult security files (intelligence, police or justice files), taken pursuant to article 31 of the law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms, with the exception of identification files.** With regard to " ***criminal history*** " **files , these services have access to files containing information on the persons implicated in criminal proceedings (TAJ file) but paradoxically do not have access to bulletin number 2 of the national criminal record listing most of the convictions pronounced, with the exception of a few decisions exhaustively listed by article 775 of the code of criminal procedure.**

**Indeed, access to B2 is currently reserved for public administrations of the State seized of applications for public employment, under the terms of 1° of article 776 of the code of criminal procedure, which does not open access to B2 and to employers, a category in which the investigating services do not fall.**

**This results in the risk of taking administrative decisions unfavorable to the persons concerned (refusal of recruitment or refusal of access to a site leading to dismissal) on the**

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**109 Ibid.**

**110 ECHR, June 22, 2017, Aycaguer v. France, n°8806/12, §38**

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**base of information relating to criminal proceedings which would not be up to date with the possible classification without follow-up, or on the contrary to authorize the recruitment or the access of a person to a site when the investigating service would not have not been informed of the criminal conviction handed down.**

**A second paradox is added to the first: consultation of criminal record no. 2 is already possible prior to recruitment for jobs in the field of public transport in accordance with Article L. 114-2 of the Internal is therefore prohibited in the case of particularly sensitive public jobs in that they lead, for example, to the entrusting of arms (recruitment of soldiers and police officers in particular).**

### 2.2. OBJECTIVES PURSUED

**In order to remedy the paradoxes mentioned in 2.1., to mitigate the risk of authorizing the recruitment or access of a person to a site when the service in charge of the investigation would not have had knowledge of a criminal conviction pronounced against him as well as, conversely, to prevent any risk of refusing access or clearance on the sole basis of a judicial challenge that has not ultimately given rise to any criminal conviction, it is necessary to allow investigating services to access information relating to convictions actually handed down by the criminal judge.**

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**The access of the investigating services to the convictions pronounced by the criminal judge could theoretically be limited to only B3; however, the latter includes only the most serious criminal convictions. This information does not provide sufficient data to assess the vulnerability and probity of the person under administrative investigation.**

**Conversely, this access could theoretically concern the information appearing in B1, which contains all the sanctions pronounced against a person by the courts or by the administrative authorities. However, access to this file is currently reserved solely for the judicial services and it does not seem necessary to modify this balance.**

### 3.2. SELECTED OPTION

**The objective of the modification of article L. 114-1 is to allow the competent services (SNEAS, DGSI, as well as DRSD and DGSE for the Ministry of the Armed Forces) to be made recipients of bulletin number 2 of the criminal record, in addition to the already possible consultations of the files of convictions for acts of terrorism or sexual offenses**

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**in order to assess the vulnerability of a person, with regard to his possible criminal past, as a whole.**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**Chapter V of Title I of Book I of the Internal Security Code is amended.**

**This article thus aligns the system of administrative inquiries prior to administrative decisions on recruitment, assignment, tenure, authorisation, approval or security clearance (L. 114-1) with that applicable to the inquiries provided for recruitment and assignment decisions concerning jobs directly related to the safety of persons and property within a public passenger transport company or a dangerous goods transport company subject to the obligation to adopt a security plan or an infrastructure manager (L. 114-2).**

#### 4.1.2. Articulation with international law and European Union law

**Since the processing of personal data authorized by the measure is necessary, adequate and proportionate to the purposes pursued, the provision is in any case in accordance with 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 the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties , and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**Not applicable.**

#### 4.2.2. Business impacts

**Not applicable.**

#### 4.2.3. Budgetary impacts

**Not applicable.**

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### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**Not applicable.**

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**The provision will contribute to confirming the conclusions of the administrative security investigations and, therefore, to securing the administrative decisions on recruitment or security clearance mentioned in article L. 114-1 of the internal security code.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

**Not applicable.**

#### 4.5.2. Impacts on people with disabilities

**Not applicable.**

#### 4.5.3. Impacts on equality between women and men

**Not applicable.**

#### 4.5.4. Impacts on youth

**Not applicable.**

#### 4.5.5. Impacts on regulated professions

**Not applicable.**

### 4.6. IMPACTS ON INDIVIDUALS

**The provision provides a balanced system with regard to the rights of persons in that it allows the competent services to know the follow-up given to legal cases. Nor does he disregard respect for the presumption of innocence for the reasons indicated above.**

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### 4.7. ENVIRONMENTAL IMPACTS

**Not applicable.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**These provisions do not require any mandatory consultation and no optional consultation has been conducted.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**These provisions will enter into force the day after the publication of the law in the *Official Journal* of the French Republic.**

#### 5.2.2. Application in space

**The provisions are expressly extended to French Polynesia, New Caledonia, Wallis-and-Futuna and the French Southern and Antarctic Lands by II and III of this article. They will therefore apply throughout the territory of the Republic.**

#### 5.2.3. Application texts

**This measure does not require any application text.**

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# Article 20: Guarantee that the fundamental interests of the Nation are taken into account in the event of private activity by a former soldier, in the field of defense or security, in relation to a foreign power

## 1. STATE OF PLAY

### 1.1. GENERAL FRAMEWORK

**In the context of the resurgence of international tensions and competition, foreign States do not hesitate to actively seek, directly or through companies acting on their behalf, the collaboration of former soldiers whose technical expertise or knowledge make operational are of strategic interest for the development of their own military capabilities. This phenomenon has been observed in several Western states, particularly in the United Kingdom and the United States, but also in France. It mainly concerns aircraft pilots, who hold valuable technical skills (catapult take-off, landing, etc.). Thus, around ten French pilots have been approached by third countries in recent years. The British authorities, for their part, indicated that around thirty of their pilots had been approached.**

**The recruitment of former soldiers within this framework mainly concerns training.**

**At a time when France is investing in new generations of weapons and reinforcing the increase in operational power of its forces, it is essential to prevent such practices, which would constitute a risk for national defense as well as for the defense of the allies.**

**In the state of the law, no organized mechanism makes it possible to prevent the departure of soldiers to foreign structures hiring them with the very objective of obtaining information or know-how of a strategic nature from them.**

**This measure aims to respond to this problem which calls into question the safeguard of the fundamental interests of the Nation.**

### 1.2. CONSTITUTIONAL FRAMEWORK AND CONVENTIONAL FRAMEWORK

#### 1.2.1. Safeguarding the fundamental interests of the Nation constitutes a constitutional requirement that can justify an attack on other principles with constitutional value.

**It emerges from the case law of the Constitutional Council and the Council of State that the " *constitutional requirements inherent in safeguarding the fundamental interests of the Nation* ",**

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**first rank of which are national independence and territorial integrity, which are the purpose, but also the protection of national defense secrets and the free disposal of armed force, are taken into account by the judge in his control of proportionality in the event of infringement of other principles with constitutional value.**

**It is up to the judge to ensure a " *conciliation which is not unbalanced* " between safeguarding the fundamental interests of the Nation and the other constitutional requirements[111]**

### 1.2.2. Derogations from freedom of contract must be justified by reasons of general interest

**Based on the provisions of article 4 of the Declaration of Human Rights and the Citizen of 1789, the Constitutional Council considers that: " *the legislator cannot affect legally concluded contracts which is not justified by a reason of sufficient general interest without disregarding the requirements resulting from Articles 4 and 16 of the Declaration of 1789" .* [112] .**

### 1.2.3. The Constitutional Council recognizes a wide margin of appreciation for the legislator in the implementation of the right to obtain employment

**According to the fifth paragraph of the Preamble to the 1946 Constitution: " *Everyone has the duty to work and the right to obtain employment. No one may be harmed, in their work or employment, because of their origins, opinions or beliefs* ".**

**On the basis of these provisions, the Constitutional Council was able to consider that the legislator, who is competent under Article 34 of the Constitution to determine the fundamental principles of labor law, could limit the scope of the right to obtain employment[113] .**

### 1.2.4. European Union law allows derogations from the free movement of workers and the freedom of establishment for security reasons

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[111] Ms. Ekaterina B., wife D., and others, November 10, 2011, No. 2011-192 QPC, regarding the right of interested persons to exercise an effective judicial remedy and the right to a fair trial; Law relating to intelligence, 23 July 2015, n° 2015-713 DC, concerning the right of interested persons to exercise an effective judicial remedy, the right to a fair trial and the adversarial principle; Law to strengthen the freedom, independence and pluralism of the media, 10 November 2016, n° 2016-738 DC, regarding freedom of expression and communication; La Quadrature du net, July 9, 2021, decision no. 2021-924 QPC, regarding respect for privacy.

[112] Law on lifelong vocational guidance and training, 19 November 2009, n° 2009-592 DC.

[113] About the accumulation of employment and pensions: Orientation law authorizing the Government by application of article 38 of the Constitution, to take social measures, January 5, 1982, n° 81-134 DC ; concerning the reduction of working time: Law on various measures relating to old-age benefits, of May 28, 1983, n° 83-156 DC ; about the automatic retirement of employees working beyond full retirement age: Mr. Jacques N., February 4, 2011, No. 2010-98 QPC.

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**The Treaty on the Functioning of the European Union (TFEU) sets out the provisions relating to the freedom of movement of workers within the territory of the European Union and the freedom of establishment.**

**With regard to the free movement of workers, Article 45 provides that: "** ***1. The free movement of workers is ensured within the Union. / (…) / 3. It includes the right, subject to limitations justified by reasons of public order, public security and public health: / a) to respond to jobs actually offered, b) to travel to for this purpose freely within the territory of the Member States, (c) to reside in one of the Member States in order to pursue employment there in accordance with the laws, regulations and administrative provisions governing the employment of national workers, (d) to remain, under conditions who will be the subject of regulations drawn up by the Commission, in the territory of a Member State, after having held employment there. 4. The provisions of this article are not applicable to employment in public administration.*** **".**

**With regard to the freedom of establishment, Article 49 provides that: "** ***restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are prohibited. This prohibition also extends to restrictions on the creation of agencies, branches or subsidiaries by nationals of a Member State established in the territory of a Member State. Freedom of establishment includes access to self-employed activities and the exercise thereof, as well as the establishment and management of businesses, and in particular companies within the meaning of the second paragraph of Article 54, under the conditions defined by the legislation. of the country of establishment for its own nationals, subject to the provisions of the chapter relating to capital".***

**Nevertheless, article 52 provides that: "** ***The prescriptions of this chapter and the measures taken by virtue of these do not prejudge the applicability of the legislative, regulatory and administrative provisions providing for a special regime for foreign nationals, and justified by reasons of public order, public security and public health*** **".**

**The concept of "public security" covers both the internal security of a Member State and its external security114. The first can be in danger, particularly when there is a** ***"direct threat to the peace and physical security of the population*** **"115 while the second, broader, apprehends "** ***the attack on the functioning of institutions and essential public services as well as the survival of the population, as well as the risk of a serious disturbance of foreign relations or the peaceful coexistence of peoples, or even the attack on military interests*** **116 ".**

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[114] CJEU, November 23, 2010, Tsakouridis, C-145/09, pt 43.

[115] CJEU, May 22, 2012, PI, C-348/09, pt 28.

[116] CJEU, June 24, 2015, HT v. Land Baden-Württemberg, C-373/13, point 78.

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### 1.2.5. Requirements related to administrative and criminal penalties

**In its decision no. 89-260 DC of 28 July 1999, the Constitutional Council considered that: " *the principle of the separation of powers, just as no principle or rule of constitutional value prevents an authority authority, acting within the framework of prerogatives of public power, can exercise a power of sanction since, on the one hand, that the sanction likely to be inflicted is exclusive of any deprivation of liberty and, on the other hand, that the The exercise of the power to sanction is accompanied by the law with measures intended to safeguard the constitutionally guaranteed rights and freedoms* ".**

**Under these constitutionally guaranteed rights and freedoms, it is possible to distinguish procedural requirements from substantive requirements.**

***Procedural requirements117 related to administrative and criminal sanctions***

#### *The rights of the defense are taken into account prior to the pronouncement of sanctions without the need for the legislator to recall their existence*

**Respect for the rights of the defence, initially enshrined as a general principle of law118 , then as a fundamental principle recognized by the laws of the Republic119 now constitutes a requirement with constitutional value attached to article 16 of the Declaration of the Rights of Man and of the Citizen of 1789120 .**

**This principle does not only concern the penalties pronounced by the criminal judge but applies to any sanction having the character of a punishment, including if the legislator has left the task of pronouncing it to a non-judicial authority121. *It implies "that no sanction having the character of a punishment can be inflicted on a person without the latter having been given the opportunity to present his observations on the facts with which he is charged" and "is binding on the authorities having a power of sanction without the need for the legislator to recall its existence "122***

#### *The objective impartiality and independence of the courts are not opposable to the sanctions taken by an authority subject to the hierarchical power of the minister.*

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[117] **The Council of State, in its 1995 report devoted to the powers of the administration in the field of sanctions, affirmed that " *the sanctions are of an essentially repressive nature. They proceed from an intention to punish a breach of an obligation. They are based on personal behavior considered to be at fault".* They are thus distinguished from administrative police measures in that they aim to punish a person who has breached a pre-existing regulation and not to prevent disturbances to public order.**

[118] **CE, May 5, 1944, Dame Veuve Trompier-Gravier, Rec. p. 133.**

[119] **Law relating to the development of the prevention of accidents at work, 2 December 1976, n° 76-70 DC.**

[120] **Law for equal opportunities, March 30, 2006, n° 2006-535 DC.**

[121] **Law relating to the freedom of communication, January 17, 1989, n° 88-248 DC.**

[122] **Mr. Stéphane R. and others, October 24, 2014, No. 2014-423 QPC.**

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**The scope of these principles has been significantly extended under the influence of Article 6§1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms123 which implies going beyond the subjective impartiality relating to the person and his behavior, but to ensure the objective impartiality relating to the functions exercised which are of a nature, independently of his personal convictions, to cast doubt of the independence of the one who holds them124 .**

**Nevertheless, compliance with these principles is essential when the sanction is pronounced by an administrative authority not subject to the hierarchical power of the minister125**

**Respect for objective impartiality and independence is not binding on administrative authorities placed under the responsibility of a minister in that they cannot be assimilated to a "tribunal" within the meaning of Article 6§ 1126 .**

***Substantive requirements related to administrative and criminal sanctions***

> ***The principle of legality of offenses and penalties, which also applies to administrative sanctions, implies specifying the obligations to which a person***

**In terms of criminal sanctions, the Constitutional Council rules that: " *the legislator derives from Article 34 of the Constitution, as well as from the principle of the legality of offenses and penalties, the obligation to determine the scope of application criminal law and to define crimes and misdemeanors in sufficiently clear and precise terms; that this requirement is necessary not only to exclude arbitrariness in the pronouncement of sentences, but also to avoid unnecessary rigor during the search for perpetrators of offences* "127**

**In terms of administrative sanctions, the Constitutional Council rules that " *applied outside of criminal law, the requirement of a definition of sanctioned offenses is satisfied, in administrative matters, by reference to the obligations to which the holder of an authorization administrative is subject to laws and regulations "128 .***

**In its decision n° 255136 of July 7, 2004, the Council of State specified that " *when it is applied to administrative sanctions, the principle of legality of offenses and penalties does not***

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123 **Article 6§1 of the ECHR lays down the principle of impartiality and independence of the courts in these terms: "Everyone has the right to have his case heard fairly, publicly and within a reasonable time, by an independent tribunal. and impartial, established by law, which will decide either disputes over its civil rights and obligations, or the merits of any criminal charge brought against it. »**

124 **EC, July 4, 2003, No. 234353.**

125 **Société Numéricâble SAS and other, July 5, 2013, No. 2013-331 QPC ; Barnes et al., March 9, 2017, no. 2016-616/617 QPC.**

126 **See in this sense, CE, March 27, 2000, No. 187703 about tax penalties; CE, 21 December 2018, n° 424520, regarding the sanctions imposed by the ANAH.**

127 **Law adapting justice to developments in crime, 2 March 2004, n° 2004-492 DC.**

128 **Decision no. 88-248 of January 17, 1989.**

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***no obstacle to offenses being defined by reference to the obligations to which a person is subject by virtue of the activity he exercises, the profession to which he belongs or the institution to which he belongs; it implies, on the other hand, that the sanctions are provided for and enumerated by a text.*** **".**

The " **non bis in idem** " ***rule does not prohibit the accumulation of administrative and criminal sanctions129***

**According to article 8 of the Declaration of 1789: "** ***The law should establish only penalties strictly and obviously necessary, and no one can be punished except by virtue of a law established and promulgated prior to the offense, and legally applied*** **".**

**It is on the basis of this article that the Constitutional Council considers that: "** ***The principles thus set out do not concern only the penalties pronounced by the criminal courts but extend to any sanction having the character of a punishment. It follows from the principle of the necessity of offenses and penalties that the same person cannot be the subject of several proceedings aimed at repressing the same facts qualified in an identical manner, by sanctions of the same nature, for the purposes of protecting the same interests. social*** **»**[130]

ÿ **With regard to the first criterion drawn from the fact that the sanctions do not tend to punish the same facts qualified in an identical manner**

**The case law of the Constitutional Council recalls that the "** ***single circumstance that several incriminations are likely to repress the same behavior can characterize an identity of facts within the meaning of the requirements resulting from Article 8 of the Declaration of 1789 only if they are qualified as same way*** **". The commentary to this decision emphasizes that "** ***This condition relating to the legal qualification of the facts does not require that the texts defining the offenses be strictly identical*** **", but it** ***"excludes on the other hand that offenses whose fields of application are very different and overlap only incidentally can be regarded as relating to identical facts*** **"131 .**

**It was able to judge, with regard to penalties applicable in the event of the issuance of convenience invoices, that could not be regarded as identical "** ***the increase provided for in article 1729 of the general tax code [which] penalizes fraudulent maneuvers having led to elude***

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**129 If article 4 of the 7th additional protocol to the European Convention for the Protection of Human Rights guarantees this right by providing that "** ***no one may be prosecuted or punished by the courts of the same State for an offense for which he has already been acquitted or sentenced by a final judgment in accordance with the law and the penal procedure of the State*** **", it may be noted that France made the following reservation at the time of ratification: "** ***only offenses under French law of the jurisdiction of the courts ruling in criminal matters must be regarded as offenses within the meaning of Articles 2 to 4 of this Protocol*** **". This reserve is applied by the internal judge (cf. C. cass, January 22, 2014 n° 12-83.579).**

**[130] For example, Société Specitubes, December 3, 2021, n° 2021-953 QPC.**

**[131] Mr. Jean-Guy C. and others, May 7, 2020, n° 2020-838/839.**

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***tax payable by the taxpayer. and*** **the provisions for** ***, to repress the sole recourse to "convenience invoices, regardless of whether or not duties have been evaded "*** [132]**.**

ÿ **With regard to the second criterion based on the fact that the repressions do not come under the body of rules protecting the same social interests**

**This criterion was expressly set out in Decision No. 2019-783 QPC of May 17, 2019, according to which: "** ***the financial sanction pronounced by the National Commission for Campaign Accounts and Political Funding comes after the examination by this commission, under the control of the Constitutional Council, of the campaign accounts of each of the candidates for the election of the President of the Republic. By giving this sanction a systematic character and by providing that its amount is equal to the overrun of the ceiling for electoral expenses, the legislator intended to ensure the smooth running of the election of the President of the Republic and, in particular, equality between candidates during the election campaign. On the other hand, by establishing a penal repression of the same facts, which requires an intentional element and makes it possible to take into account the circumstances of the offense and to adapt the severity of the penalty to the gravity of these facts, the legislator intended to sanction the possible breaches of probity of candidates and elected officials.*** **".**

ÿ **With regard to the third and last criterion drawn from the fact that the sanctions must be different nature**

**Apart from cases concerning particularly significant pecuniary sanctions, the Constitutional Council systematically concludes that sanctions of a different nature exist when only one of them involves a prison sentence133 .**

***Penalties are subject to the principle of proportionality of penalties***

**In the event of an accumulation of sanctions, it is judged that :** ***"While the possibility that two procedures are initiated may lead to an accumulation of sanctions, the principle of proportionality implies that in any case the total amount of the sanctions possibly pronounced does not not exceed the highest amount of any of the penalties incurred.*** **»** [134]**.**

**1.3. ELEMENTS OF COMPARATIVE LAW**

**Mechanisms for controlling the departure of soldiers or former soldiers who have occupied and wish to carry out a gainful activity on behalf of a foreign State or a foreign company exist in other States.**

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[132] **Decision No. 2021-942 QPC of October 21, 2021.**

[133] **for example: Law for global security preserving freedoms, May 20, 2021, n° 2021-817 DC ; Closed Company Teddi et al, March 30, 2017, 2016-621 QPC; Mr. Pierre M., September 29, 2016, 2016-570 QPC.**

[134] **For example, Société Specitubes, December 3, 2021, n° 2021-953 QPC.**

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**In the United States, Article I, Section 9, Clause 8, of the Constitution provides that " *No title of nobility shall be conferred by the United States, and no person holding any gainful office or trust therein shall may, without the consent of Congress, accept any presents, emoluments, offices, or titles whatsoever, from any king, prince, or foreign state.* »**

**This clause has been interpreted by U.S. courts to prohibit the receipt of consulting fees, gifts, travel expenses or wages by all retired, commissioned and enlisted, regular and reserve military personnel from a foreign government, unless the consent of Congress is first obtained .**

**Article 37 section 908 of the "United States Code" provides as such that " (a) *Congress consents to the following persons accepting civilian employment (and remuneration therefor) for which the consent of Congress is required by the last paragraph of section 9 of article I of the Constitution, relating to the acceptance of emoluments, offices or titles of a foreign government:***

***(1) Retired members of uniformed services.***

***(2) Members of an armed forces reserve, except members serving for a period exceeding 30 days.***

***(3) Members of the Public Health Service Reserve Corps.***

***(b) Approval Required - A person described in paragraph (a) may only accept employment or compensation described in this paragraph if the relevant Secretary and the Secretary of State approve such employment.* »**

**Considered as emoluments are compensation for employment from foreign educational or commercial institutions that are owned, operated or controlled by a foreign government because these entities are considered an extension of the foreign government.**

**In the event of non-compliance with this clause, the government may request the recovery of the sums collected and the ministry may also suspend the pension. The purpose of this clause is to prevent corruption and to preserve the independence of the United States in the face of attempts to exert foreign influence on its agents136 .**

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**[135] " The Emoluments Clauses of the US Constitution ", Congressional Research Service (CRS), January 2021.**

**[136] "The Foreign Emoluments Clause: Article I, Section 9, Clause 8", Seth Barrett Tillman, National Constitution Center, https://constitutioncenter.org/the-constitution/articles/article-i/clauses/759.**

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## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**As mentioned in point 1.1, under the current law, there is no mechanism to prevent the departure of military personnel to foreign structures or foreign-controlled companies hiring them for the very purpose of obtaining information or strategic know-how.**

**Indeed, if the provisions of article L. 4122-5 of the defense code institute the military ethics commission, its mission is to ensure the prevention of the commission of the offense of illegal taking of interests.**

**In addition, the penal code punishes the fact of delivering or making accessible to a foreign entity information, processes, objects, documents, computerized data or files whose exploitation, disclosure or combination is likely to harm the interests fundamentals of the Nation (articles 411-6 to 411-8). The consumption of these offenses supposes to raise the supply, active or passive, of any strategic information whose exploitation by a foreign entity can harm France.**

**Expertise or know-how relating to operating methods or technical specifications, in particular in the field of defence, are covered by the list of information or objects likely to fall within the scope of these offences, these aiming expressly the delivery of information or processes .**

**However, it is necessary to establish the materiality of this delivery or this provision of information in order to initiate criminal proceedings. Moreover, these provisions which punish the acts of treason have no impact, upstream, on the effective departure of the interested parties to these companies or foreign powers and the risk that this engenders.**

**It is true that article 411-5 punishes the fact of maintaining intelligence with a foreign entity and article 411-7 the fact of collecting or assembling information or materials with a view to delivery to a foreign entity.**

**However, offenses of intelligence with a foreign entity require the demonstration of a fraud, that is to say that the author acted voluntarily in full awareness of establishing a relationship with a foreign entity and that this agreement prevails a risk of harm to the fundamental interests of the Nation (411-5), or that the author has collected information with a view to delivering it to a foreign entity when this information is likely to harm these interests ( 411-7). The characterization of these offenses could theoretically be carried out before the departure of soldiers or former soldiers abroad; it is still necessary, on the one hand, to be able to collect evidence of a nature to establish the proceedings**

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[137] **See, for example, Cass. crim., June 24, 1985, no. 83-92.873: JurisData no. 1985-001833; Bull. crime. 1985, n° 247, for a trade secret.**

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**criminal. It is also necessary that the maintenance of intelligence or the collection of information intervene upstream of this departure.**

**Article 411-5 presupposes the observation of positive behavior likely to materialize a relationship of understanding with this entity and to characterize that this relationship is in itself likely to undermine the fundamental interests of the Nation. This offense is based on a certain amount of evidence that could be difficult to establish, for example in the case of a strategic competitor or a former agent pleading good faith.**

**Article 411-7 implies the material collection and/or storage of data (on a computer medium, for example). This offense is not suitable for the sole delivery of operational know-how or consultancy activities, except to establish that the person has compiled a file or photocopied manuals, technical specifications in order to deliver this strategic information to a foreign entity.**

**Thus, only the institution of a preventive control, accompanied by sanctions in the event of disregard of the provisions in question (in particular taking the form of the creation of an obstacle offence, the observation of which will be easy), would be likely to prevent effectively the risk of soldiers being recruited by a foreign power for the exploitation of their operational k**

**It requires the intervention of the legislator under article 34 of the Constitution in that this control calls into question " *the fundamental guarantees granted to civil and military officials of the State* ", " *the determination of crimes and misdemeanors as well as the penalties applicable to them* " as well as " *civil rights and the fundamental guarantees granted to citizens for the exercise of public freedoms* " and " *the constraints imposed by National Defense on citizens in their person and in their property* ".**

### 2.2. OBJECTIVES PURSUED

**The objective pursued is to establish a preventive control of the administration concerning the departure of the military, who have sensitive skills or know-how, towards powers or companies under foreign control in order to avoid disclosures likely to undermine the fundamental interests of the Nation.**

**The challenge lies in the effectiveness of this system by acting on:**

- **the definition of the scope of the functions held subject to this control;**
- **the definition of the scope of the companies concerned by this control;**
- **the period during which this control will be exercised;**
- **the criteria on the basis of which the administration may oppose the departure of the person concerned;**
- **the penalties incurred by the person concerned in the event of misunderstanding or failure to make a prior declaration to the Minister.**

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## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**In view of the issues and problems involved, only the institution of preventive control of the administration, accompanied by sanctions, as provided for in American legislation, appears relevant (see item "need to legislate" *supra).***

**One option considered was to institute a system of prior authorization by the Minister, without which the person concerned could not begin to carry out the activity envisaged for the benefit of a foreign power.**

**However, this device had several drawbacks.**

**On the one hand, it undermines the freedom of enterprise, which is constitutionally protected, more than a declaratory regime.**

**On the other hand, it requires the Minister to rule expressly on each of the applications for authorization brought before him. Indeed, since the purpose of the device is the preservation of the fundamental interests of the Nation, the silence kept on such requests is necessarily worth rejection[138] .**

**Conversely, the declaratory regime calls for an explicit decision from the minister only if the military's project must be prevented; it thus allows the administration to concentrate its training on the potentially most problematic situations, without risking delaying the professional projects of soldiers who do not raise any difficulties.**

### 3.2. SELECTED DEVICE

**The purpose of the system adopted is to establish a system of declaration prior to the departure of the persons concerned.**

**It has the effect of imposing on the soldier, holder of particularly sensitive functions and who wishes to carry out an activity in exchange for a personal advantage or remuneration for the benefit of a foreign State or a company or an organization having its headquarters outside the national territory or under foreign control, to declare it beforehand to the Minister of Defense, respecting a minimum period of notice fixed by decree in Council of State.**

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[138] **In accordance with 4° of article L. 231-4 of the code of relations between the public and the administration, which provides that, " *by way of derogation from article L. 231-1, the silence kept by the administration during two months is equivalent to a decision of rejection (…) in the cases, specified by decree in the Council of State, where an implicit acceptance would not be compatible with (…) the protection of national security, the protection of freedoms and principles of constitutional value and the safeguard of public order* ".**

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**The same obligation applies in the ten years following the termination of sensitive functions.**

**The device will not apply to all soldiers who plan to exercise a lucrative activity for a foreign State or a foreign company. It is, on the contrary, doubly limited:**

**1/ From the point of view of the past functions held by the soldier: these can only be functions presenting, independently of the rank, a particular sensitivity or requiring specialized technical skills. The provision refers to the regulation the care of specifying the list, which can thus be updated in a flexible way according to the evolution of the stakes for the fundamental interests of the Nation.**

**As such, the jobs of fighter pilots, as well as certain sensitive jobs relating to:**

- **command in the naval field (particularly with regard to submarines);**
- **cyber defense;**
- **the nuclear sector.**

**A Conseil d'Etat decree will thus define the fields of employment to which these functions relate, which will be specified by an order of the Minister of Defence. This decree will not be published, since it will include the list of the most sensitive functions for the fundamental interests of the Nation within the armies.**

**This exemption from publication (which echoes the exemption from publication of the list of operators of vital importance, provided for in Article R. 1332-3 of the Defense Code) thus meets the requirements inherent in the protection of the interests of national defense. The soldiers concerned will be individually informed of the fact that they occupy or have occupied these sensitive functions and that they therefore fall within the scope of the declaration obligation. This information will be delivered to them:**

- **for active military personnel, as soon as they take up sensitive duties, or, for those already exercising them on the date of entry into force of the law, while on assignment**
- **for former soldiers who have already left the armed forces on the date of entry into force of the law and who have performed such sensitive functions within the armed forces during the previous ten years, the information may be issued to them on the occasion reminders concerning them as reservists subject to the obligation of availability (article L. 4231-2 of the defense code).**

**2/ From the point of view of the jobs that the soldier or former soldier wishes to exercise on behalf of a foreign State or a foreign company.**

**With regard to the scope of the companies concerned, the choice was made to retain the same as that retained by Articles 411-6 to 411-8 of the Criminal Code relating to attacks on the fundamental interests of the Nation, for reasons of consistency and effectiveness of the overall system.**

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However, the system will only apply if the planned employment in one of these companies or States is in the field of defense or security.

Indeed, it is not excluded that in addition to the ignorance of the projected device, a ignorance of one of the aforementioned articles of the penal code, by the delivery of technical knowledge, is characterized. However, it is necessary to allow the administrative authority to exercise, with effectiveness, its prerogatives drawn from article 40 of the code of criminal procedure so that all the criminal offenses noted can be sanctioned by the judge. The scope of these provisions therefore seems to need to be aligned.

The system adopted provides that the reporting obligation applies within ten years following the termination of the sensitive functions previously exercised. These provisions are inspired by those provided for by article 9-2 of the ordinance n° 58-1270 of December 22, 1958 carrying organic law relating to the statute of the magistrature concerning the departure of the magistrates towards the private companies.

The duration of ten years was chosen because it ensures a balanced reconciliation between the rights and freedoms of the soldier or former soldier (freedom of contract, freedom of movement) and the constitutional requirement relating to the safeguarding of the fundamental interests of the Nation in which participates the protection, for a necessarily long period, of military know-how in very sensitive areas. Moreover, at the end of the ten-year period, the interest of foreign competitors in the recruitment of former soldiers will be reduced given the loss of knowledge acquired by the latter with the passage of time.

It also provides that the Minister for the Armed Forces may oppose the exercise of this activity when he considers that it involves the risk of disclosure by the person concerned of information, processes, objects, documents, computerized data or files to which he had access in the course of his duties and that this disclosure is likely to harm the fundamental interests of the Nation. As noted above, the wording aligns with that of Articles 411-6 to 411-8 of the Criminal Code.

This opposition pronounced by the administrative authority may be based on a range of indicators such as the degree of expertise of the person concerned, the nature of the activities of the foreign operator he wishes to join, the relations of the shareholders with hostile or non-allied foreign powers, such as the quality and intensity of diplomatic relations with the state in question. The Minister will make his decision in view of:

- ÿ information provided in his statement by the soldier, who will be responsible for precisely describing the nature of the missions that are likely to be entrusted to him in the context of the job to which he aspires;
- ÿ information or intelligence given to it by the staffs, directorates and departments of the ministry (in particular the directorate general for armaments, the specialized intelligence services or the directorate general for international and strategic relations), on the operational sensitivity of the information and know-how held

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by the soldier and the quality of the bilateral relationship with the foreign State in question (in particular, the degree of military cooperation maintained, if any, in the area concerned);

- ÿ where applicable, additional observations, written or oral from the applicant, which it will be up to the Minister to request if he plans to oppose a decision of refusal for reasons not appearing in the initial application.

Thus, on a case-by-case basis, the Minister may oppose the departure of a soldier with specific know-how to a foreign operator, for example if the State in question is a strategic competitor and/or if the project professional generates a strong risk of harm to the fundamental interests of the Nation. Conversely, if the State to which the foreign operator belongs is party to a military alliance with France involving regular technical cooperation in the field in question, the Minister will not oppose the departure of the soldier.

In the event of disregard of the obligation of prior declaration to the Minister of Defense or of the opposition pronounced by the Minister, it provides that this entails the nullity by operation of law of the contract concluded for the exercise of the private activity. as well as the possibility for the administrative authority to pronounce administrative sanctions with the withdrawal of the decorations obtained or deductions from the pension, which cannot exceed 50% of the amount of the pension, for the duration of the exercise of the illicit activity, in t

The provision relating to the nullity of the contract is inspired by article 23 of law n° 2013-907 of October 11, 2013 relating to the transparency of public life which provides that in the event of a notice of incompatibility issued by the High Authority for the transparency of public life (HATVP) the acts and contracts concluded with a view to the exercise of this activity "cease to produce their effects" (when the HATVP had been seized by the person concerned) or “are null and void” (when the matter has been referred to the High Authority by its president within two months of becoming aware of the unauthorized exercise of a private activity by the person concerned). This article was judged to be in conformity with the Constitution139, in particular with regard to the principle of freedom of enterprise, wi This sanction will in particular be effective if the contract is concluded and executed for the benefit of a foreign entity on national territory. It should indeed be specified that with regard to foreign law contracts executed in France, the proposed legislative provisions will constitute an enforceable overriding law140 .

139 Decision no. 2013-676 DC of October 9, 2013, cons. 55 and 56.

140 See, in this sense, C. Cass., crim., October 2, 2018, N° 11-88.040 15-80.735, Ryanair : *"it should be remembered that the country where the worker's activity is carried out may impose the application of mandatory rules the definition is given in article 9 of EC regulation number 593/2008 on the law applicable to contractual obligations (Rome I): "a mandatory law is a mandatory provision compliance with which is considered crucial by a country for the safeguard of its public interests, such as its political, social or economic organization, to the point of requiring its application to any situation falling within its scope, regardless of the law otherwise applicable to the contract under this Regulation. .*

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**The provisions relating to deductions from pensions are inspired by Article L. 124-20 of the general civil service code which provides for this type of sanction for civil public officials in the event of disregard of the opinion of the HATVP.**

**The pronouncement of the administrative sanctions thus provided for may only take place following the implementation of an adversarial procedure, without the law having to expressly provide for this, being a general principle of law.**

**Finally, the article penalizes the fact of carrying out such an activity without having carried out the obligation of prior declaration to the Ministry of Defense (five years' imprisonment and a fine of 75,000 euros). The criminal sanction will thus be incurred either that the person has not complied with his obligation to declare to the Minister before starting to exercise a job in the field of defense and security with a State or a foreign company , or that it did so in disregard of an opposition pronounced by the Minister of Defence. The creation of this offence-barrier, consisting of a breach of an easily verifiable objective obligation, guarantees the effectiveness of the prior control system.**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

**This article creates two new articles (L. 4122-11 and L. 4122-12) in Chapter II of Title II of Book I of Part 4 of the Defense Code.**

**Article L. 4122-11 establishes this preventive control as well as the administrative sanctions provided for in the event of disregard of the obligation of prior declaration or of opposition from the Minister of Defence.**

**Article L. 4122-12 provides for a prison sentence of five years and a fine of seventy-five thousand euros in the event of breach of Article L. 4122-11.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**Not applicable.**

#### 4.2.2. Business impacts

**The measure can only have an impact on companies abroad or under foreign control. This impact will in any case be limited, given the small number of people concerned by the control instituted by the measure.**

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#### 4.2.3. Budgetary impacts

**Not applicable.**

### 4.3. IMPACTS ON ADMINISTRATIVE SERVICES

**The scope of jobs subject to the new prior declaration system will be specified by regulation.**

**The main jobs that will be affected are personnel working in cyber, in aeronautical maintenance, in piloting aircraft, in the nuclear field, in the field of naval command.**

**For information, the report of the military ethics commission for 2021 indicates that the number of files submitted rose to 270 in 2021. Nearly 40% of these military personnel are approached by private companies because of their know-how. TO DO. The report adds that, " *since 2019, of the 754 files examined by the commission in normal procedure, 34 (4.5%) concerned foreign companies, sometimes for recruitment in France* "**

**Given the nature of the new provisions, these requests will require a sustainable additional workload for the administrative services of the Ministry of the Armed Forces, it being recalled that the declarative regime (and not prior authorization) will allow them to focus on situations raising proven difficulties.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**The system received a favorable opinion from the Superior Council for Military Service on March 9, 2023.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**This article will enter into force the day after the day of publication of the law in the *Official Journal* of the French Republic.**

**In concrete terms, it will apply from the date of entry into force of the decree specifying the list of areas of employment concerned and the order of the Minister of Defense establishing the list of functions subject to the prior declaration procedure.**

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**Former military personnel who have already started, on this date, the exercise of a job in the field of defense and security on behalf of a State or a foreign company will not be subject to the obligation to declare their activity to the Minister.**

**On the other hand, any soldier or former soldier who, after this same date, has the project of exercising such a job, must first declare it to the Minister, if he has exercised during the ten previous years one of the sensitive functions mentioned in the decree. This obligation will be binding on him subject to having been individually informed that he falls within the scope of the reporting obligation.**

#### 5.2.2. Application in space

**This article is applicable throughout the territory of the French Republic. Indeed, insofar as they relate to the field of defence, the provisions are automatically applicable throughout the territory, including in the communities covered by Article 74 of the Constitution.**

#### 5.2.3. Application texts

**A Conseil d'Etat decree will define the list of areas of employment concerned, within which an unpublished decree will specify the precise functions whose holders or former holders will fall within the scope of the obligation, as well as the procedural methods of 'application.**

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# Article 21: Allow the communication by the judicial authority to the intelligence services of the elements of an open procedure for war crimes and offenses or crimes against humanity

## 1. STATE OF PLAY

### 1.1. GENERAL FRAMEWORK

#### 1.1.1. Exceptions to the secrecy of the investigation and the instruction

**A cardinal principle of French criminal procedure, the secrecy of the investigation and the instruction aims to guarantee the efficiency and serenity of the investigations. It also helps to protect the presumption of innocence of those involved and the privacy of complainants.**

**While this general principle is laid down in the first paragraph of Article 11 of the Code of Criminal Procedure, the legislator has provided for the possibility of derogating from it in cases that it has strictly regulated, in particular to allow the public prosecutor to communicate in order to to avoid the dissemination of fragmented or inaccurate information on an ongoing criminal investigation141 or to allow the tax administration to be informed of elements leading to the suspicion of tax fraud142 .**

**The legislator has also taken into account the need for information sharing between the judicial authority and intelligence services or specialized services. The public prosecutor against terrorism (PRAT) and the investigating judge can thus communicate to the specialized intelligence services referred to in article L. 811-2 of the internal security code (so-called first circle143), on their own initiative or at the request of these services, elements appearing in the procedures and necessary for the exercise of their mission relating to the prevention of terrorism, insofar as the information comes from investigation or instruction procedures opened in terms of terrorism (article 706-25-2 of the criminal procedure code144).**

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[141] Article 11 paragraph 3 of the Code of Criminal Procedure.

[142] Article L. 101 of the book of tax procedures.

[143] Services referred to in Article R. 811-1 of the Internal Security Code: "the General Directorate for External Security, the Directorate for Intelligence and Defense Security, the Directorate for Military Intelligence, the Directorate General for internal security, the service with national competence called "National Directorate of Intelligence and Customs Investigations" and the service with national competence called "processing of intelligence and action against clandestine financial circuits". »

[144] Provision created by Law No. 2017-258 of February 28, 2017 on public security and amended by Law No. 2020-1672 of December 24, 2020 on the European Public Prosecutor's Office, environmental justice and specialized criminal justice.

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**More recently, law n° 2021-998 of July 30, 2021 relating to the prevention of acts of terrorism and intelligence, provided for two new derogations listed in article 706-105-1 of the Code of Criminal Procedure.**

**On the one hand, the judicial authority can now transmit to certain services referred to in Article L. 2321-2 of the Defense Code, on its own initiative or at the request of these services, elements of any kind necessary to carrying out their mission in terms of security and defense of information systems[145] .**

**On the other hand, the judicial authority can also transmit to certain intelligence services, referred to in articles L. 811-2 (so-called first circle) and L. 811-4 (so-called second circle[146]) of the internal security code , elements of any kind necessary for the exercise of the missions of the services concerned with regard to the prevention of organized crime and delinquency, provided that these elements appear in proceedings opened for specific offenses (drug trafficking, of human beings, fight against illegal immigration networks, arms trafficking).**

**In any event, the decision to transfer rests with the judicial authority. The intelligence services may only obtain communication of this information for strictly defined purposes and they are prohibited from retransmitting it to foreign intelligence services.**

### 1.1.2. International crimes within the jurisdiction of the public prosecutor national counterterrorism

**Crimes against humanity and war crimes and misdemeanors, as well as offenses related to them, are prosecuted, investigated and judged according to the provisions of articles 628 to 628-10 of the Code of Criminal Procedure which organizes in particular the concurrent national jurisdiction of the anti-terrorism public prosecutor and the Paris investigating judges in this matter and specifies the procedural specificities attached thereto.**

**Under crimes against humanity, genocide is the act, in execution of a concerted plan aimed at the total or partial destruction of a national, ethnic, racial or religious group, or of a group determined from any other arbitrary criterion, to commit or cause to be committed, against members of this group, a voluntary attack on life, a serious attack on physical or mental integrity, a submission to living conditions of a result in the total or partial destruction of the group, measures aimed at preventing births or the forcible transfer of children[147] .**

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[145] Specialized services in the field of information systems security affecting the war or economic potential, the security or the survival capacity of the Nation, designated in the decree of July 17, 2015 determining the State services mentioned in the second paragraph of article L. 2321-2 of the defense code.

[146] Services referred to in article R. 811-2 of the internal security code.

[147] Article 211-1 of the penal code.

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**Since Law No. 2010-930 of August 9, 2010 adapting to the Statute of the International Criminal Court, the Criminal Code also sanctions public and direct provocation, by any means, to commit genocide, with variable penalties depending on whether the provocation will or will not have been followed by effects148**

**The penal code groups "other crimes against humanity" in articles 212-1 to 212-3. Crimes against humanity thus constitute the acts exhaustively enumerated such as intentional attacks on life, extermination, enslavement, deportation or forced transfer of population, torture or rape committed in execution of a concerted plan against a group of civilian population, as part of a widespread or systematic attack.**

**Unlike genocide, the motives that led to the selection of the victim group are not decisive. It suffices that these acts concern the civilian population.**

**The acts referred to above also constitute crimes against humanity when they are committed in time of war in execution of a concerted plan against those who fight the ideological system in the name of which crimes against humanity are perpetrated. This text makes it possible to bring within the scope of crimes against humanity crimes that could otherwise be qualified as war crimes, when they are committed against resistance fighters149**

**Finally, participation in a group formed or in an agreement established with a view to the preparation, characterized by one or more material acts, of genocide or another crime against humanity is criminalized. It is a question here of incriminating as a main title criminal association applied to crimes against humanity.**

**War crimes and offenses are provided for and punished by articles 461-1 to 462-11 of the penal code. These are acts:**

- **Listed by these various provisions and targeting the persons and property also mentioned (for example, the civilian population or medical facilities),**
- **Committed during an international or non-international conflict and in connection with this conflict,**
- **And violating the laws and customs of war or applicable international conventions to armed conflicts (for example, the use of poison gas).**

**Attacks on life and physical integrity, attacks on individual liberty, attacks on the rights of minors, means and methods of combat prohibited under international humanitarian law and attacks on property are thus detailed, in the framework of conflicts armed international or not.**

148 Article 211-2 of the penal code.

149 Article 212-2 of the penal code.

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### 1.2. CONSTITUTIONAL FRAMEWORK

**The Constitutional Council considers that it is up to the legislator to ensure the reconciliation between, on the one hand, the safeguarding of public order, the search for the perpetrators of offenses and the prevention of the repetition of offenses or even the safeguarding of the interests of the Nation, all necessary for the protection of rights of constitutional value among the most fundamental and, on the other hand, respect for private life and other constitutionally protected rights and freedoms.**

**On the occasion of the examination of a priority question of constitutionality, the Constitutional Council admitted that the secrecy of the investigation and the instruction is a guarantee given to the citizens to ensure both the preservation of order public by allowing the search for perpetrators of offences, but also a guarantee of respect for the presumption of innocence and the protection of privacy150. It can only be restricted if it is justified by a reason of general interest and proportionate to it.**

**The secrecy of the investigation and the investigation has two purposes: "** ***on the one hand, to guarantee the proper conduct of the investigation and the investigation, thus pursuing the objectives of constitutional value of preventing breaches of public order public and the search for perpetrators of offences, both necessary to safeguard rights and principles of constitutional value [...], on the other hand, to protect the persons concerned by an investigation or an instruction, in order to guarantee the right to respect for private life and the presumption of innocence, which results from Articles 2 and 9 of the Declaration***

**The transmission of information, when it has the nature of personal data, must therefore be assessed in particular with regard to the right to respect for private life and the presumption of innocence.**

**Furthermore, the Constitutional Council considers that, if "** ***no constitutional norm opposes in principle the use for administrative purposes of personal data collected within the framework of judicial police activities; that, however, this use would disregard the requirements resulting from Articles 2, 4, 9 and 16 of the Declaration of 1789 if, by its excessive nature, it prejudices the rights or legitimate interests of the persons concerned .*** **151.**

**The transmission of personal information of a criminal nature by the judicial authority must be justified by imperatives protecting other rights or interests of the same value with which the rights or legitimate interests of the persons concerned must be reconciled.**

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**150 V. Constitutional Council, decision no. 2017-693 QPC of March 2, 2018.**

**151 V. Constitutional Council, decision no. 2003-467 DC of March 13, 2003, Law for internal security, cons. 32.**

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### 1.3. CONVENTIONAL FRAME

**The right to the presumption of innocence, a guarantee protected by the secrecy of the investigation, is enshrined in article 11 of the Universal Declaration of Human Rights and in article 14 of the United Nations Covenant on Human Rights. civil and political. Paragraph 2 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms also enshrines it in terms which are repeated in Article 48 of the Charter of Fundamental Rights of the European Union.**

**The right to respect for private life is guaranteed by paragraph 2 of Article 8 of the Convention which specifies under what conditions there may be interference with the enjoyment of the protected right: such interference must be "in accordance with the law" , pursue a “legitimate aim” and be “necessary in a democratic society”. This right is also included in Article 7 of the Charter of Fundamental Rights of the European Union. Furthermore, article 627 of the Code of Criminal Procedure provides that, for the application of the Statute of the International Criminal Court signed on July 18, 1998 and ratified on June 9, 2000, France participates in the repression of offenses and cooperates with this jurisdiction.**

### 1.4. ELEMENTS OF COMPARATIVE LAW

**Not applicable.**

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**The role of the intelligence services is to anticipate, understand and inform the authorities of the State of a threat and to prevent its realization on the territory of the Republic. As such, they participate in the fight against impunity for perpetrators of international crimes by collecting and analyzing information relating to specific individuals or groups, where applicable located outside the territory of the Republic.**

**However, legal proceedings may include information which, beyond their probative value allowing the characterization of the offense prosecuted, reveal or document the existence of a distinct threat which does not materialize by the commission of an offense .**
**Certain elements of these criminal investigations may then prove decisive for the intelligence services.**

**As indicated above, legislative provisions allowing the exchange of information between judicial authorities and intelligence services have been introduced in the fight against terrorism as well as in the area of organized crime and the fight against cyber attacks.**

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**Such a provision does not exist for the procedures of investigation or instruction relating to facts of war crimes and offenses and crimes against humanity, even if they would reveal information or information necessary for the exercise of the missions of the services concerned. /**

**The situation in the Sahel or the Levant and more recently the war in Ukraine have highlighted the need to widen the possibility for the anti-terrorism public prosecutor or for the investigating judge to communicate to the intelligence services elements relating to the procedures dealing with the most serious violations of fundamental norms of international law.**

**The role of these services, like the pace of judicial investigations into international crimes, have evolved in the context of new forms of armed conflict. Criminal investigations take place at the same time as events likely to be classified as crimes against humanity or war crimes, requiring greater responsiveness and more exchanges between the judicial authorities and the specialized intelligence services.**

**However, the transmission of information by the judicial authority to the intelligence services is such as to make it possible, as a preventive measure, to prevent the escape of war criminals or even their entry into the territory of the European Union.**

**A person implicated in war crimes can also be monitored by an intelligence service in order to ascertain the nature of the threat he represents, based on his contacts, his activities, or any other criteria.**

**More generally, the specialized services must be able to continue to collect and process the information necessary for their preventive threat assessment missions, in particular on individuals or various groups positioned outside the territory, as soon as the legitimacy of the right to know has been validated by the sole judicial authority.**

**This transmission of procedural elements can be essential to their mission of collecting and exploiting information relating to geopolitical and strategic issues and to the defense of the fundamental interests of the Nation, such as the execution of the European and international commitments of the France or the prevention of any form of foreign interference.**

**It therefore seems necessary to include a provision allowing, by way of derogation from article 11 of the code of criminal procedure, the National Anti-Terrorist Prosecutor's Office (PNAT) or the investigating judges seized to transmit to the specialized intelligence services referred to in article L. 811-2 of the Internal Security Code (first circle), elements appearing in open proceedings for war crimes and offenses or crimes against humanity.**

**This derogation from Article 11 of the Code of Criminal Procedure must be established by a standard of equivalent level.**

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### 2.2. OBJECTIVES PURSUED

**The objective is to transpose and adapt the mechanism already existing in Article 706-25-2 of the Code of Criminal Procedure, in matters of terrorism, by extending it to open proceedings for war crimes and offenses or crimes against humanity, and thus to allow the anti-terrorist prosecutor's office to transmit to the intelligence services the information that it would have discovered there and that it would consider necessary for the accomplishment of their missions.**

**The National Anti-Terrorism Prosecutor's Office has, in addition to its competence in matters of terrorism, concurrent national competence, pursuant to Article 628-1 of the Code of Criminal Procedure, for crimes against humanity and war crimes.**

**This extension would thus make it possible to unify its prerogatives: the transmission of information resulting from a procedure followed by the PNAT to the intelligence services of the first circle will obey the same regime for the main offenses falling within its jurisdiction152 .**

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**In accordance with article 34 of the Constitution, the provisions of criminal procedure, in this case concerning provisions relating to the secrecy of the investigation and the instruction, fall within the domain of the law. A regulatory or infra-regulatory vector would contravene the rules determining the respective areas of intervention of the law and the regulation.**

**The integration of the provision after article 11-2 of the code of criminal procedure could have been envisaged. However, in view of the architecture adopted in this code to integrate similar devices, this article more appropriately finds its place within subtitle II of the same code, devoted to the competent courts for the prosecution, investigation and judgment. crimes against humanity and war crimes and offences.**

### 3.2. SELECTED OPTION

**It is planned to transpose and adapt the existing mechanism in Article 706-25-2 of the Code of Criminal Procedure in matters of terrorism to the specific litigation of crimes against humanity and war crimes and misdemeanors.**

**After article 628-8 of the code of criminal procedure, a new article 628-8-1 is created within subtitle II of title I of book IV of the same code.**

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[152] **The National Anti-Terrorism Prosecutor's Office also has concurrent national jurisdiction for offenses relating to the proliferation of weapons of mass destruction and their vectors (articles 706-167 to 706-174 of the Code of Criminal Procedure) and for crimes of torture committed by state authorities and crimes of enforced disappearance (article 628-10 of the code of criminal procedure).**

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**This new article makes it possible to extend to investigations opened for crimes against humanity or war crimes and offenses the possibility for the anti-terrorism public prosecutor or the investigating judge in the event of a judicial investigation to communicate to the intelligence services elements of an ongoing procedure and thus to unify the regime applicable to the National Anti-Terrorism Prosecutor's Office for the main offenses falling within its jurisdiction, taking into account the possibilities already opened up in th**

**To limit the attack on the secrecy of the investigation and the investigation, the protection of privacy and the presumption of innocence, the elements thus transmitted may only be obtained by these services for the sole exercise of their missions for the defense of the fundamental interests of the Nation mentioned in 1°, 2°, 4°, 6° and 7° of article L. 811-3 of the internal security code153**

**It therefore appears necessary to provide for possible communication when elements of a procedure are correlated with certain areas of action of the intelligence services, specifically their missions relating to national independence, territorial integrity and national defence, the major interests of foreign policy, the execution of France's European and international commitments and the prevention of all forms of foreign interference, the prevention of terrorism, the prevention of organized crime and the preventing the proliferation of weapons of mass destruction.**

**For example, in the context of an investigation opened for crimes against humanity, procedural acts can allow the intelligence services to pursue an operation to prevent terrorism and to combat the proliferation of weapons of destruction massive. A person accused of war crimes can just as well justify, within the framework of the provisions of the internal security code, the collection or exploitation of information for his involvement in a transnational organized crime network.**

**This correspondence between the procedures for war crimes and offenses or crimes against humanity and the missions mentioned in 1°, 2°, 4°, 6° and 7° of Article L. 811-3 of the Security Code interior takes into account a certain porosity between the different criminal facts and the diversification of certain individuals or groups determined in their activities.**

**Moreover, if the procedure is the subject of information, this communication can only take place with the favorable opinion of the examining magistrate. The latter may also make this communication for the information procedures referred to it after obtaining the opinion of the anti-terrorism public prosecutor.**

**The information communicated pursuant to this article may not be the subject of an exchange with foreign intelligence services or with competent international organizations in the field of intelligence. This is a reinforced adaptation of the rule of international cooperation which requires that an intelligence service receiving information from another intelligence service cannot retransmit it to another**

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**153 1° National independence, territorial integrity and national defence; 2° The major interests of foreign policy, the execution of France's European and international commitments and the prevention of any form of foreign interference; 4° The prevention of terrorism; 6° The prevention of organized crime and delinquency; 7° The prevention of the proliferation of weapons of mass destruction.**

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**service (third-party service) only with the agreement of the issuing service. In this case, more strictly, no transmission of the procedural elements initially communicated by the National Anti-Terrorism Prosecutor's Office or the investigating magistrate can be authorized.**

**Any person to whom it is addressed will be bound by professional secrecy, under the conditions and under the penalties provided for in Articles 226-13 and 226-14 of the Criminal Code (paragraph 4 of the new Article 628-8-1 of the Code of Criminal Procedure) .**

**In addition, to limit the attack on the secrecy of the investigation, following the example of article 706-25-2 of the code of criminal procedure, only the so-called intelligence services of the first circle referred to in article L 811-2 of the internal security code will be able to benefit from these provisions and both the anti-terrorism public prosecutor and the investigating judge will retain the ability to assess the advisability of transmitting the information requested. The request made by the intelligence service will be likely to be rejected by the judicial authority if, in law and in fact, the conditions are not met to justify the implementation of this procedure derogating from article 11 of the code of criminal procedure.**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**The measure envisaged requires the creation, after article 628-8 of the code of criminal procedure, of an article 628-8-1, within subtitle II of the same code, devoted to the jurisdictions competent for the prosecution, the investigation and judgment of crimes against humanity and war crimes and offences. This provision will be drafted in terms similar to those of article 706-25-2 and adapted to the litigation of supranational crimes.**

#### 4.1.2. Articulation with international law and European Union law

**The legislative amendments do not disregard any rule arising from international law or European Union law.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**Not applicable.**

#### 4.2.2. Business impacts

**Not applicable.**

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#### 4.2.3. Budgetary impacts

**Not applicable.**

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**Not applicable.**

### 4.4. IMPACTS ON COURT SERVICES

**This measure could generate an additional burden for the National Anti-Terrorism Prosecutor's Office, which should nevertheless remain limited. If, as it stands, a little more than 160 procedures are followed by the specialized courts for international crimes (preliminary investigations or judicial information), this provision will not create an obligation of transmission at the expense of the judicial authority but only a faculty allowing it to assess the need to implement this derogation from article 11 of the code of criminal procedure in certain cases in which the procedural documents are likely to enable the intelligence services to carry out their missions.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

**Not applicable.**

#### 4.5.2. Impacts on people with disabilities

**Not applicable.**

#### 4.5.3. Impacts on equality between women and men

**Not applicable.**

#### 4.5.4. Impacts on youth

**Not applicable.**

#### 4.5.5. Impacts on regulated professions

**Not applicable.**

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### 4.6. IMPACTS ON INDIVIDUALS

**Not applicable.**

### 4.7. ENVIRONMENTAL IMPACTS

**Not applicable.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**These provisions do not require any mandatory consultation and no optional consultation has been conducted.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**These provisions will enter into force the day after the publication of the law in the *Official Journal.* of the French Republic.**

**As this is a text setting the procedures for prosecution and the forms of the procedure, it is immediately applicable to ongoing criminal proceedings[154]**

#### 5.2.2. Application in space

**These provisions are intended to apply in the Overseas communities governed by Article 73 of the Constitution due to the principle of legislative identity without it being necessary to make express mention thereof.**

**In the Overseas communities governed by Article 74 of the Constitution and in New Caledonia subject to the special legislative regime, an express mention of application is necessary in order to make these provisions applicable[155] via the update of the Article 804 of the Code of Criminal Procedure amended for this purpose by Article 36 of this bill.**

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[154] **Article 112-2 of the penal code.**

[155] **See article 7 of the organic law n° 2004-192 of February 27, 2004 for French Polynesia; Article 4 of Law No. 61-814 of July 29, 1961 for the Wallis and Futuna Islands; Article 6-2 of Organic Law No. 99-209 of March 19, 1999 for New Caledonia; Article 1-1 of Law No. 55-1052 of August 6, 1955 for the French Southern and Antarctic Lands.**

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**Furthermore, no adaptation of these provisions relating to the characteristics of the local authorities appears necessary.**

**These measures are therefore applicable throughout the territory of the Republic.**

#### 5.2.3. Application texts

**These provisions do not call for any regulatory measure of application.**

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# Article 22: Protecting the anonymity of former intelligence service agents or former members of special forces or specialized intervention units in the context of legal proceedings

## 1. STATE OF PLAY

### 1.1. GENERAL FRAMEWORK

**Agents of the intelligence services and members of special forces units or intervention units specializing in the fight against terrorism benefit from two mechanisms for the criminal or judicial protection of their anonymity.**

#### 1.1.1. Reinforced criminal protection against the disclosure of their identity(ies) or their membership of the service

**This criminal protection is provided by Articles 413-13 and 413-14 of the Criminal Code. The disclosure of any information which could lead, directly or indirectly, to the discovery of the use, pursuant to article L. 861-2 of the internal security code, of an assumed identity or false quality, of the real identity of an agent of a service mentioned in article L. 811-2 of the same code or of a service designated by the decree in Council of State provided for in article L. 811-4 of said code or membership in one of these services is punishable by five years' imprisonment and a fine of €75,000.**

**Articles L. 811-2 and L. 811-4 of the Internal Security Code determine the services so-called "first circle[156]" specialized intelligence services and the so-called "second circle[157] " services concerned by this protection.**

**Paragraphs 2 and 3 of Article 413-13 of the Penal Code provide for increased penalties in the event of a harmful result occurring following the disclosure on the agents or their relatives (physical or psychological harm, death).**

**The disclosure committed by negligence or imprudence by a person holding information in the professional context is also punishable in paragraph 4.**

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[156] **Services referred to in Article R. 811-1 of the Internal Security Code: "the General Directorate for External Security, the Directorate for Intelligence and Defense Security, the Directorate for Military Intelligence, the Directorate General for internal security, the service with national competence called "National Directorate of Intelligence and Customs Investigations" and the service with national competence called "processing of intelligence and action against clandestine financial circuits". »**

[157] **Services referred to in article R. 811-2 of the internal security code.**

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**Paragraph 5 confers similar protection on sources or collaborators of the service concerned.**

**Since 2016, a similar mechanism has been provided for in Article 413-14 of the Criminal Code158, within a section newly named "Attacks to certain specialized services or units", for the benefit of members of special forces units designated by decree. the Minister of Defense or intervention units specializing in the fight against terrorism designated by order of the Minister of the Interior159**

**The objective of these provisions is to preserve the confidentiality and the element of surprise required by unconventional military operations, but also to grant members of the special forces protection inspired by that granted to intelligence agents whose action they extend. and who are exposed to the same threats.**

### 1.1.2. Judicial protection of their anonymity in the event of a hearing as witness in criminal proceedings

**In Title IV *bis* of the Code of Criminal Procedure entitled "On the manner in which statements from the personnel of certain specialized services or units are received", article 656-1 provides that when the testimony of an agent of a service mentioned in Article L. 811-2 of the Internal Security Code or of a service designated by the Conseil d'Etat decree provided for in Article L. 811-4 of the same code or of a person mentioned in article 413-14 of the penal code is required during legal proceedings on facts of which he would have become aware during a mission of interest to defense and national security, his real identity must never appear during the legal proceedings .**

**Where applicable, his membership of one of these services and the reality of his mission are attested by his hierarchical authority. The questions asked must not have the purpose or effect of revealing, directly or indirectly, the true identity of this agent. Hearings are received under conditions allowing the guarantee of his anonymity.**

**If it is indicated by the hierarchical authority that the required hearing, even carried out under the conditions of anonymity indicated in the first and third paragraphs, entails risks for the official, his relatives or his department, this hearing is carried out in a place ensuring anonymity and confidentiality. This place is chosen by the head of the service and may be the official's duty station.**

**If a confrontation must be carried out between a person under investigation or appearing before the trial court and an agent mentioned in the first paragraph because of the evidence against him resulting from observations personally made by this agent, this confrontation is carried out under the conditions provided for by article 706-61 of the code of**

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158 Law n° 2016-483 of April 20, 2016 relating to the ethics and rights and obligations of civil servants.

159 Order of 20 October 2016 relating to the preservation of the anonymity of members of special forces units and decree of June 25, 2018 relating to the preservation of the anonymity of members of intervention units specialized in the fight against terrorism.

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criminal proceedings, or by means of a technical device allowing the remote hearing of the witness, his voice being made unidentifiable by appropriate technical processes.

This procedural framework is of course not applicable to personnel who would be implicated in the context of a criminal investigation, this provision in no way constituting a cause of criminal irresponsibility.

### 1.2. CONSTITUTIONAL FRAMEWORK

The Constitutional Council exercises strict control over texts limiting freedom of expression and communication. For him, the " *attacks on the exercise of this freedom must be necessary, appropriate and proportionate to the objective pursued* ", criteria deduced from article 11 of the Declaration of 1789[160] .

Concerning the parallel system of criminalization of the disclosure of the identity of specialized agents, the criminal division of the Court of Cassation was seized of a priority question of constitutionality in 2013 relating to article 413-13 of the penal code which, according to the applicant, disproportionately interfered with the freedom of expression guaranteed by Article 11 of the Declaration of the Rights of Man and of the Citizen, the constitutional objective of finding the perpetrators of offenses and finally the right persons to exercise an effective judicial remedy guaranteed by article 16 of this same Declaration.

The Court of Cassation answered in the negative, saying there was no reason to refer the QPC to the Constitutional Council, considering that Article 413-13, paragraph 1, of the Criminal Code is content to create a limit to the freedom of information concerning the identity of agents of the intelligence services, justified by the protection of the fundamental interests of the Nation and the security of those concerned, as long as they fulfill their mission in compliance with the laws, the
Court observing that the text does not establish any criminal immunity for the benefit of those concerned who are guilty of crimes or misdemeanors[161] .

Furthermore, Article 16 of the Declaration of the Rights of Man and of the Citizen ensures the "guarantee of rights", under which are protected, as constitutional principles, the rights of the defense and the principle of adversarial proceedings. which is the corollary. In this context, the Constitutional Council judges:

- ÿ that the adversarial principle and respect for the rights of the defense imply in particular that a person accused before a criminal court has been given the opportunity, by himself or by his lawyer, to challenge the conditions under which the elements of evidence which support his indictment have been collected[162] ;

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[160] V. CC, decision n° 2010-3 QPC, *Union of families in Europe [Family associations],* May 28, 2010, cons. 6.

[161] Crim., QPC, 17 Apr. 2013, No. 13-90.009: https://www.legifrance.gouv.fr/juri/id/JURITEXT000027365440.

[162] V. CC, decision no. 2014-693 DC, *Law on geolocation,* March 25, 2014.

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- **that it is up to the legislator to ensure the reconciliation between, on the one hand, the rights of the defense and the adversarial principle and, on the other hand, the objective of constitutional value of finding the perpetrators of offenses and the constitutional requirements inherent in safeguarding the fundamental interests of the Nation163 .**

**In its decision n° 2019-778 DC of March 21, 2019, the Constitutional Council validated the provisions of article 15-4 of the code of criminal procedure allowing agents of the national police or the national gendarmerie not to be identified by their surnames and first names in certain procedural acts in which they intervene, after having noted that the anonymity of these agents is preserved only when the revelation of their identity would be likely to endanger their life or that of their relatives. Under these conditions, it ruled that the legislator had struck a balanced balance between the prevention of breaches of public order and the exercise of constitutionally guaranteed rights and freedoms, including the rights of the defence.**

### 1.3. CONVENTIONAL FRAME

**Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to a fair trial, which implies respect for the rights of the defense and requires in criminal matters to give the accused an adequate opportunity and sufficient to challenge the prosecution evidence and to question the perpetrators. However, the European Court of Human Rights accepts that, provided that the rights of defense are respected, it may be legitimate for police authorities to wish to preserve the anonymity of an agent employed in secret activities, in order to not only to ensure his protection and that of his family, but also not to jeopardize the possibility of using him in future operations164 .**

### 1.4. ELEMENTS OF COMPARATIVE LAW

**Not applicable.**

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**[163] V. CC, decision n° 2022-987 QPC, M. Saïd Z. [Conditions of recourse to the means of State services submitted to national defense secrecy in the context of certain criminal proceedings], 8 April 2022, § 12.**

**[164] V. ECHR, Van Mechelen and others v. Netherlands, 1997, §§ 56-57; Batek and others v. Czech Republic, 2017, § 46; Van Wesenbeeck c. Belgium, 2017, §§ 100-101.**

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## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**The provisions of article 656-1 of the code of criminal procedure do not specify the conditions of application in time of the system of hearing as witnesses of intelligence agents, members of special forces units or intervention units. specialized in the fight against terrorism and more specifically whether this procedural framework is applicable beyond the end of the assignment in the designated service.**

**The principle of strict interpretation of criminal law could make it possible to consider that the absence of reference to former agents or former members, both in article 656-1 of the code of criminal procedure, and in the articles to which it refers in its first paragraph, is sufficient to exclude them from the benefit of this derogatory regime applicable only to current functions.**

**However, the issue of the application over time of the provisions of Article 656-1 of the Code of Criminal Procedure regularly emerges in the context of legal proceedings. Current practice is based on a differentiated assessment, depending on the situations presented, which is a source of legal uncertainty for all legal actors, former employment administrations or interested parties themselves.**

**The question of the application of the text may relate, for example, to the case of a former special forces agent returned to a traditional assignment or to that of a soldier who has become an agent of an intelligence service brought to testify about a mission prior to this assignment.**

**However, the loss of status as an intelligence agent, member of a special forces unit or specialized interventions in the fight against terrorism in no way diminishes the need to protect these personnel - in the same way as the services specialists to which they belonged - *a fortiori* if the departure from the service is very recent.**

**In addition to the issues of legal certainty, it appears inappropriate to deprive agents upon termination of their duties of a hearing framework specially provided for to protect them when they testify on facts of which they would have become aware during a mission of interest to the defense and t national security.**

**Whatever their organic link with this department or their professional background, the mission can continue, the operational challenges can be maintained and the sensitivity of the context can increase.**

**The identification of these specialized agents in a judicial context can, moreover, facilitate, by cross-checking, the discovery of the identity of their former colleagues, who are still on assignment.**

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### 2.2. OBJECTIVES PURSUED

**This involves providing for an amendment to Article 656-1 of the Code of Criminal Procedure to remove any legal uncertainty as to the application over time of this legal framework. Independently of the penal repression provided for in Articles 413-13 and 413-14 of the Criminal Code, the protection in the judicial framework of personnel who belonged to specialized units remains a major issue, including when the agents have left their functions.**

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**As this is a legislative provision specifying the derogatory hearing framework applicable to certain former specialized agents and provided for during the judicial inquiry, it must in principle find its place within the code of criminal procedure.**

**Consideration could have been given to inserting this modification in the various general provisions of the Code of Criminal Procedure dealing with the hearing of witnesses both in the context of the investigation carried out by the public prosecutor (Articles 62 and 78) and during judicial information (article 102). It nevertheless finds its place more appropriately within Title IV *bis* , which organizes the system of depositions applicable to the personnel of certain services or specialized units.**

**On the basis of the device, it could be envisaged to:**

- **To limit its application in time, after termination of office;**
- **To expressly make its application subject to the finding of a danger to the safety of the person concerned or his relatives or for the proper performance of the missions of the former service or unit to which the person concerned belongs.**

### 3.2. SELECTED OPTION

**Article 656-1 of the Code of Criminal Procedure is supplemented by a new paragraph specifying the scope of the system made explicitly applicable to the testimony of persons who belonged to the services and units it mentions.**

**This addition ensures a clear interpretation of these provisions and secures their application to officers who have left these units.**

**Article 656-1 of the Code of Criminal Procedure thus amended will allow designated persons to be subject to this special hearing regime as witnesses in order to contribute to the criminal investigation, without creating any particular risk for their safety, that of their relatives or their former service.**

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On the merits, it does not seem appropriate to limit in time the application of the device after the cessation of functions, which would be insufficiently protective for the safety of the person or his relatives, nor to subordinate the protection of anonymity the prior finding of the danger by the administrative authority under the control of the criminal judge (like the provision of article 15-4 of the code of criminal procedure). Indeed, given the specific nature of the secret missions entrusted to the intelligence services and units concerned by the provision, the disclosure of the identity of the agents who participated in them, even in the context of legal proceedings, would be likely to give indications on their operation and their organization likely to weaken the effectiveness of their current or future actions

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

The new provision adds a paragraph to article 656-1 of the code of criminal procedure.

It does not call into question respect for the rights of the defence, guaranteed by the Constitution. Article 656-1 ensures the possibility for the person in question to contest the testimony thus collected, if necessary in the context of a confrontation with the witness under the conditions provided for in article 706-61 of the Code. of criminal procedure. It also guarantees that no conviction can be pronounced solely on the basis of the statements collected from an anonymous witness.

#### 4.1.2. Articulation with international law and European Union law

Legislative changes do not require articulation with international law and European Union law.

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

Not applicable.

#### 4.2.2. Business impacts

Not applicable.

#### 4.2.3. Budgetary impacts

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Not applicable.

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

Not applicable

### 4.4. IMPACTS ON COURT SERVICES

**This measure concerns a very particular and residual category of witnesses. The extension to former agents of the specialized services or units referred to in paragraph 1 of the article should not have any particular impact on the judicial services.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

Not applicable.

#### 4.5.2. Impacts on people with disabilities

Not applicable.

#### 4.5.3. Impacts on equality between women and men

Not applicable.

#### 4.5.4. Impacts on youth

Not applicable.

#### 4.5.5. Impacts on regulated professions

Not applicable.

### 4.6. IMPACTS ON INDIVIDUALS

Not applicable.

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### 4.7. ENVIRONMENTAL IMPACTS

**Not applicable.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**No mandatory consultation is identified and no optional consultation has been conducted.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**These provisions will enter into force the day after the publication of the law in the *Official Journal.* of the French Republic. As this is a text setting the procedures for prosecution and the forms of the procedure, it is immediately applicable to ongoing criminal proceedings165**

#### 5.2.2. Application in space

**These provisions are intended to apply in the Overseas communities governed by Article 73 of the Constitution due to the principle of legislative identity without it being necessary to make express mention thereof.**

**In the Overseas communities governed by Article 74 of the Constitution and in New Caledonia subject to the legislative specialty regime, an express mention of application is necessary in order to make these provisions applicable via the update of the Article 804 of the Code of Criminal Procedure amended for this purpose by Article 36 of the bill.**

**Furthermore, no adaptation of these provisions relating to the characteristics of the local authorities appears necessary.**

**These measures are therefore applicable throughout the territory of the Republic.**

#### 5.2.3. Application texts

**This provision does not call for any regulatory implementing measure.**

[165] **Article 112-2 of the penal code.**

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# CHAPTER III – DEFENSE ECONOMY

## Article 23: Modernize and adapt the system of requisitions in time of peace and in time of war

### 1. STATE OF PLAY

#### 1.1. GENERAL FRAMEWORK

**As a parliamentary fact-finding mission recently underlined, " *the triple context of climate and ecological crisis, scarcity of resources and growing antagonism between powers - also expressed by hybrid threats not covered by nuclear deterrence –, against a background of the decline of democracy and international law, leaves little doubt as to the growing intensity of the crises that we will experience in the coming decades and as to their intertwining"* 166 ·**

**Faced with this observation, the report concluded on the need for the State to adopt a " *resilience approach* ", presented as " *the will and the capacity of the nation in all its components to guard against the main risks and threats to which it is exposed, and, if a catastrophe or a major attack occurs, to resist their consequences and quickly recover a balance which reinforces its cohesion and its fundamental values" .**
**Such a posture, intended to " *leave as little room as possible for strategic surprise* ", therefore supposes " *that the public authorities also take into account situations where their own capacities would be exceeded* ".**

**In such a case, beyond its capacities for direct or indirect intervention, by contractual means, the State can use its power of requisition, a typical manifestation of the exorbitant prerogatives from which it benefits, at the confluence of power and public utility. In fact, for the administrative authority, it is a matter of unilaterally imposing, for reasons of general interest, the temporary transfer of the use of an asset, the performance of an activity or the execution of the provision of a service by a person, when these cannot be obtained by means of amicable negotiation. The requisition can nevertheless only be pronounced on a subsidiary basis, when the means available to the requesting authority to meet the needs in question appear non-existent, unsuitable, unavailable or insufficient.**

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[166] **Alexandre Freschi and Thomas Gassiloud, Fact-finding mission on national resilience, National Assembly, February 23, 2022.**

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However, it can be recalled that the right of requisitions is not based on a single procedure, but that it is based on a juxtaposition of distinct procedures, obeying different rules of implementation.

Historically, the first regulations in this area date back to the law of July 3, 1877[167], with the establishment of a specific regime for military requisitions, the purpose of which is to " *compensate for the insufficiency of ordinary means of supplying the 'army* ', understood in the broad sense, including housing, the goods and foodstuffs necessary for their subsistence or the installations, equipment and manpower necessary for the pursuit of military activities.

It was only through the law of July 11, 1938[168] that this faculty was consecrated for the civil authority. Initially designed to apply only temporarily, with the approach of the Second World War, the provisions of this last law were finally extended several times after the end of the conflict[169], until they were made permanent, by the ordinances n° 59-63 of January 6, 1959[170] and n° 59-147 of January 7, 1959[171], which established the possibility of using it " *for the needs of the country, the services of companies and individuals, as well as the property or the use of all property .*

Today codified in Book II of the second part of the Defense Code[172], the provisions resulting from the laws of July 3, 1877 and July 11, 1938 as well as the ordinances of January 6 and 7, 1959 thus constitute the legal corpus of common law of requisitions that can be mobilized by the State, in times of peace as in times of war, respectively qualified as " *requisitions for the general needs of the Nation* ", with regard to the prerogatives conferred on the civil authority, and " *military requisitions* ", for those devolved to the military authority.

In this respect, it can be underlined that if article L. 2211-1 of the defense code states that the requisitions for the general needs of the Nation were designed in order to implement "the services necessary to ensure the *needs defence* " in the cases mentioned in article L. 1111-2 of the same code – thus referring to general mobilization, warning or a " *threat relating in particular to a part of the territory, to a sector of national life or on a fraction of the population* " – article L. 2211-2 of this code specifies that " *Regardless of the cases provided for in article L. 1111-2, the Government continues to have*

[167] Law of July 3, 1877 relating to military requisitions.

[168] Law of July 11, 1938 on the general organization of the nation for wartime.

[169] By annual extensions between 1946 and 1949, *via* the laws of May 10, 1946, n° 47-344 of February 28, 1947, n° 48-341 of February 28, 1948 and n° 49-266 of February 26, 1949, then without limitation of duration, by law n° 50-244 of February 28, 1950 maintaining provisionally in force beyond March 1 , 1950 certain legislative and regulatory provisions of wartime extended by the law of February 26, 1949.

[170] Ordinance No. 59-63 of January 6, 1959 relating to the requisitioning of goods and services.

[171] Ordinance No. 59-147 of January 7, 1959 on the general organization of defence.

[172] On the occasion of Ordinance No. 2004-1374 of December 20, 2004 relating to the legislative part of the Defense Code.

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***of the powers conferred upon it*** **" in the matter173, thus offering it the possibility of " *requisitions with a more civil connotation* "174**

**The current system of requisitions for the general needs of the Nation thus comprises two parts:**

- **on the one hand, article L. 2211-1, relating to requisitions " *to ensure the needs of the defense* " (and only them), which is applicable in the hypotheses of article L. 1111-2 and in the event of a declaration of a state of emergency175 ;**

- **on the other hand, article L. 2211-2, relating to what until the codification was called requisitions for the " *needs of the country* " (and not only of defence), possible in all case, beyond the sole assumptions of Article L. 1111-2 (therefore including outside of a " *threat* " within the meaning of this article). As the Council of State indicated in a 1945 opinion, " *neither the law of July 11, 1938, nor any subsequent legislative provision gave a definition of this last expression, the meaning of which must therefore be determined from after the general object pursued by the law* ". However, the needs of the country (or the Nation) can be related to " *activities essential to the life of the country* ", the maintenance of which would be " *essential to meet the requirements of national defence, either because of the services they are called upon to provide, or the serious disturbance that their disappearance would cause to public order* "176. It *is* on this basis that strikers were requisitioned from 1948 to 1963. *which resulted from it, on this traffic have had the effect of bringing either to the continuity of the transport service, or to the satisfaction of the needs of the population, a sufficiently serious attack to justify legally the requisition of the personnel of this control "* 177**

**This regime is thus both imprecise and very encompassing: it aims to remedy all attacks on the general needs of the Nation, without listing the different hypotheses in which these could occur. In principle, requisitions for the needs of the Nation, as their name indicates, constitute common law requisitions serving the interests of the entire Nation (or part of it), as opposed to police requisitions of 4° of article L. 2215-1 of the general code of local authorities, necessarily located at**

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**173 The provisions of Article L. 2211-2 of the Defense Code thus codified those of Article 45 of Ordinance No. 59-147 of 7 January 1959 mentioned above, the purpose of which was to preserve the option the Government, by article 2 of the aforementioned law n° 50-244 of February 28, 1950, to make extensive use of the requisition mechanism resulting from the law of July 11, 1938.**

**174 Jacques-Henri Stahl, "Jurisdiction competent to compensate a doctor requisitioned by a prefect", AJDA, 2006.**

**175 Article 10 of Law No. 55-385 of 3 April 1955 relating to the state of emergency: " *The declaration of a state of emergency is in addition to the cases provided for in article L. 1111-2 of the code defense for the execution of requisitions under the conditions provided for in book II of the second part of the same code* ".**

**176 EC, opinion, May 31, 1945, Revue de droit public, 1947, pp. 22-23.**

**177 EC, 24 Feb. 1961, Isnardon, no. 40013, A.**

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**departmental scale and strictly dedicated to the prevention of a threat to public order (which the general needs of the Nation include without being limited to it).**

**Nevertheless, as is apparent from the use of this regime under the Fifth Republic, the public authorities resort to it only with extreme parsimony, when public interests are clearly threatened. There are thus only five decrees in the Council of Ministers giving rise to the right of requisition in such circumstances:**

- **Decree No. 61-404 of April 24, 1961 establishing the right of requisition, issued on the basis of Decree No. 61-395 of April 22, 1961 declaring a state of emergency and Decree No. 61- 396 of April 22, 1961 relating to the application of the state of emergency in all the departments of the metropolitan territory, following the "generals' putsch" of April 21 of that same year;**
- **Decree No. 91-42 of January 14, 1991 establishing the right of requisition of French airlines, as a preventive measure, to allow French nationals to be evacuated in the event of a conflict in the Gulf;**
- **Decree No. 91-60 of January 17, 1991 establishing the right to requisition the employment of personnel from French shipping companies, as a preventive measure, to enable French nationals to be evacuated in the event of a conflict in the Gulf;**
- **Decree No. 2004-1190 of November 10, 2004 opening the right of requisition for French airlines, in order to allow the evacuation of French nationals present in Côte d'Ivoire after the bombardment of a camp of the Licorne force in Bouaké by an Ivorian army plane on November 6 of that same year;**
- **Decree No. 2022-1020 of July 20, 2022 opening the right to requisition helicopter rental companies capable of participating in the fight against forest fires, in order to respond to " *multiple fires of a rare intensity throughout the national territory* ".**

**Parallel to the construction of this common law of requisitions, several special regimes of civil requisitions have also developed, among which are, to name only the most significant areas of intervention:**

- **in terms of housing, ordinance no. 45-2394 of October 11, 1945178, taken with a view to remedying the housing difficulties caused by the destruction of the Second World War before being made permanent and codified179 due to the persistence of the housing crisis, confers on the prefect the option of " *proceeding, by requisition, for a maximum period of one year, renewable, with taking partial or total possession of vacant, unoccupied or insufficiently occupied* " to assign them to " *persons without housing or housed in conditions manifestly***

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[178] **Ordinance No. 45-2394 of October 11, 1945 establishing exceptional and temporary measures to remedy the housing crisis.**

**179 See Articles L. 641-1 to L. 641-14 of the Construction and Housing Code.**

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***insufficient*** **" or " *against which a final judicial decision ordering their eviction has taken place* ", in return for " *occupancy compensation* ";**

- **with regard to the protection of marine waters, laws n° 61-1262 of November 24, 1961[180] and n° 76-599 of July 7, 1976[181], respectively codified in articles L. 5141-2-1 and L. 5242-17 of the Transport Code and L. 218-72 of the Environment Code, confer on the competent administrative authority of the State the ability to requisition persons and property with a view to putting an end to a danger or prolonged hindrance to the exercise of maritime, coastal or port activities induced by the presence of a floating device or resulting from damage or an accident, referring to the compensation scheme provided for by the Defense Code;**
- **in terms of intellectual property, the provisions of Law No. 68-1 of January 2, 1968[182] , now codified in Articles L. 612-8 to L. 612-10 of the Intellectual Property Code, confer on the Minister of Defense a power of requisition allowing him, for a renewable period of one year, to prohibit the disclosure and free exploitation of inventions that are the subject of patent applications, as long as they are of interest to national defence, thus opening "the right *to compensation for the benefit of the patent application holder, to the extent of the damage suffered* » ;**
- **in terms of safeguarding public order, the provisions of law no. 87-565 of July 22, 1987[183], now codified within the internal security code[184], have conferred on the territorially competent authorities of the State, " *in the event of an accident, disaster or disaster* " , the ability to requisition " *the private means necessary for relief* ", before article 3 of law no. requisition from which the prefects benefit, subject to a specific compensation scheme. These last provisions have, in fact, inserted a new 4° within article L. 2215-1 of the general code of communities, which provides that " *in the event of an emergency, when the observed or foreseeable damage to good order, health, tranquility and public security so requires and that the means available to the prefect no longer allow him to pursue the objectives for which he has police powers, he may, by reasoned order, for all the communes of the department or several or only one of them, to requisition any good or service, to require any person necessary for the operation of this service or the use of this good" ;**
- **in health matters, article 20 of law n° 2004-806 of August 9, 2004[186] introduced, within the public health code, articles L. 3131-8 and L. 3131-9 allowing the authorities**

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[180] Law n° 61-1262 of November 24, 1961 relating to the police of maritime wrecks.

[181] Law No. 76-599 of July 7, 1976 relating to the prevention and repression of marine pollution by operations immersion carried out by ships and aircraft, and the fight against accidental marine pollution.

[182] Law No. 68-1 of January 2, 1968 on patents.

[183] Law No. 87-565 of July 22, 1987 relating to the organization of civil security, the protection of the forest against fire and the prevention of major risks.

[184] See articles L. 115-1, L. 742-2, L. 742-3 and L. 742-12 to L. 742-15 of this code.

[185] Law n° 2003-239 of March 18, 2003 for internal security.

[186] Law n° 2004-806 of August 9, 2004 relating to public health policy.

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territorially competent State, " *If the influx of patients or victims or the health situation justifies it* ", to " *proceed with the necessary requisitions of all goods and services, and in particular require the service of any health professional, whatever or its mode of exercise, and of any health establishment or medico-social establishment* ", referring to the compensation scheme provided for by the Defense Code;

ÿ in space matters, ordinance no. 2022-232 of February 23, 2022[187] introduced, within book II of the second part of the defense code, a new title II *bis* establishing a specific framework relating to the requisitioning of goods and space services, allowing the Prime Minister to obtain in the event of an emergency, for the benefit of the State, the transfer of control of a space object or the supply of services based on the use of such an object, in order to respond to needs linked to safeguarding the interests of national defence, by means of a mechanism for full compensation of the damage caused on this occasion.

Finally, laws of circumstance have sometimes been adopted to allow the use of the right of requisition on the occasion of exceptional events, such as:

ÿ Laws No. 67-532 of July 4, 1967[188], No. 87-1132 of December 31, 1987[189] and No. 2018-202 of March 26, 2018[190], authorizing the temporary requisition of land and buildings with a view to organizing Olympic Games on the national territory;

ÿ of Law No. 2020-290 of March 23, 2020[191], which gave the prefects the option of " *ordering the requisition of any person and of any goods and services necessary for the fight against the health disaster* " for the duration of the state of health emergency, once again referring to the compensation scheme provided for by the Defense Code;

ÿ Law No. 2022-1158 of August 16 , 2022[192], which gave the Minister of Energy, for a period of four years, the option of requisitioning the services responsible for operating electricity production facilities using natural gas, in the context of the threat to security of supply following the Ukrainian conflict.

As emerges from the preceding developments, the law of requisitions is the result of a piling up of scattered texts, obeying objectives and procedures which appear neither homogeneous nor coordinated and whose drafting sometimes seems outdated, subject open to interpretation or, more broadly, unsuited to the needs of the time.

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[187] Ordinance No. 2022-232 of February 23, 2022 relating to the protection of national defense interests in the conduct of space operations and the use of data of space origin.

[188] Law No. 67-532 of July 4, 1967 authorizing the temporary requisition of land necessary for development and temporary installations intended for the holding of the X Olympic Winter Games in Grenoble.

189 Law No. 87-1132 of 31 December 1987 authorizing, with regard to the taking possession of buildings necessary for the organization or running of the XVIth Olympic Winter Games in Albertville and Savoie, the application of the procedure of extreme urgency and the temporary requisition.

190 Law No. 2018-202 of March 26, 2018 relating to the organization of the 2024 Olympic and Paralympic Games.

191 Emergency law n° 2020-290 of March 23, 2020 to deal with the covid-19 epidemic.

192 Law n° 2022-1158 of August 16, 2022 on emergency measures for the protection of purchasing power.

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However, strategic objective No. 3 of the National Strategic Review 2022 emphasizes the need to have tools that make it possible, in times of crisis, to compensate for the inadequacy of the means available to the State to fully meet the requirements of the policy. of defence, the purpose of which is " *to ensure the integrity of the territory and the protection of the population against armed attacks* ", to contribute " *to the fight against other threats likely to jeopardize national security* ", to to provide " *for respect for alliances, treaties and international agreements* " and to participate " *within the framework of the European treaties in force, in the common European security and defense policy* "[193].

### 1.2. CONSTITUTIONAL FRAMEWORK

The very principle of requisitions and the general terms governing them, which must be defined in law pursuant to Article 34 of the Constitution, insofar as the fundamental guarantees granted to citizens for the exercise of public freedoms are at issue and in that they constitute, by their very object, constraints imposed by national defense on citizens in their person and in their property, is subject to the control of the constitutional judge.

On the occasion of its review, the Constitutional Council ensures that the legislative provisions carry out a " *conciliation which is not unbalanced* " between the various constitutional requirements in question.

In addition, on requisition decisions, the judge exercises concrete and full control aimed at ensuring that they are necessary, appropriate and proportionate to the objectives pursued194 .

#### 1.2.1. The safeguard of the fundamental interests of the Nation is a constitutional requirement likely to justify an attack on other principles with constitutional value.

It emerges from the case law of the Constitutional Council and the Council of State that the " *constitutional requirements inherent in safeguarding the fundamental interests of the Nation* ", foremost among which are national independence and territorial integrity, which are the purpose, but also the protection of national defense secrets and the free disposal of armed force195, are taken into account by the judge in his control of proportionality in the event of infringement of other principles with constitutional value.

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193 See Article L. 1111-1 of the Defense Code.

194 EC, December 4, 2017, Municipality of Sainte-Croix-en-Plaine, 405598.

195 The principle of " *necessary free disposal of armed force* " stems from Articles 20 and 21 of the Constitution, under which " *the Government decides, under the authority of the President of the Republic, on the use of armed force* " ( Mr. Dominique de L., 28 November 2014, n° 2014-432 QPC).

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**It is up to the judge to ensure a " *conciliation which is not unbalanced* " between safeguarding the fundamental interests of the Nation and the other constitutional requirements196**

### 1.2.2. Infringements of the right to property must be justified by a reason of general interest and proportionate to the objective pursued

**It emerges from the jurisprudence of the Constitutional Council that: " *Property is one of the human rights enshrined in Articles 2 and 17 of the Declaration of 1789. According to its Article 17: "Property being an inviolable and sacred right, no one can be deprived of it, except when public necessity, legally established, obviously requires it, and under the condition of a fair and prior indemnity". In the absence of deprivation of the right to property within the meaning of this article, it nevertheless follows from article 2 of the Declaration of 1789 that the attacks on this right must be justified by a reason of general interest and proportionate to the 'objective* pursued'197**

**If the requisition constitutes an attack on the right of property, it does not in any way constitute a deprivation of this right within the meaning of article 17 of the Declaration of 1789. Although meeting an objective of constitutional value, such an attack could not however take on a character of seriousness such that it distorts the meaning and scope of the right of own**

**In the absence of dispossession, no principle of constitutional value requires that compensation for infringements of property rights fall within the jurisdiction of the judicial judge199 .**

### 1.2.3. Respect for the principle of equality before public charges imposes full compensation for damages

**It emerges from the case law of the Constitutional Council that: " *respect for the principle of equality before public charges cannot make it possible to exclude from the right to compensation any element of the compensable damage resulting from the implementation of the requisition procedure; that it follows that in the event that the compensation provided for in Article L. 642-15 is not sufficient to cover all the damage suffered by the holder of the right of use, Art***

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196 Ms. Ekaterina B., wife D., and others, November 10, 2011, No. 2011-192 QPC, regarding the right of interested persons to exercise an effective judicial remedy and the right to a fair trial; Law relating to intelligence, 23 July 2015, n° 2015-713 DC, concerning the right of interested persons to exercise an effective judicial remedy, the right to a fair trial and the adversarial principle; Law to strengthen the freedom, independence and pluralism of the media, 10 November 2016, n° 2016-738 DC, regarding freedom of expression and communication; La Quadrature du net, July 9, 2021, n° 2021-924 QPC, about respect for privacy.

197 Mr. Jean-Claude G., January 17, 2012, n°2011-209 QPC ; M. Raïme A., December 2, 2016, n° 2016-600 QPC.

198 Orientation law relating to the fight against exclusion, 29 July 1998, no. 98-403 DC.

199 Law amending Law No. 82-652 of July 29, 1982 and containing various provisions relating to audiovisual communication, December 13, 1985, No. 85-198 DC.

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*be interpreted as allowing the court to award him additional compensation .* [200].

**1.2.4. Restrictions may be made to the freedom of enterprise provided that this does not result in a disproportionate attack with regard to the objective pursued.**

Even if the Constitutional Council recalls that " *the freedom which, under the terms of Article 4 of the Declaration* [of the rights of man and of the citizen of August 26, 1789], *consists in being able to do all that does not harm others, could not itself be preserved if arbitrary or abusive restrictions were brought to the freedom of undertake* "201, he considers that the latter " *is however neither general nor absolute* " [202] and " *that it is open to the legislator to impose restrictions on this freedom linked to constitutional requirements or justified by the general interest, provided that this does not result in disproportionate infringements with regard to the objective pursued* "203

**1.2.5. Restrictions may be made to freedom of contract as long as this does not result in a disproportionate infringement with regard to the objective pursued.**

The Constitutional Council considers, according to settled case law, that it " *is open to the legislator to bring to the freedom of contract, which stems from Article 4 of the Declaration of 1789, limitations linked to constitutional requirements or justified by the general interest, provided that this does not result in disproportionate damage to the objective pursued. Moreover, the legislator cannot affect legally concluded contracts unless justified by a sufficient reason of general interest without disregarding the requirements resulting from Articles 4 and 16 of the Declaration of 1789 .* [204].

**1.2.6. The judge ensures a balance between the exercise of the right to strike and the constitutional requirement relating to the continuity of the public service**

According to the seventh paragraph of the Preamble to the 1946 Constitution: " *The right to strike is exercised within the framework of the laws which regulate it* ". The Constitutional Council deduces that: " *By enacting this provision, the constituents intended to mark that the right to strike is a principle of constitutional value but that it has limits and empowered the legislator to*

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[200] Law amending Law No. 82-652 of July 29, 1982 and containing various provisions relating to communication audiovisual, December 13, 1985, n° 85-198 DC.

[201] Nationalization law, January 16, 1982, n° 81-132 DC.

[202] Law on the prevention of corruption and the transparency of economic life and public procedures, 20 January 1993, n° 92-316 DC.

[203] Chaud Colatine Company, January 21, 2011, No. 2010-89 QPC.

[204] Law on transparency, the fight against corruption and the modernization of economic life, December 8, 2016, No. 2016-741 DC.

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***these by effecting the necessary reconciliation between the defense of professional interests, of which the strike is a means, and the safeguard of the general interest which the strike may be likely to infringe. With regard to public services, the recognition of the right to strike cannot have the effect of hindering the power of the legislator to bring to this right the necessary limitations in order to ensure the continuity of the public service which, like the right to strike, has the character of a principle of co***

**Exercising the right of requisition can contribute to ensuring the principle of continuity of public service206 .**

### 1.3. CONVENTIONAL FRAME

**If the case law of the European Court of Human Rights (ECHR) and that of the Court of Justice of the European Union (CJEU) confirms the main principles of the case law detailed in item 1.2 above, *the* regime requisitions is likely or not to impact certain other conventional principles.**

#### 1.3.1. A requisition of services or people cannot be assimilated to forced or compulsory labor

**While article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and article 8 of the International Covenant on Civil and Political Rights prohibit forced or compulsory labour, these conventions provide that not considered as forced or compulsory labour: *"any service exacted in the event of crises or calamities which threaten the life or well-being of the community* " (article 4.3.c of the European Convention for the Protection of Human Rights and and fundamental freedoms) or: " *Any service exacted in cases of force majeure or disasters which threaten the life or well-being of the community* " (article 8.3.c.iii of the International Covenant on Civil and policies).**

#### 1.3.2. Requisitions are not subject to compliance with the principles of public procurement

**The use of requisition, in that it involves economic operators to meet a need of the State on the basis of a " *normal commercial price* ", has certain points in common with public procurement.**

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[205] Civil service transformation law, 1 August 2019, n° 2019-790 DC.

[206] Law relating to airports, 14 April 2005, n° 2005-513 DC.

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However, the requisition is not a contract when the provider's consent is missing. In the absence of this element linked to the will of the economic operator, the requisition does not fall within the framework of the directives on public procurement207 .

#### 1.3.3. The rules for the proper functioning of the EU internal market do not do not impede the exercise of the right of requisition

Such measures would in fact be liable to undermine the prohibition of quantitative restrictions on imports or exports between Member States, provided for respectively in Articles 34 and 35 of the Treaty on the Functioning of the European Union (TFEU). However, Article 36 authorizes the Member States in particular to adopt laws, regulations and administrative provisions establishing such restrictions when they are justified by reasons of public order, public security and public health.

### 1.4. ELEMENTS OF COMPARATIVE LAW

All States are faced with the difficulty of reconciling the rights of private persons with the need, in the face of certain critical situations, to implement coercive measures to obtain, from them, the supply of goods or the execution of a provision of service, when they cannot be obtained either by the direct action of the public authorities or by contractual means. Among the oldest systems, mention may be made in particular of the systems established in the United States and the United Kingdom, which give the public authorities a wide scope of intervention, while ensuring a strict guarantee of the fundamental rights of the persons concerned. .

First, the Fifth Amendment to the United States Constitution, enacted on December 15, 1791, states that " *no private property shall be requisitioned in the public interest without just compensation* ".

Although these provisions were initially considered to apply only to the requisition of immovable property, the case law of the Supreme Court has gradually extended the scope of application in order to guarantee the right to compensation for owners208 .
They now cover all types of property, tangible and intangible, including easements, contractual rights or trade secrets, as well as business services. In addition, case law retains a particularly broad meaning of " *public interest* ", even if its interpretation differs according to the jurisdictions, some considering that the

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[207] In particular Directive No. 2014/24/EU of the European Parliament and of the Council of February 26, 2014 on the award of public contracts and repealing Directive 2004/18/EC which defines, in its article 2, public contracts as being *" contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the performance of works, the supply of products or the provision of services" .*

[208] *Pumpelly v. Green Bay & Mississippi Canal Co.* (1871).

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**The fifth amendment is intended to apply as soon as the requisition provides a benefit to the community, including when the State uses it to facilitate a private interest209 .**

**Even if, most of the time, the implementation of these requisitions results in an expropriation, for example to build a road, a military base or a park, it can also result in a simple temporary limitation of the right of ownership, it being specified that, where applicable, the judicial debates focus on the duration beyond which the right to compensation is open and on the amount of the latter. Such was, for example, the case during the Second World War, during which warehouses and factories were seized210, or when a coal mine was requisitioned for a period of a month and a half211. In all cases, the owner is only compensated for the period during which he was completely deprived of his property.**

**The requisition must give rise to " *fair compensation* " for the use of the property in question by the State212. In practice, the Supreme Court specifies that it is due even if it only slightly affects the economic interest of the owner and that it must be established in relation to market prices213. On the other hand, no compensation is required from the State when the requisition is made with a view to destroying the said property in the event of imminent danger, for example during retirement operations carried out by the armies. against the enemy214 or to prevent the spread of disease or any other threat to public health or safety215 .**

**Secondly, in the United Kingdom, *the Emergency Powers Act* since 1920 authorizes the government, when it proclaims *a "state of emergency* ", to take the necessary measures to guarantee the " *essential needs of the community* ", when the supply and distribution of food, water, fuel and electricity or means of transport are threatened. This text, amended in 1964, was repealed by the *Civil Contingencies Act* of 2004, which establishes the current regime applicable to emergency preparedness and response, during which it authorizes in particular the enactment of legislation temporary special order, known as " *emergency regulations* ", without prior parliamentary review. Emergency is thus defined as referring to events and situations which threaten to cause serious harm to human well-being, the environment or the security of the United Kingdom as well as war and terrorism.**

**Article 21 of the 2004 law specifies the conditions for using these exceptional measures: on the one hand, the fact that an emergency has occurred, is occurring or is about to occur and, on the other hand, the fact that it is necessary to take steps to prevent, control**

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209 *Kelo v. City of New London* (2005).

210 *Kimball Laundry Co.v. United States* (1949) ; *United States v. Petty Motor Co.* (1946); *United States v. General Motors Corp.* (1945).

211 *United States v. Peewee Coal Co.* (1951).

212 *Kohlv. United States* (1875).

213 *Loretto v. Teleprompter Manhattan CATV Corp.* (1982).

214 *United States v. Pacific R. Co.* (1887) and *United States v. Caltex Inc.* (1952).

215 *First English Evangelical Lutheran Church c. County of Los Angeles* (1987).

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**or mitigate any aspect or effect of this urgency, while Article 20 states that such measures may be taken by a decree of the King or, if the urgency so requires, by an act of the Prime Minister, a Secretary of State or a Commissioner of Her Majesty's Treasury. It further appears that " *Emergency regulations can only be used under specific conditions and lapse after seven days unless both Houses of Parliament pass a resolution approving them. If parliamentary approval is granted, emergency regulations automatically lapse no later than 30 days after their adoption. Further regulations can be passed for a further 30-day period, but must be approved by each chamber within 7 days, with a mandatory recall provision if either chamber is on vacation. They can be amended or rejected at any time and therefore constitute at most a temporary legislative solution .***

[216].

**When emergency regulations are implemented, §1 of article 22 of the 2004 law specifies that they " *may include any provision which the person who draws them up is satisfied is appropriate to prevent, control or mitigate any aspect or effect of the emergency in respect of which the regulations are made* ", while §3 adds that they " *may make provisions of any kind which could be made by a law of the Parliament or by the exercise of the royal prerogative; in particular, regulations may:***
**[...] ( b) *provide for or permit the requisitioning or confiscation of property (with or without compensation)* ".**

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**As the report of the parliamentary fact-finding mission quoted in the preamble to item 1.1 reminds us, " *the risks likely to test the resilience of a nation are more diversified than those to which an ecosystem or an individual is exposed. Due to the complexity of contemporary societies, due to the diversity and intensity of activities and exchanges within each of them as much as to the interdependent relationships that link them to each other, the sources of vulnerabilities are numerous and partly overlap: geopolitical risks, which can take the form of high-intensity conflicts between States, are superimposed on economic fragilities, whether these are the effect of a particular situation or the long term ; the impact of phenomena such as climate change and environmental risks that are more limited in space and time, can be analyzed in ecological, political, social or economic terms; the fragmentation of the body politic, the distrust of institutions and the difficulty of defining a set of***

[216] ***Civil Contingencies Act Post-Implementation Review, 2022.***

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***principles constituting a vision of the world capable of bringing together the members of a nation beyond their differences, are all vulnerabilities specific to democratic societi***

**The parliamentary authors of this report conclude that this panorama of major events likely to affect the life of the Nation " *must lead us to constantly ask ourselves what is the right level of insurance for the country, in order to then determine what is the right level of response, depending on the desired level of coverage – it being understood that the ultimate collective guarantee remains that which our armed forces offer us, the rise in power of which must be resolutely pursued" .* Beyond a duty to anticipate risks and prevent their occurrence, these findings imply for the State to ensure that the means at their disposal will allow it to intervene effectively when the time comes.**

**However, it appears that, since the end of the cold war, our model of army has gradually decentered from its original mission of territorial defence. Indeed, structured around nuclear deterrence and the use of expeditionary forces, it must now be adapted to deal with the degradation of the strategic context across the entire spectrum of contemporary conflict. For three decades, France has maintained a substantial level of external engagement, with an average of 8,000 soldiers on permanent deployment218. The extent of this commitment necessarily has an impact on the capabilities likely to be mobilized by the armies in favor of the defense of the territory, it being specified that these external interventions cause accelerated wear and tear on military equipment, in a context marked by the difficulties supply and replenishment of stocks. As a representative of the Ministry of the Armed Forces also underlines in the aforementioned report, " *in a logic of optimization and to respect the operational contracts which appear in the White Paper, the functioning of the armies is based on a logic of flow .* […] *In the absence of reference to a contract, the ministry is less resilient than during the Cold War era when it had large stocks – masks, CBRN outfits* ".**

**In such a context, it is necessary for public authorities to develop their capacity to respond to crises and any other critical situation likely to affect the national territory. However, in this regard, the aforementioned report specifies that " *the resilience of the nation will be all the stronger if the citizen is considered as part of the response.* […] *Similarly, at the level of companies and the administration of communities and the State, resilience must become a requirement in the same way as effectiveness and efficiency, with all the preventive procedures that this implies* " . The potential recourse to the requisition of private resources to supplement those available to the administration thus appears to be an essential component in the construction of a comprehensive national risk prevention an**

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**[217] Alexandre Freschi and Thomas Gassiloud, Fact-finding mission on national resilience, National Assembly, February 23, 2022.**

**[218] In a context of multiplication of external operations, particularly in the Sahel and the Middle East (such as " *Chammal* " and " *Daman* ") and military interventions carried out in accordance with France's international commitments, in particular for the protection of maritime areas (such as " *Atalante* ", " *Irini* ", " *Agénor* " or even " *Corymbe* ") or with a view to strengthening the eastern flank of the North Atlantic Treaty Organization (such as " *Aigle* " and " *Linx* ").**

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**The modernization of the law applicable in the matter would then constitute, for the State, the guarantee that it has an effective vector of action, responding to the conditions of implementation that are clear and adapted to the evolutions of the strategic context.**

**Given the restrictions attached to the application of a requisition system for private persons, such an overhaul of the law in force can only be provided for, under Article 34 of the Constitution, within the framework a legislative mechanism, accompanied by all the guarantees applicable under constitutional and European case law, both with regard to the execution of requisitions and from the point of view of compensation for the services actually performed and the damage suffered on this occasion .**

### 2.2. OBJECTIVES PURSUED

**As shown in section 1.1 *above,* the regime of requisitions defined by the Defense Code is historically based on two distinct regimes: on the one hand, that of military requisitions, the main purpose of which is to ensure the the supply of the armed forces and related formations, and, on the other hand, that of requisitions for the general needs of the Nation, intended to obtain the services necessary for the needs of the Nation to respond to critical situations.**

**However, these provisions now appear to be largely obsolete, complex to implement and based on criteria whose scope is sometimes uncertain. These shortcomings are detrimental to the general effectiveness of the devices in question and hamper the ability of the military authorities to implement them in emergency situations.**

**These structural shortcomings have in particular justified the recent creation of a new regime for the requisition of space goods and services, based on revised criteria for use, on a streamlined implementation procedure and on a principle of full compensation for the expenses incurred by the space operators concerned and the damage that occurred on this occasion.**

#### 2.2.1. The need for clarification of the cases of possible recourse to the system of requisitions and their adaptation to the current context

**Firstly, the cases of opening of the right to requisition no longer seem adapted to the evolutions of the strategic context, in particular with regard to the needs of national defense and the missions devolved to the armed forces and attached formations.**

**In fact, military requisitions can only be used, for the needs of the army and the gendarmerie, " *in the event of partial or general mobilization* [...] *or assembly of troops* " (article L. 2221- 2 of the Defense Code), which appears particularly restrictive. Irrespective of these exceptional circumstances, they can, of course, be used " *at any time and in any place* " to meet the needs of the navy and the air and space forces (article L. 2221-3 of the same code) but, " *except in the case of mobilization* ", only supply services can be requisitioned**

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**listed in 1° to 6° of article L. 2222-1 (housing, food, heating, means of transport and their accessories, materials, tools and machines necessary for the performance of military work), excluding example of the needs related to the maintenance in operational condition of military equipment or the supply of the forces with arms, ammunition or war material. In any event, it appears that military requisitions are subsidiary to requisitions for the general needs of the Nation (Article L. 2221-1 of the Defense Code).**

**Similarly, when it is intended to meet " *defence needs* ", the implementation of requisitions for the general needs of the Nation is subject to the implementation of general mobilization or warning or the existence of a threat relating in particular to a part of the territory, to a sector of national life or to a fraction of the population (article L. 2211-1, which refers to the cases listed in article L. 1111- 2). While other provisions make it possible, in principle, to broaden the potential use of this type of measure " *independent of the cases provided for in Article L. 1111-2* " (Article L. 2211-2), this option does not is accompanied by no precision or condition, leading to strong questions as to the constitutionality of such recourse to requisition.**

**Given this last legal risk, the opening of the right of requisition seems confined to situations of exceptional gravity, thereby considerably restricting its scope and, beyond that, its operational usefulness.**

**In this respect, it also seems essential to take more account of the anticipation of threats and crises, by providing the State with the capacity to intervene ahead of their occurrence. The war in Ukraine and, to a certain extent, the health crisis, have thus demonstrated that the responses to events of such magnitude generally prove to be much more costly than those which could have been implemented upstream, in order to to prevent or limit its effects. This is all the more true in military matters, where the requisition of certain materials or certain components necessary for the manufacture or maintenance of war materials appears significantly less effective when military operations are engaged in view of the production times. necessary to renew stocks, which is moreover in an extremely competitive sector marked by situations of global shortages.**
**In this perspective, it may prove necessary to requisition all or part of a production chain, without a direct and immediate threat weighing on national territory necessarily being identified.**

**At the same time, it is important to provide the public authorities with a right of requisition when faced with an urgent need to safeguard the interests of national defence. For example, in the event that a fighter plane is damaged at sea, the army may need to resort, as soon as possible, to the means of companies specialized in the sector of deep water activities to recover the device before intervention by foreign powers, thereby preserving protected information that gives it a tactical military advantage.**

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**In the light of these developments, it seems necessary to clarify the cases of opening of the right to requisition by determining in an exhaustive manner the typology of the situations in which the State could resort to it, providing at the same time guarantees of legal certainty. to the public authorities as well as to the private persons potentially concerned.**

### 2.2.2. The need for a global approach to simplifying the provisions in vigor

**Secondly, the procedures for exercising the requisitions provided for by the Defense Code appear particularly complex, it being specified that they are governed by nearly a hundred legislative articles and more than one hundred and eighty regulatory articles. By way of comparison, the legal framework applicable to prefectural requisitions, which nevertheless appears to be perfectly operational, is based on a single legislative article, provided for in article L. 2215-1 of the general code of local authorities. This observation testifies to the need to drastically simplify the rules in force in order to make them fully applicable and operational for the administrative authority.**

**Certain provisions also appear to be anachronistic and must in this sense be modified or deleted, such as those relating to " *female personnel* " (article L. 2212-2), " *cloistered religious communities* " (article L. . 2223-4) or even those specifying that " *the inhabitants are never dislodged from the room or the bed where they usually sleep* " (article L. 2223-5). In the same vein, it no longer seems necessary today to retain in the law subdivisions as developed as those relating to requisitions relating to " *housing and [to] quartering* " (articles L. 2223-1 to L .2223-1), " *vehicles* " (articles L. 2223-7 to L. 2223-11), " *railways* " (articles L. 2223-12 to L. 2223-16), " *navigable waterways* " (article L. 2223-17), " *industrial establishments* " (articles L. 2222-2 and L. 2223-18) or even " *goods deposited in customs warehouses and in general stores, or during transport by rail* " (article L. 2223-19), especially since despite these long developments, it appears paradoxically that the guarantees provided to the persons required in these situations are not necessarily suited to current constitutional requirements.**

**Finally, the very construction of the legislative part of the Defense Code devoted to requisitions contains a certain number of inconsistencies which should be remedied. Among the most noteworthy, it may be emphasized that a chapter devoted to the requisitioning of goods and services for the general needs of the Nation contains provisions devoted to maritime transport of a nature of national interest (articles L. 2213-5 to L. 2213-8), whose implementation conditions are defined amicably between the shipowners and the administration, and to the constitution of a fleet of a strategic nature (article L. 2213-9), " *making it possible to ensure the security of supplies of all kinds, means of communication, services and essential maritime works in times of crisis, as well as to supplement the means of the armed forces", whereas the systems in question have, in principle , ,* intended to be used without requisition.**

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### 2.2.3. The need for an overhaul of the current compensation scheme

**Thirdly, it appears that the system of compensation for requisitions and the resulting damages, as defined by the Defense Code, is particularly unsuitable, given the complexity of the mechanisms for determining the amount of allowances, the inadequacy of the procedural rules in force with the current structure of the administration as well as the obsolete nature of the dispute settlement methods that it establishes between the State and the citizens.**

**In order to illustrate this complexity, it can be underlined that the compensation for the required services distinguishes the situation from the requisitions of buildings, farms, depending on whether they are agricultural or not (article L. 2234-2), goods furniture (article L. 2234-4), motor vehicles (article L. 2234-6), people (article L. 2234-7) as well as troop accommodation (articles L. 2234-8 and L. 2234- 9). Notwithstanding these specific rules, it is specified, on the one hand, that " *whenever the circumstances allow it, tariffs or scales of compensation, established within the framework of the legislation on prices, are defined by joint decrees of the Minister of Defence, the Minister of the Economy and Finance and the Minister responsible for the resource, after compulsory consultation or on the proposal of an advisory committee* […], *which is joined, on this occasion, by representatives of the organizations professionals* " (article L. 2234-5) and, on the other hand, that " *additional indemnities may be allocated, on justification, to compensate for damage not compensated* " (article L. 2234-3). Similarly, with regard to compensation for damage suffered by requested persons, specific rules are provided to govern the " *consequences of work carried out by the State on requisitioned buildings, ships or aircraft* " (Articles L. 2234 -11 to L.2234-16).**

**Beyond the risk of unconstitutionality of such a system of fixed compensation (see item 1.2.3), the procedure for settling the compensation due under the requisitions appears excessively cumbersome, insofar as "In each department there is *a commission for the evaluation of requisitions composed of an equal number of representatives of public administrations and representatives of economic, professional, industrial, commercial or agricultural groups" (article L. 2234-20), which decides on the setting of tariffs or* scales of compensation mentioned above (article L. 2234-5) or when the requested person contests the amount of the compensation (article L. 2234-21). In addition, it appears that " *special valuation commissions may be set up for certain categories of property, on the initiative of the minister responsible* " (article L. 2234-20).**

**The simplification of the provisions in question, which are not easy to implement in the event of a crisis, will make it possible to reinforce the effectiveness of the system of requisitions set by the Defense Code. Beyond that, it can be emphasized that the modifications in question will produce equivalent effects on many other legal regimes that refer to this co**

### 2.2.4. The need to complete the mechanisms related to the requisitions

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**Fourthly and lastly, the Defense Code sets out mechanisms related to that of requisitions, which deserve to be developed, in order to give them their full effectiveness, but also strengthened, to meet current constitutional requirements.**

**Thus, article L. 2232-1 provides that " *The Government may proceed in peacetime* […] *to any census of persons, equipment, vehicles, materials or objects, products, foodstuffs, tools, buildings, installations or companies likely to be required for mobilization or in the cases provided for in Article L. 1111-2 and for any tests it deems essential* ". However, to date there is no possibility of planning crisis exercises.**

**However, as underlined by the report of the parliamentary fact-finding mission referred to in item 1.1 *above,* it is important to develop a risk culture in France, presented by the " *Géorisques* " portal of the Ministry of Ecological Transition as should " *allow students to acquire rules of conduct and reflexes, but also to collectively discuss practices, positions and issues* ". It is thus a question of " *improving the effectiveness of prevention and protection* ", by " *bringing out a whole series of appropriate behaviors when a major event occurs* ". This requirement is reflected in recommendation no. 1 formulated by said report, which recommends " *developing the culture of risk among the French population through awareness-raising policies and practical exercises at regular intervals* ".**

**Beyond these considerations, combining the possibility of identifying and testing, upstream, the people, goods and services likely to be requisitioned with that of mobilizing them within the framework of exercises would thus confer on the State an exhaustive vision mobilized re depending on the threats. Moreover, the implementation of such an option would allow it to engage in dialogue with the people potentially concerned, facilitating at the same time the search for amicable solutions, alternatives to the implementation of requisitions, once the crisis has occurred. . Similarly, understanding the practical conditions for implementing these measures would allow the State to better define its needs and, for the companies concerned, to prepare, if necessary, alternative models allowing the pursuit of their activity or, at the very least, to reduce the impact of requisitions on their economic model.**

**Lastly, it appears necessary to supplement the legislative provisions applicable to the census as well as those making it possible to prescribe the blocking of movable assets with a view to proceeding to their requisition (article L. 2233-1) with maximum conditions of duration, in order to guarantee that their implementation will only have a limited impact on the rights of data subjects. It is also appropriate to underline the importance of ensuring the full effectiveness of this last mechanism, which makes it possible to prevent the goods likely to be requisitioned from being sold or exported beforehand in order, on the one hand, to confer the administrative authority the time necessary to define and implement a requisition plan and, on the other hand, to preserve the internal capacities to respond to the**

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## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**As a preamble, it may be emphasized that it did not seem appropriate to develop new contractual mechanisms to respond to the difficulties and objectives presented respectively in items 2.1 and 2.2. Indeed, all requisitions obey the principle of subsidiarity: they can only be used, on the one hand, when the means available to the State are non-existent, unsuitable, unavailable or insufficient and, on the other hand, after that an amicable agreement has been sought with the person concerned, except when the urgency of the situation does not allow it.**

**Therefore, two main options were considered:**

- **either retain the general architecture of the defense code, making only the adjustments necessary to respond effectively to the needs of national defence;**

- **or carry out a total overhaul of the provisions in force, thus breaking with a legal corpus whose wording is in line with the provisions of the laws of July 3, 1877 and July 11, 1938, with regard respectively to military requisitions and requisitions for the general needs of the Nation.**

**However, it is precisely the question of the conservation of this distinction, on which rests, since the origin, the French law of the requisitions, which made it possible to make a choice between the two aforementioned options. Indeed, after an inventory of defense needs carried out within the Ministry of the Armed Forces, it appeared that the military requisitions had now become manifestly unsuited to the employment framework of the armed forces and formations attached to the national territory. , it being recalled that Article L. 1321-1 of the Defense Code states that in principle " *no armed force may act on the territory of the Republic for the needs of defense and civil security without a legal requisition* ".**
***On the other hand,* notwithstanding its complexity and its shortcomings, the system of requisitions for the general needs of the Nation, much broader in its object, seemed to offer, in its main principles of implementation, an appropriate legal framework.**

**Since the option chosen was to abolish military requisitions, a major reform therefore seemed to be necessary since it was *at least* necessary to repeal Title II of Book II of the second part of the Defense Code and some related articles (article, L. 2234-8 and L. 2236-3 to L. 2236-5), i.e. 37 legislative articles. In addition, it no longer seemed coherent to keep a title I devoted to requisitions for the general needs of the Nation and a title III relating to " *provisions common to all requisitions* ". In view of the need to clarify the cases of possible recourse to the system of requisitions for the general needs of the Nation, to remove certain anachronistic provisions, to remedy the inconsistencies in the construction of certain subdivisions of title I, to make the mechanism more operational compensation and to match the provisions in force with guarantees in accordance with**

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**constitutional requirements, a simple renumbering of the rules in force, subject to a few adjustments, thus appeared largely insufficient.**

**In order to respect the objectives of simplification and readability of the law, the option of a total overhaul of the system of requisitions has thus been retained.**

### 3.2. SELECTED OPTION

#### 3.2.1. With regard to arrangements related to requisitions

**The provisions concerning maritime transport of a nature of national interest and the constitution of a fleet of a strategic nature, provided for in Articles L. 2213-5 to L. 2213-9 of the Defense Code, are retained by law and integrated into the first part of the Defense Code, within the chapter devoted to naval control of maritime navigation.**
**Only article L. 2213-8 relating to the requisition of this fleet has not been kept, its usefulness disappearing in that it no longer seems appropriate to distinguish the regime according to the type of property**

**Furthermore, as noted in item 2.2.4 *above,* the inventory and testing mechanism provided for in the current article L. 2232-1 has been taken over and supplemented, in order to comply with the requirements of article 34 of the Constitution. The Prime Minister may order the identification of persons, goods and services likely to be required, which the ministers concerned may submit to any tests or exercises, under certain conditions and limits: they must take into account the operating requirements of the companies concerned and the continuity of public service and cannot exceed five days per year.**

**The scheduling of the tests and exercises is brought to the attention of the persons concerned and, where applicable, of their employer at the latest fifteen days before their execution and the completion of the latter gives rise to the right to compensation.**

**As noted in item 2.2.4 *above,* the mechanism for blocking movable property, currently provided for in Article L. 2233-1, is also retained and accompanied by guarantees with regard to the requirements of Article 34 of the Constitution. and the rights and freedoms involved. The guarantees of duration and compensation which are provided for in the regulatory part are enhanced at the legislative level. The blocking is limited to fifteen days, renewable once, this period having to be followed either by a requisition, or by a lifting. It obeys, moreover, the same conditions as the requisitions with regard to the guarantees given to persons. This gives rise to compensation.**

#### 3.2.2. With regard to the use cases of requisitions

**The dichotomy between requisitions for the needs of the Nation and military requisitions is replaced by the dichotomy between requisitions aimed at responding to:**

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- **a current or foreseeable threat to the activities essential to the life of the Nation, the protection of the population, the integrity of the territory, the permanence of the institutions of the Republic or justifying the implementation of the international commitments of the State in defense matters.**

  **This use case, which is inspired by the notions retained in article L. 1111-1 relating to the national security strategy and the defense policy, insofar as it concerns the continuity of the State, the permanence of the institutions, the integrity of the territory and the respect of the treaties, falls under the attributions devolved by article 5 of the Constitution to the President of the Republic219. A decree in the Council of Ministers will then be necessary to open the use of this type of requisition.**

  **The President of the Republic may also empower the administrative or military authority he designates to carry out these measures.**

- **an emergency, when safeguarding the interests of national defense justifies it. These criteria are inspired by the provisions concerning prefectural requisitions and spatial requisitions220. This case of use comes under the attributions devolved by the Constitution to the Prime Minister who is responsible for National Defense (article 21). A decree from the Prime Minister will then be necessary to open the use of this type of requisition.**

  **This hypothesis of requisition can intervene if the aforementioned conditions are met and if the circumstances do not call for a response from the President of the Republic.**

**In both cases, the requisitions may concern any person, natural or legal, as well as any goods and services necessary to deal with the threat or the emergency. It is indeed proposed, for reasons of simplification and intelligibility of the standard, to give up the numerous regimes which concern such type of good or such type of service.**

**In addition, the activation of these two types of requisitions will not prevent the triggering of the recall or maintenance in activity of persons subject to the obligation of availability under the military operational reserve in the event of exceptional circumstances, including the conditions of implementation are also modernized by this bill.**

#### 3.2.3. With regard to the substantive conditions of requisitions

**Each type of requisition follows an identical regime: the measures prescribed must be strictly proportionate to the objectives pursued and adapted to the circumstances of time and place. A requisition can only be ordered in the absence of any other adequate means to meet the need and cannot last longer than necessary.**

**Each requisition decision must specify its purpose and its terms of application. In terms of requisitioning people, the physical and mental aptitudes, as well as the**

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[219] Mr. Dominique L, November 28, 2014, No. 2014-432 QPC, recital 9.
[220] See article L. 2224-1 of the defense code.

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professional and technical skills will be taken into account and will make it possible to requisition only the necessary people who can meet the objective pursued. This measure will strengthen the application of the principle of proportionality of requisitions and will also provide additional protection for potentially vulnerable groups (people with disabilities, pregnant women, etc.).

#### 3.2.4. With regard to the territorial scope of the device

The territorial scope of the device is defined:

ÿ any natural person on national territory may be requisitioned, regardless of their nationality;

ÿ similarly, any French national, regardless of their place of residence, may also be subject to these measures. Indeed, the situations requiring the use of requisitions can never be completely predefined in advance and certain French nationals with specific skills could be useful to the armies in the event of assistance to allied countries;

ÿ on the other hand, can only be requisitioned legal persons whose head office is located in France;

ÿ finally, it appeared necessary to draft a specific provision for ships. The nationality of the ship's flag is in fact different from the nationality of its owner. The Convention on the Law of the Sea of December 10, 1982 of Montego Bay provides for the application of the law of the flag State, wherever the ship is. In order to respect this international convention and to avoid potentially sensitive situations, it was considered preferable to expressly mention this restriction.

#### 3.2.5. With regard to the terms of compensation

Compensation for requisitions (as well as blocking), the terms of which are provided for in the future article L. 2212-8 of the Defense Code, will take up the main principles of the system set for prefectural requisitions. The material, direct and certain costs resulting from the application of the prescribed measures will be remunerated, and only the latter. Indeed, requisition compensation cannot be a source of unjust enrichment for the requisitioned person. While the reparation must be full, it cannot exceed the reality of the harm, in accordance with the constitutional requirement of good use of public funds221. The amount of the compensation will be established on the basis of the normal and lawful price of the service.

For damage that would not be covered by the compensation (example of damage caused to the property of the person who is the subject of the requisition), a paragraph provides for full compensation for the said damage, except for a personal act of the requested person. Finally, the case of

[221] Law reforming representation before the courts of appeal, 20 January 2011, decision no. 2010-624 DC.

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**damage resulting from acts of third parties is also provided for, the State being in this case subrogated to the rights of the victim.**

**It will be up to the administrative jurisdiction with regard to its attributions resulting from the Constitution to hear the appeals brought by the citizens in the matter.**

**In order to ensure respect for the proper use of public funds, the requested person will be required to provide the administrative or military authority, if the latter so requests, with all documents or information enabling the amount compensation due to him. Public officials carrying out these missions will be bound by professional secrecy.**

**3.2.6. With regard to the execution of requisitions**

**With regard to the issues at stake, the system takes up what currently exists in the Defense Code222 and in the general code of local authorities, for prefectural requisitions, by providing for the possibility for the State to have the measures executed automatically. prescribed by the requisition decision.**

**In addition, the principle of criminal sanction in the event of willful non-execution by the requested person of a legally ordered requisition measure is maintained.**

**However, in order to provide for sufficiently dissuasive penalties with regard to the issues in question, on the one hand, and, on the other hand, to have appropriate investigative powers, the quantum of the criminal sanction (currently one year imprisonment and a fine of 4,500 euros in peacetime) is aligned with the existing quantum for space requisitions223, i.e. a sentence of five years' imprisonment and a fine of 500,000 euros.**

**Finally, the act of a public official carrying out illegal requisitions will also be penalized whether he is a soldier224 or a civilian225. This measure incorporates the current provisions of the Defense Code.**

**3.2.7. With regard to the coordination measures of the devices**

**Finally, this article includes provisions for adaptation, in various parts of the Defense Code, on the one hand, and in other codes and legislative texts, on the other hand, in order in particular to update the existing references. Currently. These updates**

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**[222] Article L. 2221-10 of the Defense Code.**

**[223] Article L. 2236-2-1 of the Defense Code.**

**[224] Article L. 323-22 of the code of military justice: "The act of any soldier exercising a requisition without having the capacity to do so is punished, if this requisition is made without violence, by imprisonment for five years. If this requisition is exercised with violence, he is punished by ten years' imprisonment. »**

**[225] Five years' imprisonment and a fine of 500,000 euros under the combined provisions of article 432-10 of the penal code and current article L. 2236-6 of the defense code.**

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**are accompanied by no modification of the substance of the impacted articles, with the exception of the articles devoted to the overseas adaptation of these modifications.**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

**The simplifications made to the requisition system defined by the Defense Code will directly benefit the many other systems that refer to its compensation mechanism, thereby increasing their operational usefulness. This is thus the case for:**

- **ÿ the requisitions of the services responsible for the operation of electricity production facilities using natural gas, made by the Minister for Energy on the basis of the provisions of 2° of Article L. 143-6-1 of the energy code;**
- **ÿ the requisitioning of persons and property, carried out by the competent administrative authority of the State with a view to putting an end to a serious danger of damage to the coast or to related French interests resulting from damage or an accident that has occurred at sea, on the basis of the provisions of V of article L. 218-72 of the environment code;**
- **ÿ the requisitions of health professionals, health establishments or medico-social establishments, carried out by the territorially competent authorities of the State on the basis of the provisions of Articles L. 3131-8 and L. 3131-9 of the public health code ;**
- **ÿ the requisitions of shipowners, captains, masters or masters of ships, sailors, dockworkers, pilots, boatmen and tugboats, carried out by the authority vested with the power of port police or by the port authority in order to provide their service and the corresponding means, on the basis of the provisions of Article L. 5331-9 of the Transport Code;**
- **ÿ the dissemination by any audiovisual means, without the prior authorization of its author or his successors in title, of an unedited literary, scientific or artistic work, produced by the Minister responsible for communication on the basis of the provisions of Article L 1146-1 of the defense code;**
- **ÿ compensation for damage caused by firing exercises, marches, maneuvers or general operations involved in troop training, carried out on the basis of the provisions of Article L. 2161-2 of the Defense Code.**

**Furthermore, these provisions will require, by way of coordination, a certain number of updated references, both in the Defense Code (articles L. 1323-1 and L. 2113-2 as well as the sixth part of this code ) as well as in the insurance code (articles L. 160-6 and L. 160-7), in the energy code (article L. 143-3), in the code of military justice (article L. 323- 22), in the general tax code (article 1048), in the code of military disability pensions**

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**and war victims (article L. 522-5), in the book of tax procedures (article L. 130) and in the transport code (articles L. 5241-1 and L. 5434-1).**

**In any case, it should be emphasized that independently of the simplification of the compensation process mentioned *above,* the present overhaul of the requisition regime provided for by the Defense Code is not intended – and will not for effect – to call into question the conditions of implementation of the other requisition mechanisms.**

**In particular, remain unchanged, within the limits of their territorial competence, the prerogatives conferred on the prefects on the basis of the provisions of 4° of article L. 2215-1 of the General Code of Local Authorities, the scope of which has been clarified by case law as applying to " *necessary measures, imposed by urgency and proportionate to the requirements of public order* "[226]. Thus, when it comes to ensuring the protection of the population at the level of a department, the regime provided for by the general code of local authorities will apply. If the territorial extent of the threat exceeds the limits of a department, the defense code will be likely to apply, following the example of the recent requisition of helicopter rental companies, intended to fight against fires. large-scale forest, justified by the need to work " *in a coordinated manner throughout the national territory* " against " *a major threat to public order* "[227]. Depending on the circumstances, the solution of adopting several decrees on the basis of the CGCT in several departments will naturally remain open.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**Given the restrictive conditions for opening the right to requisition provided for by the Defense Code, the use of which remains exceptional as a matter of principle, as evidenced by the exhaustive enumeration of its use since 1958 appearing within item 1.1 *above,* this measure will *a priori* have no significant macroeconomic impact.**

#### 4.2.2. Business impacts

**The requisitioned companies will have to carry out their economic activities for the benefit of the State. If all the actions carried out within the framework of the requisition will be compensated according to the normal price of the service provided and if any damage inflicted on the company will, in principle, be fully covered, the sums which will thus be paid to them as compensation shall have neither the purpose nor the effect of making up for any loss of earnings. In the event of contractual penalties due by the requisitioned company to one of its co-contractors for delay or non-performance of the contract, due to the requisition, the amount of these**

[226] EC, Judge in chambers, October 27, 2010, n° 343966.

[227] Notice of decree n° 2022-1020 of July 20, 2022 opening the right of requisition of the companies of rental of helicopters capable of participating in the fight against forest fires.

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**penalties may be borne by the State. On the other hand, given that it is impossible to estimate with precision the loss of a competitive advantage for a company in such circumstances, it cannot be taken into account.**

**Moreover, it should be remembered that, although a requisition can generate significant costs for a company, this system is only intended to be implemented on an exceptional basis and that it appears, in the vast majority of cases, possible to proceed by mutual agreement.**

**Finally, the economic and societal impacts of such measures for companies could be mitigated by the capacity conferred on the State to identify in advance the companies likely to be approached and to organize their involvement in crisis exercises. Thus, the scope of possible requisitions can be identified and refined before any real application, which will make it possible to limit the effects of the measure to what is strictly necessary, in order to penalize the activity of the companies concerned as much as possible.**

#### 4.2.3. Budgetary impacts

**The cost of the requisition and any damage it may have caused, both to the person or property requisitioned and to third parties, will, in principle, be fully borne by the State, excluding damage directly caused by the requisitioned person. Therefore, any requisition will necessarily have a budgetary impact. Nevertheless, due to the very exceptional nature of the requisition, the latter remains impossible to quantify.**

**On the other hand, the concern to provide fair compensation to those requisitioned, while ensuring the best possible management of State funds justifies the creation of an investigation mechanism, allowing authorized agents of the State to carry out documentary and on-the-spot checks on interested parties. This device, which is not intended to be used systematically, may in particular be applied when the estimate of the cost of the requisition by the requisitioned person is considered excessive by the requesting administration.**

**In any case, the financial cost of the requisition will constitute one of the parameters that the State will have to take into account before deciding to use this power and will condition, if necessary, the scope of the measures actually implemented. .**

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**Local authorities, like all legal persons, are liable to be called upon and to see their resources requisitioned. In accordance with the principle of free administration of local authorities, the constraints imposed on them in this area are set by law, in article L. 1111-7 of the general code of local authorities, which provides that "local authorities exercise *their own powers in compliance with the constraints imposed by national defence* " and, as such, that " *the State has as***

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***of the services of the municipalities, departments, regions, their groups and their public establishments as needed.*** **Therefore, it does not seem necessary to include these provisions in the Defense Code.**

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**The application of the law of requisitions remains optional for the administrative authority and can only intervene on a subsidiary basis, when no other solution appears possible and it is not possible to obtain an amicable agreement. It cannot, in this sense, be considered as representing a permanent burden for the competent services.**

**Moreover, a number of provisions are intended to facilitate the implementation of the system by the administrative authority, namely:**

- **the ability to identify, upstream, the people, goods and services likely to be requisitioned (article L. 2211-1), which makes it possible to define a priori *the* scope of the measures to be implemented in the event of a critical situation and to obtain, for this purpose, valuable information;**
- **the ability to organize tests or exercises (article L. 2211-1), which allows both to establish a dialogue with the persons concerned, to obtain the necessary information upstream on the persons, goods or services in question and to prepare for the practical implementation of the system, when the time comes;**
- **the ability to prescribe a blocking measure (articles L. 2211-2 to L. 2211-4), which in particular allows the administration to have a period of 15 to 30 days to define and implement a plan organized requisition, when necessary.**

**In addition, agents authorized by the administrative authority may, if necessary, carry out documentary and on-site checks to ensure fair compensation for the requisitions made. This control, which will be implemented if the circumstances justify it, does not seem likely to place an excessive additional burden on the administration.**

**Finally, this measure significantly simplifies the procedures applicable in this area, in particular by abolishing the commissions for evaluating requisitions, the tariffs and scales of compensation or even the differentiated procedures for implementing and compensating requisitions, which weighed down up to now considerably the task of the administra**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on people with disabilities

**The measures envisaged do not include specific provisions applicable to people with disabilities. However, the new article L. 2212-6 of the defense code will expressly specify that " *persons are requisitioned according to their abilities***

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***physical and psychological and their professional or technical skills .*** **Thus, the requisitions of people will be individualized and will take into account the personal characteristics of the people concerned.**

#### 4.5.2. Impacts on equality between women and men

**This article has no impact on equality between women and men. Although the current provisions of Article L. 2212-2 of the Defense Code, which include provisions specifically devoted to the requisitioning of " *female personnel* " will not be repeated, the new Article L. 2212-6, mentioned in item 4.5.1, will make it possible to take into account the individual situation of each person potentially concerned, for example in the case of pregnant women. In the spirit of the reform, women and men appear in this sense on a strictly equal footing.**

#### 4.5.3. Impacts on youth

**This article does not include any provision specifically impacting this public.**

#### 4.5.4. Impacts on regulated professions

**The provisions envisaged have no specific impact on the regulated professions.**

### 4.6. IMPACTS ON INDIVIDUALS

**Individuals may be subject to requisitions, either directly, or through measures concerning their property, or as employees of a requisitioned company. Each measure will nevertheless be accompanied by the guarantees required under the constitutional and conventional requirements mentioned in items 1.2 and 1.3, both in terms of the conditions for implementing the requisition itself and the compensation provided.**

### 4.7. ENVIRONMENTAL IMPACTS

**No specific environmental impact has been identified for this measure.**

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## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**The communities falling under article 74 of the Constitution and New Caledonia have been seized on February 24, 2023 (Saint-Barthélémy, Saint-Martin, Saint-Pierre-et-Miquelon, French Polynesia), February 27, 2023 (French Polynesia) and February 28, 2023 (New Caledonia).**

**The Higher Council of Administrative Courts and Administrative Courts of Appeal was seized on February 24, 2023 on the basis of Article L. 232-3 of the Code of Administrative Justice and issued a unanimous favorable opinion on March 23 2023.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**As specified below, within item 5.2.3 *below,* these legislative provisions require the adoption of a decree by the Council of State to produce their full effect.**

**These measures will not come into force until the publication of the implementing decree for this measure and no later than twelve months from the publication of this law.**

#### 5.2.2. Application in space

**In accordance with the provisions of Article L. 1 of the Defense Code, as it is a measure linked to the national defense policy, this measure will automatically apply to the entire territory of the Republic, including all overseas communities, without any express mention of application being, in principle, required.**

**However, the specific administrative organization of certain communities and their physical distance from mainland France require the adoption of specific requisition procedures in the event of a communication breakdown. To do this, the right of requisition, in this particular case, will be attributed to the senior official of defense and territorially competent security, like the powers of non-military defense which are devolved to him under article L. 1311 -1 of the Defense Code, it being up to him to report as soon as possible to the competent authorities.**

**If the requisitions may concern any natural person present on the national territory, including foreign nationals and legal persons whose head office is located in France, they may also be applied to any natural person of French nationality not residing on the national territory. .**

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**Finally, as explained in item 3.2 *above,* the requisition of a vessel will be carried out according to the nationality of its flag, regardless of that of the shipowner.**

#### 5.2.3. Application texts

**Book II of the second part of the regulatory part of the Defense Code must be amended by decree in Council of State in order in particular:**

- **to align its subdivisions with those retained in the law, in accordance with the principle of homothety of the legislative and regulatory parts of a code, by renumbering accordingly the articles whose maintenance appears necessary;**
- **to draw the consequences of the abolition of military requisitions, the overall simplification of the procedures for exercising requisitions and the overhaul of the compensation scheme, by repealing the articles which have thus become irrelevant;**
- **to set the conditions for the practical implementation of the census, tests and exercises, blocking and the two new hypotheses of recourse to requisitions, respectively based on urgency and on threat.**

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# Article 24: Organize the possibility of building up strategic stocks of materials or components of strategic interest for the armies as well as the prioritization of the delivery of goods and services for the benefit of the armies

## 1. STATE OF PLAY

### 1.1. GENERAL FRAMEWORK

**With around ten major groups and nearly 4,000 small and medium-sized enterprises and mid-sized enterprises – including 500 identified as strategic – which generate nearly 200,000 direct or indirect jobs, the Defense Industrial and Technological Base (BITD ) is one of France's major assets, allowing it to be one of the rare nations to independently produce military equipment as structural as fighter planes or nuclear submarines. Among the strengths of this ecosystem, we can mention the quality of the dialogue between the State and the companies concerned, the duality of many of them, allowing the military segment to benefit from investments in the civilian sector. (as exemplified by the A400M transport aircraft), as well as their export success.**

**However, the recent evolution of the international situation, marked by a high intensity war on the European continent as well as by the risks of shortage of raw materials, makes it more necessary than ever to secure and streamline the supply of equipment and ammunition. of the French armed forces by BITD companies. Indeed, structured around nuclear deterrence and the use of expeditionary forces, our army model must be adapted to deal with the degradation of the strategic context over the entire spectrum of contemporary conflict, in the light of the triptych " *competition-contestation-confrontation* " developed in the Strategic Update of 2021. The latter is based on the observation of a significant increase in the military budget of the major powers since the beginning of the 2010s, which has made competition between States the main determinant of their defense policies. This globalization of competition appears conducive to contestation, corresponding to the situation where a competitor takes advantage of an opportunity to impose a fait accompli, including by using military force, and to the extension of the fields of confrontation, multiplying, by consequent risk of direct military clashes between great powers.**

**Since the end of the cold war, in a context of deflation of the budget allocated to defence[228] under the heading of " *peace dividends* ", emphasis has been placed, with regard to the equipment of the armed forces, on the optimization of performance and on the constraint of cost. However, the**

[228] **In the early 1980s, the defense budget, excluding pensions, represented 3% of GDP, compared to 2% today. In constant euros, it also fell from 39 billion euros in 1990 to 31.4 billion euros in 2014, a decrease of 20%.**

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**of the hypothesis of a major commitment calls for a paradigm shift, the ability to reduce production times and increase the rate of deliveries no longer being adjustment variables, but again constituting crucial supply issues .**

**However, among the lessons of the war in Ukraine, it appears that the structuring of the national production tool is no longer adapted to the current situation of " *contestation* ", under which our armed forces need to quickly reconstitute their stocks following deliveries made for the benefit of the Ukrainian forces, nor *a fortiori* to a possible situation of " *confrontation* ", under which they would be confronted with the level of attrition, consumption and erosion of equipment observed in recent Conflicts.**

**Notwithstanding the difficulty of obtaining precise figures with regard to the war in Ukraine, the material losses suffered on both sides, like the level of ammunition consumption, testify to the reality of the risk of shortage for the belligerents. In this regard, the National Assembly's recent fact-finding mission on high-intensity preparation noted that " *the attrition rates suffered by the Israeli army during the Yom Kippur War (1973) or the Argentine army during the Falklands War (1982)* [were] *4% and 8% respectively* "229 .**

**These findings have been corroborated in particular by recent high-intensity exercises carried out by the armed forces, which have confirmed the potentially high number of destructions of equip** Thus, the ***Polaris 21*** **exercise , carried out in 2021, resulted in the destruction of seven to eight first-rate buildings out of the twenty mobilized, including two frigates in the first fifteen minutes.** Similarly, ***Volfa*** **exercises conducted by the Air and Space Force show high levels of aircraft attrition and ammunition consumption.**

**In this respect, the delivery of military equipment to Ukraine has made it possible to highlight the relative weakness of our stocks for certain equipment or ammunition, particularly with regard to Caesar guns or *in* the field of ground-to-air defence, but also the inability of our BITD, without changing its current model, to quickly produce these materials in order to replenish the stocks of our armed forces and to ensure the continuation of deliveries to the Ukrainian forces. To this end, the Minister for the Armed Forces proposed, on 22 February 2023, an action plan for the production of ammunition, centered on the relocation of stocks and production sites230 as well as on the acceleration of the pace231 and on the increased ammunition production232 .**

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**229 Patricia Mirallès and Jean-Louis Thiérot, Fact-finding mission on high-intensity preparation, National Assembly, February 17, 2022.**

**230 The Minister notably announced the decision taken by *Eurenco,* the European leader in explosives, propellants and military fuels, to relocate its powder production line for large calibers in the first half of 2025, with the aim of producing 1,200 tonnes of powder per year, i.e. 500,000 modular charges, in the town of Bergerac.**

**231 Particularly with regard to *Caesar cannons,* 155 mm shells and *Mistral missiles,* essential for ground-to-air defense, for which the minister specified: " *We were producing 20 Mistrals per month in 2022. This figure has risen to 30 in 2023 and will rise to 40 in 2024* ".**

**232 Emphasis is placed on European partnerships, like the MBDA company to which the United Kingdom, Italy and France have given a collective mandate to reduce the production of Aster missiles from 40 to 18 *mo***

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**In view of these findings, the President of the Republic insisted on the need to enter into a " *war economy* ", during his speech to the armed forces on July 13, 2022, emphasizing that " *To meet this need that the Nation will have to continue to equip itself, sometimes to help some of our friends or allies to equip themselves, we must structure a French and European economy in which the models, the rhythms, the standards must be considered according to, if I may say so, a different music theory.* […] *we are going to have to invest sometimes faster, stronger and manufacturers will have to meet these needs.* […] *The great sophistication and customization of our systems which are our strength* […] *are sometimes the cause of considerable development and production delays* […]. *To replenish certain stocks faster and stronger, to know how to produce more materials that are adapted to this return of high-intensity warfare on our soil, to re-examine certain innovation choices in order to restore balance, in some way, to objectives that can compete: the most extreme innovation and deadlines, the ability to mass-produce them as quickly as possible. This is why we must at all times keep the technological and tactical advantage, while securing the subcontracting chains and the supply of raw materials and maintaining the necessary skills" .**

**These guidelines lead in particular to adapting the general economy of contracts relating to war materials and, more broadly, of defense and security markets, whose legislative and regulatory framework does not currently include any provision specifically dedicated to the security of supplies for military forces. armies. To this end, the 2022 National Strategic Review specifies in particular that " *in addition to the acquisitions, over the next few years, of the most critical equipment necessary to deal with a conflict of high intensity or likely to rapidly attrition, a preparation for the war economy is being developed in order to adapt the BITD in a progressive and flexible manner to the different geopolitical contexts* ". Beyond these considerations, the current strategic context underlines the need to have new legal tools making it possible, in times of crisis, to compensate for the insufficiency of contractual arrangements for mobilizing resources of strategic interest for the armies and reducing the delivery times for war materials, in a competitive context.**

### 1.2. CONSTITUTIONAL FRAMEWORK

#### 1.2.1. The safeguarding of the fundamental interests of the Nation is a constitutional requirement likely to justify an attack on other principles with constitutional value.

**It emerges from the case law of the Constitutional Council and the Council of State that the " *constitutional requirements inherent in safeguarding the fundamental interests of the Nation* ", foremost among which are national independence and territorial integrity, which are the purpose, but also the protection of national defense secrets and the free disposal of armed force, are taken into account by the judge in his control of proportionality in the event of infringement of other principles with constitutional value.**

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It is up to the judge to ensure a " *conciliation which is not unbalanced* " between safeguarding the fundamental interests of the Nation and the other constitutional requirements[233]

Insofar as it is based on the implementation of the principle of " *necessary free disposal of armed force* " arising from Articles 20 and 21 of the Constitution, under which " *the Government decides, under the authority of the President of the Republic, of the use of armed force* " 234, any measure intended to guarantee the supply of material to the armed forces may thus infringe the exercise of certain rights and freedoms granted to the partners of the administration.

### 1.2.2. Restrictions may be made to the freedom of enterprise provided that this does not result in a disproportionate attack with regard to the objective pursued.

Even if the Constitutional Council recalls that " *the freedom which, under the terms of Article 4 of the Declaration* [of the rights of man and of the citizen of August 26, 1789], *consists in being able to do all that does not harm others, could not itself be preserved if arbitrary or abusive restrictions were brought to the freedom of undertake* "235, he considers that the latter " *is however neither general nor absolute* " [236] and " *that it is open to the legislator to impose restrictions on this freedom linked to constitutional requirements or justified by the general interest, provided that this does not result in disproportionate infringements with regard to the 'objective* pursued'[237]

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For example, in order to recognize the proportionality of the provisions of Law No. 55-385 of April 3, 1955 relating to the state of emergency allowing the administrative authority, within the framework of the state of emergency, to order the temporary closure of performance halls, drinking establishments and meeting places of any kind, the constitutional judge noted that the legislator had framed the conditions of implementation of the device, that it had expressly provided that the measures in question had to be justified and proportionate to the reasons which motivated them, that "the administrative judge *is responsible for ensuring that each of these measures is appropriate, necessary and proportionate to the purpose it pursues* " and that the law defines the conditions of application over time[238] .

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[233] Ms. Ekaterina B., wife D., and others, November 10, 2011, No. 2011-192 QPC, regarding the right of interested persons to exercise an effective judicial remedy and the right to a fair trial; Law relating to intelligence, 23 July 2015, n° 2015-713 DC, concerning the right of interested persons to exercise an effective judicial remedy, the right to a fair trial and the adversarial principle; Law to strengthen the freedom, independence and pluralism of the media, 10 November 2016, n° 2016-738 DC, regarding freedom of expression and communication; La Quadrature du net, July 9, 2021, n° 2021-924 QPC, about respect for privacy.

[234] Mr. Dominique de L., 28 November 2014, n° 2014-432 QPC.

[235] Nationalization law, January 16, 1982, n° 81-132 DC.

[236] Law on the prevention of corruption and the transparency of economic life and public procedures, 20 January 1993, n° 92-316 DC.

[237] Chaud Colatine Company, January 21, 2011, No. 2010-89 QPC.

[238] Human Rights League, February 19, 2016, n° 2016-535 QPC.

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**The introduction of measures intended to guarantee the supply of the armed forces therefore presupposes that the correlative obligations imposed on armaments professionals are fully justified with regard to the objectives pursued by the law and that they appear proportionate in relation to the categories of undertakings concerned and their actual activity.**

### 1.2.3. Derogations from freedom of contract must be justified by grounds of general interest.

**The Constitutional Council considers, according to settled case law, that it " *is open to the legislator to bring to the freedom of contract, which stems from Article 4 of the Declaration of 1789, limitations linked to constitutional requirements or justified by the general interest, provided that this does not result in disproportionate damage to the objective pursued. Moreover, the legislator cannot affect legally concluded contracts unless justified by a sufficient reason of general interest without disregarding the requirements resulting from Articles 4 and 16 of the Declaration of 1789 .* [239] .**

**In the present case, with regard to the existence of such a ground of general interest, the constitutional judge held in particular that by conferring on the High Council for Financial Stability the ability to temporarily limit the payment of the redemption values of a life insurance contract, " *the legislator intended to allow the prevention of risks representing a serious and characterized threat either for the stability of the financial system, or for the financial situation of the whole or a significant sub-group organizations in the insurance sector* " and that, " *in doing so, the legislator pursued an aim of general interest* ".**

**It shows that the legislator is in particular entitled to temporarily postpone the effects of contracts in order to prevent the occurrence of risks representing a serious and serious threat either to the continuity of a given sector of activity, or to the particular situation of a significant subset of entities in this sector. The guarantee of the supply of the armed forces appears, in this sense, to constitute a reason of general interest sufficient to justify an infringement of contractual freedom.**

### 1.2.4. Limitations may be made to the exercise of the right of ownership, subject to being justified by a reason of general interest and proportionate to the objective pursued.

**While article 2 of the Declaration of 1789 enshrines property among the " *natural and imprescriptible rights of man* ", article 17 of this same text proclaims that " *property being an inviolable and sacred right, no one may be deprived of it except when public necessity, legally established, obviously requires it, and under the condition of a fair and prior indemnity* ".**

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239 Law on transparency, the fight against corruption and the modernization of economic life, 8 December 2016, n° 2016-741 DC.

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However, on the occasion of the examination of a provision providing that the owner of a dividing wall may be required to make it adjoining in whole or in part at the request of the owner of the land adjoining it, the Constitutional Council ruled that it did not fall within the scope of Article 17 of the Declaration of 1789 insofar as the " *master of the wall* […], *within the limits of common use set by Articles 653 et seq. of the Civil Code, continues to exercise on its property all the attributes of the right of ownership* "[240]

Following a similar reasoning, it held that a provision allowing the administrative authority to make the issue of a building permit or the absence of opposition to a declaration of works subject to the institution of an easement prohibiting or limiting the use, in the winter period, of alpine chalets or summer pasture buildings not served by roads and networks " *does not entail deprivation of property within the meaning of article 17 of the Declaration of 1789 but a limitation to the exercise of the right of ownership* "[241]. The same applies to easements tending to the permanent establishment of undergrou supports for overhead conductors on undeveloped, unfenced private land[242]

This is particularly the case with provisions authorizing tax officials to carry out control tests of the procedures for the automated processing of a company's accounts "without providing for compensation for temporary deprivation of use of the *company's equipment* ", being clarified that " *no constitutional rule imposes compensation for the hardships suffered by a company as a result of the tax audit* "[243] .

In addition, following the example of its aforementioned case law relating to infringements of freedom of enterprise and freedom of contract, the Constitutional Council considers that "in the absence *of deprivation of the right to property, it nevertheless results from the article 2 of t Declaration of 1789 that the limits placed on its exercise must be justified by a reason of general interest and proportionate to the objective pursued* "[244]

With regard to the assessment of the proportionality of such a measure, the constitutional judge, for example, ruled that this condition was satisfied when the legislator had circumscribed its scope of application, that the corresponding decision was " *placed under the control of the administrative judge* " and that " *The owner of the property subject to the easement has the option, with regard to changes in circumstances, to request its repeal from the administrative authority at any time* "[245]

It therefore seems possible to impose on companies contributing to the supply of the armed forces limitations on the exercise of the right of ownership they hold over the goods necessary for the exercise of this activity, without however attaching them to a mechanism

[240] Mr. Pierre B., November 12, 2010, n° 2010-60 QPC.

[241] Civil society Rural land grouping Namin and Co, May 10, 2016, n° 2016-540 QPC.

[242] Association Avenir Haute Durance and others, February 2, 2016, No. 2015-518 QPC.

[243] Finance law for 1982, December 30, 1981, n° 81-133 DC.

[244] Mrs. Barbara D. and others, April 8, 2011, n° 2011-118 QPC.

[245] *See* decision no. 2016-540 QPC mentioned above.

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**compensation, provided that they are justified by a reason of general interest and proportionate to the objective pursued.**

### 1.2.5. Obligations may be imposed on private operators without creating a breach of equality before public charges, provided that they can be linked to the activities of the said operators.

**According to article 13 of the Declaration of 1789 " *For the maintenance of the public force, and for the expenses of administration, a common contribution is essential: it must be equally distributed among all the citizens, by reason of their faculties* " . The Constitutional Council considers that if this article " *does not prohibit making certain categories of persons bear specific charges for a reason of general interest, this should not result in a marked breach of equality before the charges public* »[246].**

**In practice, the constitutional judge verifies whether, through the difference in treatment thus instituted, the legislator " *has not passed on to private persons expenses which, by their nature, would be the responsibility of the State* ". This was the case for the provisions of article L. 34-11 of the postal and electronic communications code subjecting the operation of certain mobile radio network equipment (5G) to prior authorization to verify the absence of serious risk of damage to the interests of defense and national security: if the implementation of these provisions is likely to entail charges for the operators, this does not result in a characterized breach of equality before public charges, the securing of mobile communication networks being " *directly linked to the activities of the operators who use and operate these networks in order to offer electronic communication services to the pu*[247]**

**More flexibly, the Constitutional Council considered that provisions requiring manufacturers and importers of tobacco products, on the one hand, to print or affix to the packaging units of these products a tamper-proof security device and, on the other hand, to provide free of charge the equipment necessary for the detection of these elements to the agents of the administrations responsible for controlling them, " *the legislator intended to guarantee the authenticity of the tobacco products put on the market to fight against their illicit trade* " , it being specified that " *the fight against the illicit trade in tobacco products is not unrelated to the activities of the companies that manufacture or import them, which moreover have an interest in the implementation of the control mission, by the State, safety devices affixed to the packaging units*[248]**

***Conversely,* it has been held that " *if it is permissible for the legislator, in compliance with constitutionally guaranteed freedoms, to impose on telecommunications network operators***

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[246] Law containing various provisions for adaptation to Community law in the field of transport, 10 January 2001, no. 2000-440 DC.

[247] Société Bouygues télécom and other, February 5, 2021, n° 2020-882 QPC.

[248] National Company for the Industrial Exploitation of Tobacco and Matches, January 24, 2020, No. 2019-821 QPC.

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*to put in place and operate the technical devices allowing interceptions justified by the needs of public security, the contribution thus made to the safeguarding of public order, in the general interest of the population, is foreign to the operation of telecommunications networks* " and " *that the resulting expenses cannot therefore, by their nature, be borne directly by the operators* "249 .

Consequently, companies contributing to the supply of the armed forces, without compensation for the expenses involved, can only be charged with obligations likely to be directly linked to their activities and which would not, by their nature, have necessarily intended to come under the jurisdiction of the State.

#### 1.2.6. The application of the principle of responsibility does not preclude the establishment of special conditions for the implementation of this responsibility

The Constitutional Council considers, according to settled case law, that " *it follows from the freedom proclaimed by Article 4 of the Declaration of 1789 that, in principle, any act whatsoever of man which causes harm to another obliges the the fault of which he managed to repair it. The ability to act responsibly implements this constitutional requir However, the latter does not preclude the legislator from adjusting, for reasons of general interest, the conditions under which liability may be incurred. It may thus, for such a reason, make exclusions or limitations to this principle provided that this does not result in a disproportionate infringement either of the rights of the victims of wrongful acts or of the right to an effective judicial remedy which derives from Article 16 of the Declaration of 1789* "250

In this sense, the legislator appears justified in attaching the option for companies to seek compensation for damages caused by administrative decisions to a procedure enabling the reality and extent of the alleged damages to be verified.

In this respect, the Constitutional Council ruled in particular that the provisions conferring on the prefectural authority the power to carry out an administrative inquiry prior to the exercise of a right of ownership by individuals did not infringe the rights and freedoms that the latter derive from the Constitution since " *neither by their purpose nor by their wording, the provisions* [in question] *exclude the involvement of the liability of the public authorities in the event that a decision legally taken on their basis would cause a compensable damage* "251.

249 Amending finance law for 2000, 28 December 2000, n° 2000-441 DC.

250 2010-2 QPC, June 11, 2010, cons. 11; 2010-8 QPC, June 18, 2010, cons. 10; 2011-116 QPC, April 8, 2011, cons. 4; 2011-127 QPC, May 6, 2011, cons. 7; 2011-167 QPC, September 23, 2011, cons. 4; 2014-415 QPC, September 26, 2014, cons. 5.

251 Complementary law to law n° 88-1202 of December 30, 1988 relating to the adaptation of agricultural exploitation to its economic and social environment, 22 January 1990, n° 89-267 DC.

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**In doing so, any prior verification mechanism implemented by the administration appears justified as long as it remains subject to the control of the judge.**

### 1.2.7. Any breach of the measures ordered by the administrative authority, carried out within the framework of the prerogatives of public power, is likely to give rise to administrative sanctions.

**It emerges from constitutional case law that " *the principle of the separation of powers, just as no principle or rule of constitutional value stands in the way of an administrative authority, acting within the framework of prerogatives of public power, being able to exercise a power to sanction when, on the one hand, the sanction likely to be imposed is exclusive of any deprivation of liberty and, on the other hand, that the exercise of the power to sanction is accompanied by law with measures intended to safeguard the constitutionally guaranteed rights and freedoms* "[252]**

**Under these constitutionally guaranteed rights and freedoms, it is possible to distinguish between procedural requirements and substantive requirements.**

#### 1.2.7.1. *The rights of the defense must be taken into account prior to the pronouncement of sanctions and are essential without the legislator having to recall their existence.*

**Respect for the rights of the defence, initially enshrined as a general principle of law[253], then as a fundamental principle recognized by the laws of the Republic[254], now constitutes a requirement with constitutional value attached to article 16 of the Declaration of the Rights of Man and of the Citizen of 1789[255].**

**This principle does not only concern the sentences pronounced by the criminal judge, but applies to any sanction having the character of a punishment, including if the legislator has left the task of pronouncing it to a non-judicial authority[256]. It implies " *that no sanction having the character of a punishment can be inflicted on a person without the latter having been given the opportunity to present his observations on the facts with which he is charged"* and " *is binding on the authorities having a power of sanction without the need for the legislator to recall its existence* "[257]**

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[252] Law relating to the security and transparency of the financial market, 28 July 1999, n° 89-260 DC.

[253] CE, May 5, 1944, Dame Veuve Trompier-Gravier, Rec. p. 133.

[254] Law relating to the development of the prevention of accidents at work, 2 December 1976, n° 76-70 DC.

[255] Law for equal opportunities, March 30, 2006, n° 2006-535 DC.

[256] Law relating to the freedom of communication, January 17, 1989, n° 88-248 DC.

[257] Mr. Stéphane R. and others, October 24, 2014, No. 2014-423 QPC.

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#### 1.2.7.2. *The objective impartiality and the independence of the courts are not opposable to the sanctions taken by an authority subject to the hierarchical power of the minister.*

**The scope of these principles has been significantly extended under the influence of Article 6§1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (CESDH)258, which implies going beyond the subjective impartiality relating to the person and his behavior, but to ensure the objective impartiality relating to the functions exercised which are by nature, independently of his convictions personal, to cast doubt on the independence of the person holding them259 .**

**Nevertheless, compliance with these principles is essential when the sanction is pronounced by an administrative authority not subject to the hierarchical power of the minister260 .**

**Respect for objective impartiality and independence is not binding on administrative authorities placed under the responsibility of a minister in that they cannot be assimilated to a "tribunal" within the meaning of Article 6§ 1 (see, in this sense, CE, March 27, 2000, No. 187703 regarding tax penalties; CE, December 21, 2018, No. 424520, regarding the penalties imposed by the ANAH).**

#### 1.2.7.3. *The principle of legality of offenses and penalties, which applies to administrative sanctions, implies specifying the obligations to which a person is subject.*

**In terms of administrative sanctions, the Constitutional Council rules that " *applied outside of criminal law, the requirement of a definition of sanctioned offenses is satisfied, in administrative matters, by reference to the obligations to which the holder of an authorization administrative is subject to the laws and regulations* "261 .**

**In its decision no. 255136 of 7 July 2004, the Conseil d'Etat specified that " *when applied to administrative sanctions, the principle of legality of offenses and penalties does not prevent offenses from being defined by reference to the obligations to which a person is subject because of the activity he exercises, the profession to which he belongs or the institution to which he belongs; it implies, on the other hand, that the sanctions are provided for and enumerated by a text* ".**

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[258] **Article 6§1 of the ECHR lays down the principle of impartiality and independence of the courts in these terms: " *Everyone has the right to have his case heard fairly, publicly and within a reasonable time, by an independent tribunal. and impartial, established by law, which will decide either disputes over her civil rights and obligations, or the merits of any criminal charges brought against her*" .**

[259] **EC, July 4, 2003, No. 234353.**

[260] **Société Numéricâble SAS and other, July 5, 2013, No. 2013-331 QPC ; Barnes et al., March 9, 2017, no. 2016-616/617 QPC.**

[261] **Law modifying the law n° 86-1067 of September 30, 1986 relative to the freedom of communication, January 17, 1989, n° 88-248 DC.**

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#### 1.2.7.4. *Sanctions are subject to the principles of individualization and proportionality of penalties.*

**According to article 8 of the Declaration of 1789, " *The law shall establish only such penalties as are strictly and evidently necessary, and no one shall be punished except by virtue of a law established and promulgated prior to the offence, and legally applied* ". However, it emerges from constitutional case law that " *the principles set out in Article 8 of the Declaration of 1789 do not concern only the penalties pronounced by the criminal courts but extend to any sanction having the character of a punishment* ". it being specified that " *if the necessity of the penalties attached to the offenses falls within the discretion of the legislator, it is incumbent on the Constitutional Council to ensure, in disciplinary matters, that there is no manifest inadequacy between the disciplinary penalties incurred and the obligations whose disregard they tend to repress* "262**

**For example, the Constitutional Council has recognized the constitutionality of a measure conferring on the administrative authority, " *under the control of the judge, the task of setting the amount of the pecuniary sanction, within the limit of the maximum determined by the contested provisions, and to proportion this sanction to the seriousness of the alleged facts, to the importance of the damage caused to the economy, to the situation of the sanctioned company or the group to which it belongs and to the possible repetition of prohibited pra**

### 1.3. CONVENTIONAL FRAME

**If the case law of the European Court of Human Rights (ECHR) and that of the Court of Justice of the European Union (CJEU) confirms the main principles of the constitutional case law detailed in 1.2 above, it can be emphasized *that* any measure imposed on companies supplying the armed forces could have an impact on certain rights and freedoms protected by European Union law, in particular on the rules relating to the proper functioning of the internal market.**

**Such measures would in fact be liable to undermine the prohibition of quantitative restrictions on imports or exports between Member States, provided for respectively in Articles 34 and 35 of the Treaty on the Functioning of the European Union (TFEU) as well as the prohibition of restrictions on the freedom of establishment, provided for in Article 49 of this text.**

**However, Articles 36 and 52 of the TFEU in particular authorize the Member States to adopt legislative, regulatory and administrative provisions establishing such restrictions when they are justified by reasons of public order, public security and public health.**

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[262] Mr. Michel G., November 25, 2011, n° 2011-199 QPC.

[263] Société Grands Moulins de Strasbourg SA and others, 14 October 2015, no. 2015-489 QPC.

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**In addition, it appears that public security can be invoked for both internal and external security reasons. It is up to each Member State to demonstrate that the measures it imposes are justified. In judgment no. 72/83 of 10 July 1984, *Campus Oil,* the CJEU thus validated a national measure derogating from article 34 of the TFEU for reasons of public security, which required oil importers to obtain supplies , up to 35% of their needs, with a national oil company, respecting prices set by the government.**

**More specifically, Article 346(1)( b)** of the TFEU authorizes any Member State to " ***take the measures which it considers necessary for the protection of the essential interests of its security and which relate to the production or trade*** **" of products appearing on a list fixed by the Council264, mentioned in paragraph 2 of the same article. As specified in recital 10 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009265, " *this list only includes equipment which is designed, developed and produced for specifically military purposes* ", it being emphasized that it " *is generic and should be interpreted in the broad sense in the light of the evolving nature of technologies, acquisition policies and military needs leading to the development of new types of equipment* ".**

### 1.4. ELEMENTS OF COMPARATIVE LAW

**US law provides, *via* the " *Defence Priorities and Allocations System Program* " (DPAS), a mechanism for prioritizing contracts and orders, particularly applicable to national defence, energy and homeland security. This system, whose implementation is not limited to crises and armed conflicts, can also be used to come to the aid of another State. Its main objective is to ensure the timely availability of industrial resources to meet the requirements of national defense and emergency preparedness.**

**DPAS is subject to Section 700.1 of Title 15 of the *Code of Federal Regulations* and is derived from the Defense *Production Act* of 1950 (Sec. 101) . The authorization given by Congress to use it for a limited time has been renewed more than 50 times since 1950.**

**Based on this authorization, the President of the United States may require the preferential acceptance and performance of contracts or orders and the allocation of materials, services and facilities necessary for their implementation, in order to support certain programs concerning national defense or energy. The Department of Commerce benefits, through an Executive Order *(The National Defense Resources Preparedness***

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**[264] List fixed by Council Decision No 255/58 of 15 April 1958, which was not published in the Official Journal of the European Communities until 27 September 2001, on the occasion of the answer given to written question E 1324/ 01 asked by MEP Bart Staes.**

**[265] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works, supply and service contracts by contracting authorities or contracting entities in the fields of defense and Security.**

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***Executive Order,*** **EO 13603), of a delegation to implement the corresponding decisions. In this respect, it is his responsibility in particular to authorize the Department of Defense to prioritize the contracts or orders concerned.**

**There are two levels of prioritization: on the one hand, "DO" contracts, which have priority over "common law" contracts, and, on the other hand, "DX" contracts, which have priority over " OD". From a formal point of view, all these acts include the degree of prioritization, a required delivery date, a signature and a declaration signaling the applicability of the DPAS procedures.**

**US companies affected by these prioritized contracts and orders are legally required to give them priority processing and to respect, if necessary, the schedule imposed by the administration. There is a very limited number of cases where the rejection of a prioritized order is possible: either when the order is impossible to execute on the requested date (in this case, the order must be rejected, but a later delivery date must necessarily be proposed), or when the order or the service requested is not or is no longer provided by the requested company.**

**These prioritizations are frequently used by the US Department of Defense, it being specified that the Department of Commerce estimates that approximately 300,000 of these contracts are concluded each year.**

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**The consequences of the war in Ukraine and the disorganization of supply chains following the health crisis are currently causing difficulties in the supply of certain components or raw materials of strategic interest. In this respect, among the documents relating to the finance law for 2023, the annual performance project relating to program 146 presents in particular " *the global shortage of components and the extension of the supply period of the production chain* " as the causes of the delay of certain major armament programs. Such difficulties would necessarily be multiplied in the event of a major engagement by France against a strategic competitor, thus hampering the capacity of the BITD to increase in power to meet the equipment needs of the armed forces. In this sense, it appears necessary to ensure that national legislation provides the latter with sufficient guarantees in terms of securing their supplies.**

**The 2022 National Strategic Review reflects this need by proposing that " *common stocks of components or raw materials* [be] *set up at the initiative and under the responsibility of industry to support military industrial activities, in the event of conflict* ", adding that, " *to ensure the capacity of its sovereign missions, the State must be able, according to the evolution of the conflictuality, to impose priorities* ". Indeed, since the end of**

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**During the Cold War, the defense industry operated according to a flow logic, enabling the companies concerned to optimize their margins. However, such a mode of operation burdens the capacities for resilience and reactivity of the national production tool and therefore does not appear compatible with the requirements of a "war *economy* ", i.e. say an economy articulating its policies and its choices around the support of the defense effort in order to allow French industry to support this war effort over the long term, in case of need for the armed forces or for the benefit of a partner. In such a context, it is now necessary to switch to a logic of stocks, the correct sizing of which depends on the production rates of manufacturers. In this respect, if the existence of an initial stock is always necessary for the first phases of a conflict, one of the strategic stakes for the continuation of this one is the capacity of the industrialists to ensure the reconstitution of the said stock**

**Independently of the framework of the contractual relationship, the legislation in force does not include any mechanism allowing, on the one hand, to impose on BITD companies the constitution of stocks of materials or components of strategic interest and, on the other hand , to order them to give priority to the execution of orders placed by the State within the framework of a defense and security contract. On this last point, it may be emphasized that the power to unilaterally modify contracts enjoyed by public persons under the public procurement code and the principles established by administrative case law, by virtue of the general rules applicable to administrative contracts, does not are not necessarily adapted to the objective of accelerating the acquisition times of the service or the equipment ordered insofar as this option does not apply, on the one hand, if the said acceleration appears likely to upset the general scheme of the contract and, on the other hand, in some of the hypotheses envisaged *(cf.* situations mentioned below, within §2 of item 2.2, referring, on the one hand, to contracts concluded by international organizations or by partner States and, on the other hand, to services provided by subcontractors of a co-contracting State).**

**Given the constraints that would result from the introduction of such measures at the expense of manufacturers, these could, moreover, only be provided for within the framework of a legislative mechanism, accompanied by all the guarantees required under the constitutional and European case law.**

### 2.2. OBJECTIVES PURSUED

**In order to respond to the difficulties identified in the preceding paragraph, this measure is intended to secure the supply of the armed forces:**

- **on the one hand, on a preventive basis, by guaranteeing the availability of resources necessary for the manufacture of military equipment;**
- **on the other hand, by accelerating the delivery of war materials already ordered, when circumstances so require.**

**To meet this dual objective, two complementary systems are thus envisaged:**

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**1/ First of all, the State must have the option of requiring certain companies playing a decisive role in the supply of the armed forces to have adequate stocks in order to allow them to honor orders placed with them in accordance with contractually defined execution deadlines, to increase their reactivity and to prepare future orders, including in a context of shortage. However, even if the Ministry of the Armed Forces endeavors to obtain from the companies of the BITD that they constitute such stocks in a voluntary and coordinated manner, within a contractual framework, it appears necessary to have appropriate measures intended to guarantee the satisfaction of all the needs of national defense, by conferring on the administrative authority the task of determining the nature and volume of said stocks.**

**In this respect, two types of stocks should be distinguished, which serve distinct purposes and which do not involve the same implementation requirements.**

**First, the need to keep stocks may concern raw materials or generic critical components, generally necessary for all defense industries in the same sector, such as titanium or other critical metals. In doing so, it seems particularly possible for the companies concerned to pool the constitution of such stocks.**

**Secondly, it may be necessary to build up stocks for basic components or semi-finished products specific to certain military equipment, the immediate availability of which appears likely to enable the manufacturer to increase its production rate by significantly.** Such is for example the case of the ***Caesar*** **cannon tubes , which represent a small proportion of the total production cost, but a significant part in the overall production time of this weapon system. Mention may also be made of mirrors used in the manufacture of optronic systems.**

**2/ Furthermore, in an armaments sector which appears to be increasingly competitive, the availability of materials or components of strategic interest does not, on its own, constitute a sufficient guarantee for the supply of the armed forces. Indeed, beyond the schedule of orders set by contract, the State must be able, when circumstances so require:**

- **to compel any manufacturer with whom it has entered into a defense and security contract to perform this contract in priority over any other contractual commitment binding it to a third party;**
- **and, if necessary, to order a shorter delivery time compared to the schedule initially provided for in the contract.**

**Beyond the sole needs of the French armed forces, it must also be able to mobilize this ability to prioritize to honor its international commitments, to ensure the pursuit of international cooperation in military matters as well as to execute contracts concluded by international organizations. to which it is a party or by partner States.**

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In this respect, it should be noted that 30 to 70% of the production process for military equipment, depending on the armament programs considered, is carried out by subcontractors, who occupy a crucial place in the production process, in particular by upstream of the manufacturing chain, the prime contractor often playing the role of integrator. For example, over the two years of manufacturing the radars that equip the *Rafale,* the first year of production is entirely carried out by Thales subcontractors . To increase the rate of production, it is therefore necessary to extend the scope of application of the option of prioritization open to the State to the whole of the production chain which it is necessary to mobilize, including the sub- contractors of all levels whose participation is essential to the performance of the contracts in question.

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

It was envisaged to simply resort to contractual mechanisms to guarantee the conditions of supply of the armed forces with military equipment, it being recalled that the administration always has the option of resorting to the system of requisitions when a measure of constraint is imposed. proves necessary. However, it appeared that such an option would not make it possible to respond satisfactorily to all the issues in question and that it would be preferable to set up an intermediate mechanism.

Firstly, even if the Ministry of the Armed Forces endeavors to obtain, from the manufacturers of the BITD with which it is contractually bound, that they constitute, in a voluntary and coordinated manner, stocks of materials and components necessary to the equipment of the armed forces, it can, in practice, prove difficult to obtain firm commitments in this area, especially in a context of rising prices.

Furthermore, while the volume and nature of the stock to be built up may change depending on economic factors, the conditions for revising a contractual clause provided for this purpose are not necessarily compatible with the need to adapt it quickly to new new needs, knowing that, if necessary, such an evolution of the contract can be accompanied by a heavy financial counterpart. However, this additional cost borne by the State appears all the less appropriate since the creation of such a stock, which is similar to working capital, is directly linked to the activities of professionals in the sector and necessarily contributes to satisfaction of their own interests.

Secondly, any measure aimed at prioritizing orders placed by the State or by its strategic allies seems difficult to reconcile with obtaining the prior consent of manufacturers in the sector, particularly for dual companies whose customers are, by definition, more diverse. Indeed, any clause instituting a priority delivery mechanism could be perceived as a handicap in a very competitive sector.

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**In addition, the simple contractual route appears insufficient to secure the entire production chain of military equipment, which includes not only the industrial holder of the contract, but also its subcontractors, who do not necessarily have a link with the state.**

**Thirdly and lastly, whether it concerns the creation of stocks or the prioritization of orders, the problem of securing supplies for the armed forces is part of a process of anticipating difficulties which does not necessarily correspond to the criteria for implementing the system of defense requisitions, as amended by this bill, which can only be called upon in the event of a current or foreseeable threat or in the event of an emergency. It therefore seems necessary to have a more flexible device, allowing to intervene upstream, when the contractual way proves to be unsuitable.**

### 3.2. SELECTED OPTION

**In order to meet the objectives defined in item 2.2 *above,* this measure provides the State with two new tools that can be applied unilaterally in order to complete the mechanisms that it can put in place by contract, which do not offer all the sufficient guarantees to prevent the lack of supply of the armed forces with military equipment.**

**Firstly, it is planned to give the administrative authority the power to order BITD manufacturers to build up a minimum stock of materials or components of strategic interest, like various already applicable in domestic law.**

**In this respect, it may be recalled that Articles L. 642-2 et seq. of the Energy Code impose on any approved oil operator carrying out, in mainland France, an operation resulting in the payment of domestic consumption taxes or, in an overseas department, releasing certain petroleum products for consumption or refueling aircraft, to contribute to the constitution of " *strategic* petroleum stocks", defined in proportion to the quantities covered by the operations in question, to such that France permanently has a quarter of the quantities imported or introduced the previous calendar year. Similarly, Article L. 5121-29 of the Public Health Code requires any marketing authorization holder and any pharmaceutical company operating a medicinal product to constitute a "safety stock" *for* medicinal products intended for French market, within a limit which cannot exceed four months of coverage of drug needs, calculated on the basis of the volume of sales of the specialty during the last twelve rolling months of stock for all drugs. It can also be emphasized that neither of these two systems is accompanied by a mechanism for compensation by the State for the stocks thus constituted by the private operators concerned.**

**The obligation established by this measure can nevertheless be imposed only on companies holding an authorization to manufacture and trade in war materials, arms, ammunition or their components of categories A and B, issued on the basis of Article L. 2332-1 of the Defense Code. Indeed, given the military equipment needs**

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**of the armed forces, it does not seem necessary to extend this possibility to all companies in the sector.**

**In concrete terms, this obligation may be imposed on them by order of the Minister for the Armed Forces, independently of any current contract, with the aim of increasing their responsiveness and preparing future orders from the armed forces, while compressing deadlines as much as possible. between these orders and the actual delivery of the materials in question. If the device provides that the stocks can be pooled by agreement between the different companies concerned, the latter cannot, on the other hand, use them without authorization from the administrative authority. They will also not be able to claim compensation for the costs of constituting and immobilizing said stocks, as long as these contribute to the performance of their professional activity, like the regime applicable to strategic stocks of hydrocarbons. or medication.**

**In return for the constraints thus imposed on manufacturers, this mechanism is accompanied by significant guarantees:**

- **the maximum value of the prescribed stock will be capped by regulation, so that the constitution and maintenance of the stock remain moderate costs for companies;**
- **the maximum value and the volume of the prescribed stock must be proportionate and take into account, on a case-by-case basis, the particular situation of the company (taking into account its volume of activity, the nature of the equipment sold and the status of current orders), the degree of tension noted for the supply of the materials and components concerned as well as the foreseeable needs of the armed force**

**This last requirement of proportionality will also imply, on the part of the State, a periodic review of the constraints thus imposed by decree. In this respect, given the production times for military equipment, it does not however seem necessary to follow a short-term approach, it being specified that an update occurring approximately every two years should enable the companies concerned to organize to constitute and manage this stock.**

**The constitution of such a stock is also accompanied by the obligation, for the company, to communicate to the Ministry of Defense the elements strictly necessary for the control of the respect of this obligation, the violation of which is accompanied by sanctions. In the event of a breach, the administrative authority thus has the option, after a formal notice not followed by effect, to impose a pecuniary penalty on it, the amount of which may not exceed twice the value of the unconstituted stocks, in the limit of 5% of the annual turnover recorded during the two previous financial years. This is, in fact, to ensure that the company will fulfill its obligations in this area, without jeopardizing its financial balance However, in the event of a repeat offence, it may have the manufacturing and trade authorization which it holds revoked, as provided for in Article L. 2332-11 of the Defense Code, for " *any individual who has committed a breach of the provisions* » of this code relating to the manufacture of and trade in arms and war materials or the related regulatory provisions.**

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**Secondly, on the model of the American legislation presented in section 1.4, it is planned to confer on the administrative authority, for the performance of a defense or security contract that it has concluded with a of the BITD, the faculty, by decree, of:**

- **compel the manufacturer concerned to perform the obligations arising from this market by priority over any other contractual commitment binding it to a third party;**
- **and, if necessary, unilaterally set a reduced delivery time in relation to the contractual terms.**

**Limited to the sole perimeter of national defence, the scope of this system is nevertheless broader than that provided for with regard to the obligation to constitute stocks of strategic interest when it is likely to apply. to all holders of a defense and security contract mentioned in article L. 1113-1 of the public procurement code as well as to subcontractors of any level whose participation is essential for the execution such markets. Indeed, the latter can relate to heavy or complex equipment, the production of which depends on a plurality of actors.**

**This system contributes to the reduction of war material delivery times and aims to guarantee the continuity of the missions of the armed forces, to honor France's international commitments and to give priority to the execution of armament contracts entered into by a company French with an international organization or a third State.**

**In order to respect the constitutional requirements, it is, moreover, expressly provided that the measures thus prescribed must be proportionate to the objectives pursued and appropriate to the circumstances of time and place.**

**In return, the State will be required to fully compensate for the material damage resulting directly and certain from the prioritization measures. Thus, in particular, the potential effect of delay induced on the delivery of the same equipment to the other customers of the company concerned will be neutralized, for the company, by the guarantee that all the penalties for delay imposed on it by its other partners contractual obligations or that any judgments which could be pronounced against it in the event of questioning of its contractual liability will be borne by the State. For the sole purpose of assessing the damage suffered in such situations, companies must provide the administrative authority, if the latter so requests, with all documents or information likely to justify the amount of compensation. due.**

**Like the system provided for with regard to the obligation to constitute a stock of strategic interest, the industrialist will be liable, in the event of breach of the obligation of priority execution and after formal notice remains without effect, a pecuniary penalty, the amount of which may not exceed twice the value of the services ordered, within the limit of 5% of its average annual turnover recorded during the two previous financial years.**

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**These measures are grouped together in a new chapter, the current architecture of the defense code not allowing the integration of the corresponding provisions within an existing subdivision of this code.**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**In the light of the choices made explicit within item 3.2, this measure creates, within Title III of Book III of the first part of the Defense Code, devoted to economic defence, a new chapter relating to " *the the security of supplies for the armed forces and related formations* ". It includes three articles:**

- **the new article L. 1339-1 introduces the possibility, for the administrative authority, to order companies holding an authorization to manufacture and trade in war materials, weapons, ammunition and their components for categories A and B, the constitution of a minimum stock of materials or components of strategic interest;**
- **the new article L. 1339-2 confers on the administrative authority the option, on the one hand, of ordering the companies holding a defense or security contract as well as their subcontractors to carry out any or part of the services covered by the contract in priority over any other contractual commitment and, on the other hand, to specify the period within which the performance of the services is expected, by derogating, where applicable, from the contractual stipulations;**
- **the new article L. 1339-3 refers to a Conseil d'Etat decree to specify the terms of application of this chapter.**

#### 4.1.2. Articulation with international law and European Union law

**The provisions of this measure fall within the scope of the derogations from the rules of the internal market granted by the TFEU, recalled in section 1.3 *above.***

**In this respect, it should also be noted that a European regulation is currently being drawn up on the creation of an emergency internal market instrument (SMEI), intended to guarantee a structural and concrete solution for safeguarding the free movement of people, goods and services in the event of future crises.**

**The crisis management architecture proposed in this framework includes a monitoring mechanism for the single market, the determination of different levels of risk and the coordination of a graduated response according to three phases: emergency prevention, alert situation and emergency.**

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When an alert situation is declared, the proposal for a regulation provides that the Member States, in liaison with the Commission, concentrate their monitoring on the supply chains of goods qualified as being of strategic importance and that they constitute strategic reserves. of said goods.

When an emergency situation is triggered, the proposal for a regulation establishes a list of prohibited restrictions and provides for the implementation of a rapid and reinforced control of the restrictions decided by the Member States. On this occasion, the Commission would also h
faculty:

- ÿ to issue targeted requests for information to economic operators, likely to take a binding form accompanied by a power of sanction;
- ÿ to ask economic operators to accept priority orders for products deemed useful in a crisis situation, the list of which would be determined by an implementing act.

In any event, this draft text provides for the possibility for Member States to preserve the essential interests of their security. These European works in progress do not therefore prevent France from equipping itself with mechanisms of internal law capable of guaranteeing the continuity of the supply of its armed forces.

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

The provisions of the measure making it possible to impose the constitution of stocks have, in the first order, no macroeconomic impact: once the initial constitution of stocks, which will lead to a temporary over-ordering on the markets, the flows of orders to maintain these stocks will result from production flows and will therefore return to the usual flows with suppliers, not creating a lasting imbalance with respect to other economic players who may depend on the same suppliers. It should be noted that the initial constitution represents a limited flow compared to the volumes ordered for civil activities: the potential impact is therefore deemed to be insignificant and temporary.

The provisions of the prioritization measure may in principle have macroeconomic consequences on non-defence activities which would be slowed down due to the prioritization granted to the performance of services in favor of defense contracts. The limited sizes of the series of military equipment, compared to the series and volumes produced for civilian industrial activities, nevertheless make it possible to consider that this impact will remain limited.

#### 4.2.2. Business impacts

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**Provisions for stockpiling can have an economic impact on businesses, due to the resulting financial immobilization. This request is nevertheless justified by virtue of the arguments previously developed in this impact study, by the strategic nature of the activities carried out for the benefit of the State, which requires that the manufacturers concerned take precautions adapted to the stakes, like the existing provisions for oil stocks and in the health sector.**

**While the constitution of stocks is accompanied by the obligation, for the companies concerned, to communicate to the Ministry of Defense the elements strictly necessary for the control of the respect of the measures thus pronounced, it can be underlined that the holders of an authorization manufacture and trade in weapons or war materials are already required, on the basis of the second paragraph of article L. 2332-5 of the defense code, to establish an exhaustive register of materials put into manufacture, repair, transformation, bought, sold, rented, preserved, stored or destroyed266. The compilation of information relating to the stocks constituted under the new article L. 1339-1 of the Defense Code will only constitute, in this sense, a corollary of the keeping of this register. Insofar as the agents empowered to monitor compliance with the legislation on armaments already have the option of requesting the provision of all verbal or written information and all reports necessary for carrying out this monitoring267, this new obligation is will be a continuation of those which are currently incumbent on the companies concerne**

**Furthermore, the text is not prescriptive on the nature of the solutions and manufacturers can define among themselves the conditions under which they intend, if necessary, to pool stocks of common references. The provisions of the prioritization measure have no financial consequences for companies due to the planned compensation mechanism. The potential economic impacts, linked to the dissatisfaction of customers who would see their supplies delayed, seem acceptable given the legislative level of the system, which companies will be able to rely on to justify the suffered nature of the delay. The existence of a similar device in American legislation is also a useful educational element for companies towards their customer base. The legislative nature of the system also allows companies to gradually include appropriate clauses in their contracts with their customers.**

#### 4.2.3. Budgetary impacts

**As allowed by the constitutional case law recalled *above* in section 1.2.4, the obligation imposed on companies contributing to the supply of the armed forces to constitute stocks of components or raw materials of strategic interest will not open**

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**266 See Articles R. 2332-17 to R. 2332-20 of the Defense Code and R. 313-40 and R. 313-41 of the Security Code interior.**

**267 See fourth paragraph of Article L. 2339-1 of the Defense Code and fifth paragraph of Article L. 317-1 of the homeland security code.**

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**not entitled to compensation for damages relating to the costs of setting up and maintaining the said stocks. In this sense, this measure will have no impact on public finances.**

***On the other hand,*** **the obligation for the State to fully compensate the material damage resulting directly and certain from the prioritization measures pronounced on the basis of the new article L. 1339-2 of the defense code will prevail, the if applicable, a budgetary impact. Nevertheless, because of the short-term nature of the use of such a measure, it remains impossible to quantify.**

**The desire to provide fair compensation to the companies concerned, while ensuring the best possible management of State funds, also justifies the obligation for the manufacturer to provide the administration, if the latter the request, all documents or information likely to justify the amount of compensation due. This system, which is not intended to be used systematically, may in particular be applied when the compensation requested is considered excessive by the administration.**

**In any case, the financial cost of this prioritization will constitute one of the parameters that the State will have to take into account before deciding to use this power and will condition, if necessary, the scope of the measures actually implemented. .**

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**Not applicable.**

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**The implementation of the two systems introduced in new articles L. 1339-1 and L. 1339-2 of the Defense Code remains optional for the administrative authority. These cannot, in this sense, be considered as representing a permanent burden for the competent services within the Ministry of the Armed Forces.**

**In addition, if the administrative authority decides to use it, it can be emphasized that these services already have a certain amount of information likely to facilitate its application, acquired during examining applications for manufacturing and trade authorizations or awarding defense and security contracts held by the companies concerned. This pre-existing link between the recipients of the corresponding measures is thus likely to facilitate the task of the administration.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

**Not applicable.**

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#### 4.5.2. Impacts on people with disabilities

**Not applicable.**

#### 4.5.3. Impacts on equality between women and men

**Not applicable.**

#### 4.5.4. Impacts on youth

**Not applicable.**

#### 4.5.5. Impacts on regulated professions

**Not applicable.**

### 4.6. IMPACTS ON INDIVIDUALS

**Not applicable.**

### 4.7. ENVIRONMENTAL IMPACTS

**Not applicable.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**The representatives of the manufacturers concerned were consulted within the framework of dedicated working groups, with regard to “war economy” reflections. The objectives of the system were thus able to be shared with the Council of French Defense Industries (CIDEF), the main industrial prime contractors, the interprofessional groups of the defense sectors and certain groups representing SMEs. However, the details of how the reform will be implemented have not been communicated to those concerned.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**As specified *below* in item 5.2.3, these legislative provisions require the adoption of a Conseil d'Etat decree to produce their full effect.**

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**These measures will not enter into force until the publication of the said implementing decree and, at the latest, within a period of twelve months from the publication of this law.**

#### 5.2.2. Application in space

**In accordance with the provisions of Article L. 1 of the Defense Code, as it concerns a measure linked to the national defense policy, this provision shall apply automatically to the entire territory of the Republic, including all overseas communities, without any express mention of application being required.**

#### 5.2.3. Application texts

**It follows from the second paragraph of I of the new article L. 1339-1 of the Defense Code that it is up to the regulatory power to set the maximum proportion that the obligation to constitute stocks of strategic interest imposed on a company in relation to the turnover resulting from its sales of equipment during the two previous financial years.**
**In this respect, it is specified that this maximum value may be differentiated according to the nature of the materials and components considered.**

**Furthermore, it is clear from the first paragraph of I of new articles L. 1339-1 and L. 1339-2 of this code that the implementation of the obligations to constitute stocks of strategic interest and to prioritize orders is ordered by stopping way.**

**Finally, as specified in the new article L. 1339-3 of the same code, the methods of application of these two mechanisms must be specified by decree in Council of State. The corresponding provisions, which will also be codified in Chapter IX of Title III of Book III of the first part of the Defense Code, must in particular define the competent authorities:**

- **on the one hand, to order the implementation of the corresponding measures;**
- **on the other hand, the competent authority to pronounce administrative sanctions in the event of breach of the corresponding obligations.**

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# Article 25: Develop the regime for cost surveys in public procurement

## 1. STATE OF PLAY

### 1.1. GENERAL FRAMEWORK

**When the State and its public establishments conclude public contracts, they have the possibility, in certain identified cases, of carrying out, with the most important tenderers, holders, related companies and subcontractors, surveys in order to determine the costs of returns (actual or estimated) for the services covered by these contracts. This control, which relates to the information making it possible to establish the cost price, is intended to improve the knowledge by the administration of the industrial costs in order to allow, for "similar" services and in the absence of competition, a negotiation rational price. This system makes it possible to avoid an unjustified increase in the prices negotiated with companies in a situation of monopoly, encourages the companies concerned to control their costs and contributes to guaranteeing the proper use of public funds (appropriateness of the nego**

**The public procurement code (CCP) provides for and regulates this practice in articles L. 2196-4 to L. 2196-6 for so-called "classic" contracts and L. 2396-3 and L. 2396-4 for defense or security contracts (MDS). On the other hand, nothing is planned for the "other markets" of book V of the second part of the code.**

**The said investigations can only concern " *contracts for which the specialty of the techniques, the small number of candidates with the required skills, reasons of secrecy or imperative reasons of urgency or crisis do not allow to call for competition or to make it play effectively* " and those whose services are complex and over five years old as mentioned in article L. 2196-4 of the public procurement code (article L. 2396-3 for MDS).**

**As part of such investigations, the companies concerned provide the buyer, at his request, " *all information on the technical and accounting elements of the cost price of the services which are the subject of the contract* " (article L. 2196-5 of the PCB). In addition, contract holders and their subcontractors have the obligation to " *allow and facilitate the possible verification, on documents or on site, of the accuracy of* [this] *information* "; in this context, they may be " *required to present their balance sheets, profit and loss accounts as well as their analytical accounts and all documents likely to allow the establishment of the cost price* " (article L. 2196-6 of the CCP).**

**Concretely, in this situation, competition does not operate effectively and therefore cannot fully play its role of moderating prices.** To overcome the disadvantages of this situation, the administration carries out an a ***posteriori* check (after award of the contract and completion of the services) of the costs actually borne by the contractor as well as by his**

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**most important sub-contractors and reuses the elements thus collected within the framework of the negotiation of new contracts comprising similar services (most often these are new manufacturing stages of a product - which may have undergone limited changes -, the continuation of the maintenance of the same product, the provision of similar services, *etc.).* This device is particularly effective for recurring services (such as maintenance).**

**The administration can also carry out a control of the elements having been used for the development of the estimate of the tenderer. This control is carried out during the procurement procedure after the tenders have been submitted by the tenderers and before or in parallel with the negotiation. In this case, it is an *a priori* control (articles L. 2196-5 of the CCP and L. It is then possible to investigate the construction conditions of the tender and the references on which the tenderer relied.**

### 1.2. CONSTITUTIONAL FRAMEWORK

**The provisions relating to cost surveys contribute to satisfying the constitutional requirement for the proper use of public funds, which stems from article 14 of the Declaration of the Rights of Man and of the Citizen[268] .**

**Moreover, the right of communication of information available to the administration from the companies concerned is likely to infringe the freedom of enterprise. Seized of the right of communication recognized to agents of the Competition Authority, relating to the books, invoices and other professional documents belonging to a company or a trader under investigation, the Constitutional Council deemed it to be in conformity to the Constitution. Responding more particularly to the complaint alleging ignorance of the right to respect for private life and the secrecy of correspondence, the Constitutional Council, in order to dismiss it, focused in particular on the particular nature of the documents whose communication is requested, documents professional or work, and on the fact that the provisions in question do not allow the communication of documents protected by the right to respect for private life or professional secrecy to be required.**

### 1.3. CONVENTIONAL FRAME

**The provisions relating to cost control are strictly governed by national law. European Union law does not require it to be used and, conversely, does not prohibit it either.**

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[268] **Constitutional Council, Decision No. 2019-781 DC, May 16, 2019, § 55 and 56, *Law on business growth and transformation.***

**269 Constitutional Council, decision no. 2016-552 QPC of July 8, 2016.**

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### 1.4. ELEMENTS OF COMPARATIVE LAW

**Most of the major States in the world with an armaments industry have, unlike France which is thus an exception, a normative text which details the method of constructing cost elements for the negotiation of armaments markets without a stake. in competition or direct inclusion in controlled expenditure contracts.**

**Thus, since 1953, there has been in German law a text relating to the principles of determining prices on the basis of the cost price ("Leitsätze für Preisermittlung auf Grund von Selbstkosten").**

**In 2014, the United Kingdom adopted legislation on the control of allowable costs for the awarding of defense contracts ("Allowable Costs guidance"). The Ministry of Defense and its subcontractors must jointly consider, when awarding a contract, whether the related costs are admissible in eligible defense contracts.**

**In Spain, an ordinance of October 15, 1998 lays down the rules establishing the criteria to be used for calculating the costs of certain supply, consultancy and assistance contracts and services awarded by the Ministry of Defense under a negotiated procedure.**

**Finally, in 2012, Canada adopted a text on the "Principles of contract costs" intended to detail all the costs to be taken into consideration in the conclusion of contracts.**

**Similar schemes also exist in Italy and Australia.**

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**Checking the veracity of the information justifying the amount of the price offered by a company is fundamental for public purchasers when they cannot rely on other elements to assess the appropriateness of the price. The public procurement code gives them this prerogative.**

**However, as the law stands, there is no provision to define the constitution and methods for calculating the cost of public contracts (expenses that can be incorporated into the costs and rules of incorporation), which leads to disputes during the performance of controls, the presentation and use of their results.**

**Prior to their repeal in 1999 following decisions by the Council of State270, decrees approving the books of accounting clauses applicable to the determination of cost prices specified the charges that could not be included in the costs271 and the methods for calculatin**

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**[270] Council of State, 17 December 1999, French Defense Industries Council, n° 191514 and n°**
**[271] 191515. such as dividends, corporation tax, amortization of start-up costs, severance pay.**

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**hourly rates and fees. Since then, the administration and the defense industrial and technological base companies have not been able to agree on determining the cost price, which is a source of difficulty during contract negotiations and disputes.**

**Consequently, in order to clarify the method of calculating the accounting elements necessary for the valuation of the technical elements of the cost price in the markets, both with manufacturers and with the authorities of the European Union, it is proposed to insert a catchphrase in the legislative part of the public procurement code, in this case in article L. 2196-7, allowing the development of calculation methods, with reference value, by regulatory means.**

**This new provision is valid both for public contracts in Book I and for defense or security contracts covered by Book III of the CCP or those covered by Book V of the same code. Article L. 2396-3 will be modified for this purpose, in the book relating to MDS.**

**For the record, the contracts covered by Book V, entitled "other public contracts", are exempt from European Union law (in particular the rules on advertising and competition) and include in particular certain defense and security contracts, mentioned in article L. 2515-1. Thus, certain contracts that meet the definition of a defense or security market may not be subject to most of the provisions of the code. It's the case :**

- **contracts relating to arms, munitions or war material when, within the meaning of Article 346 of the Treaty on the Functioning of the European Union, the protection of the essential security interests of the State so requires, in particular for purchases that require extremely high confidentiality or high speed of acquisition (3° of article L. 2515-1);**
- **contracts for which the application of the second part of the code would require the disclosure of information contrary to the essential interests of State security, in particular for particularly sensitive works, supplies or services, which require extremely high confidentiality, such as certain purchases intended for border protection or the fight against terrorism or organized crime, purchases related to encryption or intended specifically for covert activities or other equally sensitive activities carried out by internal security forces or by the armed forces (4° of article L. 2515-1);**
- **contracts concluded according to specific procurement rules provided for by an international agreement or an administrative arrangement concluded between at least one Member State of the European Union and at least one third State (6° of Article L. 2515-1) ;**
- **contracts intended for intelligence activities, including counter-espionage, counter-terrorism and the fight against organized crime (7° of Article L. 2515-1);**
- **contracts awarded for operational needs outside the territory of the European Union and that operational needs require that they be concluded with local economic operators located in the area of operations (9° of Article L. 2515-1 );**

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**Book III defense or security contracts, *on the other hand,* are contracts that meet the definition of MDS from article L. 1113-1 of the CCP but whose object does not fall within the aforementioned list.**

- **The duplication of the cost control system comes back to "other supply markets" defense or security" of book V of the CCP.**

**The cost control system must also be made expressly applicable to contracts covered by Book V of the Public Procurement Code. In fact, given the absence of competition for these contracts, the tenderers and holders of this category of public contracts should, in particular, be subject to the same obligations to communicate information relating to the technical and accounting elements of the cost of facilitates documentary and on-site verifications. Holders may be the subject of an investigation under Article 54 of Law No. 63-156 of February 23, 1963 on finance for 1963 and its implementing decree of 1964 - but these old texts have a lesser in scope than the provisions of the public procurement code applicable to contracts in books I and III (in particular, they only concern holders, and not bidders).**

**Book V contracts as well as bids by tenderers for such contracts, like those under Books I and III, must be checked in order to verify that the prices offered remain consistent with the cost price for the companies.**

**This measure is justified by the very large number and financial volume of arms contracts awarded on the basis of book V of the code, including some of the most strategic for the forces, such as the purchase of nuclear ballistic missile submarines ( SSBN). The armament contracts passed on the basis of book V of the CCP represent approximately six billion euros per year, on average over the last few years.**

**The absence of an explicit legal basis currently deprives purchasers of their ability to require bidders and holders of contracts awarded under Book V of the code to carry out a cost survey.**

**It is therefore necessary to legislate in order to duplicate the regime currently in force for the classic book I markets (articles L. 2196-4 to L. 2196-6 of the code) and the defense or security markets (MDS) for the book III (articles L. 2396-3 and L. 2396-4) to defense contracts or security book V.**

**This is the purpose of the creation of Article L. 2521-6 of the Public Procurement Code, which will aim to extend to Book V the rules for cost surveys currently applicable to Book I and Book I markets. of Book III (MDS).**

**In this way, the Ministry of the Armed Forces will be able to impose cost control on its co-contractors on the basis of Article L. 2521-6 applicable to Book V MDS.**

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### 2.2. OBJECTIVES PURSUED

**The objective of the provisions presented is twofold.**

**On the one hand, the insertion of legislative articles, making it possible to specifically require from holders and tenderers, by decree, information on the cost elements that can be objectified, will clarify and secure the cost control system implemented by the Ministry of Defence. This will protect against the risk of litigation.**

**The practice of cost surveys, implemented for many years at the Ministry of the Armed Forces by the Directorate General for Armaments, has seen its legal basis evolve significantly since the 1960s.**

**In 1996, three interministerial decrees272 defined in great detail the procedures for keeping company accounts for contracts signed with companies in the aeronautics and space, engineering and electronics and telecommunications sectors, for the purposes of determination of costs. It was a question of laying down, as soon as the contract was awarded, the conditions for later carrying out the cost surveys. However, noting that the ministers had exceeded the authorization given by the law (which was limited to empowering them to determine the forms in which the accounts of the undertakings subject to the investigations had to be presented and to lay down the rules to be followed for the keeping of accounts for each market) " *in particular by enacting the principle of a fixed remuneration for certain production costs and by excluding others from the calculation of the price of the products sold* ", the Council of State invalidated two of these decrees, concerning defense directly (aeronautics and space; electronics and telecommunications) at the request of CIDEF273 .**

**A new decree was therefore adopted on 20 December 2000274, defining the general framework within which the cost prices of the services of companies operating in the aeronautics and space sector and in the fields of telecommunications and aeronautical construction are determined. It is limited to defining the accounting principles that contract holders must implement for the purposes of a *posteriori cost surveys,* without deciding on the list of accounting items to be retained or excluded to determine the cost price.**

**The proposed legislative provision aims to broaden the authorization given to the competent ministers so that the methods for calculating the accounting elements can be defined by decree.**

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**[272] Order of July 1 , 1986 approving the book of accounting clauses for engineering companies, design offices and consulting companies. This order, unlike the other two, was not repealed in 1999 and is still applicable.**

**Order of March 5, 1996 defining the general framework within which the cost prices of the services of companies operating in the aeronautics and space sector are determined.**

**Order of 2 May 1996 defining the general framework within which the cost prices of the services of companies operating in the fields of telecommunications and electronic construction are determined.**

**[273] CE, December 17, 1999, n° 191514 and n° 191515.**

**[274] Order of December 20, 2000 defining the general framework within which the costs and production costs of the services of companies operating in the aeronautical and space fields and the fields of telecommunications and electronic construction are determined.**

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**valuation, offering more transparency for economic operators whether they are bidders or contract holders while ensuring the legal certainty of said contracts.**

**On the other hand, the ministry is seeking to extend the cost investigation regime to defense and security contracts in Book V of the second part of the public procurement code.**

**The objective, through this modification, is to allow Book V MDSs to have regulations in terms of cost control at the same level as those applicable to Book III defense or security contracts.**

**Indeed, these contracts, like those covered by titles I and III, need to be the subject of cost surveys in order to control the efficiency of purchases. To date, the control carried out is based on consensual provisions, by definition subject to the good will of the tenderer.**

**The application of the provisions relating to cost control to Book V defense or security contracts, already in force for "classic" public contracts and Book III defense or security contracts, is relevant because the absence of competition in these strategic and sensitive markets particularly exposes them to the risk of price drift.**

**Indeed, the absence of competitive bidding deprives the purchaser of negotiating capacity, which it seems appropriate to compensate for by an obligation, at the expense of tenderers and holders, of transparency on the cost price of the services which make up the subject of the contract. The control of the estimate of the cost price and the actual costs will take place both at th awarding of contracts, when the tenderers submit their offers, only at the stage of execution of the contract, after the latter has been awarded under the same conditions as for the contracts in Book I and III.**

**The objective of these measures for the Ministry of the Armed Forces is *ultimately* to rebalance its relations with companies in the defense industrial and technological base. The definition by regulatory means of the accounting elements of valuation to be taken into account for the estimate of the cost price is in no way similar to an administered price system but only aims to determine a basis for negotiation to assess the appropriateness of the margins practiced by the company.**

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## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**The *status quo* could be a source of persistent disputes: in the absence of binding provisions with regard to the defense manufacturers concerned275, uncertainty would continue to prevail as regards both the scope of cost investigations and the elements to be taken into account for the valuation of the costs borne by the manufacturer for the performance of the service.**

### 3.2. SELECTED OPTION

**On the one hand, with regard to the public contracts of Book I, it is proposed to insert article L. 2196-7 in the public procurement code as follows:**

***"For the application of this section, the following may be specified by decree, as necessary:***

***1° The form in which the technical and accounting elements mentioned in Article L. 2196-5 and in the second paragraph of Article L. 2196-6 are presented to the administration, if the latter so requests;***

***2° The nature of the charges included in the determination of the cost price and the terms of their accounting. »***

**On the other hand, for book III defense or security contracts, it is proposed to modify article L. 2396-3 of the public procurement code as follows: "The provisions of articles L. *2196- 4, L. 2196-5 and L. 2196-7 apply* ".**

**Finally, in order to make the cost investigation regime currently in force for classic contracts and MDS in Book III applicable to defense or security contracts in Book V, it is proposed to insert article L. 2521- 6 reads as follows:**

**" *Section 3 of Chapter VI of Title IX of Book III relating to the control of the cost price of contracts for the State and its public establishments is applicable to the public defense or security contracts mentioned in Chapter V of Title 1 of this Book .* »**

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[275] **See, in particular, the decision of the Council of State (February 10, 2023, No. 460448, *French Defense Industries Council,* conc. C. Guibé), which rules that the letter by which the General Delegate for Armaments gives his interpretation of the notion of cost price of services, for carrying out cost surveys, does not constitute a " *document of general scope likely to produce significant effects on the rights or the situation of companies in the industrial defense sector* " and , therefore, cannot be the subject of an appeal before the administrative judge.**

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## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**The provision relating to the definition of the methods for calculating the cost cost surveys in the Book I and Book III markets involves the subsequent modification of the public procurement code in its regulatory part in order to explain the methods for calculating the elements the cost price of the services and to detail what the concept of cost price covers.**

**The measure relating to the duplication of the system of cost price surveys for contracts in Book V applies exclusively to defense or security contracts covered by this book. Therefore, this provision does not apply to markets other than MDS.**

**The new provision will be articulated with those, at the regulatory level, providing for the possibility of sanctions in the event of a mismatch between the expectations relating to the elements of cost control and the achievement by the holders or the candidates. Article R. 2196-8 of the public procurement code thus provides for a two-step system:**

- **upstream of the contract, at the award stage, "** ***when an estimate of the cost price is made before notification of the contract, the buyer indicates in the consultation documents and in the contract the penalties applicable in the event of a breach to the obligation appearing in the first paragraph of Article L. 2196-5 " (which*** **provides that the tenderers provide the buyer, if the latter so requests, with all information on the technical and accounting elements of the estimate of the cost price of the services which are the subject of the contract);**

- **after notification, "** ***if the holder does not provide the purchaser, within the time limit set by the latter, with information on the technical and accounting elements of the cost price of the services which are the subject of the contract or provides information inaccurate, the buyer may, after formal notice which has remained without effect, decide to suspend payments to be made within the limit of one tenth of the amount of the contract when the failure is the fault of the holder or withhold an equivalent amount. After another unsuccessful formal notice, the buyer may decide to transform this holdback into a final holdback, without prejudice to the possible termination of the contract at the fault of the holder.*** **»**

**In addition, as previously indicated, the legislative part of the public procurement code will be amended through the insertion of article L. 2196-7 for the evolution of the regime applied to civil contracts and of article L 2396-5 with regard to book III defense or security contracts.**

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**As for the duplication of the cost control mechanism for defense or security contracts in Book V of the CCP, it involves the insertion of Article L. 2521-6 in Chapter 1, Title II of the book V of the public order code.**

#### 4.1.2. Articulation with international law and European Union law

**Not applicable.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**Not applicable.**

#### 4.2.2. Business impacts

**The new provision allows companies to be perfectly informed of the methods of calculating the cost price for the public contracts they contract with the administration. They will then be able to anticipate their contribution to the surveys by setting up the tools to meet the expectations of the purchasing departments. The presentation of costs according to the schemes adopted in future closings will require them to make a reasonable adjustment in relation to their cost accounting and proportionate in view of the resulting objectification of the costs.**

**Due to its limited scope (markets not open to competition or particularly complex) and the methods of its implementation (the technical and accounting elements of the cost price constitute only one of the elements allowing the negotiation of the price), this measure cannot be assimilated to a system of controlled expenditure which would weigh on the freedom of enterprise.**

**This ability to control costs will also find its application when awarding defense or security contracts under Book V of the Code. Companies will now have to provide all the necessary information on the technical and accounting elements of the estimate of the cost price of the services that are the subject of the contract. Without undermining the free determination of prices, the measure will guarantee more transparency and better control of the appropriateness of the prices of the most sensitive markets.**

#### 4.2.3. Budgetary impacts

**The evolution of the control of the cost price of public contracts induced by this article will allow a better control of the appropriateness of the prices by avoiding for the administration a possible additional cost of its expenses.**

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### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**Not applicable.**

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**Thanks to the introduction of these provisions, the Ministry of the Armed Forces will be able to carry out a more efficient control of the costs actually borne by the candidate economic operator, the tenderer or the holder of the contract.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

**Not applicable.**

#### 4.5.2. Impacts on people with disabilities

**Not applicable.**

#### 4.5.3. Impacts on equality between women and men

**Not applicable.**

#### 4.5.4. Impacts on youth

**Not applicable.**

#### 4.5.5. Impacts on regulated professions

**Not applicable.**

### 4.6. IMPACTS ON INDIVIDUALS

**Not applicable.**

### 4.7. ENVIRONMENTAL IMPACTS

**Not applicable.**

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## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**These provisions do not require any mandatory consultation and no optional consultation has been conducted.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**These provisions will require the publication of a decree to be fully applicable.**

#### 5.2.2. Application in space

**The future provisions will apply throughout the territory of the Republic, both in mainland France and overseas due to the principle of legislative identity which prevails in the field of cost surveys for overseas communities.**

#### 5.2.3. Application texts

**A simple decree will explain the methods for calculating the cost price.**

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# CHAPTER IV – STRATEGIC CREDIBILITY

## Article 26: Strengthen the autonomy of the armies in health matters

### 1. STATE OF PLAY

#### 1.1. GENERAL FRAMEWORK

**The core business of the Armed Forces Health Service (SSA) is to provide medical support to the armed forces and to offer injured soldiers the best chance of survival and recovery.**
**In addition to this main mission, the health service of the armies makes a substantial contribution in the field of public health and in the implementation of government plans, intended to deal with nuclear, radiological, biological and chemical (NRBC) risks. .**

**To this end, the SSA, which is a joint support service within the meaning of Article L. 1142-1 of the Defense Code, relies on five components which form a coherent whole: forces medicine, training, supply health, research and hospital medicine. Composed in 2020 of 67% soldiers and 33% civilians, it had 14,699 agents and 3,952 reservists in the same year.**

**Its missions and powers are provided for in Articles R. 3232-11 and following of the Defense Code.**

##### 1.1.1. In terms of medical support for the armed forces in theaters external operations to mainland France

**Several types of structures provide care for the wounded throughout the healthcare chain at the operational level, from "role 1" to "role 4". Within the combat units themselves there are health teams (forward medicine) made up of doctors and paramedics trained in the care of polytraumatized patients (role 1). They have mobile, adapted and efficient means, served by personnel accustomed to emergencies and trained in the most difficult conditions. Light hospital structures are placed as close as possible to the combat units and allow the treatment of absolute emergencies by anesthetists-resuscitators and surgeons trained to act in extreme situations (role 2).**

**Role 3 constituted by the medical-surgical hospital allows stabilization thanks to advanced techniques of resuscitation and surgery as well as the conditioning of the wounded soldier for his strategic medical evacuation by air (MEDEVAC) towards the hospitals of the armies or hospital structures with greater resources and medical or surgical specialties essential following treatment (medico-surgical hospitals) (role 4). These early and systematic medical evacuations allowing the transport of**

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**wounded to these care facilities are at the heart of French medical support doctrine. During these evacuations, the injured person receives constant medical assistance.**

**In addition to the special skills required to practice medicine in such delicate conditions, this permanent proximity of medical support, considered an essential factor in combatant morale, requires a specific organization.**

**The health product supply chain (drugs, biomedical equipment, oxygen and blood products, etc.) is essential for operational medical units (medical post, surgical unit, etc.) deployed outside the national territory. The products supplied are adapted to the particular conditions encountered in external theaters and meet operational requirements (speed of execution and implementation).**

**The blood supply is crucial for troops in operation since the main cause of death for the wounded is haemorrhage.**

**Currently, pursuant to Article L. 1221-10 of the Public Health Code, only the French Blood Establishment, the army blood transfusion center, health establishments and army hospitals are authorized to store labile blood products (red blood cells, platelets, plasma).**

**To ensure their priority mission of health support for the armed forces, certain other organizations of the armed forces health service must be able to provide emergency blood transfusions in order to optimize care and increase the chances of survival of wounded soldiers. .**

**As such, it is necessary to authorize the medical centers of the armed forces health service, when they are located in buildings of the national navy, and for their mobile care teams carrying out their mission in military aircraft, as well as the Paris fire brigade and the battalion of Marseille firefighters to store labile blood products.**

#### 1.1.2. In research and medicine

**The Army Blood Transfusion Center (CTSA) is primarily responsible for blood transfusion support for the armed forces, on French territory and in external operations, in times of peace, crisis or conflict. It collects blood in Ministry of Defense establishments, prepares it and checks it in order to be able to distribute labile blood products, such as plasma, platelets and blood cells, to the Forces. The manufacture of lyophilized plasma, called PLYO or FLYP (French LYophilized Plasma) is a specificity of the CTSA.**

**The CTSA carries out therapeutic and research activities within the framework of regenerative medicine. Stem cell research finds direct application in cell therapy, hematology for bone marrow transplants, and orthopedic surgery. That on the production of grafts (skin) is used for the management of severe burns.**

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**VI of Article L. 1222-11 of the Public Health Code provides that the CTSA is authorized to carry out the collection, the biological qualification of the donation and the preparation of labile blood products, their distribution and their delivery in particular for the satisfaction of the priority mission of medical support for the armed forces.**

**As part of the CBRN plan, it was decided to develop medical countermeasures falling under the category of blood-derived drugs. It is therefore necessary to authorize the Ministry of the Armed Forces to manufacture this type of medicine.**

**These medicinal products are defined in article L. 5121-1 of the public health code. It is "any medicine prepared industrially from blood or its components". They include in particular drugs derived from plasma fractionation and plasma for transfusion purposes.**

**The provisions of Article L. 5124-14 of the Public Health Code confer on the public limited company called "French Fractionation and Biotechnology Laboratory" a monopoly in principle for the manufacture of medicinal products derived from blood from blood or its components collected by the French Blood Establishment (EFS).**

**Article L. 1222-1-1 of the Public Health Code created by Ordinance No. 2016-1406 of October 20, 2016276 nevertheless introduced a derogation for the benefit of EFS to allow it to continue manufacturing plasma transfusion, reclassified as a medicinal product derived from blood by a decision of the Council of State277 pursuant to community case law and directives 2001/83/EC278 and 2002/98/EC279. The EFS can only manufacture drugs derived from blood of the transfusion plasma type, excluding those, stabilized, resulting from the fractionation of blood subject to the provisions of article L. 5124-14 of the same code. Whether it is therefore the "French Fractionation and Biotechnology Laboratory" or the French Blood Establishment, the activity of manufacturing medicines derived from blood is authorized by law.**

**The CTSA is not currently authorized to manufacture blood-derived drugs, whereas the development and manufacture of certain blood-derived drugs by the armed forces health service is necessary for the treatment of exposed persons or victims of events employing agents of a nuclear, radiological, biological and chemical nature.**
**These drugs are essential solutions in the context of medical countermeasures. The use of these drugs can participate in particular in prophylaxis (primary and secondary), pre-treatment and treatment under medical support during engagements**

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[276] Ordinance No. 2016-1406 of October 20, 2016 adapting and simplifying the legislation relating to the French Blood Establishment and activities related to blood transfusion.

[277] Council of State, July 23, 2014 No. 349717.

[278] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 establishing a Community code relating to medicinal products for human use.

[279] Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 laying down quality and safety standards for the collection, testing, processing, storage and distribution of human blood and blood components, and amending Directive 2001/83/EC.

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**of the armed forces outside and on national territory and also to the contribution of the Ministry of defense to the State's response to CBRN risks and events.**

**Consequently, it is necessary to modify article L. 1222-11 to authorize the CTSA to manufacture, import, export and use the medicinal products derived from blood defined in 18° of article L. 5121-1 in order to respond to specific defense or national security needs.**

### 1.2. CONSTITUTIONAL FRAMEWORK

**The Preamble to the Constitution of October 27, 1946 provides in paragraph 11:**

***"It [the Nation] guarantees to all, in particular to the child, to the mother and to old workers, the protection of health, material security, rest and leisure. Any human being who, because of his age, physical or mental state, economic situation, is unable to work has the right to obtain suitable means of existence from the community. »***

### 1.3. CONVENTIONAL FRAME

**Article 12 of the International Covenant on Economic, Social and Cultural Rights, an international multilateral treaty adopted on December 16, 1966 by the General Assembly of the United Nations and entered into force on January 3, 1976, stipulates that "1. The States parties to *the this Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The measures which the States Parties to the present Covenant shall take with a view to ensuring the full exercise of this right shall include the measures necessary to ensure: [...] (c) The prophylaxis and treatment of epidemic, endemic, occupational and other diseases , as well as the fight against these diseases; (d) The creation of conditions for ensuring medical services and medical aid in the event of illness for all* ".**

### 1.4. ELEMENTS OF COMPARATIVE LAW

**With regard to the possibility of storing labile blood products, Ireland has authorized, since 2020, the performance of transfusions directly at the scene of the accident. As such, ambulances are authorized to store labile blood products.**

**With regard to the manufacture of medicinal products derived from blood, many other European States (for example Switzerland or Germany) have opted for a competitive model rather than granting a monopoly to one company or a designated state entity.**

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## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**The storage of labile blood products is strictly governed by articles L.1221-10 and following of the public health code. A limiting list designates the structures which can store labile blood products.**

**For the manufacture of drugs, the law provides that only the French Fractionation and Biotechnology Laboratory and the French Blood Establishment can manufacture drugs derived from blood. It is therefore necessary, as was done for the EFS on the occasion of the aforementioned Ordinance No. 2016-1406 of October 20, 2016, to resort to the law to allow the CTSA to manufacture them. The law also establishes the competences of the CTSA. It is necessary to amend it in order to provide for the manufacture of medicinal products derived f**

### 2.2. OBJECTIVES PURSUED

**On the one hand, the storage of labile blood products in military aircraft during medical repatriation, in national navy buildings far from health structures, in the medical vehicles of the Paris fire brigade and the battalion of Marseille firefighters during medical transport between air bases and army hospitals would make it possible to optimize care and increase the chances of survival for wounded soldiers. It is therefore necessary to allow these structures, insofar as they are charged with specific defense missions, to store labile blood products.**

**On the other hand, the French Fractionation and Biotechnology Laboratory (public limited company) or the French Blood Establishment are not in a position to manufacture medicinal products derived from blood with the aim of constituting and maintaining a strategic stock for specific defense requirements. Conversely, the army blood transfusion center has the capacity and skills to manufacture these drugs. In a logic of strategic autonomy as well as national sovereignty, it is therefore necessary to entrust this competence to a State service such as the CTSA.**

**The objective of this measure is therefore to authorize the armed forces' blood transfusion center to manufacture drugs derived from blood as part of the development of medical countermeasures.**

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## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**With regard to the conservation of labile products, only one option was considered, that of modifying Article L. 1221-10 of the Public Health Code.**

**Concerning the manufacture of medicines derived from blood by the blood transfusion center of the armed forces, it was first considered to modify article L. 5124-14 of the public health code in order to create an exemption from the monopoly in principle conferred at the French Fractionation and Biotechnology Laboratory. However, in parallel with the measures allowing the French Blood Establishment to manufacture medicinal products derived from blood, it was decided to modify only the specific provisions relating to the CTSA.**

### 3.2. SELECTED OPTION

**The option retained concerning the storage of labile products is that of a modification of article L. 1221-10 of the public health code in order to allow these structures to store labile blood products. It is expected that this retention capacity will be reserved for specific defense needs such as the repatriation of a wounded soldier who, exposed to particular risks, requires rapid treatment. In addition, the same guarantees as for health establishments apply to these structures (authorization after the opinion of the army blood transfusion center and under the supervision of a doctor or pharmacist). For coordination purposes, Article L.1221-10-2 is also amended.**

**Concerning the manufacture of medicinal products derived from blood, the option retained is the modification of VI of article L. 1222-11 of the public health code in order to add two paragraphs inspired by article L. 1222-1-1 relating to the French Blood Establishment.**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**This measure modifies Articles L. 1221-10, L.1221-10-2 and L. 1222-11 of the Public Health Code.**

#### 4.1.2. Articulation with international law and European Union law

**This measure complies with Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 establishing quality and safety standards for the collection,**

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**control, processing, storage and distribution of human blood and blood components, and amending Directive 2001/83/EC on the Community code relating to medicinal products for human use and Directive 2001/83/EC of 6 November 2001 establishing a Community code relating to medicinal products for human use.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**Not applicable.**

#### 4.2.2. Business impacts

**Not applicable.**

#### 4.2.3. Budgetary impacts

**The manufacture of medicines derived from blood by the army blood transfusion center will be financed by the budget of the Ministry of the Armed Forces. The development cost is estimated at 11 million euros.**

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**Not applicable.**

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**The activity of CTSA will increase with the manufacture of these blood-derived drugs. However, this ramp-up will not fundamentally change the structure of the CTSA.**

**The CTSA will be inspected by the National Agency for the Safety of Medicines and Health Products (ANSM) as a pharmaceutical establishment for the manufacture of these blood-derived medicines. This new skill will require additional staff. As an operator, the CTSA must comply with the normative criteria of an operator laboratory.**

### 4.5. IMPACTS ON THE ARMIES

**The preservation of labile blood products makes it possible to optimize the medical support of the armed forces.**

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**Furthermore, the measure allowing the production of certain medicines derived from blood strengthens the therapeutic arsenal for the protection of the armed forces, particularly in terms of medical countermeasures. The use of these drugs can in particular participate in prophylaxis (primary and secondary), pre-treatment and treatment as medical support during armed forces engagements outside and on national territory and also in the contribution of the Ministry of the Armed Forces to the State response to CBRN risks and ev**

### 4.6. SOCIAL IMPACTS

#### 4.6.1. Impacts on society

**Not applicable.**

#### 4.6.2. Impacts on people with disabilities

**Not applicable.**

#### 4.6.3. Impacts on equality between women and men

**Not applicable.**

#### 4.6.4. Impacts on youth

**Not applicable.**

#### 4.6.5. Impacts on regulated professions

**Not applicable.**

### 4.7. IMPACTS ON INDIVIDUALS

**The storage of labile blood products in military aircraft during medical repatriation, in French Navy buildings far from health facilities, in the medical vehicles of the Paris fire brigade and the battalion of marine firefighters in Marseille during medical transport between air bases and army hospitals would make it possible to optimize care and increase the chances of survival for wounded soldiers.**

**The measure allowing the production of certain drugs derived from blood strengthens the therapeutic arsenal for the protection of soldiers, particularly in terms of medical countermeasures. The use of these drugs can in particular participate in prophylaxis (primary**

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**and secondary), pre-treatment and treatment for medical support during armed forces engagements outside and on national territory.**

### 4.8. ENVIRONMENTAL IMPACTS

**Not applicable.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**Although its opinion is not necessarily required, the National Agency for the Safety of Medicines and Health Products was consulted on this measure.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**The planned measure will apply the day after publication of the law in the *Official Journal* of the French Republic.**

#### 5.2.2. Application in space

**The planned measure will apply throughout the territory of the French Republic. Extension measures are provided for in article 36 of this bill for the territories of New Caledonia, French Polynesia, Wallis-and-Futuna and the French Southern and Antarctic Lands.**

#### 5.2.3. Application texts

**The measure on the conservation of labile products will call for the drafting of a simple decree in order to specify the terms of the authorization granted by the administrative authority after consulting the blood transfusion center of the armies.**

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## Article 27: Reinforcement of the legal regime for the fight against aircraft circulating without anyone on board presenting a threat

### 1. STATE OF PLAY

#### 1.1. GENERAL FRAMEWORK

**Aircraft circulating without anyone on board, commonly called "drones", are aircraft whose remote pilot is the person who manually controls the evolutions or, in the case of an automatic flight, the one who is able to intervene at any time. on its trajectory or, in the case of an autonomous flight, that which directly determines the trajectory or the waypoints of these aircraft.**

**The low cost of drones, the evolution of their technologies (autonomy, video quality) and the interest they arouse in the population lead to a significant increase in their number.**

**This increase leads to increased use of airspace. However, the circulation of drones in the airspace can present risks for the safety of people, sites, other aircraft or property.**

**Indeed, drones are equipped with cameras that can transmit sensitive data to the remote pilot or to a third party, for example, on the protection of sites, on the equipment of the armed forces or on their training methods. The latter can, moreover, fly over other sensitive places including prisons, nuclear power plants, sports arenas and major events (Rugby World Cup, G7, etc.) while being likely to transport prohibited substances or materials that may pose a significant risk to public security or national defense (explosives, weapons, hacking devices, etc.).**

**In this respect, the parliamentary information report no. 2166280 on the aerospace action of the State by Mr. Ferrara and Mr. Lejeune notes that: " *The malicious use of drones has several aspects. It may firstly involve observation actions, in order to collect intelligence for the purposes of information and espionage or with a view to the commission of an act of violence, like a prison break. Similarly, drones can be equipped with various sensors allowing them to eavesdrop. Then, drones can be used to transport various packages, or even be able to drop objects, including explosives, in prohibited access areas, on sensitive sites or for contraband purposes. Their transience increases the level of risk in this regard. In addition, the legitimate use of a drone can also represent a risk, simply because of the lack of training of the remote pilot or the risk of accident due to pilot error, breakdown or collision. . »***

[280] Report registered at the Presidency of the National Assembly on July 17, 2019, page 9.

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**The number of illegal overflights observed over no-fly zones (including nuclear power plants, prisons and sensitive Ministry of Defense sites) is high and increasing significantly from year to year.**

**Moreover, during the implementation of a particular air security system in the context of events such as a G7 or the July 14 parade, the services responsible for the fight against malicious drones note the presence of numerous drones in areas to be protected.**

**To address these concerns, Article 24 of Law No. 2021-998 of July 30, 2021 on the prevention of acts of terrorism and intelligence supplemented Article L. 33-3-1 of the Postal Code and electronic communications and established the possibility for State services, under certain conditions, to use jamming equipment281 against malicious drones.**

**However, this mode of neutralization can only act against drones whose flight is based on the reception of radioelectric signals, whether instructions issued by the pilot on the ground, or satellite navigation signals. However, technological developments are gradually making part of the drones autonomous, therefore insensitive to jamming. Their neutralization will have to be based on new control technologies which are gradually becoming available today but do not fall within the scope of application of article L. 33-3-1 of the postal and electronic communications code.**

**It's the case :**

- ÿ **electromagnetic directed effect weapons (AED), which are not jammers but aim to directly disrupt the operation of the drone's on-board electronics and are thus effective against drones operating without an external link (pilot, radio navigation);**

- ÿ **interceptor drones that block the flight of the malicious drone by several means techniques :**
  - o on **-board electromagnetic interference;**
  - o **capture by net, in order to deposit the potentially dangerous drone in a chosen location, rather than neutralizing it on the spot;**

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**281 Article L. 33-3-1 of the Postal and Electronic Communications Code provides that: "I.- Any of the following activities are prohibited: import, advertising, transfer free of charge or against payment , the putting into circulation, installation, possession and use of any device intended to render inoperative radio equipment or devices integrating radio equipment of all types, both for transmission and for reception. / II.- Notwithstanding the first paragraph, these activities are authorized for the purposes of public order, defense and national security, or the public service of justice. / The use by State services of devices intended to render inoperative the radio equipment of an aircraft traveling without anyone on board is authorised, in the event of an imminent threat, for the purposes of public order, national defense and security or the public service of justice or in order to prevent the overflight of an area in violation of a prohibition pronounced under the conditions provided for in the first paragraph of article L. 6211-4 of the transport code . A Conseil d'Etat decree determines the procedures for implementing these measures, in order to guarantee their necessity and their proportionality with regard to the objectives pursued, as well as the competent authorities**

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- **percussion, etc.**

### 1.2. CONSTITUTIONAL FRAMEWORK

#### 1.2.1. The safeguard of the fundamental interests of the Nation is a constitutional requirement likely to justify an attack on other principles with constitutional value.

**It emerges from the case law of the Constitutional Council and the Council of State that the " *constitutional requirements inherent in safeguarding the fundamental interests of the Nation* ", foremost among which are national independence and territorial integrity, which are the purpose, but also the protection of national defense secrets and the free disposal of armed force, are taken into account by the judge in his control of proportionality in the event of infringement of other principles with constitutional value.**

**It is up to the judge to ensure a " *conciliation which is not unbalanced* " between safeguarding the fundamental interests of the Nation and the other constitutional requirements[282]**

#### 1.2.2. The constitutional objective of preventing breaches of public order must be reconciled with the constitutionally guaranteed freedoms

**The Constitutional Council has recognized the objective with constitutional value drawn from the prevention of breaches of public order, considering that it is up to the legislator to ensure the reconciliation between, on the one hand, the exercise of constitutionally guaranteed freedoms and , on the other hand, the prevention of breaches of public order and in particular breaches of the security of persons and property[283]**

**The right to property is one of the constitutional freedoms that must be reconciled with this constitutional objective[284] .**

#### 1.2.3. Infringements of the right to property must be justified by a reason of general interest and proportionate to the objective pursued

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[282] **Ms. Ekaterina B., wife D., and others, November 10, 2011, No. 2011-192 QPC, regarding the right of interested persons to exercise an effective judicial remedy and the right to a fair trial; Law relating to intelligence, 23 July 2015, n° 2015-713 DC, concerning the right of interested persons to exercise an effective judicial remedy, the right to a fair trial and the adversarial principle; Law to strengthen the freedom, independence and pluralism of the media, 10 November 2016, n° 2016-738 DC, regarding freedom of expression and communication; La Quadrature du net, July 9, 2021, n° 2021-924 QPC, about respect for privacy.**

[283] **Orientation and programming law relating to security, January 18, 1995, no. 94-352 DC) or the fight against terrorism (M. Rouchdi B. and others, March 29, 2018, n° 2017-695 QPC).**

[284] **M. Raïme A., December 2, 2016, n° 2016-600 QPC.**

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**It emerges from the jurisprudence of the Constitutional Council that: " *Property is one of the human rights enshrined in Articles 2 and 17 of the Declaration of 1789. According to its Article 17: "Property being an inviolable and sacred right, no one can be deprived of it, except when public necessity, legally established, obviously requires it, and under the condition of a fair and prior indemnity". In the absence of deprivation of the right to property within the meaning of this article, it nevertheless follows from article 2 of the Declaration of 1789 that the attacks on this right must be justified by a reason of general interest and proportionate to the objective pursued.* »285**

**This right is likely to be infringed if the use of equipment results in the drone falling, causing its deterioration or destruction. However, depending on the type of drone in question and the type of device used, the drone is likely to deviate from its trajectory, return to its starting point, land or fall to the ground.**
**Infringement of the property right is then only potential.**

**In any event, infringements of the right of ownership must be reconciled with the requirements noted in points 1.2.1 and 1.2.2.**

### 1.3. CONVENTIONAL FRAME

**The Convention on International Civil Aviation, concluded in Chicago on December 7, 1944, determines the fundamental principles of international air law. Its article 1 provides that: " *each State has complete and exclusive sovereignty over the airspace above its territory* ".**

**This provision is supplemented by b) of Article 9 providing that: " *Each Contracting State also reserves the right, in exceptional circumstances, in times of crisis or in the interest of public security, to restrict or temporarily and with immediate effect prohibit flights over all or part of its territory, provided that this restriction or prohibition applies, without distinction of nationality, to aircraft of all other States.* »**

**Finally, Article 36 of the Convention on International Civil Aviation provides that: " *Any Contracting State may prohibit or regulate the use of cameras on board aircraft flying over its territory.* »**

**More specifically on unmanned aircraft, Article 8 of the Convention specifies that: " *No aircraft which can fly without a pilot may fly over the territory of a Contracting State without a pilot, except with the special authorization of that State and in accordance with the conditions Each Contracting State undertakes to ensure that the flight of such an unmanned aircraft in regions open to civil aircraft is subject to controls which make it possible to avoid any danger to civil aircraft.* »**

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[285] Mr. Jean-Claude G., January 17, 2012, n°2011-209 QPC ; M. Raïme A., December 2, 2016, n° 2016-600 QPC.

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**These provisions have been set out in domestic law in Book II relating to air traffic of the sixth part relating to civil aviation of the Transport Code.**

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**As mentioned in point 1.1, article 24 of law no. 2021-998 of July 30, 2021 on the prevention of acts of terrorism and intelligence, henceforth codified in article L. 33-3-1 of the code of Posts and Electronic Communications does not cover new equipment in that its effects do not specifically target the radio equipment of drones. The modification of this article of the postal and electronic communications code requires a text of legislative scope.**

**Furthermore, the right to property, which is likely to be altered, requires recourse to the law since article 34 of the Constitution provides in particular that: "The law establishes *the rules concerning: civil rights and the fundamental guarantees granted to citizens for the exercise of public freedoms; freedom, pluralism and independence of the media; the constraints imposed by the National Defense on citizens in their person and in their property* ".**

### 2.2. OBJECTIVES PURSUED

**The objective pursued by this device is to supplement the existing legal framework by authorizing State services to use other devices to fight against drones presenting a threat to public order, national defense or security or penitentiary establishments in order to broaden the range of technical means offered to the State services concerned by the fight against drones representing a threat and to reinforce the overall effectiveness of the system for fighting against malicious drones.**

**The widening of this panel offered to the State is notably motivated by the evolution of the technical capacities of drones and new means of control. As noted in parliamentary information report no. 4320286 by MM. Baudu and Lassalle relating to "The war of drones": " *Within two or three years, the jamming pistols and rifles currently used by the internal security forces as, occasionally by the armies, could prove to be ineffective against the drones of last generation ; ".* This observation is supplemented by the following recommendations : *"Faced with the unbridled pace of the evolution of threats, the rapporteurs call for the continuation "all over the place" of experiments, like those carried out on the site of the general management of the armament (…) around a directed energy laser weapon (HELMA-P). In the medium and long term, the rapporteurs recommend supporting developments in the field of anti-drone drones, conducted energy weapons***

[286] Report registered at the Presidency of the National Assembly on July 7, 2021, pages 81 and 82

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***electromagnetics, the autonomization of the fight against drones, passive technologies or even quantum radars.* ".**

**In addition, it is a question of meeting the challenges of protecting existing sensitive sites but also of preparing for the major events that France will host in the coming months with the Rugby World Cup in 2023 and the Olympic and Paralympic Games in 2024.**
**Moreover, the aforementioned report states that: " *On French territory, the fight against drones (LAD) will represent one of the major national security challenges in the years to come, particularly in view of the World Cup. rugby in 2023 and the Olympic and Paralympic Games in 2024* ".**

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. CONSIDERED OPTION

**It could have been envisaged to enrich the provisions provided for in the postal and electronic communications code relating to the jamming of aircraft traveling without anyone on board by listing the other means available in a restrictive manner.**

**Nevertheless, such an option would fix for the future the possibility of using new equipment and relying on technological developments. It therefore seems more appropriate to rely on a device that wants to be "neutral" from a technological point of view.**

### 3.2. SELECTED OPTION

**The measure envisaged provides for the possibility for State services to use any device intended to render inoperative or neutralize an aircraft traveling without anyone on board which represents an imminent threat to public order, national defense and security or the public service of justice, or in order to prevent the overflight by such an aircraft of a prohibited zone.**

**The use of such material with regard to the purposes pursued must be appropriate, necessary and proportionate. These basic conditions are taken from the current wording of article L. 33-3-1 of the postal and electronic communications code. A Conseil d'Etat decree will specify the procedures for implementing anti-malicious drone systems.**

**Unlike the current legal regime limited solely to jamming equipment, it is expected that the list of devices that can be used against malicious drones will be fixed by an order from the Prime Minister in order to cover all types of technical devices (including jamming) whether they have the effect of causing the drone to fall or simply altering its trajectory.**

**Furthermore, in an approach promoting the accessibility and intelligibility of the standard, it is proposed to provide for a single legislative mechanism codified in a single code. The internal security code seems to be the most appropriate to accommodate all of these provisions in**

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**that it concerns State services contributing to public order, national defense and security or the public service of justice in order to protect property and persons. In addition, it can be noted that several articles of the internal security code refer to the interests of national defense, including the provisions provided for in article L. 611-3287 allowing private security agents to detect malicious drones.**

**For reasons of editorial coordination, this article deletes the second paragraph of II of Article L. 33-3-1 of the Postal and Electronic Communications Code in order to merge the content of its provisions with the new provisions inserted in the homeland security code.**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**The new provisions are codified in a new chapter created in Title I (public order) of Book II (public order and security) of the Internal Security Code.**

**As mentioned in the previous point, this article deletes the second paragraph of II of article L. 33-3-1 of the postal and electronic communications code for reasons of editorial coordination. This deletion does not have the effect of calling into question the regime for jamming malicious drones which is now merged into the internal security code.**

### 4.2. IMPACTS ON ADMINISTRATIVE SERVICES

**The State services concerned by the fight against drones representing a threat are the services in charge of internal security, national defense and the protection of prison establishments or sensitive sites.**

**The services under the Ministry of the Armed Forces and the Ministry of the Interior are already equipped with detection and jamming equipment. The other ways to counter malicious drones are gradually becoming available today and some of them might be deployed for the 2024 Olympics and Paralympics.**

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[287] **Article L. 611-3 of the Internal Security Code provides that: "The agents mentioned in Article L. 611-1 may use radioelectric, electronic or digital means allowing the detection, near the goods of which they have guard, aircraft circulating without anyone on board likely to represent a threat to the safety of these goods and the people who are there. They can use and, if necessary, transmit the information collected to State services contributing to internal security and national defence. »**

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**The Air Defense and Air Operations Command is the inter-army and interministerial coordinating service managing air security protection systems during major events, which will also be the case during the 2024 Olympic and Paralympic Games, which will require the deployment of light systems (eg jammer) or a heavy system (gonio radars, videos, neutralization systems).**

### 4.3. IMPACTS ON INDIVIDUALS

**The use of a device rendering inoperative or neutralizing an aircraft circulating without anyone on board who represents a threat restricts the remote pilot's right to use his property.**

**However, this use or neutralization of the aircraft traveling without anyone on board has the particular purpose of protecting the safety of persons, sites and property.**

### 4.4. ENVIRONMENTAL IMPACTS

**The various means of combating malicious drones are not the direct cause of any effect on the environment.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**These provisions do not require any mandatory consultation and no optional consultation has been conducted.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**The provisions of this article enter into force the day after publication in the *Official Journal* of the French Republic.**

#### 5.2.2. Application in space

**These provisions are intended to apply in the overseas communities governed by Article 73 of the Constitution due to the principle of legislative identity without it being necessary to make express mention of it.**

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**In the overseas collectivities governed by article 74 of the Constitution and in New Caledonia subject to the system of legislative specialty, an express mention of application is necessary in order to make these provisions applicable288 .**

**Furthermore, no adaptation of these provisions relating to the characteristics of the local authorities appears necessary.**

**These measures are therefore applicable throughout the territory of the Republic.**

### 5.2.3. Application texts

**A Conseil d'Etat decree must set the terms and conditions for the implementation of devices rendering inoperative or neutralizing aircraft traveling without anyone on board presenting a thr An order from the Prime Minister will set the list of devices that can be used by the State services to fight against these aircraft.**

[288] **See article 7 of the organic law n° 2004-192 of February 27, 2004 for French Polynesia ; Article 4 of Law No. 61-814 of July 29, 1961 for the Wallis and Futuna Islands; article 6-2 of the organic law n° 99-209 of March 19 1999 for New Caledonia; Article 1-1 of Law No. 55-1052 of August 6, 1955 for the French Southern and Antarctic Lands.**

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# Article 28: Ratification of the space ordinance – Take into account, in the law on space operations, the constellations of satellites by subjecting them to the same regime as space objects as well as the recovery of launcher stages

## 1. STATE OF PLAY

### 1.1. GENERAL FRAMEWORK

**Law No. 2008-518 of June 3, 2008 relating to space operations (hereinafter referred to as "LOS") was adopted in order to meet the needs created by the evolution of the space sector and its players in France.**

**France is undeniably a space nation in that it has all the components to excel in this field: a space port289, industrialists specializing in the design and manufacture of launch systems and orbital systems, as well as service providers based on the use of data obtained *via* satellites.**
**Until the end of the 1990s, all space activities were placed under the control of the State, through a limited number of entities which were either its emanations (such as the National Center for space – hereinafter CNES) either under its direct or indirect control (such as Arianespace). Therefore, no legislation on space operations was necessary since everything went through government instructions. However, from the end of the 1990s, the spatial landscape slowly changed and opened up to new players, due to successive privatizations and spin-offs. The adoption of a specific law to regulate their activities was then necessary.**

**It is in this changing context that the LOS was developed, in order to meet a triple objective. First of all, France had to honor its international commitments290. In fact, these treaties, which could entail the liability of France291 in the event of damage**

[289] The Guiana Space Center in Kourou.

290 Treaty of 27 January 1967 on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; Agreement of 22 April 1968 on the rescue of astronauts, the return of astronauts and the return of objects launched into outer space; Convention of 29 March 1972 on international liability for damage caused by space objects; Convention of January 14, 1975 on the registration of objects launched into outer space; Agreement of December 18, 1979 governing the activities of States on the Moon and other celestial bodies, signed by France but not ratified. Texts available on the following link: 02-57670_F_c1-4 (unoosa.org).

291 Article 6 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies provides that each State is responsible for its activities and those of its nationals. Article 7 of the same Treaty specifies that each launching State is responsible for repairing the damage that it or its nationals cause. In this respect, the state of the victim can claim all of the reparation from the state that caused the damage.

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**caused by space objects292, it was necessary to organize the liability of players in the French space sector, while securing them. Next, the LOS guarantees a high level of security, whether for property, people or the environment in the face of the risks generated by space activities293. Finally, it establishes a regime ensuring the long-term viability of space activities, in particular by imposing rules limiting the creation and proliferation of debris in space294 .**

**In order to meet the objectives set out above, the LOS has set up a system of prior authorization for space activities. It provides that any French operator295, who wishes to carry out or have carried out a launch, from French territory or from the territory of another State, or who wishes to ensure the control in orbit of a space object must obtain prior authorization from the ministry in charge of space. The CNES is exempted from this authorization system, when it acts within the framework of its institutional missions296, and the State when it conducts these operations in the interest of national defence. These authorizations are processed and delivered free of charge to operators297 .**

**In addition to creating a space operations authorization regime, the LOS also:**

- **Set up a national registration register, kept by the CNES and allowing the State to monitor the entire French satellite fleet and thus meet its international commitments;**
- **Established the liability regime applicable to space operations, in particular for damage caused to third parties;**
- **Established a reporting system for their activities for primary operators data of spatial origin;**
- **Granted, by modification of the Research Code298, to the President of CNES special administrative police powers for the operation of the facilities of the Guiana Space Center (hereinafter referred to as "CSG") and, as such, a general mission of safeguard consisting in controlling the technical risks linked to the preparation and performance of launches from the CSG in order to ensure the protection of people, property, public health and the environment, on the ground and in flight.**

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[292] **It is any object in outer space such as satellites or launcher stages.**

[293] **The LOS incorporates the liability principles contained in international treaties and provides that the space operator is liable without fault for any damage caused on the ground or in the airspace. In this, this regime is particularly protective.**

[294] **In 2008, CNES estimated that there were 300,000 pieces of debris larger than 1cm and 30 million larger than 1mm.**

[295] **Companies of all sizes (including startups, SMEs), universities.**

**296 Article L. 331-2 of the Research Code.**

**297 See table 2 regarding the operations carried out.**

**298 Articles L. 331-6 to L. 331-8 of the Research Code.**

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**Law no. 2008-518 of 3 June 2008 relating to space operations has been supplemented by several implementing texts aimed at enabling its implementation (see diagram below).**

**The application texts are intended to deal with three themes:**

- **The system of prior authorization for space operations;**
- **Assignment of missions to CNES;**
- **The system of prior declaration for the exploitation of data of space origin.**

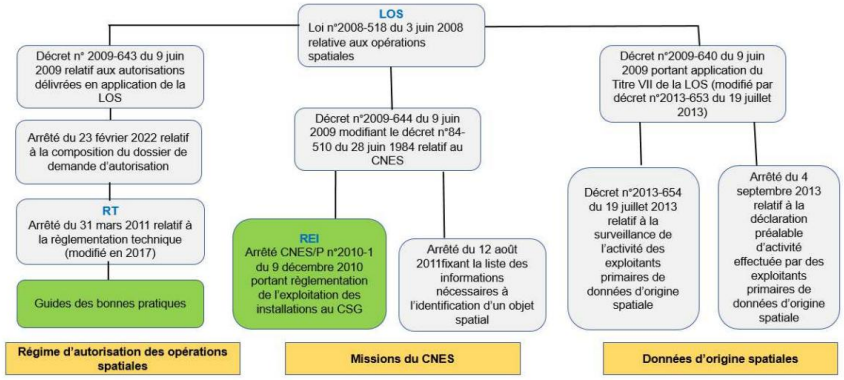


***Diagram 1 – Corpus of legal texts applicable to French space activities***

**Ordinance No. 2022-232 of February 23, 2022 on the protection of national defense interests in the conduct of space operations and the use of space-derived data[299] led to a modification of the LOS aimed at taking into account take into account the interests of national defense in the context of space operations, in particular by exempting the State from the prior authorization regime for space operations that it conducts in the interest of national defense and by strengthening the control of compliance with interests of national defense when issuing authorizations for space operations. In addition, a specific space requisition regime has been adopted.**

**Although a ratification bill was introduced in the Senate on March 16, 2022, this order was never formally ratified.**

**Evolution of the French space sector since 2008**

**The arrival of the *New Space*[300] in the mid-2000s marked a major turning point in the space ecosystem in that private companies, mostly American and not**

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**[299] Adopted on the basis of the authorization provided for by article 44 of law n° 2020-1674 of December 24, 2020 on research programming for the years 2021 to 2030 and laying down various provisions relating to research and teaching superior.**

**[300] New business models advocating agility and innovation are emerging from the private sector in the space sector.**

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**necessarily from the space sector, manage to finance innovative and low-cost solutions that bring the space sector into a particularly competitive era.**

**Thus, access to space is being privatized and the space sector is no longer a domain reserved for specialists but is now open to new players. Coming from the digital, *big data* or aeronautics industry, the latter extend the field of application of space technologies301 and impose a commercial vision geared towards the needs of the customer and the users of spatial data302 .**

**As a result, we note not only a significant increase in the number of operators (Table 1 below) and operations subject to authorization under the LOS (Table 2 below), but also an evolution of activities (eg in-orbit and constellation service) and space technologies (eg reusable launcher). In this respect, the law must adapt to these developments in order to remain sufficiently covering and coherent, and to remain an effective tool for ensuring the sustainable development of space activity in France while guaranteeing the safety of people, goods and preservation of the environment during any space operation. Indeed, the LOS has become over its implementation a *soft-power tool,* serving as a reference in European and international *forums*** dealing in particular with new challenges in the space sector (eg CUPEEA, IADC, ISO).

**Table 1: Evolution of the number of LOS operators from 2008 to 2022**

| | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Number of satellite operators | | | | 1 | 3 | 4 | 4 | 5 | 5 | 5 | 6 | 7 | 8 | 9 | 10 | 11 |
| Number launch operators | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |

**Table 2: Evolution of the number of satellites and launchers authorized between 2008 and 2022**

| | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Number of in-orbit control authorizations granted | | | | 2 | 39 | 5 | 4 | 5 | 2 | 7 | 6 | 7 | 10 | 11 | 12 | 13 |

[301] **Internet in transport, IoT, etc.**

[302] **Client and user for connected homes, mobile phone operators for example. Wider, all services that use spatial data such as telecom, imagery, positioning.**

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| | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Number of launch authorizations granted | | | 6 | 7 | 10 | 7 | 11 | 12 | 11 | 11 | 11 | 9 | 7 | 7 | 6 |

**The evolution of technologies and the development of new modes of space activities (constellations of satellites, emergence of reusable launchers) require adapting the text of the LOS in order to be able to supervise these activities without hindering them.**

**Finally, a modification of the research code is necessary in order to extend the special police powers of the president of the National Center for Space Studies (CNES) to the control of technical risks related to the preparation and the realization of all space operations carried out at the Guiana Space Center (CSG) in Kourou and no longer just "launch operations". The term "launch" is in fact too restrictive and does not make it possible to control certain operations, such as the returns from the stages of the launchers or space modules.**

### 1.2. CONSTITUTIONAL FRAMEWORK

**The objective is to extend the supervision and control of an economic sector. In accordance with Article 34 of the Constitution, such an objective, which is likely to constitute an infringement of freedom of enterprise, can only be achieved by law. According to consistent case law of the Constitutional Council, it is open to the legislator to impose restrictions on this freedom linked to constitutional requirements or justified by the general interest, provided that this does not result in disproportionate attacks on the regard to the objective pursued .**

**The provisions in question respond on the one hand to the pursuit of a general interest (controlling expanding activities) and, on the other hand, will simplify the procedures required of operators, while securing their activities (see below ) .**

**Under international conventions governing the space sector, damage caused by a private operator is considered to be the responsibility of the launching State. The control of these activities, by means of an authorization system, meets the requirement of good use of public funds304. The need to resort to the law in 2008 imposes, due to the parallelism of forms and powers, resorting to a vector of the same nature to make adjustments to this legislation (see section 2.1).**

### 1.3. CONVENTIONAL FRAME

**UN legal framework – International space law is today governed by five international treaties, adopted under the aegis of the United Nations:**

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[303] **CC, decision no. 2010-89 QPC, January 21, 2011, *Chaud Colatine Company*.**

[304] **CC, decision 2006-545 DC, December 28, 2006.**

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- **Treaty of 27 January 1967 on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies; entered into force for France on 5 August 1970;**
- **Agreement of 22 April 1968 on the rescue of astronauts, the return of astronauts and the return of objects launched into outer space; entered into force for France on 31 December 1975;**
- **Convention of 29 March 1972 on international liability for damage caused by space objects; entered into force for France on 31 December 1975;**
- **Convention of 14 January 1975 on the registration of objects launched into outer space; entered into force for France on September 15, 1976;**
- **Agreement of 18 December 1979 governing the activities of States on the Moon and other celestial bodies; signed by France on January 29, 1980 but not ratified.**

**Apart from the case of the Moon Agreement, the treaties have been widely ratified, in particular by the other space powers.**

**The 1967 Treaty lays down the general framework that later treaties clarify. The following are in particular set out:**

- **The principle of freedom of exploration and use of outer space (Article I of the Outer Space Treaty);**
- **The principle of non-appropriation (Article II of the Outer Space Treaty);**
- **The principle of peaceful use of outer space (Article IV of the Treaty from space) ;**
- **The principle of international responsibility *(responsibility)* of States for the activities of their nationals (Article VI of the Outer Space Treaty) and the principle of international responsibility *(liability)* of launching States for damage caused (Article VII of the Outer Space Treaty and 1972 Liability Convention);**
- **The principle of authorization and continuous monitoring by States of the activities of their national (Article VI of the Outer Space Treaty);**
- **The obligation to set up a national registration register (Article VIII of the Outer Space Treaty and 1975 Registration Convention).**

**By having adopted a law on space operations, France responds:**

- **On the one hand, the obligations resulting from these treaties, and in particular the obligation to authorize and monitor the activities of its nationals;**
- **On the other hand, organizes the liability of players in the French space sector, whose activities are likely to involve France's liability at the international level.**

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**European framework – The European space framework is articulated around two actors: the European Union (hereafter referred to as "EU") and the European Space Agency (hereafter referred to as "ESA").**

**The EU has only limited shared competence in space matters. Article 189 of the Treaty on the Functioning of the European Union specifies that the EU " *may promote joint initiatives, support research and technological development and coordinate the efforts necessary for the exploration and use of outer space* . ". For this, it can undertake space programs, but cannot proceed with the harmonization of the legislative and regulatory provisions of the Member States. However, the EU could rely on its internal market competences to legislate on the services offered by space infrastructures.**

**ESA is governed by the Convention establishing a European Space Agency, which entered into force in 1980. ESA enters into agreements with state and non-state entities in order to implement space programs (scientific or industrial) or to promote space in Europe (particularly through ESA funding and participation in certain educational or research structures). ESA does not adopt rules relating to the control of space operations.**

### 1.4. ELEMENTS OF COMPARATIVE LAW

**Other space powers have adopted legislation regulating the activities of launching or conducting operations in space.**

**The** British ***Space Industry Act* , of March 15, 2018, uses a less restrictive vocabulary than the law on French space operations. Thus, point 5 of article 12 defines launching as one or more space activities involving the launching of a space object. Furthermore, the issue of a license may be attached to a space activity which is not necessarily limited to the launch and control of a single space object, without however the notion of constellation or group of satellites being mentioned. (points 5 and 6 of article 12).**

**The *Commercial Space Launch Activities Act,* adopted by the United States, provides a specific permit mechanism for reusable launchers. This specific permit has the same characteristics as that granted to a non-reusable launcher and is considered as an ordinary license allowing a space launch (§50906). The United States already authorizes the use of reusable launchers (for example *Space* X's Falcon 9).**

**US legislation does not provide specific provisions relating to satellite constellations, but neither does it restrict the authorizations issued by the authorities to a single space operation.**

**Finally, as an example, the New Zealand *Outer Space and High Altitude activities Bill*** of 2017 only envisages a global authorization covering different activities relating to one or more launches, for a renewable period of five years.

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**Thus, the United Kingdom and the United States have authorized the deployment of the first satellite constellations ( Oneweb** constellation **comprising 648 satellites for the United Kingdom and *Starlink,* 12,000 satellites in the United States).**

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**The dynamism of space initiatives over the past ten years, particularly in the United States with private American investors linked, for a good part of them, to the digital market (communication, geolocation, etc.) calls for increased vigilance with regard to the use and the exploitation of space.**

**In this context, French initiatives are also emerging and shaking up the applicable legislative and regulatory framework, both in terms of orbital systems (constellations) and launch systems (reusable launchers). Faced with these developments, the existing framework must be adapted to these new activities in order to allow their sustainable development and to optimize the examination of authorizations under the LOS. Indeed, the LOS, in its initial version, had been designed for non-reusable launchers of the Ariane5 type and for single satellite control operations.**

**The integration of new concepts (reusable elements of the launcher and group of coordinated space objects) cannot however be carried out simply at the regulatory level: on the one hand, the LOS includes an article relating to the definitions which will be modified; on the other hand, the scope of authorizations, which is defined by law, will also be adapted (see sections 3.1 and 3.2).**

**For access to space (launchers), it is a question of taking into account the future recoverable launchers, whose 'basic bricks' are the subject of developments in international cooperation and which will arrive on the market before the end of the decade.**

**For control operations in orbit, it is a question of taking into account the constellations (in particular in low orbit) which can include several hundreds or even thousands of satellites.**

#### *Concerning "groups of coordinated spatial objects" (constellations)*

**The current version of LOS, which only provides for control of a single space object in orbit, does not provide for control authorization for a group of space objects understood as a single system. It therefore does not make it possible to impose technical requirements on a constellation as a whole, such as requirements relating to the coordination of the satellites making up the constellation, either autonomously or via the ground. These can only be imposed individually, satellite by satellite. In addition, the current state of the regulations potentially places an extremely heavy administrative burden on manufacturers and the administration in the event of a constellation launch.**

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**comprising several dozen or even several hundred satellites. An evolution of the LOS will make it possible to lighten the administrative burden weighing on the various players, without compromising the safety of people and property.**

***Concerning the recovery of reusable launcher elements:***

**The current version of the LOS, and in particular the liability regime it implements, refers to the notions of "launch phase" and "control phase". The definition of "launch phase" currently provided for in the LOS is as follows: *"period of time which, in the context of a space operation, begins at the moment when the launch operations become irreversible and which, subject to the provisions contained, where applicable, in the authorization issued pursuant to this law, ends with the separation of the launcher and the object intended to be placed in outer space" .* The law does not clearly identify whether or not the recovery of reusable launcher elements fits into the launch phase. In a field where the risk of litigation is high in the event of damage or victims, a clarification of the activities authorized by the LOS is therefore necessary.**

***Ultimately,* an update of the LOS would make it possible to support the operators implementing these new space activities by giving them a clear and stable legal and regulatory framework, necessary for their sustainability. The process of updating the LOS is in fact carried out with the constant concern that French operators can develop their business model in a legally controlled context in order to remain competitive.**

### 2.2. OBJECTIVES PURSUED

***Introduction of the notion of "group of coordinated spatial objects"***

**Projects for (mega)constellations in low orbit have been flourishing for more than ten years, in the United States (Starlinks), China, Russia and with international consortia, *such* as ONEWEB, whose generation 2 will involve the French operator Eutelsat. The European Union will acquire the Iris2 constellation and the French Kinéis constellation should be deploy**

**The objective pursued, by introducing this notion into the LOS, is to support these developments in *Newspace* by allowing, in particular, the adoption of new regulatory requirements aimed at ensuring better coordination between space activities. This coordination aims in particular to reduce the risk of collisions and thus to ensure the long-term viability of space activities.**

**From now on, a group of coordinated space objects will be considered, for the administrative procedures for issuing launch or control authorizations, as a single satellite: the manufacturer will not need to file a request for satellite launch authorization by satellite.**

***Launcher recoverable stages***

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**The introduction of the concept of recovery on the ground of a vehicle stage after a launch attempt in the LOS is consistent with the technological evolution in the design of launchers. The clarification of the perimeter of the launch phase will make it possible to ensure the application of the liability regime provided for in the LOS to the recovery phase of reusable launcher stages.**

**By providing this clarification, the amendment to the LOS aims to provide a certain legal framework for these activities. As such, it provides legal certainty to European operators, particularly French ones, which should enable them to develop their activities in the face of particularly aggressive American competition (Space X). Even if the economic model of such concepts is not consolidated, the recoverable rather than consumable approach seems, in the current context of terrestrial sustainable development, unavoidable.**

**Finally, the extension of the powers of control of the President of CNES to all space operations carried out from the CSG of Kourou not only constitutes a measure of coordination with the developments explained above, but will thus make it possible to cover all the space activities taking place at CSG (including on-site returns of space objects).**

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

***Introduction of the notion of "group of coordinated spatial objects":***

**Two options, not involving any modification of law no. 2008-518 of June 3, 2008 relating to space operations, were considered but discarded:**

**Option 1: Application of the existing prior authorization regime for space operations to each satellite of a constellation and modification of the technical regulations only**

**3° of article 2 of the law relating to space operations provides that " *Should first obtain an authorization issued by the administrative authority [...] any French operator who intends to ensure the control of such an object [space object] during his stay in outer space .***

**One of the options considered was to treat the case of constellations not as a group of space objects, but to treat each satellite of a constellation individually, i.e. to apply to these new technologies the current standard, without changing it. In this case, a French operator wishing to ensure control of a constellation should request as many in-orbit control authorizations as there are satellites making up its constellation. Consequently, each control operation of a satellite of a constellation would then be processed independently of the operations of the other satellites.**

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**The advantage of such an option was that it could be implemented without changing the law relating to space operations. However, in order to take into account the problems associated with the constellations, it was then planned to update the decrees defining the technical regulations to add specific technical requirements for satellites forming part of a constellation, such as imposing a collision avoidance manoeuvres, requirements to limit optical disturbances.**

**This option was not retained because it presented two major difficulties:**

- ÿ **The first, and main, difficulty is linked to the absence of a global analysis of the constellation and the consequences that this type of activity could have on the space environment. Indeed, this option did not allow, in particular:**
  - o **To take into account the effect of number, inherent in a constellation, in the calculations of probabilities carried out within the framework of the analysis of technical conformity, such as the calculation of the probability of making a victim on the ground or of carrying out with successful withdrawal from service of all satellites in the constellation;**
  - o **To impose technical requirements relating to the geometry of the constellation, with a view in particular to reducing the risk of collisions in orbit between the satellites of the same constellation;**
  - o **To have an overview of the mission and the capacity of the constellation;**
  - o **To link the satellites of a constellation between them. In the event that an anomaly is identified on a satellite of the constellation, to draw consequences for the other satellites of the constellation that may also be affected by this anomaly which would have already been authorized.**
- ÿ **The second difficulty is linked to the administrative red tape caused by this option. Indeed, such an option mechanically implied the filing of a significant number of authorization requests by the operator concerned. These burdens would weigh both on the operator (compilation of files) and on the State services in charge of processing requests (ministry concerned, CNES). It should be considered that, even if, within the framework of similar satellites of a constellation, the time for analyzing the files could be reduced compared to the files currently processed, such a procedure would not contribute to the simplification of the procedures with the administrations and would lack optimization.**

**Option 2: Use of the licensing mechanism for constellations and modification of the technical regulations only (discarded)**

**Paragraph 2 of Article 4 of the LOS provides that " *Licences attesting, for a fixed period, that a space operator justifies moral, financial and professional guarantees may be issued by the competent administrative authority in***

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***permissions. These licenses may also attest to the compliance of the systems and procedures mentioned in the first paragraph with the technical regulations enacted. Finally, they can constitute authorization for certain operations ".***

**It was envisaged to use the mechanism of license equivalent to authorization in order to avoid the operator having to request an authorization of control in orbit for each identical satellite of its constellation. In this case, as in option 1, it was possible to modify the technical regulations to add specific requirements applicable to each satellite of a constellation.**

**The licenses equivalent to authorization allow an operator to carry out, for a determined period (ten years maximum), as many identical operations as he wishes on simple prior information from the administrative authority. These licenses can only be granted for in-orbit control operations, excluding launch operations.**
**Currently two licenses of this type are in progress and relate to operations carried out by identified platforms, in geostationary orbit.**

**If this option provides a solution to the problem of the multiplication of requests for authorization to control satellites in orbit and to the administrative burdens that this entails, it comes up against the same difficulty as option 1 by not making it possible to take into account the constellations as a whole. Indeed, a license only makes it possible to overcome the prior authorization process. This option therefore does not make it possible either to meet the need to carry out an overall analysis of the activities of the constellations and to take into account the effect of numbers.**

**Moreover, insofar as a license does not limit the number of operations that can be carried out by the operator, the administrative authority, once the license has been granted, ultimately no longer has control over the *number* of launched satellites. However, in the context of the constellations, this number can be very large. In this regard, while this risk is relatively limited for geostationary satellites – given the cost associated with this type of operation – it is less so for small satellites, such as those generally used in constellations.**

**Like the first option, this option 2 was therefore deemed to provide an insufficient response to the issues related to the constellations.**

***Recoverable stage of launchers***

**On this subject, the objective was to clarify the notion of "launch phase" in order to specify that it includes the recovery of the launcher stages. No option other than changing the law was available.**

### 3.2. SELECTED OPTION

***Introduction of the notion of "group of coordinated spatial objects":***

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**The option chosen aims to consider that the control of a group of coordinated space objects constitutes a space operation as such and must, therefore, be the subject of a single authorization for control in orbit covering the whole operations carried out by the satellites that make it up.**

**Therefore, and in order to submit the control of this group of space objects to authorization, it is necessary to modify the definition of space operation in order to extend it to the control of a group of coordinated space objects, and not not only to the mastery of a s**

**However, under liability, each satellite that is part of a constellation will still be considered a particular space object. This justifies that the modifications made to the LOS only concern the parts of the text relating to authorizations or transfers of control and not those relating to liability or compensation for damage.**

***Recoverable stage of launchers***

**The option retained consisted in modifying the definition of "launch phase" in 4° of article 1 of the LOS to indicate that the recovery of reusable launcher components is an integral part of the launch phase.**

**The definition, thus completed, will be as follows: "** ***Launch phase: the period of time which, in the context of a space operation, begins at the moment when the launch operations become irreversible and which, subject to the provisions contained, where applicable, in the authorization issued pursuant to this law, ends with the separation of the launcher and the object intended to be placed in outer space. The launch phase includes, if necessary, the recovery of the reusable elements of the launcher*** **".**

**This clarification confirms the application of Articles 14 and 15 of the LOS on the liability regime vis-à-vis third parties, to cases of damage caused during the recovery of these elements.**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**The changes made to the law relating to space operations and described *above* in 3.2 (introduction of the concept of "group of coordinated space objects" and addition to the definition of the launch phase to introduce the concept of element recovery launcher) concern its articles 1 (Definitions) 2 (Authorizations), 3, 4, 7, 8, 9, 11, 11-1 and 20-1 (to introduce, for consistency, the concept of a group of coordinated space objects ).**

**Furthermore, Article L. 331-6 of the Research Code is amended.**

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**These provisions do not have a major impact on the domestic legal order; only the implementing texts of this law need to be modified.**

#### 4.1.2. Articulation with international law and European Union law

**These provisions are intended to enable France to develop its system of prior authorization for space operations in order to improve it and respond more fully and more appropriately to the principle of authorization and continuous monitoring of the space activities of their nationals such as than provided for in article VI of the Outer Space Treaty.**

**Insofar as there is currently no European framework governing space operations and that the competence of the EU is exercised without harmonizing the legislative and regulatory frameworks of the Member States, the modification of the LOS will have no impact on France's compliance with its international obligations.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**The present changes to the LOS aim to provide an adequate and stable legislative framework for new space activities (constellation, reusable launchers) and thus to offer operators legal certainty allowing them to develop their activities in this area. Indeed, the absence of a legislative framework to oversee these initiatives could have the effect of leading the companies concerned to turn to other countries to operate their launchers or satellites.**

**By proposing an appropriate legal framework, France could encourage French companies to engage in these activities. This should stimulate innovation, driven in particular by emerging players, and *ultimately* allow the development of new services provided from space for the benefit of businesses, citizens and institutions (IoT for example).**

#### 4.2.2. Business impacts

**The provisions introduced through this evolution of the LOS do not *ultimately*** impose **any new obligations on the operators concerned. On the contrary, they aim to simplify and extend the legal framework applicable to constellations and the recovery of reusable floors. Consequently, they lead to a definite strengthening of the competitiveness of French companies and to encourage the latter's investment in these themes.**

**The impact of the proposed modifications will be the same for all the operators concerned, considering that only CNES and the State when it conducts space operations in the interest of national defense are exempt from the authorization regime.**

#### 4.2.3. Budgetary impacts

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Not applicable.

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

Not applicable.

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**The simplification of the authorization procedure for satellite constellations, by enshrining the principle of a single authorization for these constellations, will make it possible to contain the activity of the services in charge of examining applications and issuing authorizations. As explained *above,* these constellations can group together a very large number of space objects, which, according to the legislation currently in force, must each be subject to authorisation. Grouping these authorizations within a single authorization will make it possible to offload the activity of these services, to allow them to study the constellation systems as a whole, and, consequently, to offer better guarantees as to the study of these requests.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

**These provisions relating to constellations will allow operators to offer democratized access to connectivity (Internet, connected objects) and thus reduce the digital divide. Indirectly, the revision of the LOS will strengthen companies' access to information.**

**While the deployment of constellations may have effects on the environment (light pollution, risk of congestion in orbit), the proposed legislative amendments aim to ensure better security for these operations in order to better protect the space environment *by* preventing creation of debris, in particular by implementing rules to limit the risk of collision.**

**Finally, by providing visibility to launch operators on the operating framework for reusable launchers, the proposed measure will stimulate the development of such launchers, which have a reduced impact on the environment.**

#### 4.5.2. Impacts on people with disabilities

Not applicable.

#### 4.5.3. Impacts on equality between women and men

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Not applicable.

#### 4.5.4. Impacts on youth

Not applicable.

#### 4.5.5. Impacts on regulated professions

Not applicable.

### 4.6. IMPACTS ON INDIVIDUALS

Not applicable.

### 4.7. ENVIRONMENTAL IMPACTS

**The notion *of recoverable stage* will allow the space industry to limit its damage to the environment since the recovered stages will be reused several times. On the other hand, the application of the law to new return operations of reusable launchers will ensure their environmental safety.**

**Moreover, the introduction of the concept of constellation will make it possible, in the application texts of the LOS, to propose a framework in order to limit the cumulative effects of the satellites of this constellation.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**These provisions do not require any mandatory consultation and no optional consultation has been conducted.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**The amendments to the provisions of Law No. 2008-518 of June 3, 2008 relating to space operations will enter into force the day after the publication of this law in the *Official Journal* of the French Republic.**

#### 5.2.2. Application in space

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**The areas covered by these provisions (space and research) come under so-called "sovereignty" provisions. Therefore, no mention of extension or express application in the overseas communities is necessary.**

### 5.2.3. Application texts

**It is planned to adapt the following implementing texts:**

- **Decree No. 2009-643 of June 9, 2009 as amended relating to authorizations issued pursuant to Law No. 2008-518 of June 3, 2008 relating to space operations: in order to clarify any procedural specificities associated with authorizations to control a group of coordinated spatial objects;**
- **The decree of February 23, 2022 relating to the composition of the three parts of the file mentioned in article 1 of decree no. 2009-643 of June 9, 2009 relating to authorizations issued pursuant to law no. amended June 2008 relating to space operations: in order to complete the list of documentary supplies expected in accordance with the needs of the technical analysis for the constellations and for the reusable launcher stages;**
- **The order of March 31, 2011, as amended, relating to the technical regulations pursuant to decree no. 2009-643 of June 9, 2009 relating to authorizations issued pursuant to law no. 2008-518 of June 3, 2008 relating to operations space: in order to precisely define the concepts of constellation and mega-constellation and to modify existing technical requirements or to add new technical requirements adapted to new activities (constellation, recovery of reusable launcher stages).**

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# Article 29: Consolidate the provisions concerning nuclear defense

## 1. STATE OF PLAY

### 1.1. GENERAL FRAMEWORK

**In the civil nuclear field, with regard to nuclear safety and radiation protection305 , the use of service providers and subcontractors in basic nuclear installations (civilian nuclear installations) is governed by Article L. 593 -6-1 of the environment code.**
**This provision was introduced at the legislative level by law n° 2015-992 of August 17, 2015 relating to the energy transition for green growth (known as the TECV law). Prior to 2015, the provisions relating to the use of service providers and subcontracting in basic nuclear installations were governed solely at the regulatory level by the order of 7 February 2012 setting the general rules relating to basic nuclear installations.**

**Article L. 593-6-1 of the Environmental Code provides that *"because of the particular importance of certain activities for the protection of the interests mentioned in Article L. 593-1306 , a Conseil d'Etat decree may regulate or limit the use of service providers or subcontractors for their implementation* ". This provision also prohibits the operator from delegating the monitoring of important activities carried out by an external service provider. Articles R. 593-9 to R. 593-13 of the Environment Code as well as the decree of February 7, 2012 mentioned above specify these provisions.**

**This framework is justified by constraints linked to the risk of loss of technical control and skills among operators, difficulties in the transmission of information and dilution of responsibilities.**

**Of the four legal regimes governing the nuclear field of defence307, that of the protection and control of nuclear materials not intended for deterrence concerns**

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**[305] Article L. 591-1 of the Environment Code: "Nuclear safety is the set of technical provisions and organizational measures relating to the design, construction, operation, shutdown and dismantling of basic nuclear installations and the transport of radioactive substances, taken with a view to preventing accidents or limiting their effects. Radiation protection is protection against ionizing radiation, i.e. the set of rules, procedures and means of prevention and monitoring aimed at preventing or reducing the harmful effects of ionizing radiation produced on people, directly or indirectly, including through damage to the environment. »**

**306 These are public safety, health and sanitation as well as the protection of nature and the environment.**

**[307] Regime for the protection and control of nuclear materials not assigned to the means necessary for the commissioning implementation of the deterrence policy : Articles L. 1333-1 to L. 1333-14 of the Defense Code.**

**System of nuclear facilities and activities of defense interest: Articles L. 1333-15 to L. 1333-20 of the Defense Code.**

**Regime of nuclear installations concerning deterrence: articles L. 1411-1 to L. 1411-7 of the defense code**

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**mainly the civil nuclear world, and aims to take into account the issues of malevolence308. The other three regimes relate to nuclear installations and activities relating to defence, nuclear installations relating to deterrence and materials**
**nuclear weapons for deterrence.**

### 1.2. CONSTITUTIONAL FRAMEWORK

**Supervising, limiting or prohibiting the use of service providers or subcontracting is likely to undermine the principle of freedom of trade and industry and in particular freedom of enterprise, a principle with constitutional law which derives from article 4 of the Declaration of the Rights of Man and of the Citizen309. It is up to the legislator to place restrictions on this freedom linked to constitutional requirements or justified by the general interest, provided that this does not result in disproportionate infringements with regard to the objective pursued310 .**

### 1.3. CONVENTIONAL FRAME

**At the international level, the Convention on Nuclear Safety and the Convention on the Physical Protection of Nuclear Material, which entered into force in 1996 and 1987 respectively, do not include any provisions relating to the use of external service providers and subcontracting in the field of defense nuclear.**

**At European level, nuclear materials and installations are governed by the Treaty establishing the European Atomic Energy Community, known as the "Euratom Treaty" and by the derived legislation resulting from it.**

**The Euratom Treaty aims in particular to establish uniform safety standards to protect the population and workers, and to ensure the use of nuclear materials for civilian purposes.**

**As regards the military uses of nuclear energy, the Euratom Treaty provides for several derogations. The main one relates to the security check311 carried out by the Commission**

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**Regime for the protection of nuclear materials allocated to the means necessary for the implementation of the deterrence policy: articles R*. 1411-11-18 to R*. 1411-11-35 of the defense code.**

**[308] The purpose of this regime is "to protect nuclear materials and associated activities mentioned in Article L. 1333-2 against any malicious act or loss of nuclear materials, with the aim of avoiding nuclear proliferation and preventing any risk or inconvenience to public health, sanitation, safety, and the environment that may result therefrom, as well as the control of these materials and activities. (Article R. 1333-1 of the Defense Code)**

**309 Constitutional Council, Nationalization Law, 16 January 1982, no. 81-132 DC.**

**[310] Constitutional Council, Law relating to preventive archaeology, January 16, 2001, n° 2000-439 DC.**

**[311] Physical and accounting checks on nuclear materials in order to ensure the conformity of their use in relation to operator's declaration**

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European Union, Article 84 providing that: " *Control cannot extend to materials intended for defense needs which are being specially shaped for these needs or which, after this shaping, are, in accordance with a operations, implanted or stored in a military establishment.* »

It should be noted that when the Euratom Treaty does not include any rule in a particular field, the rules of the Treaty on the functioning of the European Union apply.

A judgment of the CJEU in 2002312 recognized and clarified the shared competences of Euratom with the Member States in the field of nuclear safety. The Council adopted legislation on nuclear safety in 2009 313 and legislation on the management of radioactive waste and spent fuel in 2011314. These two directives only apply to civil installations and activities315. A 2013 directive also deals with radiation protection issues316 .
Only the safety directive includes provisions relating to contractors and subcontractors: when their activities are likely to affect nuclear safety, the licensee remains responsible with regard to their activities and must ensure that they have sufficient and qualified human resources.

In addition, nuclear security, which refers to measures aimed at preventing and detecting theft, sabotage, unauthorized access, illegal transfer or any other malicious act involving nuclear materials and other radioactive materials or associated facilities, falls within the sole competence of the Member States.

Thus, no provision of European law stands in the way of this measure.

### 1.4. ELEMENTS OF COMPARATIVE LAW

The Treaty on the Non-Proliferation of Nuclear Weapons, which came into force in 1970, recognizes five nuclear-armed states: the United States, Russia, the United Kingdom, France and China. Nevertheless, due to the sensitivity of the subject, few official publications are

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[312] Judgment of the CJEU of 10 December 2002 in case C-29/99, Commission v Council.

[313] Council Directive 2009/71/Euratom of 25 June 2009 establishing a Community security framework nuclear facilities, amended by Council Directive 2014/87/Euratom of 8 July 2014.

[314] Council Directive 2011/70/Euratom of July 19, 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste.

[315] Article 2 of Directive 2009/71: “This directive applies to all civil nuclear installations subject to licensing”

Article 2 of Directive 2011/70: “This Directive applies to all stages: (a) of the
management of spent fuel, when the latter results from civil activities; b) the
management of radioactive waste, from production to disposal, when this waste results from activities civil. »

[316] Council Directive 2013/59/Euratom of 5 December 2013 laying down basic standards for health protection against the dangers resulting from exposure to ionizing radiation and repealing directives 89/618/Euratom, 90/641/Euratom, 96 /29/Euratom, 97/43/Euratom and 2003/122/Euratom.

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**can be consulted in open source on the rules regarding the use of external service providers and subcontracting within the nuclear defense installations of these States.**

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**The regimes governed by the Defense Code and applicable to nuclear materials, facilities or activities, whether they have nuclear security or safety as their objective, do not include provisions on the use of external service providers and subcontracting at the level legislative. When they exist, the limitations in this area are only provided for by texts of insufficient level (decree or order)317, even though these regimes aim to take into account both the issues of protection of persons, property and environment than national defense issues.**

**Moreover, as the measure is likely to infringe the freedom of enterprise, it can only be introduced by the legislator.**

### 2.2. OBJECTIVES PURSUED

**The planned provisions aim to consolidate the legal regime applicable to all nuclear materials and activities governed by the Defense Code to guarantee nuclear safety and security.**

**In the regime for the protection and control of nuclear materials, their facilities and their transport (Articles L. 1333-1 to L. 1333-14 of the Defense Code), there are no legislative provisions relating to supervision of the use of external service providers and subcontracting for nuclear activities subject to authorization defined in Article L. 1333-2 of the Defense Code. If regulatory provisions existed, they had no legislative basis and therefore could not be maintained or extended during the recent overhaul of this legal regime318. The addition of a new article is therefore intended to provide a legislative basis for the framework for the use of external service providers and the subcontracting that**

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[317] **Regime for the protection and control of nuclear materials: order of August 18, 2010 relating to the protection and control of nuclear materials during transport (articles 21 and 26) and order of June 10, 2011 relating to the physical protection of installations housing nuclear materials the possession of which requires a license (Article 18).**

**System of nuclear materials assigned to means of deterrence: article R. 1411-11-24 of the defense code.**

[318] **Decree n° 2021-713 of June 3, 2021 taken to adapt chapter III of title III of book III of part 1 of the code defence, and its implementing decrees dated December 27, 2022.**

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**wish to put in place the competent ministers (minister of defense and minister in charge of energy).**

**A provision relating to the use of external service providers or subcontracting has been added to the regime for nuclear facilities and activities of interest to defense (IANID). This new article aims, in addition to being able to regulate, limit or prohibit the use of external service providers or subcontractors, to create an obligation to monitor activities important for safety or radiation protection carried out by external service providers or subcontractors. - contracto**

**A similar provision has also been introduced into the regime for nuclear installations relating to deterrence to take into account the risks that may arise in the event of recourse to service providers or subcontracting (malicious or hostile acts and breaches of public secrecy). National Defense).**

**Finally, the addition of a section relating to the protection of nuclear materials intended for deterrence aims to provide a legislative basis for Article R. 1411-24 of the Defense Code which provides that authorized carriers may not use of a subcontractor for the transport by non-military means of nuclear materials assigned to deterrence. Currently, none of the legislative provisions mentioning the nuclear materials allocated to the means necessary for the implementation of the deterrence policy provides for rules relating to the use of external service providers and subcontracting.**

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**It could have been envisaged in certain cases to resort to contractual clauses. However, the objective of the measure is to regulate the possibility for an operator holding an administrative authorization, and not a public or private contract, to use external service providers or subcontracting. These operators are not necessarily placed under the control, even partial, of the State. With regard to the regime for the protection and control of nuclear materials, the operators concerned are mostly private (it may concern, for example, transport carried out by Orano or the operation of nuclear power plants by EDF). The Commissariat for Atomic Energy and Alternative Energies, a public industrial and commercial establishment, is a major civil and military nuclear operator. Non-State operators are also involved in the regimes applicable to nuclear installations and activities relating to defence, to nuclear installations relating to deterrence, as well as to nuclear materials intended for deterrence.**

**Only the option chosen, namely the insertion of legislative provisions into the four legal systems concerned, makes it possible to meet the need.**

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### 3.2. SELECTED OPTION

**Like the provisions introduced in the legislative part of the Environmental Code319 by the TECV law with regard to subcontracting and the use of external service providers for civil nuclear installations (see item 1.1 *above),* it is proposed to provide the same guarantees at the legislative level for the regimes of the code of defense governing nuclear materials, installations and activities.**

**Thus, when nuclear materials, installations or activities subject to the various regimes provided for by the Defense Code in this area are involved, subcontracting and the use of external service providers may be subject to limitations, justified by the need to protect certain issues. In this context, four new provisions have been inserted into the Defense Code, the terms of application of which will be defined by decree in the Conseil d'Etat.**

**In concrete terms, they provide for the possibility of supervising, limiting or prohibiting the use of external service providers or subcontracting. They go beyond Article L. 593-6-1 of the Environmental Code in that the possibility of prohibiting this recourse is extended. Indeed, this article authorizes the supervision and limitation of the use of external service providers or subcontractors in basic nuclear installations and expressly prohibits it only for the monitoring of activities important for the protection of the interests mentioned in article L. 593-1 of the environment code.**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**This article provides for the creation of four articles within the legislative part of the Defense Code:**

- **an article L. 1333-3-1 in the system for the protection and control of materials nuclear;**
- **an article L. 1333-16-1 in the regime governing nuclear installations and activities defense ;**
- **an article L. 1411-7-1 in the regime for nuclear installations concerning the deterrence;**
- **an article L. 1411-7-2, in a new section relating to the regime for the protection of nuclear materials intended for deterrence.**

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**319 Article L. 593-6-1 of the environment code.**

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#### 4.1.2. Articulation with international law and European Union law

**The addition of these new articles within the Defense Code does not have any consequences on the relationship between French law, international law and European Union law because the measure falls within the sole jurisdiction of France. .**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**Not applicable.**

#### 4.2.2. Business impacts

**The impacts on companies differ according to the case in point: the consequences will not be the same in cases where subcontracting and the use of external service providers are simply supervised than in those where this use of external companies will be totally forbidden. Nevertheless, these restrictions on freedom of enterprise for companies are justified for reasons of nuclear security and safety.**

**In addition, the creation of the obligation for operators, in defence-related nuclear facilities and activities, to impose the monitoring of suppliers of equipment important for nuclear safety and of activities important for nuclear safety, when they are carried out by external contractors, is likely to have an impact in terms of human resources, organization and contractual relations.**

#### 4.2.3. Budgetary impacts

**Not applicable.**

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**Not applicable.**

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**Not applicable.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

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**Not applicable.**

#### 4.5.2. Impacts on people with disabilities

**Not applicable.**

#### 4.5.3. Impacts on equality between women and men

**Not applicable.**

#### 4.5.4. Impacts on youth

**Not applicable.**

#### 4.5.5. Impacts on regulated professions

**Not applicable.**

### 4.6. IMPACTS ON INDIVIDUALS

**Not applicable.**

### 4.7. ENVIRONMENTAL IMPACTS

**Not applicable.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**These provisions do not require any mandatory consultation and no optional consultation has been conducted.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**The planned measure will enter into force the day after the promulgation of the law in the *Official Journal* of the French Republic.**

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#### 5.2.2. Application in space

**This measure applies throughout the territory of the Republic.**

#### 5.2.3. Application texts

**A decree issued by the Council of State will be necessary to specify the methods of application of each of these four legislative measures.**

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# Article 30: Communication by the judicial authority of the follow-up given to military criminal cases

## 1. STATE OF PLAY

### 1.1. GENERAL FRAMEWORK

**In 1982, the legislator brought military justice closer to common law justice by abolishing the permanent courts of the armed forces on national territory in peacetime and by entrusting the prosecution, investigation and judgment of offenses committed by the military active in common law courts specializing in military matters (JDCS)320 .**

**The criminal procedure applicable to the military remains marked by a few peculiarities, including those set out in article 698-1 of the code of criminal procedure which requires the public prosecutor, in the absence of denunciation of the facts to the judicial authority by the minister in charge of defense or the military authority authorized by him, to seek their opinion from the Minister or from these authorities prior to any act of prosecution concerning crimes and misdemeanors committed by the military on the territory of the Republic in the exercise of their service and all offenses committed outside the national territory by or against the military.**

**Given within one month, this notice must be included in the file of the procedure on pain of nullity.**

**Article 34 of Law No. 2011-1862 of December 13, 2011, by supplementing the first paragraph of Article 698-1 of the Code of Criminal Procedure, has clarified and widened the scope of the notice procedure in three additional scenarios:**

- **In the event of an indictment against an unnamed person, which means that the opinion of the Minister of Defense must be sought when the information gathered shows that a soldier is likely to be prosecuted;**
- **In the event of a supplementary indictment, following revelations during the investigation of new facts that can be blamed on a soldier;**
- **And in the event of requisitions following a complaint with civil action.**

**Article L. 211-24 of the Code of Military Justice provides, for offenses committed in external operations, that the opinion of the Minister of Defense will be requested when, following a decision of non-suit, the public prosecutor will have decided to request the reopening of the information on new charges.**

**The opinion of the Minister of Defense constitutes a channel of information as privileged as it is framed between the military institution and the judicial authority.**

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**[320] Law No. 82-621 of July 21, 1982 relating to the investigation and judgment of offenses in matters military and state security and amending the codes of criminal procedure and military justice.**

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**The request for an opinion transmitted by the public prosecutor guarantees the Minister of Defense that he will be systematically informed of the facts implicating a soldier in the exercise of his service, allowing him to take all the internal measures which are impose to put an end to any disturbances or remedy them.**

**In return, the opinion, in the same way as the denunciation, provides the prosecution with elements of appreciation which it does not usually have in a criminal file on the operational context, the scope and the constraints of the mission of the soldier concerned, the technical specifications of the equipment in question, the repercussions of the facts in the armies, the evaluation of the material damage suffered by the institution, or even the internal and/or disciplinary measures taken. It is in view of these elements that the Minister of Defense concludes on the procedural orientation that he considers the most appropriate.**

**The economy of this procedure is therefore not only to enlighten the judicial authority on the military specificities likely to have an impact on the criminal assessment of the file, but also to keep the military authority informed. Thus, during parliamentary proceedings, Robert Badinter, Keeper of the Seals at the origin of Law No. 82-621 of July 21, 1982, maintained that "the purpose of this provision is to take account *of military specificity: the military authority must be informed of the prosecution's intentions and be able to make its opinion known* "321.**

**As mentioned by Senator Marcel-Pierre Cléach in his opinion made on behalf of the Foreign Affairs and Defense Committee tabled on March 23, 2011 on the bill relating to the distribution of disputes and the streamlining of certain judicial procedures , the objective of this procedure is indeed *"to organize a reciprocal exchange of information between the military authority and the public ministry"* so that the hierarchical authority takes the measures ordered by the involvement of a soldier in a penal procedure. Thus, " *the exchange of information between the public prosecutor and the military authority allows the latter to take into account the possible exercise of criminal proceedings, these elements being likely to have an impact on the way of serving, the availability and therefore the operational capacity of the soldier concerned* "322 .**

### 1.2. CONSTITUTIONAL FRAMEWORK

**According to the case law of the Constitutional Council, it follows from the independence of the judicial authority set out in the first paragraph of Article 64 of the Constitution, the judicial authority to which the magistrates of the prosecution belong, a principle according to which the public prosec**

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[321] **JO debates AN, April 14, 1982, 2nd session, p. 1128.**

[322] **Opinion No. 367 (2010-2011) by Mr. Marcel-Pierre Cléach, made on behalf of the Foreign Affairs and Defense Committee, tabled on March 23, 2011, on the bill relating to the distribution of disputes and streamlining of certain legal procedures, p. 76.**

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freely, seeking the protection of the interests of the company, its action before the courts323 .

The Constitutional Council was called upon to rule on the provisions of article 698-1 of the code of criminal procedure. Seized of a priority question of constitutionality (QPC), it rejected the complaint of disregard of the principle of equality before justice, considering that the legislator intended to guarantee that can, if necessary, be brought to the attention of the judicial institution the specificities of the military context of the facts at the origin of the prosecution or particular information relating to the presumed perpetrator with regard to his military status or his mission, without creating unjustified discrimination. It is emphasized that this opinion does not bind the public prosecutor in the assessment of the follow-up to be given to the facts and that, appearing in the file of the procedure, it can be discussed by the parties324. In addition, it is emphasized that the notice before prosecution does not concern flagrant crimes or misdemeanors.

The Constitutional Council was able to recall that the secrecy of the investigation and the instruction is a guarantee given to citizens to ensure both the preservation of public order by allowing the search for perpetrators of offences, but also a guarantee respect for the presumption of innocence and the protection of privacy. It can only be restricted if it is justified by a general interest and proportionate to it325 .

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

The provisions of Article 698-1 of the Code of Criminal Procedure do not allow the military authority to know the legal follow-up given to the procedures in the context of which it has given an opinion or denounced the facts.

Admittedly, article L. 261-6 of the code of military justice provides that within three days of the execution of a judgment of conviction concerning a soldier, the public prosecutor is required to send an extract to the commander of the administrative formation to which the convicted person belonged. But this article, made applicable in time of peace by the effect of article 698-5 of the code of penal procedure, concerns only judgments of condemnation.

As an exception to the principle of the secrecy of the investigation and the instruction provided for in article 11 of the code of criminal procedure, several texts already require the public prosecutor to communicate the judicial follow-up given to criminal proceedings.

Such an obligation appears in particular in article 40-2 of the code of criminal procedure for denunciations made by the public authorities under article 40, the public prosecutor

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323 Decision No. 2017-680 QPC of December 8, 2017, par. 6.

324 Decision no. 2015-461 QPC of April 24, 2015.

325 Decision no. 2017-693 QPC of March 2, 2018.

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**Republic to notify them of the prosecution or alternative measures decided upon following their report.**

**Similarly, Article 561-30-1 of the Monetary and Financial Code provides that, for acts likely to relate to the laundering of the proceeds of an offense or the financing of terrorism which have been the subject of an information notice from the national financial intelligence unit to the public prosecutor, the latter must inform him of the initiation of legal proceedings, of the discontinuance of proceedings and of the decisions handed down by the criminal courts.**

**In addition to these reporting returns, Law No. 2016-457 of April 14, 2016 on the information of the administration by the judicial authority and the protection of minors established two information systems by creating an article 11- 2 and an article 706-47-4 in the code of criminal procedure. The first is a general and optional system of information by the judicial authority of the public authority of employment of certain penal decisions concerning their agents or the persons placed under their control, the second a specific system for the protection of minors and which is mandatory (serious, violent or sexual offenses committed by persons in habitual contact with minors).**

**The first provision, which only concerns crimes and misdemeanors punishable by imprisonment, therefore remains optional and limited to cases where the public prosecutor considers this transmission necessary, due to the nature of the facts or the circumstances of their commission, to put an end to or prevent a disturbance to public order or to ensure the safety of persons or property.**

**In terms of military criminal cases, it appears necessary to enshrine in law the principle of systematic communication of the legal consequences by the judicial authority to the military authority, whatever the penalty incurred, the offense prosecuted or the activity of the respondent.**

**Indeed, the current geopolitical context, which requires a significant projection of personnel abroad but also a consequent deployment of soldiers on national territory, reinforces the need for the military institution to have personnel whose involvement in a procedure criminal justice is not likely to hinder their missions or operational issues. This context of multiplication of fronts of engagement, in particular by the emergence of new conflict zones, mobilizes a growing number of personnel. In the same spirit as what was noted in 2016 in the application circular for Article 11-2 of the Code of Criminal Procedure326, the purpose of this information is to enable the employment authority to take the measures that she considers necessary.**

**Knowledge of the legal consequences of military criminal cases is particularly essential. Since offenses in this area are mainly related to the exercise of**

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**[326] Circular of August 4, 2016 presenting the criminal procedure provisions of Law No. 2016-457 of April 14, 2016 on the information of the administration by the judicial authority and the protection of minors and its decree application no. 2016-612 of May 18, 2016 (NOR: JUSD1622465C).**

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service327, their major consequences on the employability of the personnel concerned can be major: aptitude/authorization to carry weapons, ban on entering into contact with the victim, co-perpetrators or accomplices or witnesses, ban on appearing in specific places , authorization to drive military vehicles, authorization to leave the national territory for screenings in external operations (OPEX) in particular.

It seems appropriate that, within the restricted framework of military criminal litigation for which an opinion has been rendered or a denunciation made, the military authority which has ruled on the judicial follow-up it advocates, be informed of the decision taken. finally by the prosecution.

### 2.2. OBJECTIVES PURSUED

In order to allow better follow-up of criminal cases and make relations more fluid, a legal basis should be created for the transmission of information between the specialized courts and the military institution.

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. CONSIDERED OPTION

A circular from the Keeper of the Seals dated September 9, 1984328 reminded the specialized common law courts of the need to inform the military authorities of the judicial decisions pronounced against the soldiers. It could have been envisaged to provide for a new ministerial circular or an agreement between the Ministry of Justice and the Ministry of the Armed Forces describing this information transmission circuit.

However, the provisions of criminal procedure fall within the domain of the law and any text which allows an exemption from the secrecy of the investigation and the instruction, provided for in article 11 of the code of criminal procedure, must be integrated into a coherent system that respects the hierarchy of standards. The option of a simple regulatory or infra-regulatory modification must be ruled out.

It would not be relevant to insert in the code of military justice or in the code of defense the text of legislative level allowing this communication. It appears essential that it be correlated with the provisions of article 698-1 of the code of criminal procedure which sets the system for the request for an opinion before prosecution and for denunciation.

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[327] With the exception of offenses committed outside the national territory by the military or against them (article 697-4 of the CPP), offenses which are not systematically linked to the service.

[328] Circular reviewing the first application of the law of July 21, 1982 and supplementing the instructions contained in a first application circular of December 6, 1982 (Ref. CRIM.84 – 14 – E.1/9.9.84).

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### 3.2. SELECTED OPTION

**It is proposed to create a paragraph 4 in article 698-1 of the code of criminal procedure so that the military authority is advised of the judicial follow-up given to military criminal cases taking into account the administrative, disciplinary and operational consequences which may result therefrom.**

**The drafting of this measure will transpose the structure of Article 40-2 of the Code of Criminal Procedure which concerns reports of criminal offenses to the judicial authorities by public officials.**

**Provision will thus be made for the public prosecutor to notify the Minister of Defense or the military authority authorized by him of the prosecution or alternative measures to the prosecution which have been decided following the denunciation or opinion mentioned in the first paragraph. In the event of classification without continuation of the procedure, he will communicate his decision by indicating the legal reasons or opportunity which justified it.**

**This will allow the military authority to be informed about the reason for the dismissal of the procedure (insufficiently characterized offence, absence of offence, legal reason, or failure of the complainant, for example).**

**In the absence of spontaneous transmission by the public prosecutor, the military authority will have a legal basis allowing it to request the competent public prosecutor's office and thus obtain the follow-up given to a military criminal case (prosecutions initiated, alternative or dismissal ) without contravening the provisions of article 11 of the code of criminal procedure.**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

**The modification of Article 698-1 of the Code of Criminal Procedure in these terms is not likely to constitute an attack on the independence of the judicial authority, this communication which occurs at a later stage cannot interfere with the decision whether or not to prosecute or implement alternative measures.**

**Moreover, this provision will only concern part of the military criminal litigation, flagrant crimes and misdemeanors and prosecutions brought before the JDCS against civilians for example, being de facto excluded from the scope of the procedure of notice *before* prosecution.**

**Furthermore, a legislative harmonization measure must be taken in the first and third paragraphs, the designation *Minister of Defense* will be retained to replace that of *Minister responsible for defence.***

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### 4.2. IMPACTS ON COURT SERVICES

**This measure only concerns the judicial courts competent to hear military criminal proceedings, i.e. the nine specialized common law courts on national territory. Without particular procedural formalism, the communication of the judicial follow-up can be carried out by the specialized registry also staffed with military personnel (military clerks). It should therefore not have a significant impact on judicial services.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**These provisions do not require any mandatory consultation and no optional consultation has been conducted.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**These provisions will enter into force the day after the publication of the law in the *Official Journal.* of the French Republic. As this is a text laying down the procedures for prosecution and the forms of the procedure, it is immediately applicable to ongoing criminal proceedings provided that a final decision has not yet been rendered.**

#### 5.2.2. Application in space

**These provisions are intended to apply in the overseas communities governed by Article 73 of the Constitution due to the principle of legislative identity without it being necessary to make express mention of it.**

**In the overseas collectivities governed by article 74 of the Constitution and in New Caledonia subject to the legislative specialty regime, an express mention of application is necessary in order to make these provisions applicable via the update of the Article 804 of the Code of Criminal Procedure amended for this purpose by Article 36 of this bill.**

**Furthermore, no adaptation of these provisions relating to the characteristics of the local authorities appears necessary.**

**These measures are therefore applicable throughout the territory of the Republic.**

#### 5.2.3. Application texts

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**These provisions do not require any application text.**

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# Article 31: Creation of an authorization system relating to study activities prior to the laying or removal of a submarine cable or pipeline in the territorial sea

## 1. STATE OF PLAY

### 1.1. GENERAL FRAMEWORK

**Before laying a submarine cable or pipeline, an operator must carry out preliminary studies329 to confirm the planned route. These studies are of different types: bathymetric surveys330, sediment sampling (coring) or even UXO (UneXploded Ordnance) studies to detect the possible presence of submerged explosive devices. Depending on the techniques used, these studies may have an impact on the subsoil (coring) or on the environment (impact of sonars on marine fauna in particular).**

**In national law, Article 1 of Decree No. 2017-956 of May 10, 2017 setting the conditions for the application of Articles L. 251-1 and following of the Research Code331 relating to marine scientific research (RSM332) at sea territory excludes cable laying activities from the MSR regime by referring to Article 28 of Ordinance No. 2016-1687 of December 8, 2016 relating to maritime areas under the sovereignty or jurisdiction of the French Republic . However, Article 28 of the Ordinance only applies on the continental shelf and in the exclusive economic zone and does not explicitly deal with survey activities prior to the laying or removal of a cable or an underwater pipeline.**

**In fact, the maritime prefectures or the services of the government delegates for State action at sea (AEM) overseas have various practices (MSR regime, direct application of UNCLOS) to deal with these types of applications in the exclusive economic zone or in the territorial sea.**

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329 Most often carried out by private service providers or more exceptionally by public bodies (SHOM, IFREMER, Navy).

330 Bathymetry: science of measuring the depths and relief of the ocean in order to determine the topography of the sea floor.

331 L. 251-1 of the Research Code: "Any marine scientific research activity, carried out in the territorial sea, in the exclusive economic zone and in the ecological protection zone defined by Ordinance No. 2016-1687 *of 8 December 2016* relating to maritime areas under the sovereignty or jurisdiction of the French Republic, is subject to authorization accompanied, where applicable, by prescriptions under the conditions and according to the procedures set by decree in the Council of State".

332 Marine scientific research is regulated under Part XIII of the United Nations Convention on the Law of the Sea. This convention aims to promote research for peaceful purposes and the dissemination of knowledge, without hampering other uses of sea, by setting the necessary framework for organizing the control and regulation of this activity. The decree of 10 May 2017 only concerns activities that do not benefit from another type of authorization (scientific fishing, mining, laying of cables or underwater pipelines, etc.).

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**This observation led the Secretary General for the Sea to lead an interministerial working group on this issue. The work resulted in the modification of decree no. 2013-611333 by decree no. 2021-1942 of December 31, 2021334 . government project only on the continental shelf and the exclusive economic zone, considering that the studies prior to the laying of cables did not fall under " *marine scientific research* " within the meaning of Article L. 251-1 of the Research Code . In these areas, the study activities prior to the laying of an underwater cable or pipeline are now subject to a notification regime (Article 18-1 to 18-5 of Decree No. 2013 -611).**

**To date, the study activities prior to the laying or removal of a cable or a pipeline in the territorial sea are not framed by any national regulations.**

### 1.2. CONSTITUTIONAL FRAMEWORK

**The Council of State had the opportunity to recall the competence of the legislator, with regard to the creation of a new system of administrative authorization in the field of submarine cables, on the occasion of the last modification, in 2021, of Decree No. 2013-611 of July 10, 2013 mentioned above. The authorization system affects the freedom of enterprise, which is constitutionally guaranteed, and it is up to the legislator to define the conditions under which it may be infringed, for reasons of general interest or meeting a constitutional requirement335**

### 1.3. CONVENTIONAL FRAME

**The United Nations Convention on the Law of the Sea signed in Montego Bay on December 10, 1982 does not specify the legal regime applicable to survey activities prior to the laying or removal of a cable or pipe- submarine line. Indeed, this type of activity, made possible by technological advances, is relatively recent with regard to the UNCLOS negotiation period (1970s).**

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[333] Decree No. 2013-611 of 10 July 2013 relating to the regulations applicable to artificial islands, installations, works and their related installations on the continental shelf and in the exclusive economic zone and the ecological protection zone as well as cables and subsea pipelines.

[334] Decree No. 2021-1942 of December 31, 2021 amending Decree No. 2013-611 of July 10, 2013 relating to the regulations applicable to artificial islands, installations, works and their related installations on the continental shelf and in the economic zone exclusive territory and the ecological protection zone, as well as the route of submarine cables and pipelines.

[335] Decision n° 2000-439 DC of January 16, 2001 - Law relating to preventive archeology
"(...) *13. Considering that it is open to the legislator to bring to the freedom of enterprise, which derives from article 4 of the Declaration of the Rights of Man and of the Citizen of 1789, limitations linked to constitutional requirements or justified by the general interest, provided that this does not result in disproportionate interference with regard to the objective purs*

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Its article 2 stipulates that the sovereignty of the coastal State extends to the territorial sea as well as to the bottom of this sea and its subsoil. Since the activities of studies prior to the laying or removal of a cable or pipeline do not come under the "innocent passage" regime, the coastal State is competent to set the rules applicable to these activities. in its territorial sea.

#### 1.4. ELEMENTS OF COMPARATIVE LAW

There are various state regulations that may apply to survey activities prior to the laying or removal of a submarine cable or pipeline.

Some States apply the marine scientific research regime, others *ad hoc legal frameworks.* The interpretation of UNCLOS remains the same, however, concerning the need to seek the authorization of the coastal State, the territorial sea being an area placed under its sovereignty by virtue of Article 2 of the Convention.

However, no regulations specific to the activities of preliminary studies have been identified.

### 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

#### 2.1. NEED TO LEGISLATE

Exceptions to the right of innocent passage, the activities of studies prior to the laying or removal of a cable or a submarine pipeline in the territorial sea can be very sensitive with regard to the sensors put in place. work.

The creation of a system of prior authorization is therefore necessary in order to supervise these activities and take into account the impact on the safety of navigation, the protection of the environment or maritime cultural property, or the safeguarding of the interests of national defense.

Thus, with regard to a subject falling within the scope of the law (cf. 1.2), an amendment to Ordinance No. 2016-1687 of December 8, 2016 relating to maritime areas under the sovereignty or jurisdiction of the French Republic is required.

#### 2.2. OBJECTIVES PURSUED

This provision has a dual purpose:

- ÿ harmonize the regulations on all maritime areas relating to study activities prior to the laying or removal of a submarine cable or pipeline. This harmonization is part of the State's approach to ensuring

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better readability of the measures relating to the laying of submarine cables and their arrival on national territory336 ;

ÿ ensure respect for State sovereignty for certain missions relating to the right of innocent passage through territorial waters, in particular for national defense imperatives.

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

During the work to amend Decree No. 2013-611 mentioned above and in the absence of any specific legislative provision, the Council of State did not consider it possible to create by decree a system of authorization in the territorial sea for activities of studies prior to the laying or removal of a submarine cable or pipeline.

Furthermore, the application of the MSR regime seems ill-suited to these preliminary studies which do not correspond to the spirit developed in UNCLOS aimed at increasing " *scientific knowledge of the marine environment in the interest of all humanity* (article 246).

### 3.2. SELECTED OPTION

It is therefore proposed to create an article 41 *bis* in Ordinance No. 2016-1687 of 8 December 2016 relating to maritime areas under the sovereignty or jurisdiction of the French Republic in order to create an authorization regime for studies prior to the laying or removal337 of a submarine cable or pipeline in the territorial sea. A modification of article 55 is also proposed in article 36 of this bill in order to take into account the particularities of application overseas.

It is also proposed to take into account the creation of this new regime in the architecture of the order of December 8, 2016 by replacing the title of Title III "Supervision of research at sea" by "Supervision of research and studies in sea ".

The impact on the safety of navigation, the protection of the environment or maritime cultural property, or the safeguarding of national defense interests must be taken into account during the examination of authorization applications.

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[336] Instruction of the Prime Minister of November 13, 2020 relating to the attractiveness of French territory in terms of submarine communication cables.

337 The rules applicable to installation and removal are set by the agreement for the use of the public maritime domain (article L. 2124-1 et seq. of the CG3P).

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**A modification of the aforementioned Decree No. 2013-611 will subsequently be necessary in order to define this authorization procedure according to an architecture comparable to that of the notification system for preliminary studies in the EEZ and on the continental shelf. *Ultimately,* the locally competent State authority338, or the locally competent authority for communities governed by Article 74 of the Constitution, French Polynesia and New Caledonia, in conjunction with the local authority responsible for the police of the right of innocent passage in the territorial sea, will have to notify the operator of the authorization, possibly accomp**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**The system adopted results in the creation of an article 41 bis in Title III of Ordinance No. 2016-1687 of 8 December 2016 relating to maritime areas under the sovereignty or jurisdiction of the French Republic for the activities studies prior to the laying or removal of a submarine cable or pipeline in the territorial sea. It completes the legal framework applicable to maritime areas.**

#### 4.1.2. Articulation with international law and European Union law

**These provisions are compatible with international regulations, in particular the United Nations Convention on the Law of the Sea signed in Montego Bay on December 10, 1982. According to its article 79.4, the coastal State has full sovereignty in the territorial sea and can therefore establish conditions applying to cables which enter its territorial sea.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**By harmonizing the applicable standards, these provisions may contribute to the attractiveness of France in terms of submarine communication cables.**

#### 4.2.2. Business impacts

**The creation of this authorization system will make it possible to establish a single authorization system applicable to study activities prior to the laying or removal of a cable or a pipe-**

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[338] **State representatives at sea in mainland France, in communities governed by Article 73 of the Constitution, Wallis-et-Futuna and in the French Southern and Antarctic Lands.**

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**submarine line. Decree No. 2013-611 will then be amended based on recent provisions on the notification of studies prior to the laying of submarine cables or pipelines in the exclusive economic zone or on the continental shelf.**

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**The communities of New Caledonia, French Polynesia, Saint-Barthélemy, Saint-Martin and Saint-Pierre-et-Miquelon will continue, in accordance with their powers339, to authorize or prohibit locally the activities of studies prior to the laying or removal of submarine cables and pipelines, involving the State authorities responsible for police measures aimed at enforcing the right of innocent passage, in particular under the requirements of the National Defense.**

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**The creation of this authorization system will make it possible to harmonize the practices of State services and facilitate decision-making by providing a single legal basis.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on people with disabilities

**Not applicable.**

#### 4.5.2. Impacts on equality between women and men

**Not applicable.**

#### 4.5.3. Impacts on youth

**Not applicable.**

#### 4.5.4. Impacts on regulated professions

**Not applicable.**

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**339 Cf. articles 27 of the organic law n° 2004-192 of February 27, 2004 on the statute of autonomy of French Polynesia, for French Polynesia, LO 6214-6 of the general code of local authorities (CGCT), for Saint- Barthélemy, and LO 6314-6 of the CGCT, for Saint-Martin, as well as the opinion of the Council of State n° 380759 of November 8, 2007, for New Caledonia and for Saint-Pierre-et-Miquelon.**

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### 4.6. IMPACTS ON INDIVIDUALS

**Not applicable.**

### 4.7. ENVIRONMENTAL IMPACTS

**The creation of this authorization system will make it possible to take into account the preservation of the marine environment in the study of the files of study activities prior to the laying or removal of a cable or a pipe. -line submarine.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**These provisions do not require any mandatory consultation and no optional consultation has been conducted.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**This article comes into force the day after the publication of the law in the *Official Journal.* of the French Republic.**

#### 5.2.2. Application in space

**The provisions of this article are applicable to Saint-Barthélemy, Saint-Martin, Saint Pierre-et-Miquelon, French Polynesia and New Caledonia, subject to the powers devolved to these communities, as well as in the Wallis- et-Futuna and in the French Southern and Antarctic Lands.**

#### 5.2.3. Application texts

**This legislative measure will take the form of an amendment to Decree No. 2013-611 of July 10, 2013 relating to the regulations applicable to artificial islands, installations, works and their related installations on the continental shelf and in the exclusive economic zone and the ecological protection zone as well as submarine cables and pipelines will be necessary (see 3.2 *above).***

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# CHAPTER V – SECURITY OF INFORMATION SYSTEMS

## Article 32: Prescribing domain name filtering measures (DNS) to hosts, Internet service providers (ISPs) or registrars in the event of threats likely to affect national security

### 1. STATE OF PLAY

#### 1.1. GENERAL FRAMEWORK

##### 1.1.1. General context and IT architecture

***General operation of the DNS system***

**The "Domain Name System" or DNS is a service that maps a domain name to an *Internet Protocol (IP)* address – the number permanently or temporarily assigned to each device connected to the Internet, address that takes the form of a sequence of numbers (for example, "45.60.12.53") and is machine-readable.**

**The domain name (URL or *Uniform Resource Locator* in French, "uniform resource locator", in the form "example.fr"), easier to remember and transcribe for the Internet user, constitutes the alphanumeric alias of the IP adress. The machines called domain name servers (or DNS servers) make it possible to establish the correspondence between the domain name and the IP address of the machines in a network.**

**The DNS system is based on a tree structure. All of the domain names thus constitute an inverted tree where each node is separated from the next by a point. Each node of the tree is called "domain name". The absolute name, corresponding to all the labels of the nodes of a tree structure, separated by periods, and terminated by a period, is called FQDN *(Fully Qualified Domain Name) address.* For example, "legifrance.gouv.fr. is an FQDN address.**

**When a query relating to a domain name is made, servers are successively interrogated to find the corresponding IP address. If, for example, the domain name "example.fr" is searched for, a root server is first queried, which refers to the authoritative server for the first level domain, called the Top Level Domain ( " . fr" in the example). Secondly, the first-level authoritative server returns the address of the authoritative server on the second level (here, "example.fr"), and this until the request is resolved.**

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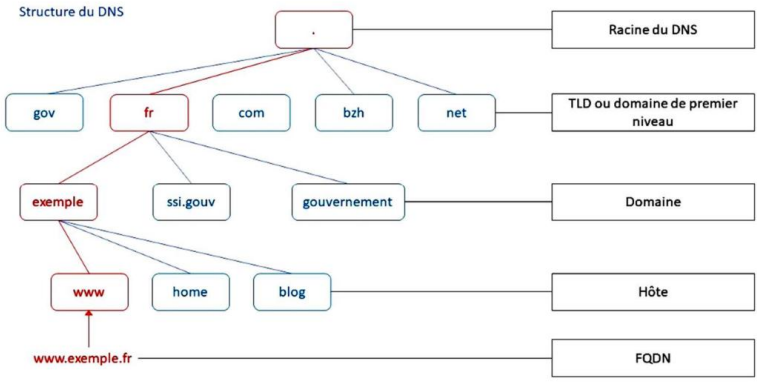


**It is therefore a distributed database (no server understands all the data of the DNS system) and hierarchical (lower level servers depend on higher servers to operate).**

***The main players in the DNS system likely to be affected***

**The DNS actors likely to be affected by malicious acts are essentially the following:**

- **Internet service providers (ISPs): these operators, through their networks, connect their customers' information systems to the Internet network and are therefore required to pass on their networks all flows, legitimate or malicious;**
- **data hosts: these operators provide website creators with storage space on secure servers so that their sites can be accessed on the Internet. Data hosts can unwittingly host malicious data, such as command and control centers (known as “C2 servers”) that allow a malicious actor to control their attack tools remotely;**

- **registers such as the French Association for Internet Naming in Cooperation - AFNIC (register, in particular, of ".fr") and domain name registrars established in France: these entities manage the reservation of domain names .**
  **On the one hand, domain name registries maintain and manage domain names (correspondence between the domain name and the person or organization owning it).**
  **On the other hand, the registrars are delegated by the registries the marketing of domain names (reservation of domain names for a limited period). They often offer, in addition to the rental of domain names, a DNS service allowing the rental company to directly register the IP address of a server to allow resolution.**

### 1.1.2. Filtering measures provided for in positive law

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**Filtering measures, some of which use the DNS, already exist in positive law. They are based on a number of techniques:**

- **the simple removal of illegal content;**
- **dereferencing: the contentious resource is not deleted but is no longer accessible via a search engine, as it is no longer referenced in the list proposed by the latter;**
- **blocking by IP address, which consists of setting up a blacklist of IP addresses so that communications to them are blocked;**
- **blocking by DNS which amounts to filtering the domain name. It prevents the Internet user from connecting to the resource associated with the domain name (mainly Internet sites), a resource which is made inaccessible to all users;**
- **the interruption of access without prior request for withdrawal.**

***Obligations incumbent on operators***

**Article 6-1 of Law No. 2004-575 of June 21, 2004 on confidence in the digital economy (LCEN) provides for an obligation of withdrawal by technical service providers, spontaneously (§ I, 7) or after notification ( § I, 5), in case of illegal content.**

**As a reminder, Law No. 2020-766 of June 24, 2020 aimed at combating hateful content on the internet, which required platforms to remove certain illegal content (incitement to hatred, etc.), had been partially censored by the Council. constitutional in that it *"encourage[d] online platform operators to remove content reported to them, whether or not it is manifestly illegal"* and therefore unconstitutionally infringed the exercise of the freedom of expression and communication340 .**

***Judicial blockage***

**Various legislative provisions authorize judicial measures to restrict access:**

- **article 6, § I, 8 of the aforementioned law n° 2004-575 of June 21, 2004 creates the so-called "internet summary" procedure: the judicial authority can prescribe in summary proceedings to a host or an ISP " *all specific measures to prevent damage or put an end to damage caused by the content of an online public communication service* ", in terms of attacks on persons (apology for crimes against humanity, *etc.) ;***
- **Article L. 336-2 of the Intellectual Property Code341 provides that rights holders may ask the judge to order in summary proceedings all measures to prevent or put an end to an infringement of a copyright or a neighboring right;**

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[340] cons. const., decision of June 18, 2020, no. 2020-801 DC.

[341] Amended by Law No. 2009-669 of June 12, 2009 promoting the dissemination and protection of creation on the Internet, known as the Hadopi I law.

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- **article 61 of law no. 2010-476 of May 12, 2010 on opening up to competition and to the regulation of the online gambling sector provides that the president of the online gambling regulatory authority may apply to the judge for interim measures to obtain the blocking of a site. The procedure is called "referred online games". Decree No. 2011-2122 of December 30, 2011342 specified that Internet service providers must then use DNS blocking;**
- **under article 706-23 of the code of criminal procedure, the stoppage of an online public communication service can be pronounced by the judge in chambers for acts of glorification of terrorism, when they constitute manifestly unlawful disturbance, at the request of the public prosecutor or any natural or legal person having an interest in acting;**
- **according to Article L. 163-2 of the Electoral Code, the judge in chambers may prescribe, during the three months preceding an election, all proportionate and necessary measures to put an end to deliberate, artificial or automated and massive dissemination by means of a service of communication to the public online of inaccurate or misleading information likely to alter the sincerity of the upcoming election.**

***The administrative blockage***

**Pursuant to Article 6-1 of the aforementioned LCEN law, the administrative blocking procedure in the event of provocation or glorification of terrorism or child pornography requires, in order to be implemented, a prior request for withdrawal from the authority administration. In the absence of a response within 24 hours, the same authority requests the blocking of the site from the operators, under penalty of criminal sanction. It is then a blocking by D**

**Finally, Article L. 521-3-1 of the Consumer Code gives agents of the administrative authority responsible for competition and consumer affairs the possibility of enjoining the offices and registrars of domain names to block a domain name, delete it or transfer it to this authority.**

### 1.2. CONSTITUTIONAL FRAMEWORK

**The provisions envisaged are intended to prevent threats likely to harm national security. They therefore pursue the objective of constitutional value of safeguarding the fundamental interests of the Nation343 .**

#### 1.2.1. The constitutional principles of freedom of communication and freedom of enterprise

342 Decree No. 2011-2122 of December 30, 2011 relating to the procedures for stopping access to a betting offer activity or unauthorized online gambling.

343 CC, November 10, 2011, *Mrs Ekaterina B., wife D., and others*, n° 2011-192 QPC ; CE, December 30, 2021, *La quadrature du net and others.*

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**The Constitutional Council has been able to affirm on several occasions that access to the Internet is a manifestation of the freedom of communication enshrined in Article 11 of the Declaration of rights of man and of the citizen (DDHC) but also of the freedom to undertake referred to in article 4 of the DDHC344. It also affirmed in a decision of October 6, 2010 that the choice and use of domain names were subject to constitutional protection: *"in the current state of the means of communication and in view of the generalized development of services of communication to the public online, as well as the importance assumed by these services in economic and social life, in particular for those who exercise their activity online", their* framework *"affects the rights of intellectual property, the freedom of communication and freedom of enterprise* "345**

**To ensure the constitutionality of a legislative provision limiting a right or freedom, the Constitutional Council first ensures that the measure envisaged pursues an authorized objective. The proposed provisions aimed at stopping malicious acts that pass through the DNS and constitute a threat that could harm national security, there is little doubt that this is the case here.**

**Next, the infringement of rights and freedoms must be proportionate to the objective pursued. To ensure this, the Constitutional Council implements a triple proportionality test, during which it checks the necessity, the adaptation and the *stricto sensu* proportionality of the infringement346. The adaptation condition is met here, since the planned measure makes it possible to achieve the goal of securing information systems. The infringement of freedoms that it is likely to entail is necessary in view of the evolution of the threats and because, as developed *above,* there are no other legal tools in positive law making it possible to carry out the objective pursued. Finally, it is proportionate in that the infringement of freedoms is limited to what is strictly necessary and that the implementation of the system is surrounded by guarantees (see below , point 3.2.2.).**

**This conclusion is corroborated by past case law of the Constitutional Council. As explained *above* (1.1.2.), there is a similarity in terms of means of action between the measures already provided for in positive law and the measure envisaged. They carry equivalent attacks on freedom of communication and freedom of enterprise, in such a way that the judge will have to assess their proportionality in a similar way347 .**

**In addition, the system envisaged does not involve any assessment of the content of the site by the administrative authority, unlike certain existing filtering measures which suppose the existence of a criminal offense to be assessed. In this case, the National Information Systems Security Agency (ANSSI) will have to refer to elements**

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[344] cons. const., dec. June 10, 2009, No. 2009-580 DC ; cons. const., dec. Oct. 6, 2010, No. 2010-45 QPC.

[345] cons. const., dec. Oct. 6, 2010, No. 2010-45 QPC.

[346] cons. const., dec. March 10, 2011, No. 2011-625 DC.

[347] See in particular Cons. const., dec. March 10, 2011, no. 2011-625 DC and CE, Feb. 15. 2016, French Data Association Network, No. 389140 and No. 389896.

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**objective techniques for characterizing and neutralizing detected computer threats and attacks.**

**These technical elements, to be provided for by a regulatory text, may for example be similar to those referred to in Article R. 9-12-6 of the Postal and Electronic Communications Code for the application of Article L. 2321 -2-1 of the Defense Code and controlled by ARCEP (elements likely to justify the existence of the threat likely to affect the security of information systems).**

#### 1.2.2. The constitutional principle of equality before public charges

**The Constitutional Council examines the legal obligations imposed on private actors in the light of the principle of equality before public charges which results from article 13 of the Declaration of 1789 and according to which "for the maintenance of the public force, and *for administrative expenses, a common contribution is essential: it must be equally distributed among all the citizens, according to their faculties* ".**

**In addition to the tax area, the Constitutional Council has consistently held that, *"[w]hile this article does not prohibit making certain categories of persons bear particular burdens, for reasons of general interest, it should not result in a characterized breach of equality before public charges "348* .**

**The proposed measures are likely to generate additional costs borne by ISPs, hosts or the registration office for ".fr" domain names or registrars established on French territory. Although they are not entirely foreign to their activity, they will however not impose themselves in the same way on all the actors, in such a way that the choice has been privileged to compensate them. The amount of compensation for these additional costs could be determined after consultation with the entities concerned with regard to their existing practices (cost of blocking, price of a domain name transfer which ranges from 2 to 100 euros per year and per of domain for about ten requests per year, etc.).**

### 1.3. CONVENTIONAL FRAME

**The principle of net neutrality, enshrined in positive law349, guarantees the equal treatment of content on the Internet, and therefore their free circulation. It is, in particular, asserted**

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[348] **cons. const., dec. of January 24, 2020, n° 2019-821 QPC.**

[349] **Principle introduced into domestic law by Law No. 2016-1321 of October 7, 2016 for a Digital Republic and provided for in article L. 33-1 of the postal and electronic communications code.**

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**by Regulation (EU) 2015/2120 of November 25, 2015[350] and interpreted for the first time by the Court of Justice of the European Union (CJEU) in a decision of September 15, 2020[351] .**

**Nevertheless, the principle of net neutrality is not absolute. The aforementioned Regulation (EU) 2015/2120 provides for exceptions to this principle, which are mentioned in paragraph 3 of its article 3 and explained in recitals 13 to 15 of its Preamble. In particular, Internet access service providers may take various measures, including the blocking of certain content, to comply with Union legislative acts or national legislation which is in conformity with Union law, to which such suppliers are subject to, or to measures in accordance with, Union law giving effect to such Union legislation or national legislation, including decisions of a court or public authority vested with the powers required.**

**Thus, the principle does not preclude the implementation of legislative provisions restricting access to an online public communication service, if they are justified by an imperative to safeguard public order. In France, article L. 33-1 of the CPCE provides for example that *"I. The establishment and operation of networks open to the public and the provision of electronic communications services to the public are free subject to compliance with rules relating to: a) The conditions of permanence, quality, availability, security and integrity of the network and the service, which include obligations to notify the competent authority of security incidents having had a significant impact on their operation ; [...] e) The prescriptions required by public order, national defense and public security, in particular those which are necessary for the implementation of interceptions justified by the needs of public security, as well as the guarantees of fair remuneration for the services provided in this respect and those which are necessary to respond, in accordance with the guidelines set by the national authority for the defense of information systems, to threats and attacks on the security of the information systems of public authorities and operators mentioned in Articles L. 1332-1 and L. 1332-2 of the Defense Code* ".**

**The access restrictions that will result from the application of the provision considered here will therefore fall within the scope of the exception provided for in a) of 3 of Article 3 of Regulation 2015/2120.**

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[350] **Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures relating to open internet access and amending Directive 2002/22/EC on universal service and user rights with regard to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union : *"This Regulation aims to establish common rules intended to guarantee equal and non-discriminatory treatment of traffic in the provision of internet access services and the corresponding rights of end-users. It aims to protect end users and to guarantee, at the same time, the continuity of the functioning of the internet ecosystem as a driver of innovation".* Users therefore have the right " *to access and distribute information and content, to use and provide applications and services and to use the terminal equipment of their choice, wherever finds the end user or provider, and regardless of the location, origin or destination of the information, content, application or service, through their access service to the 'internet* ', while ISPs have a duty to treat ' *all traffic equally and without discrimination, restriction or interference, regardless of the sender and recipient, the content viewed or broadcast, the applications or services used or provided or the terminal equipment used* ".**

[351] **CJEU September 15, 2020, *Telenor,* joined cases C-807/18 and C-39/19.**

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### 1.4. ELEMENTS OF COMPARATIVE LAW

**Other countries have implemented solutions based on DNS resolvers to combat cyberattacks and cybercrime. On the other hand, the cyber threats targeted by these devices may vary depending on the State.**

**Thus, the British and American projects aim to protect their administrations from cyberattacks (sites recognized as malicious) as well as against the risks of spying on queries and computer attacks involving DNS query spoofing. The Belgian and Canadian solutions have widened the perimeter to different types of online scams (fraudulent sites, software, malware, phishing for Canada and concerning the BAPS, all types of phishing outside the camp of domains hosting content) for the general public.**

## 2. NEED TO LEGISLATE AND OBJECTIVE PURSUED

### 2.1. NEED TO LEGISLATE

**This provision must be adopted at the legislative level, having regard, first of all, to its impact on the activity of operators. The provision indeed specifies the measures likely to be enjoined, the way in which these measures are controlled and the procedures for compensating the additional costs for the said operators.**

**In addition, the provision is likely to fall within the scope of one of the exceptions to the principle of net neutrality imposed by the EU regulation of 25 November 2015 and the postal and electronic communications code, that of measures cyber defense.**

**A legislative provision is therefore necessary to define a framework and provide sufficient guarantees to avoid disproportionate attacks on public freedoms (freedom of enterprise, freedom of communication) and the principle of net neutrality.**

### 2.2. PURSUED OBJECTIVE : SECURING THE DNS SYSTEM

**Today, the vast majority of computer attacks have involved the use of DNS352 by using domain names without the security implemented by system players and any commercial filtering offers being sufficient to protect the victims. For example, an attacker can divert the flow from a particular domain to a malicious website that he controls (the correspondence between the domain name and the IP address is no longer the one initially defined and valid) in order to pass for the original site or disrupt the activity of the site in question, or even prevent it.**

[352] **Most of the 831 incidents handled by ANSSI in 2022 involved the use of DNS.**

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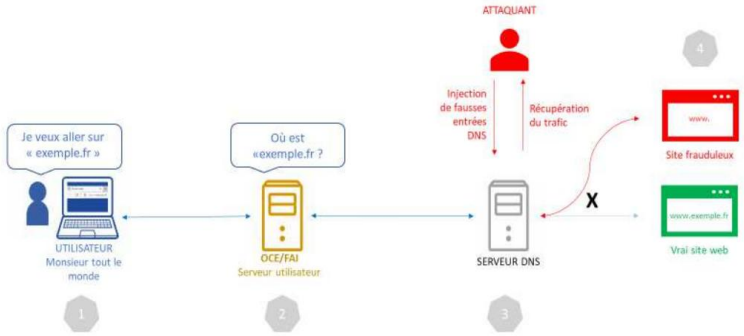


Exemple d'une vulnérabilité du DNS

**The successive reforms have made it possible to impose on the players, and in particular the ISPs and hosts, a certain number of information system security obligations353 (information system security rules). The provision envisaged would lead to involving them more, in conjunction with the ANSSI, in cyber defense operations, which today are increasingly necessary in view of this growing threat. Operators would thus help to ensure that end users have a secure flow of data when browsing the Internet.**

**This would also allow a significant increase in national capacities for detecting computer attacks and would give ANSSI the ability to neutralize serious and proven threats likely to affect the safeguarding of national security.**

**A request to data hosts and ISPs to block or redirect a domain name entirely controlled by an attacker to a neutral server would inform users of the suspension of the domain name.**

**Redirection to a secure server would allow ANSSI to observe malicious behavior to identify markers and alert victims.**

**In addition, requiring the registrar and registrars to proceed with the registration, renewal, suspension or transfer of the domain names concerned would ensure that the blocking cannot be bypassed.**

**Finally, the possibility for ANSSI to alert the victims of a compromise or a vulnerability will contribute to the general strengthening of the level of security.**

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**[353] Article L. 2321-2-1 of the Defense Code allows ANSSI to implement detection devices on the server of a host, an ISP or an OCE when it is aware of a threat in order to detect events likely to affect the security of public authority information systems, OIVs or OSEs.**
**ANSSI may collect data and analyze only relevant technical data (traffic capture) and only to characterize the threat. On the basis of Article L. 33-14 paragraph 2 of the CPCE, ANSSI may ask OCEs to use, on their own detection devices, technical markers that it provides them to characterize an attack on OIVs , OSE or AP.**

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## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**One option considered was to add an article to the LCEN (Pharos device). Regarding the scope of the measure, this option had the advantage of targeting certain common operators (ISPs and hosts in particular), but not registrars.**

**Moreover, the Pharos system does not pursue the same purpose since it aims, in the field of the digital economy and not the security of information systems, to fight against illegal content likely to constitute criminal offences.**

**Finally, in terms of readability and legal certainty, ANSSI's powers as the information systems defense authority are concentrated in the defense code.**

**This option appeared, for these different reasons, unsatisfactory.**

**A second option consisted in modifying article L. 33-1 and article D. 98-7 of the CPCE. These already existing articles could theoretically have founded the system but, in view of its scope and the risk of infringement of public freedoms, a legislative level was favoured.**

**Moreover, the existing filtering devices in other areas are at the level of the law.**

**Finally, as previously mentioned, in terms of readability and legal certainty, ANSSI's powers as the information systems defense authority are concentrated in the defense code.**

**No constant law option therefore seems to be able to prevent or effectively remedy attacks committed through the intermediary of the DNS.**

### 3.2. SELECTED OPTION

**This provision gives ANSSI the power to request the filtering of domain names used or exploited by cyber-attackers. Its implementation is conditional on the prior observation of a threat likely to affect national security.**

**The distinction between two types of filtering measures stems in particular from the criterion of the good faith of the holder of the domain name.**

**If the holder is not at the origin of the misuse of his domain name, then there is a gradation of measures:**

- **initially, ANSSI may order the latter to take appropriate measures to neutralize the threat, within a time limit set by it;**
- **if it has not taken the appropriate measures within the stated period, ANSSI may request the blocking or suspension of the domain name concerned.**

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***On the other hand,*** **if the holder of the domain name has specifically registered it for attack purposes, the filtering measures could go as far as:**

- **redirection of the domain name concerned to a neutral or secure server controlled by ANSSI;**
- ÿ **as well as the registration, renewal, suspension, or transfer to ANSSI of the domain name, which in the latter case becomes the holder.**

**Despite a similarity in terms of means of action, in particular concerning blocking by DNS, the pre-existing measures do not share with the envisaged provision nor the triggering element (illegal content, infringement of copyright, absence of authorization for an online gambling operator or altering the sincerity of the vote) nor the purposes (fight against terrorism, child pornography or deceptive commercial practices).**

### 3.2.1. Presentation of the device

**The device envisaged aims to secure the domain name system against the actions of malicious actors. The proposed measures will only be implemented in the event of a threat likely to affect national security. This is identified by ANSSI by means of "technical markers" used within the framework of its missions, defined in article R. 9-12-2 of the postal and electronic communications code (CPCE) as *" technical elements characteristic of a computer attack operating mode, allowing the detection of malicious activity or the identification of a threat likely to affect the security of information systems* ". ANSSI identifies domain names used by attackers on a daily basis, these domain names themselves constituting technical markers. It proceeds in the same way to characterize a threat pursuant to Article L. 2321-2-1 of the Defense Code (CODEF) and justify its existence to the Regulatory Authority for Electronic Communications, Posts and press distribution (ARCEP)[354] .**

**A distinction is made depending on whether the malicious domain name was registered in good faith by its legitimate owner or whether it was registered for the sole purpose of compromising the security of information systems, in order to limit the consequences that a filtering measure could have on the owner of a domain name without the intention of committing a computer attack.**

**When an owner is identified who registered the domain name in good faith, ANSSI may, initially, ask him to take appropriate measures to neutralize the effects of the attack committed using his domain name. If the owner does not take these measures within the time limit, ANSSI may then order the hosts and ISPs to implement a blocking measure, or enjoin the registries and registrars to suspend the domain name.**

[354] **Article R. 9-12-6 of the CPCE.**

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**When the domain name is completely controlled by an attacker who registered it for the sole purpose of committing malicious acts, likely to harm national security, the threat justifies that ANSSI can act without delay. It can then order data hosts and ISPs to block it or redirect it to a neutral server or a secure server.**

**In this same case, ANSSI may also order the registrar and registrars to register, renew, suspend or transfer the domain names concerned.**

**Redirection with observation phase, whether it is a redirection by hosts or ISPs to a secure server controlled by ANSSI, or a redirection from a domain name retrieved and** controlled directly by ANSSI, makes it possible to observe the attacker's modus operandi and ***ultimately*** **identify new victims.**

**3.2.2. The guarantees provided**

***Measures adapted to the specificity of the situation***

**A filtering measure is likely to have detrimental consequences for the owner of a legitimate domain name which is used as an attack vector. In order to ensure the reconciliation between safeguarding national security, on the one hand, and freedom of enterprise and freedom of communication, on the other hand, it is first provided that ANSSI asks the owner legitimate to take targeted measures to avoid negative consequences in terms of accessibility of its website (targeted deletion of a resource from the website such as a page, content, etc.), and this within a given period.**

**It is only at the expiry of the time allowed to the owner to act, when the latter has not taken the appropriate measures, that it can request the blocking from the ISPs or the hosts, or the suspension of the name of domain (i.e. the suspension of the entire website) with the ".fr" domain name registration office or registrars established on French territory.**

**Only the hypothesis of a domain name registered exclusively for malicious purposes by the attacker or a nominee presenting a threat likely to harm national security will justify that ANSSI take immediate measures in addressed to the same actors as referred to in the previous paragraph.**

**When the threat requires a measurement for the purpose of characterizing the threat, this will be surrounded by additional guarantees in order to regulate the collection of useful data and their use (see *below).***

***The material and temporal limitation of the measures***

**As for their content and duration, the measures taken are strictly necessary and proportionate to the specific objective pursued, namely the prevention, characterization and neutralization of the threat.**

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**In addition, the observation phase following redirection by hosts or ISPs to a secure server controlled by ANSSI is limited to a period of two months, renewable once in the event of persistence of the threat after assent of ARCEP.**

***Control of ARCEP and the remedy before the administrative judge***

**The new prerogatives granted to ANSSI are accompanied by a *posteriori* control by an independent administrative authority, ARCEP. Given its skills in the electronic communications sector and in order to ensure the overall consistency of the system, it appears to be in the best position to verify compliance with its conditions of application. In addition, ARCEP has already been designated as the authority responsible for monitoring ANSSI's activities within the framework of the implementation of Articles L. 2321-2-1 and L. 2321-3 paragra**

**As presented *above,* the renewal of the redirection measures is subject to the assent of ARCEP. It is understood that this control by ARCEP will also cover the justification of the threat and the proportionality of the measure.**

**ANSSI's injunctions aimed at asking ISPs, hosts, the office or registrars for these filtering measures will, like any unilateral administrative act, be subject to appeal before the administrative judge, in accordance with Article L. 411-2 of the code of relations between the public and the administration (CRPA), including in summary proceedings.**

***Data collection in the observation phase***

**The collection and storage of certain technical data strictly necessary to characterize computer attacks (such as source and destination IP addresses, types of protocols used, browsing session metadata, number and size of packets exchanged) is already provided for in Article L. 2321-3, paragraph 2, of the Defense Code.**

**The data whose exploitation is necessary to understand the operating methods of the attackers will only be obtained and exploited for the purposes of defending the information systems and only in the event of a threat likely to affect national security. The purposes of the device, namely the characterization, the neutralization of attacks and the information of victims, do not require access to content data. The data collected is destroyed within ten years from the date of collection. Finally, ANSSI immediately destroys any data that is not strictly necessary for the prevention, characterization and neutralization of the effects of a computer attack.**

**Furthermore, since the system put in place by ANSSI has the particular objective of alerting the victims of the attacks, it must first identify them, which implies the collection and processing of personal data in compliance with the law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms.**

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## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**It is proposed to add an article L. 2321-2-3 in the defense code.**

**Furthermore, by means of article 35 of this draft law and in order to set out the methods of control of ARCEP on the implementation of the system thus created, articles L. 2321-5 of the code of defense and L. 36-7, L. 36-14 and L. 130 of the CPCE are modified.**

#### 4.1.2. Articulation with international law and European Union law

**The aforementioned Regulation (EU) 2015/2120 provides for exceptions to the principle of net neutrality which are mentioned in paragraph 3 of its article 3 and explained in recitals 13 to 15 of its Preamble. In particular, Internet access service providers may take various measures, including the blocking of certain content, to comply with Union legislative acts or national legislation which is in conformity with Union law, to which such suppliers are subject to, or to measures in accordance with, Union law giving effect to such Union legislation or national legislation, including decisions of a court or public authority vested with the powers required.**

**Such exceptions appear in the same terms in the French version of the regulation (Article L. 33-1 of the CPCE)[355] .**

**Insofar as it tends to ensure the security of information systems, the provision considered here therefore falls within the scope of the exceptions provided for by the European regulation on net neutrality and by national law.**

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[355] ***"I. - The establishment and operation of networks open to the public and the supply to the public of electronic communications are free subject to compliance with rules relating to:***

***a) The conditions of permanence, quality, availability, security and integrity of the network and the service, which include obligations to notify the competent authority of security incidents that have had a significant impact on their operation; […]***

***e) The prescriptions required by public order, national defense and public security, in particular those necessary for the implementation of interceptions justified by the needs of public security, as well as guarantees of fair remuneration for services provided in this respect and those which are necessary to respond, in accordance with the guidelines set by the national authority for the defense of information systems, to threats and attacks on the security of the information systems of the public authorities and the operators mentioned to Articles L. 1332-1 and L. 1332-2 of the Defense Code".***

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## 4.2. ECONOMIC AND FINANCIAL IMPACTS

### 4.2.1. Macroeconomic impacts

**This measure aims to strengthen the capacity for action of the national information systems security authority. It does not affect the commercial services that could be offered by private entities, so there is no impact on the market at the macroeconomic level.**

### 4.2.2. Business impacts

**As this measure imposes new obligations but not new investments for ISPs, hosts, the registration office for ".fr" domain names or registrars established on French territory, there is provision for compensation additional costs that these requests may generate for these entities.**

**It should be mentioned that some foreign ISPs (British Telecom, Telstra) already have default security measures in place356. More recently, a July 2020 study by *the Australian Strategic Policy Institute* mentions the fact that ISPs could be obliged or encouraged to take certain proactive security measures such as blocking certain sites or deleting illegitimate or spoofed traffic357 .**

### 4.2.3. Budgetary impacts

**The budgetary impact for the State of the compensation for additional costs appears limited given the prices currently practiced on the domain name registration market.**

## 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**None.**

## 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**In view of the new obligations that would weigh on ISPs, hosts, the registration office for ".fr" domain names or registrars established on French territory, an extension of the control missions is planned *a posteriori* by ARCEP to ensure compliance with the objectives sought.**

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[356] https://www.ncsc.gov.uk/blog-post/bts-proactive-protection-supporting-ncsc-make-our-customers-safer.

[357] https://www.aspi.org.au/report/clean-pipes-should-isps-provide-more-secure-internet.

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## 4.5. SOCIAL IMPACTS

### 4.5.1. Impacts on society

**This provision will help to strengthen the security of information systems in France by securing the domain name system against the actions of malicious actors in the event of a threat likely to undermine national security. It will make it possible to neutralize the misuse of a domain name by a cyber attacker, to improve understanding of attack procedures and therefore to act accordingly.**

### 4.5.2. Impacts on people with disabilities

**None.**

### 4.5.3. Impacts on equality between women and men

**None.**

### 4.5.4. Impacts on youth

**None.**

### 4.5.5. Impacts on regulated professions

**None.**

## 4.6. IMPACTS ON INDIVIDUALS

**In the event of a domain name being blocked, individuals no longer have access to the pages concerned. However, the implementation of the measures is only planned in the event of threats likely to affect national security, which suggests that the impact for individuals is measured.**

## 4.7. ENVIRONMENTAL IMPACTS

**None.**

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## 5. TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**In accordance with Article L. 36-5 of the Postal and Electronic Communications Code, this provision was presented to the Electronic Communications Regulatory Authority (ARCEP), which issued its opinion on March 9, 2023358 .**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**These provisions will enter into force the day after the publication of the law in the *Official Journal.* of the French Republic.**

#### 5.2.2. Application in space

**The provisions will apply throughout the territory of the Republic.**

#### 5.2.3. Application texts

**The conditions of application of the proposed device will be defined by decree in Council of State.**

[358] **Opinion n° 2023-0542 of the Regulatory Authority for Electronic Communications, Posts and Press Distribution dated March 9, 2023 on provisions relating to the security of information systems within the framework of the bill relating to military programming for the years 2024-2030.**

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# Article 33: Provide for the communication to ANSSI of certain technical cache data of domain name system servers (DNS)

## 1. STATE OF PLAY

### 1.1. GENERAL FRAMEWORK

**The “Domain Name System” or DNS is a service that maps a domain name to an Internet Protocol (IP) address – the number permanently or temporarily assigned to each device connected to the Internet, address that takes the form of a sequence of numbers (for example, “45.60.12.53”) and is machine-readable.**

**The machines that receive requests for domain name resolution (translation of a domain name into an FQDN address) are called “DNS resolvers (for *Domain Name System)* ”. There are specialized DNS resolvers by scope (mobile telephony, sector of activity, *etc.)* among electronic communications operators.**

**In order to save time to return a response to the user, DNS resolvers keep correspondences between IP addresses *(Internet Protocol)* and domain names temporarily: this is called cache data. . Indeed, if different users make the same domain name request, the DNS resolver no longer has to query the different domain name servers since it has already stored the information. These servers thus have the following data:**

- **the source IP address, i.e. the IP address of the machine of the user making the request domain name to IP address resolution;**
- **the requested domain name (the domain name (URL or *Uniform Resource Locator* in French, "uniform resource locator", in the form "example.fr"), easier to remember and transcribe for the Internet user, constitutes the alphanumeric alias of the IP address);**
- **the date of the request (timestamp);**
- **the IP addresses of the different machines queried. Unlike source IP addresses, these IPs do not indirectly identify individuals but only machines.**

**A domain name resolution system provider is any person providing a service allowing the translation of a domain name into a unique number identifying a device connected to the Internet.**

**To date, however, no text proposes a definition of a domain name resolution system provider, nor does it allow an authority to contact these providers or electronic communications operators to obtain a copy of a part of**

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**cache data (only those that are non-identifying) that these players keep temporarily for needs related to better quality of service.**

#### 1.2. CONSTITUTIONAL FRAMEWORK

**The fact that the National Information Systems Security Agency (ANSSI) recovers data is not likely to infringe individual freedoms insofar as it would not collect the source IP addresses, which are the only enable the indirect identification of natural persons. It is therefore impossible for it to determine or track the users who try to access the various resources (access requested to such and such a domain name). ANSSI will only collect data from servers, ie from machines behind which there is no physical person. This provision therefore does not affect the right to respect for private life, any more than the freedom of expression and communication.**

**In order to prevent ANSSI from collecting more data than the technical data it needs to characterize an attack, ARCEP will check, through permanent access to the database storing this data, that the data collected is indeed that that ANSSI has the right to collect and only these. In addition, it may also check that the persons who collected this data within ANSSI are indeed the agents who have been individually designated and specially authorized to do so.**

**Furthermore, the impact on economic freedoms is also very modest: electronic communications operators and domain name resolution system providers are limited to transmitting to ANSSI data that they already collect within the framework of their own activity.**

**It follows from the foregoing that this provision, necessary to improve cyber defense capabilities, does not affect these rights and freedoms disproportionately to the aims it pursues.**

#### 1.3. CONVENTIONAL FRAME

**This provision does not affect the right to respect for private life, protected by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.**

**Moreover, it only very marginally affects the economic freedoms protected by the Charter of Fundamental Rights of the European Union, in a manner proportionate to the aims pursued to improve French cyber defense capabilities.**

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### 1.4. ELEMENTS OF COMPARATIVE LAW

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**The DNS is an essential infrastructure of the Internet. As such, it is widely used by attackers359 who can use domain names to manage their attack infrastructure. By observing their use of the DNS, it is possible to obtain information on their infrastructure and its evolutions.**

**To date, there is no legal framework allowing an OCE or a domain name resolution system provider to provide ANSSI with a copy of the DNS query logs (cache data or event history) made by their customers.**

**The planned device would allow ANSSI to know the DNS requests that have been made by customers, legitimate and malicious, in an anonymous way, to identify the attacker's infrastructure and monitor its activity. One could, for example, consider an operational situation in which the attackers set up specific attack servers for their victims in France. Resolver input (or logs) might be collected during searches. Through this, the ANSSI could then access the data relating to the DNS query, its timestamp and the resolver that resolved the query. Since resolvers are specialized by scope (mobile telephony, sector of activity, etc.) at OCEs and domain name resolution system suppliers, the data obtained by ANSSI would make it possible to characterize the attack and the attacker's strategy.**

**Moreover, in the sectors of file storage, messaging or office automation, the trend is towards increasing use of cloud computing (cloud computing360) by domain name resolution system providers. However, exchanges between the Internet and cloud services are encrypted, which prevents the tracking of attackers usually carried out by ANSSI. Providing ANSSI with access to part of the information contained in the DNS caches of these suppliers will give it some visibility on the activities of actors malicious.**

**Thus, and insofar as the envisaged mechanism, by requiring companies to communicate to ANSSI a copy of their customers' DNS request logs, is likely to restrict entrepreneurial freedom, it requires taking a legislative measure . This measure thus implies modifying the legislative part of the Defense Code.**

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[359] **The vast majority of the 831 incidents handled by ANSSI in 2022 involved the use of the DNS.**

[360] **Method of processing a customer's data, the use of which is carried out via the Internet, in the form of services provided by a provider.**

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**Such a level of standard is also necessary to introduce a *posteriori* control by ARCEP on the collection of the data in question.**

### 2.2. OBJECTIVES PURSUED

**The provision aims to improve knowledge of the operating methods of cyber-attackers who use domain names to carry out their computer attacks, in particular by making it possible to identify the servers set up by the attackers and to trace the chronology of their attacks.**

**More specifically, the purposes pursued by this measure are as follows:**

- **strengthen and complete the knowledge base of the threat. Indeed, having these sources would make it possible to supplement the DNS resolution information obtained from other more traditional sources of passive DNS data (historical database of the Computer *Incident response center Luxembourg* or CIRCL, *domain tools),* it being noted that no source IP is collected either by these actors;**
- **strengthen ANSSI's ability to detect malicious behavior carried out on national territory (more particularly on servers present on national territory);**
- **refine the qualification capability during the threat analysis.**

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**No other option with constant law makes it possible to obtain the objective sought because only the operators concerned have this data.**

### 3.2. SELECTED OPTION

**Law no. 2018-607 relating to military programming for the years 2019-2025[361] strengthened ANSSI's capacities to accomplish its missions by improving its capacities for detecting events likely to affect the security of the information systems of the State, public authorities and public and private operators.**

**The device envisaged targets the communication of certain DNS resolver cache data by relying on the electronic communications operators (OCE), among which are the Internet service providers (ISPs) and the providers of the resolution system of**

[361] **Law n° 2018-607 of July 13, 2018 relating to military programming for the years 2019 to 2025 and containing various provisions relating to defence.**

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**domain names. Indeed, these operators, through their networks, connect their customers' information systems to the global network and may therefore be required to pass malicious flows through their networks, in particular by means of the DNS resolvers that they update. available to their customers.**

**The new provision would require OCEs and domain name resolution system providers to regularly send ANSSI their anonymized DNS cache data (only the name of the response server, its IP address and the timestamp of the response ) for threat analysis and characterization purposes. On the other hand, these data would be cleaned of any source IP address, the only one likely to indirectly allow the identification of a user, natural person, and therefore constituting personal data within the meaning of data protection legislation. personal character. Indeed, the objective is not to identify the author of the requests made to the server but only the type of network used by the attacker. ECAs and domain name resolution system providers will therefore have to set up a means of copying and communicating on a recurring basis the previously anonymized DNS cache data.**

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**An article L. 2321-3-1 is created in the defense code to introduce this measure.**

**Furthermore, in order to provide for a *posteriori* control by ARCEP on the data collected by ANSSI, article 35 of the draft law provides for a modification of the scope of application of articles L. 2321-5 of the Defense Code and L. 36-14 of the Postal and Electronic Communications Code.**

#### 4.1.2. Articulation with international law and European Union law

**Not applicable.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**None.**

[362] Law n° 78-17 of January 6, 1978 modified relating to data processing, files and freedoms.

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#### 4.2.2. Business impacts

**ECAs and domain name resolution system providers already produce logs for their internal needs. In addition, ECAs must retain this data to meet certain legal obligations under the Post and Electronic Communications Code. It would only involve sending a copy of the non-identifying technical data to ANSSI. The impact of this measure will therefore be very limited: in terms of costs, it will only involve the cost of implementing and supervising the process, particularly in the event of automation of the service.**

#### 4.2.3. Budgetary impacts

**None.**

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**None.**

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**This provision gives ANSSI new resources as part of its mission to defend information systems. Its agents will receive DNS cache data, which they can then analyze.**

**ARCEP is also entrusted with the responsibility of monitoring the implementation of this new system by ANSSI agents.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

**This provision will make it possible to strengthen the security of the information systems of all Internet users in France.**

#### 4.5.2. Impacts on people with disabilities

**None.**

#### 4.5.3. Impacts on equality between women and men

**None.**

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#### 4.5.4. Impacts on youth

**None.**

#### 4.5.5. Impacts on regulated professions

**None.**

### 4.6. IMPACTS ON INDIVIDUALS

**This provision has no impact on individuals. Indeed, only machine IP addresses will be transmitted to ANSSI agents. However, these data, unlike source IP addresses, do not allow people to be identified, even indirectly.**

### 4.7. ENVIRONMENTAL IMPACTS

**None.**

## 5. TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**Pursuant to Article L. 36-5 of the Postal and Electronic Communications Code This provision was presented to ARCEP, which issued its opinion on March 9, 2023[363] .**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**These provisions will enter into force the day after the publication of the law in the *Official Journal.* of the French Republic.**

#### 5.2.2. Application in space

**The provisions will apply throughout the territory of the Republic.**

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[363] **Opinion n° 2023-0542 of the Regulatory Authority for Electronic Communications, Posts and Press Distribution dated March 9, 2023 on provisions relating to the security of information systems within the framework of the bill relating to military programming for the years 2024-2030.**

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#### 5.2.3. Application texts

**The conditions of application of the proposed device will be defined by decree in Council of State, taken after opinion of the Authority of regulation of the electronic communications, the posts and the distribution of the press. In particular, it will determine the technical data transmitted by the operators to the ANSSI agents.**

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## Article 34: Require software publishers who are victims of a computer incident on their information systems or who have a critical vulnerability in a product or service to inform ANSSI and their French customers

### 1. STATE OF PLAY

#### 1.1. CURRENT SITUATION

**Many incidents observed by and reported to ANSSI during the year 2022 originate from the exploitation of vulnerabilities that nevertheless have patches made available by publishers and that have been the subject of notices or bulletins. alert, still available on the CERT-FR website. For the most critical, these publications have been accompanied by reporting campaigns. These vulnerabilities concern particularly common software used by a large number of public and private organizations. Some of these vulnerabilities, among the most exploited, have been fixed since 2021364 .**

**The objective is for software users to be well informed of vulnerabilities and to be able to take the right measures to avoid incidents.**

**In the current state of the law, there is no mechanism requiring software publishers to declare to ANSSI and inform their users of incidents or critical vulnerabilities affecting one of their products or information systems.**

**Positive law certainly already provides for certain information obligations incumbent on various digital players.**

ÿ **Personal data controllers must:**

- o **Notify the Commission Nationale de l'Informatique et des Libertés (CNIL) of any violation of personal data that presents a risk to the rights and freedoms of natural persons, with an initial analysis of the circumstances of this violation as well as the first measures put in place to contain it365 ;**
- o **Inform data subjects of this personal data breach, when it creates a high risk for their rights or freedoms366. If the data controller does not carry out this communication himself, the CNIL**

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[364] See CERT-FR threats and incidents report.

[365] Article 33 of 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 the Directive 95/46/EC (General Data Protection Regulation) ; articles 58 and 83 of law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms.

[366] Article 34 of the GDPR; articles 58 and 83 of the aforementioned law n° 78-17.

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can demand that he do so. This notification, initially applicable to the electronic communications sectors, has been extended to all data controllers in order to make them more responsible with regard to the security measures to be put in place for their processing of personal data.

ÿ Certain cybersecurity players, such as:

ÿ operators of vital importance (OIV) must notify ANSSI of any incident affecting one of their information systems of vital importance368 ; operators of essential services (OSE) or digital service providers (DSP), when a significant incident affects one of their information systems necessary for the provision of these services369 ;

ÿ the ANSSI takes measures to inform the public, for operators of essential services (OSE) or digital service providers (DSP), or by digital service providers (DSP) at the request of ANSSI, when this information is necessary to prevent or deal with an incident (Law No. 2018-133 mentioned above).

Electronic communications operators must notify the competent authority of security incidents that have had a significant impact on their operation370 .

### 1.2. CONSTITUTIONAL FRAMEWORK

The Constitutional Council may be called upon to examine the legal obligations imposed on companies in the light of freedom of enterprise, which stems from Article 4 of the Declaration of the Rights of Man and of the Citizen, according to which: "Freedom *consists to be able to do anything that does not harm others* . The Constitutional Council has confirmed that it comprises two objects, namely: " *not only the freedom to access a profession or an eco but also freedom in the exercise of this profession or activity* " (cons. no. 7)371 .

In particular, it ruled that the law which creates a declarative obligation for certain companies does not infringe the freedom of enterprise with the aim of transmitting to the administration information relating to their establishment and economic, accounting and tax indicators of their activity372 .

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367 Article 58 of the same regulation; article 20 of the aforementioned law n° 78-17.

368 Article L. 1332-6-2 of the Defense Code.

369 Articles 7 and 13 of Law No. 2018-133 of February 26, 2018 on various provisions for adaptation to European Union law in the field of security.

370 Article L. 33-1 of the Post and Electronic Communications Code (CPCE).

371 Decision no. 2012-285 QPC of November 30, 2012 (Alsace-Moselle corporations).

372 Decision no. 2015-725 DC of December 29, 2015 (cons. 33, Official Journal of December 30, 2015, p. 24763.

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### 1.3. CONVENTIONAL FRAME

**The notification of an incident stems in part from a dynamic imposed at the level of European Union law, whether it is an incident relating to networks or information systems373 or a breach of data at personal character .**

**Nevertheless, there is no text of European Union or international law allowing software publishers to consider notification of computer incidents or critical vulnerabilities affecting their products and services, even though these incidents and vulnerabilities are likely to be the entry point for attacks on users' information systems.**

**The freedom to do business is also guaranteed by Article 16 of the Charter of Fundamental Rights of the European Union. This article protects the freedom to exercise an economic or commercial activity, freedom of contract and free competition375. The Court of Justice of the European Union (CJEU) rules on its basis that the freedom to conduct a business does not constitute an absolute prerogative but may be subject to a wide range of interventions by public authorities likely to establish, in the general interest, restrictions on the exercise of economic activity.**

### 1.4. ELEMENTS OF COMPARATIVE LAW

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

**This provision must be adopted at the legislative level as soon as it modifies the legislative part of the Defense Code with regard, firstly, to its impact on the activity of operators who are software publishers.**

**In addition, the provision indeed clarifies their obligation to notify a computer incident or a critical vulnerability as well as the possibility for the National Information Systems Security Agency to order them to inform their users in the event of a risk of breach of security of their information systems.**

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[373] **Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures to ensure a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS Directive 2); Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European electronic communications code.**

[374] **Ibid.**

[375] **CJEU, 22 January 2013, Sky Österreich, aff. C-283/11; CJEU, October 17, 2013, Schaible, aff. C-101/12; CJEU, July 16, 2020 OC others, business. C-686/18.**

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**The possibility for ANSSI to make this vulnerability or incident public, as well as its injunction to publishers if it has not been implemented, also falls within the scope of the law.**

## 2.1. NEED TO LEGISLATE

### 2.1.1. The systemic risks of vulnerabilities

**A vulnerability, *a fortiori* when it is significant, can constitute, even when it concerns a system, software or service not characterized as particularly sensitive, an indirect means of reaching entities that are themselves sensitive. Such a vulnerability allows the pre-positioning of potential attackers for a cyberattack.**

**For example, attackers can exploit a vulnerability as part of a rebound attack against users using the goods or services of the affected publisher, for the purpose of data exfiltration, modification or trapping, or even an alteration, even the destruction of a system. In such a scenario, the risk can become systemic in the case of a mass deployment of a product or service across an entire IT infrastructure.**

### 2.1.2. The absence of a legal basis for prescribing information for users of vulnerable goods or services

**While there is an obligation to report personal data breaches to the persons concerned (see 1.1 *above),* there is no equivalent legal framework concerning technical data generated during malicious activities (for example in the event of exfiltration, sabotage, etc.) or product vulnerabilities.**

**Consequently, in the absence of effects on personal data, users using products provided by software publishers do not have the legal means to be informed of the possible risks they incur in the event of an incident or of vulnerability.**

### 2.1.3. The absence of current tools that can be used by ANSSI to inform users

**Currently, it is excluded that ANSSI is authorized to intervene with all users using the goods and services of these publishers, its scope of action being restricted to the State, public authorities and certain public operators and private.**

**The Agency also does not have the necessary means to inform these users, for several reasons:**

- **software publishers who are victims of incidents are sometimes reluctant to provide ANSSI with the list of users using their products (on the grounds of business secrecy)**

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- **given the confidentiality of the lists of OIVs and OSEs, ANSSI is also not in a position to provide the victim with a targeted list of sensitive entities to be informed as a priority.**

#### 2.1.4. The effectiveness of the reporting tool

**Before the European legislator took up the issue of personal data via the General Data Protection Regulation (GDPR), the few companies that reported breaches relating to personal data affected by a computer incident or who informed of the discovery of a vulnerability in their products or services were only driven by reputational considerations.**

**The creation of reporting obligations by the GDPR has had a significant leverage effect on the number of reports. By way of illustration, in its 2021 annual report, the CNIL indicates a 79% increase in data breach notifications. It should be noted that this obligation has acted as a major accelerator of business security. For the same year 2021, the CNIL indicates that 81,393 organizations – private and public alike – have also appointed a data protection officer.**

#### 2.1.5. The need to integrate ANSSI into the notification process

**Publishers may underestimate the consequences, for their users and for the digital ecosystem, of the existence of vulnerabilities. Overdetermining the potential reactions of the financial markets or investors, they may thus prove reluctant to communicate to their users any weaknesses in their products.**

**Moreover, the publisher alone does not always have sufficient technical capacities to identify the users of vulnerable products or services and alert them effectively.**

#### 2.1.6. The effectiveness of the measure

**Although ANSSI can enjoin the publisher to provide this information, without this injunction being accompanied by a sanction, the absence of a binding nature of the measure does not annihilate its useful scope, beyond its incentive character.**

**It creates a legal framework so that the major publishers can transmit information to ANSSI – a framework that currently does not exist. A legal framework for this measure would protect them when they make such notifications (as is currently the case: the major software publishers, such as GAMAMs (Google, Apple, Meta, Amazon, Microsoft), very regularly inform their customers flaws discovered in their products and ways to fix them (patch)).**

**This would offer significant leverage with regard to small publishers (particularly in France) who do not necessarily apply good vulnerability management practices and are sometimes**

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**reluctant to inform their customers. This would also make it possible, in the event of persistent reluctance, to report incidents and significant vulnerabilities in their place, and thus obtain the desired effect – namely the information of the users concerned by the incidents and thre**

**The lack of information by the publisher and the ANSSI injunction that may result from it may be accompanied by information for users (which would help to encourage publishers), but also by public information relating to the breach. of the editor. Such communication would, for its part, be even more likely to encourage software publishers to demonstrate transparency, at the risk of losing significant market share.**

**The fact that there would initially be no penalty associated with a lack of notification may also constitute a first step to get market players used to it, without excluding the possibility that in the future, a sanction other than only reputation is introduced by the legislator.**

**In addition, it may happen that publishers are unaware of the use made of their product, for example by operators of vital importance or in certain confidential uses (equipment on board for national defense purposes, for example). In this regard, this article would allow ANSSI to inform these sensitive end users.**

**Insofar as the envisaged provision creates an obligation weighing on companies, a fortiori with extraterritorial scope, it is necessary to have recourse to the law.**

**Insofar as this provision aims to strengthen the means available to ANSSI in its mission as the national information systems security authority, it will be included in the Defense Code.**

### 2.2. OBJECTIVES PURSUED

**This measure will contribute to strengthening the cyber-protection of French entities of interest and will reinforce good cyber governance practices on the part of software publishers vis-à-vis users using their products.**

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**ANSSI now approaches publishers on these subjects in an amicable manner without always meeting with the expected success. The option of continuing to educate them informally would therefore not achieve the objectives pursued.**

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### 3.2. SELECTED OPTION

#### 3.2.1. Presentation of the envisaged device

**This provision creates a dual obligation for software publishers. That of declaring to ANSSI the incidents on their information systems and the vulnerabilities identified in their products and information systems, and that of informing the users using the product concerned.**

**If the publisher does not comply with this obligation, ANSSI may order them to do so, without this injunction being accompanied by any sanction other than the possibility for ANSSI to make the vulnerability or the incident public, as well as than to make the injunction public when the publisher has not acted on it.**

**The publishers concerned are those who supply the affected product on French territory, to companies having their registered office on French territory or to companies controlled, within the meaning of Article L. 233-3 of the Commercial Code, by companies having their registered office on French territory.**

**This measure aims to guarantee that potential victims among users, in particular the most sensitive, are properly informed so that they can subsequently implement, if necessary, appropriate remedial measures, once the vulnerability secured by the publisher.**

#### 3.2.2. Planned guarantees

**In the present case, there is no infringement of freedom of enterprise.**

**To restrict a fundamental right, a measure must be necessary and adequate. If it were considered that the measure is likely to cause such an attack, it would be justified by the pursuit of two objectives, that of safeguarding the security of information systems and that of alerting users using the goods and services of these software publishers, who will be warned of the vulnerabilities to which they could be exposed.**

**More generally, the proposed measure pursues the general interest objective of safeguarding national security through a better level of cybersecurity. The measure aims to enable ANSSI to carry out its mission of security and defense of information systems defined by the Prime Minister in accordance with Article L. 2321-1 of the Defense Code.**

**Partial and limited, this attack on freedom of enterprise, if proven, is in any case proportionate to the objectives pursued. In this case, the planned mechanism is strictly circumscribed, and its implementation framed by guarantees in order to ensure its proportionality.**

**In effect :**

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- **it concerns only software publishers and users using their products on French territory, including companies having their registered office in France and companies controlled by them;**
- **the measures remain ad hoc, i.e. the obligation to declare and the obligation to inform will only be implemented when the software publishers:**
  - **either will be victims of an incident on their information systems;**
  - **either will have a significant vulnerability on a product sold to users on French territory, including companies having their registered office in France and companies controlled by them;**
- **only ANSSI will receive notifications from software publishers;**
- **only software publishers will be able to inform users of their products, unless ANSSI is forced to make the significant vulnerability or the incident public, for lack of doing so by the publisher. Their way of proceeding may possibly be provided for contractually with them.**

**Nor is there any breach of business secrecy, protected by Law No. 2018-670 of July 30, 2018 transposing Directive 2016/943/EU of June 8, 2016 on the protection of know-how undisclosed commercial information, when the information concerned by article 34 does not meet the criteria of protected information, set out in article L. 151-1 of the commercial code.**

**In addition and in any event, Article L. 151-7 of the same code provides that business secrecy *"is not enforceable when obtaining, using or disclosing the secret is required or authorized by European Union law, international treaties or agreements in force or national law, in particular in the exercise of the powers of investigation, control, authorization or sanction of the judicial or administrative authorities" .***

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**It is proposed to add an article L. 2321-4-1 in the defense code.**

#### 4.1.2. Articulation with international law and European Union law

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**The notification of an incident stems in part from a dynamic imposed at the level of European Union law, whether it is an incident relating to networks or information systems376 or a breach of data at personal character .**

**Nevertheless, there is no text of European Union or international law allowing software publishers to consider notification of computer incidents or critical vulnerabilities affecting their products and services, even though these incidents and vulnerabilities are likely to constitute the entry point for attacks carried out on users' information systems.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**None.**

#### 4.2.2. Business impacts

**This measure will contribute to strengthening the cyber-protection of French entities of interest and will reinforce good cyber governance practices on the part of software publishers vis-à-vis users using their products.**

**The micro-economic impact of this measure can be considered significant. The implementation of this provision may lead to:**

- **an additional and significant administrative burden for software publishers who are the victims of an incident on their information systems or who have a critical vulnerability in a product or service sold;**
- **the contractual consideration of the obligation to notify users using the products of these publishers.**

**At the same time, however, it is necessary to measure the potential cost that the measure would save. If these vulnerabilities were exploited by an attacker, this would inevitably lead to a significant cost to be paid to proceed with the remediation of the damaged information systems. It is also necessary to consider the users who have suffered damage and are likely to claim compensation. Finally, the cost in terms of image would be potentially very significant, especially in the event of concealment of the vulnerability or of the incident that deprived users of the possibility of limiting its effects.**

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[376] **Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures to ensure a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS Directive 2); Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European electronic communications code.**

[377] **Ibid.**

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#### 4.2.3. Budgetary impacts

**None.**

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**None.**

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**This provision extends the prerogatives of ANSSI since it creates a dual obligation for software publishers. That of declaring to ANSSI the incidents on their information systems and the significant vulnerabilities identified in their products and information systems, and that of informing the users using their affected products. In addition, if the publisher does not comply with this obligation, ANSSI may order them to do so, inform users or make this vulnerability or incident public, as well as its injunction to publishers if it has not been implemented.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

**The provision will help to strengthen the security of information systems in France.**

#### 4.5.2. Impacts on people with disabilities

**Not applicable.**

#### 4.5.3. Impacts on equality between women and men

**Not applicable.**

#### 4.5.4. Impacts on youth

**Not applicable.**

#### 4.5.5. Impacts on regulated professions

**Not applicable.**

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### 4.6. IMPACTS ON INDIVIDUALS

**Users using the goods and services of software publishers will be required to be informed by the publishers of incidents on their information systems and of vulnerabilities identified in their products and information systems. This measure thus aims to guarantee that potential victims among users, in particular the most sensitive, are properly informed so that they can implement, if necessary, once the vulnerability has been secured by the publisher, remedial measures. adapted.**

### 4.7. ENVIRONMENTAL IMPACTS

**Not applicable.**

## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**These provisions do not require any mandatory consultation. However, they have been submitted for information to ARCEP at the same time as the other articles of this bill relating to the security of information systems.**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**These provisions will enter into force the day after the publication of the law in the *Official Journal.* of the French Republic.**

#### 5.2.2. Application in space

**The provisions will apply to French and foreign software publishers who provide a product to users throughout the territory of the Republic, including companies having their registered office in France or companies controlled by them, within the meaning of article L. 233-3 of the commercial code.**

**In this respect, they can have an extraterritorial scope (like the GDPR), because they aim to protect users with a legal connection to the national territory.**

#### 5.2.3. Application texts

**The conditions of application of the proposed device will be defined by decree in Council of State.**

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# Article 35: Strengthen capacities for detecting cyberattacks and informing victims

## A- Adapt the system for detecting cyberattacks by allowing the establishment of ad hoc devices in data centers, the collection of data from servers identified as malicious and the retention of data directly useful for the prevention and characterization of threat

### 1. STATE OF PLAY

#### 1.1. GENERAL FRAMEWORK

**From article 34 of law n° 2018-607 of July 13, 2018 relating to military programming for the years 2019 to 2025, article L. 2321-2-1 of the defense code allows the Agency National Information Systems Security Authority (ANSSI), when it becomes aware of a threat, to implement, on electronic communications networks operated by electronic communications operators (OCE), hosts or suppliers Internet access devices, devices mobilizing technical markers for the sole purpose of detecting events likely to affect the security of the information systems of public authorities, operators of vital importance or operators of essential services.**

**Article R. 2321-1-3 of the Defense Code defines these technical markers as *"technical elements characteristic of a computer attack operating mode, allowing malicious activity to be detected or a threat to be identified".* ANSSI can implement them for the useful duration and to the extent strictly necessary to characterize the threat. It may collect data and analyze only relevant technical data for the purpose of such characterization.**

**Furthermore, under Article L. 2321-5 of the Defense Code, the Regulatory Authority for Electronic Communications, Posts and Press Distribution (ARCEP) is responsible for ensuring compliance by the ANSSI of the conditions of application of the aforementioned article.**

**The procedures for this control are defined in Article L. 36-14 of the Post and Electronic Communications Code (CPCE), specifying that:**

- **ANSSI informs the dispute settlement, prosecution and investigation panel from ARCEP of the scope and nature of the aforementioned measures;**
- **ARCEP has, at its request and in compliance with national defense secrets, access to the information or documents necessary to ensure compliance with the conditions of application of these provisions;**

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- **ARCEP may address recommendations to ANSSI for the purpose of ensuring the regularity of the measures set out above, and may order it to interrupt its operations or delete the technical data collected if it considers that the follow-up given to these recommendations are insufficient;**
- **finally, the Chairman of ARCEP can appeal to the Council of State when ANSSI does not comply with an injunction addressed to it.**

### 1.2. CONSTITUTIONAL AND CONVENTIONAL FRAMEWORK

**Article L. 2321-2-1 of the Defense Code authorizes ANSSI to collect information without the agreement of the person concerned, and to use the technical data thus collected. This is clearly likely to infringe various constitutionally guaranteed rights – more particularly the right to respect for private life[378], but also the right to the protection of personal data, the right to secrecy of correspondence and the right to liberty. of expression protected by Articles 2, 4 and 11 of the Declaration of the Rights of Man and of the Citizen of 1789.**

**Article L. 2321-2-1 of the Defense Code has not been subject to a constitutional review by the Constitutional Council. Nevertheless, the Conseil d'Etat considered, in view of all the guarantees provided, and in particular the control of ARCEP, and in view of the general interest which endeavors to prevent threats aimed more particularly at information systems of public authorities and operators of vital importance or likely to affect them, that such measures only affect the rights guaranteed by the Constitution or France's international commitments with a justified and proportionate infringement[379] .**

**In addition, the Council of State rejected an appeal for excess of power brought against the decree of December 13, 2018[380] taken, in particular, for the application of the aforementioned article[381]. The High Court ruled that these measures implemented the constitutional requirements related to the safeguarding of the fundamental interests of the Nation and the prevention of breaches of public order. Moreover, it considered that there was no need to refer the priority question of constitutionality raised to the Constitutional Council and dismissed all the pleas alleging ignorance of European Union law.**

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[378] **cons. const., 23 dec. July 23, 1999, no. 99-146 DC. The right to privacy can be reconciled with other requirements. The invasion of privacy must be proportionate to the objective pursued and that sufficient safeguards are implemented to limit this invasion.**

[379] **EC opinion, 1st Feb. 2018, No. 394142.**

[380] **Decree No. 2018-1136 of December 13, 2018 issued for the application of Article L. 2321-2-1 of the Defense Code and Articles L. 33-14 and L. 36-14 of the Post and Electronic Communications Code.**

[381] **CE, December 30, 2021, No. 428028, *La Quadrature du Net and others.***

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### 1.3. ELEMENTS OF COMPARATIVE LAW

**Implementing systems to better detect and observe cyberattacks is common practice in many countries, including:**

- ÿ **in Germany, where the law on information technology security authorizes the federal authorities in charge of the security of information systems to take measures to detect security breaches in the installations of the Federal State or of certain companies if facts suggest that they are not protected and that their security is at risk. The authorities are also authorized to use systems and procedures in order to collect data necessary for the evaluation of the functioning of malicious software and the modi operandi of attacks. These detection and observation activities are generally carried out under the supervision of the Federal Ministry of the Interior, which exercises legal and technical supervision, or the Federal Commissioner for Data Protection and Freedom of Information. In addition, appeals are available to the competent courts for persons affected by the activities of securing the information systems of the German federal authorities. It should be noted that the German authorities cannot, however, have access to the content of a server unless its owner consents.**

- ÿ **in the Czech Republic, where the government Center for Monitoring, Alerting and Responding to Computer Attacks offers services for detecting attacks and observing attack operating methods to regulated entities. The Czech National Cybersecurity Agency (NÚKIB) is authorized to carry out these activities in accordance with the law. The provision of these types of services is usually determined by agency capacity and strategic priorities.**

- ÿ **in Singapore where the Cyber Security Agency (CSA) coordinates the cyber defense efforts of various government agencies and notably carries out advanced cyber defense actions when deemed necessary in order to detect attacks and observe the threat. The Computer Security Act of Singapore authorizes the Minister to order any person or organization to take such measures or comply with any requirements as may be necessary to prevent, detect or counter any threat to a computer or system computer or a category of computers or computer systems in the event of an imminent threat to an essential service or to national security, defence, foreign affairs, the economy, health, public security and public order in Singapore.**

- ÿ **in Italy, legislative work is underway to consider the implementation of any additional detection capabilities. Governance and oversight procedures will also be designed as part of this legislative analysis.**

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## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

**It is proposed to perfect the existing system by amending article L. 2321-2-1 of the defense code to allow ANSSI to access the data, metadata and content strictly necessary for understanding the threat, the identification of victims and the protection of the Nation.**

### 2.1. NEED TO LEGISLATE

**An evolution of the system provided for by article L. 2321-2-1 is necessary for several reasons.**

**Carrying out a computer attack assumes that its author controls a certain number of machines, which form his attack arsenal, also called attack infrastructure. They are used at all stages of the attack, for example to enter a system and compromise the victim's equipment, or to corrupt or steal data.**

**For obvious reasons of discretion, the attacker does not use his own means in this arsenal. He therefore resorts to the rental of machines (in a legal manner), or to machines which he has previously taken control of illegally. In both cases, these machines may belong to electronic communications operators, hosts, or Internet access providers in France or even to their subcontractors, as soon as the latter access and manipulate information from these operators. or administrations with the same level of criticality and the same privileges as their clients.**

**The current device makes it possible to obtain, for a limited time, information on the network traffic of this machine (incoming and outgoing flows to/from the machine). However, in practice, the accessible data remains very limited, only allowing to know with which other machines the attacker communicates, as well as the method of communication used (also called protocol). Furthermore, it is also common for the attacker to use protocols encrypting the communications, which do not make it possible to determine whether the latter are malicious.**

**The existing system therefore does not make it possible to deal with the contemporary reality of the threat.**

**Furthermore, fairly broad access is generally granted to subcontractors (access to the IS, to information, etc.), whereas the security measures that a sensitive entity imposes on itself are often much less, or even non-existent, among subcontractors. -contractors, who also do not have the same financial and human resources as sensitive entities and are not subject to the same legal obligations. As a result, attackers, *in order to ultimately* reach sensitive entities, frequently use their subcontractors as a gateway.**

#### 2.1.1. Clarify the letter of the text to allow the collection by ANSSI of all the data of a targeted flow, as provided for in the spirit of the aforementioned Law No. 2018-607

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**On the occasion of the implementation of the system provided for by article L. 2321-2-1 of the defense code, a divergence of interpretation of the text between ANSSI and ARCEP appeared. The latter has adopted a restrictive reading of the concept of data likely to be collected by ANSSI: it considers that only technical data can be collected. On the other hand, according to ANSSI, if only the technical data can be kept, the collection of data should relate more broadly to the entirety of the targeted flow. Such an interpretation results from a combined reading of paragraphs 3 and 4 of the article.**

**ANSSI's analysis appears to be corroborated by parliamentary work on the aforementioned Law No. 2018-607. Whether it is the National Assembly or the Senate, parliamentarians have admitted that the elements collected could infringe privacy, even incidentally, as long as the guarantees provided are clearly specified so that this infringement does not not be disproportionate.**

**For example, Mr. Philippe Bonnecarrère, rapporteur for the opinion of the law commission, explained as follows:**

> ***"The search for viruses requires [...] intrinsically to look in the document, not to read it – I acknowledge this, Madam Minister, but to verify the presence of an abnormal character. [...].***
>
> ***We simply want to put in place a guarantee by referring to a decree in Council of State the definition of the elements that can be verified and collected, because they will obviously relate, beyond the only e-mail addresses, to the content.* »382 .**

**Reading these preparatory works shows that the intention of the legislator was to authorize ANSSI to recover traffic or flows and that "other data" covers all the data that ANSSI may collect at the occasion of its mission but must destroy if they do not prove useful for the prevention or the characterization of the threat. What is more, it is indeed the wording favored by the Government, aimed at not "limiting" the data collected by ANSSI, which was retained within the framework of the work of the joint committee.**

**This is also, moreover, the interpretation of the Council of State in its aforementioned opinion on the bill relating to military programming for the years 2019 to 2025. It makes a distinction between "technical data", collectable and analyzable by ANSSI, and other "data" (i.e. non-technical), for their part collectable by ANSSI, but which must be immediately destroyed if they are not relevant to the sole purposes of threat characterization:**

> **" [The *system] also allows ANSSI, when the threat of which it is informed is likely to affect the security of the information systems of the same public authorities or operators, to carry out such detections itself for the duration and to the extent strictly necessary for the characterization of the threat, to collect data and to analyze only the technical data relevant for the sole purpose of this characterization* "383 .**

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**[382] Extract from the parliamentary debates during the 1st reading before the Senate (meeting of May 22, 2019).**

**[383] EC opinion, 1st Feb. 2018, No. 394142.**

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**It therefore appears that the capture of traffic should be authorized on condition that it is sufficiently justified, in particular with ARCEP, and that any data that would ultimately not be useful for the prevention or characterization of the threat is immediately destroyed. (with a trace of this destruction).**

**However, the restrictive interpretation of the text by ARCEP currently forces ANSSI to significantly limit its collection of data, by limiting itself solely to technical data (metadata), which deprives it of content data and information often present necessary to obtain a relevant qualification of the threat and of broader scope (operating mode, identification of other victims, discovery of a previously unknown malicious code, etc.). A clarification of the text, in accordance with the spirit of the law when it was passed in 2018, therefore seems necessary.**

#### 2.1.2. Obtain a copy of the targeted server in the event of a particular threat and major IS security incident

**Apart from being ambiguous, the current wording of the article, while it has made it possible to increase ANSSI's capacity for action, is insufficient on two counts.**

***The implementation of specific markers to detect events assumes prior knowledge of the attacker which can only be obtained by analyzing the data set on a compromised machine.***

**Article L. 2321-2-1 of the Defense Code, in its current wording, does not allow ANSSI to act in anticipation of a threat and prevents it from effectively protecting its beneficiaries.**

**The current text provides that ANSSI may place devices using technical markers with certain operators for the sole purpose of detecting events likely to affect the security of the information systems (IS) of the public authorities and operators mentioned in Articles L. 1332-1 and L. 1332-2 of this code or in article 5 of law n° 2018-133 of February 26, 2018[384]. However, this means of action, if it makes it possible to prevent certain attacks, implies that the ANSSI already knows upstream the operating modes used by the attackers and has drawn specific markers from them to be able to detect them. . It therefore does not allow him to detect an unknown or uncharacterized actor and only allows actions in reaction.**

**ANSSI must therefore be able to access the contents of the infected machine (copy of the hard disk, copy of the RAM) in order to recover the configurations and details of the malicious codes or implants used by the attacker, the data that he has theft, the attacker's connection logs or even the secret elements allowing the malicious traffic to be deciphered.**

***ANSSI currently only has access to the effects of malicious activities (network flows) and not to their causes (code, logs, stored content).***

[384] **Law No. 2018-133 of February 26, 2018 on various provisions for adaptation to European Union law in the field of security.**

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**ANSSI can now access the technical data of network flows. However, these network flows are triggered by actions launched upstream by malicious actors using codes and malicious software, "command and control" tools (tools under the control of attackers from which they launch attacks), Trojan horses, etc. Only access to the source of the malicious actions launched upstream makes it possible to understand their nature, their form and to analyze the situation more generally. This presupposes being able to access the code of the malicious action, the tools and the log files (or "system logs", recording all the activity of an IS and making it possible to determine the sequence of actions carried out on a given system) to understand the nature of malicious actions. For this purpose, it is necessary to make copies of compromised machines.**

**By way of illustration, in 2017, by observing certain malicious actions by a victim, ANSSI managed to reconstruct the configuration file of an attacker's control server. He was then able to identify a physical server under the control of this attacker hosted by a French host. However, all communications in and out of this machine passed through the ToR network (which ensures the anonymity of those who use it through a series of encryption of requests) and, therefore, were unusable in the state. The Public Prosecutor's Office opened an investigation in flagrance and the investigating service requested ANSSI to proceed with the analysis of the identified server. This made it possible to identify all the victims attacked, but also all the potential targets of the attacker, not yet activated, which were listed on the analyzed server. The latter were able to be subject to dedicated monitoring by ANSSI and to guard against the actions of this attacker.**

#### 2.1.3. Faced with an ever-increasing evolution of the threat, allow ANSSI to extend the scope of the system to data center operators.

**ANSSI is now faced with an evolution of the threat, since malicious actors are becoming more professional and taking advantage of loopholes linked to the territoriality of legal frameworks. ANSSI observes the frequent use by attackers of compromised servers (to be integrated into an attack infrastructure), rented by foreign hosts from data center operators - within the meaning of article L. 32 of the CPCE - based on the national territory. Indeed, the cyberattacker, close to the state level, systematically seeks to limit the possibilities of imputation of his attack, by creating an anonymization infrastructure according to two methods:**

- **the purchase of *virtual private servers* (or VPS for *Virtual Private Server)* which are links created for the exclusive use of the attacker and completely controlled by him, but whose purchase in a perfectly anonymous manner is complex;**
- **the compromise of infrastructure elements (servers, routers, firewalls, *switches,* etc.) and the installation on them of relay programs which are as many links of anonymization.**

**Consequently, when ANSSI has to deal with attacks against the most important interests of the nation, the use of compromised servers is almost systematic.**

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**However, as the law stands, ANSSI cannot install its devices at the operators of data centers whose exclusive activity it is, because they are neither hosts nor Internet access providers within the meaning of law n° 2004-575 for confidence in the digital economy.**

#### 2.1.4. Adapt the guarantees and the proportionality of the infringement of freedoms

**Such an extension of the scope of application of Article L. 2321-2-1 of the Defense Code at the material (infrastructure) and organic (data center operators) level does not call into question the proportionality of the measure. with regard to the objectives of general interest pursued by ANSSI. The following guarantees appear to be duly protective:**

- ÿ **prior targeting of the compromised machine that is the subject of the copy;**
- ÿ **the immediate destruction of the data by ANSSI as soon as they are deemed unnecessary for threat prevention and characterization;**
- ÿ **control of the application of these new measures by ARCEP.**

**The broadening of the scope of application of the aforementioned article is offset by increased supervision, since ANSSI will only be able to make requests within a limited scope and for a limited period, and always for the sole purpose of prevention and characterization of threats aimed more particularly at the IS of public authorities, operators of vital importance and essential operators within the meaning of law n° 2018-133 of January 26, 2018 mentioned above or likely to affect them through their subcontractors.**

**With regard to access to data, they will only be obtained and used by individually designated and specially authorized agents, and only for the purposes of defending the information systems of the aforementioned operators or authorities. In addition, they will be destroyed within a specified period, but not exceeding the duration strictly necessary, that is to say immediately when they are not useful and two years when they are.**

**Captures made by ANSSI using the device thus amended, although likely to concern a wider field, will always be targeted, justified and subject to the control of an independent administrative authority, to prevent data other than those useful for prevention or characterization of the threat are retained. In addition to a clarification of the law, the new wording envisaged is accompanied by an adaptation of the associated guarantees, in particular through the adjustment of the control of ARCEP in order to ensure that ANSSI respects the application of the amended provisions. .**

### 2.2. OBJECTIVES PURSUED

**The main objective of this measure is to improve ANSSI's knowledge of the operating modes of cyberattackers:**

- ÿ **by having access to information of interest, essential for understanding and apprehending the situation, in particular present in the content of network communications (identity of victims, nature of the attack, instructions sent by the attacker to the m**

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under his control, etc.), or on the disk and memory of the machine used by the attacker (malicious tools developed by the attacker, working methods, knowledge base on his victims, etc.);

ÿ by extending the scope of the measurement to data center operators.

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

A modification of Law No. 2004-575 of June 21, 2004 on confidence in the digital economy could be considered but was not considered satisfactory since:

ÿ it only took into account some of the changes required by the measure new ;

ÿ it tended to make positive law more complex by adding to the law of June 21, 2004 prescriptions whose object has a purpose of national security.

### 3.2. SELECTED OPTION

This component complements Article L. 2321-2-1 of the Defense Code in three respects:

ÿ it extends the data collected to the content of network communications and more broadly by obtaining a copy of the server used by the attacker;

ÿ furthermore, it includes data center operators within the scope of operators on which ANSSI could affix technical markers or obtain a copy of their servers;

ÿ lastly, it includes subcontractors of public authorities, operators of vital importance and operators of essential services for whose benefit ANSSI can detect and characterize events likely to affect the security of their information systems.

In addition, ARCEP's control is adapted to provide additional guarantees, in particular with respect to the copy of the server used by the attacker.

## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

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**This provision requires an amendment to Article L. 2321-2-1 of the Defense Code and Article L. 36-14 of the Postal and Electronic Communications Code.**

#### 4.1.2. Articulation with international law and European Union law

**As this is a measure whose purpose relates to national security, it falls within the competence of the Member States under the Treaty on the Functioning of the European Union. The amendments to Article L. 2321-2-1 of the Defense Code do not call into question the provisions of European Union law.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**Not applicable.**

#### 4.2.2. Business impacts

**The measure concerns data center operators within the scope of operators on which ANSSI could affix technical markers or obtain a copy of their servers.**

**Furthermore, it includes subcontractors of public authorities, operators of vital importance and operators of essential services for whose benefit ANSSI can detect and characterize events likely to affect the security of their information systems.**

**The services provided under Article L. 2321-2-1 of the Defense Code now give rise to compensation (decree of February 18, 2020 issued pursuant to Article R. 2321-1-5 of the Defense Code). of the defense). A modification of this decree for the compensation of the costs related to the copying of the machines will be necessary.**

**Likewise, the costs for a data center operator resulting from the implementation of the detection system will be compensated under the aforementioned decree. These costs amount to less than a thousand euros per year, corresponding essentially to electricity consumption and the space occupied by the device mobilizing technical markers.**

#### 4.2.3. Budgetary impacts

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**Not applicable.**

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### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**Involving all the effector offices of the Agency's Operations Sub-Directorate (i.e. more than 70% of the staff of this sub-directorate), the analysis of raw network captures taken by ANSSI's detection devices as well as the analysis of data from copies of compromised machines requires significant dedicated resources, both for the analysis itself and for the development of automated analysis tools. This must be taken into account in the ANSSI employment plan.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

**This measure should contribute to strengthening the security of information systems in France.**

#### 4.5.2. Impacts on people with disabilities

**Not applicable.**

#### 4.5.3. Impacts on equality between women and men

**Not applicable.**

#### 4.5.4. Impacts on youth

**Not applicable.**

#### 4.5.5. Impacts on regulated professions

**Not applicable.**

### 4.6. IMPACTS ON INDIVIDUALS

**Not applicable.**

### 4.7. ENVIRONMENTAL IMPACTS

**Not applicable.**

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## 5. CONSULTATIONS AND TERMS OF APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**Pursuant to Article L. 36-5 of the CPCE, this provision was presented to ARCEP, which issued its opinion on March 9, 2023[385] .**

### 5.2. TERMS OF APPLICATION

#### 5.2.1 Application over time

**These provisions will enter into force the day after the publication of the law in the *Official Journal* of the French Republic.**

#### 5.2.2 Application in space

**The provisions will apply throughout the territory of the Republic.**

#### 5.2.3 Application texts

**The conditions of application of the proposed system will be defined by decree in Council of State and the terms of compensation for the services will be provided for by decree.**

[385] **Opinion n° 2023-0542 of the Regulatory Authority for Electronic Communications, Posts and Press Distribution dated March 9, 2023 on provisions relating to the security of information systems within the framework of the bill relating to military programming for the years 2024-2030.**

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## B- Make the implementation of detection capabilities mandatory for electronic communications operators (OCE)

### 1. ETAT DES LIEUX

#### 1.1. GENERAL FRAMEWORK

**In terms of cyberdefense and cybersecurity, the legislator initially favored protection rather than detection, by securing sensitive information systems (in particular those of operators of vital importance (OIV)) and by providing State services a capacity to respond to attacks386. However, these legislative measures have proved insufficient to deal with the proliferation of the threat387 and the risks resulting from the exposure of individuals' information systems (cf. examples cited *above* relating to the compromise of servers).**

**Prior to the aforementioned Law No. 2018-607 of July 13, 2018, there was no legislative provision relating to the capabilities of detection and characterization of computer attacks by electronic communications operators (OCE). However, the operators, insofar as they connect users to the global network and see all the flows pass through their networks, occupy a key position to enable the detection of attacks, especially since they often serve as a point support for attackers to target their customers. Article 34 of Law No. 2018-607 therefore sought to strengthen the national capacity to detect computer attacks by involving ECAs more closely. It has thus created a system aimed at better involving the OCEs in cyberdefence, in conjunction with the ANSSI. This system is codified in article L. 33-14 of the CPCE as well as in the second paragraph of article L. 2321-3 of the defense code (CODEF).**

**The objective of these legislative provisions was, for purposes of defense and security of information systems:**

- **on the one hand, to authorize the OCEs to implement, on their networks, systems for detecting computer attacks targeting their subscribers (Article L. 33-14, paragraph 1, of the CPCE). These are technical devices that compare network activity in real time with attack markers (these markers are technical elements specific to certain attackers, such as the IP address of a malicious server or the name of a booby-trapped website). These automatically analyze the traffic without looking at the content, limiting themselves to comparing it to the attack markers. Traffic is not stored;**
- **on the other hand, to set, in terms of detection, the procedures for technical exchanges between these operators and the ANSSI. To enable them to detect sophisticated attacks, ANSSI**

[386] **Article L. 2321-2 of the Defense Code.**

[387] **831 computer attacks were handled by ANSSI in 2022.**

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**provides operators with attack markers. In the event of a computer attack associated with one of these markers, the detection systems deployed by the operators produce a security alert, containing only the technical information related to the attack.**
**The operator then informs ANSSI of this alert and, if the detected attack concerns an OIV, an operator of essential services (OSE)388 or a public authority, the latter may request additional technical information to characterize the attack. and establish appropriate protection and remediation measures .**

**The law has accompanied these new operational means with guarantees. Thus, ARCEP is responsible for ensuring that ANSSI complies with the conditions of application of paragraph 2 of Article L. 2321 3 of CODEF. The powers vested in ARCEP in this context are set out in Article L. 34-16 of the CPCE.**

### 1.2. LEGAL FRAMEWORK

**The Conseil d'Etat rejected an appeal for excess of power directed against the implementing decree for article L. 33-14 of the CPCE. In particular, it ruled that there was no need to refer to the Constitutional Council the priority question of constitutionality raised against this legislative provision. It also dismissed all of the pleas alleging disregard of European Union law directed, by way of exception, against it390. The constitutionality and conventionality of the mechanism provided for in the aforementioned Article L. 33-14 are therefore now well established.**

**In addition, the Constitutional Council had the opportunity to rule on the financial compensation paid by the State to OCEs, in particular in a decision of February 5, 2021, where it considered that "[t]he securing of communication *networks mobile, through the prior authorization of the operation of certain devices, is directly linked to the activities of the operators who use and operate these networks in order to offer electronic communications services to the public. Therefore, by adopting the contested provisions, the legislator did not, in any event, pass on to private persons expenses which, by their nature, would be the responsibility of the State .***

**It emerges from these decisions that compensation by the State for the expenses that electronic communications operators incur to comply with their legal obligations is only mandatory when these expenses are unrelated to their activity.**

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[388] **Within the meaning of Article 5 of Law No. 2018-133 of February 26, 2018 on various provisions for adaptation to European Union law in the field of security, which refers to "operators, public or private, offering services essential to the functioning of society or the economy and whose continuity could be seriously affected by incidents affecting the networks and information systems necessary for the provision of said services". These operators are appointed by the Prime Minister.**

[389] **Paragraphs 2 to 4 of Article L. 33-14 of the CPCE and paragraph 2 of Article L. 2321-3 of the Defense Code.**

[390] **EC, 30 Dec. 2021, *La Quadrature du Net* and others, n° 428028.**

[391] **cons. const., dec. of February 5, 2021, n° 2020-882 QPC.**

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### 1.3. ELEMENTS OF COMPARATIVE LAW

**Several foreign states have implemented cyber defense obligations for electronic communications operators, but not all of them have made the implementation of detection capabilities mandatory, in particular:**

- **In Germany, the Telecommunications Act specifies that telecommunications service providers may use attack detection systems which are defined in the IT Security Act as appropriate technical and organizational measures to protect against external disturbances (disasters or cyberattacks) that may cause significant deterioration or pose a security risk to telecommunications networks and services. The law on information technology security also provides for the obligation for the operators of critical infrastructures, which also include certain telecommunications service providers, to take appropriate organizational and technical precautions (including the use of attack detection). These systems must continuously and automatically record and evaluate the parameters and characteristics of the operations in progress. They must also be able to identify and prevent threats on an ongoing basis and plan appropriate corrective measures.**

- **In the Czech Republic, only the largest electronic communications operators are essential service operators. On the other hand, all electronic communications operators are regulated under the law on cybersecurity. However, this law provides that regulated entities are not obliged to introduce and implement security measures or to report incidents.**
  **However, they are required to take measures to react in the event of a declaration of a cyber emergency. Electronic communications operators are also regulated by a sectoral law which obliges operators to report cyber incidents to the respective competent authorities. With the NIS2 directive, the Czech Republic is planning changes in the supervision architecture of electronic communications operators.**

- **In Singapore, the law on network security does not include specific requirements vis-à-vis electronic communication operators. In contrast, ex ante cybersecurity requirements are imposed on critical infrastructure owners such as cybersecurity audits and risk assessments.**

- **In Italy, the Electronic Communications Code obliges electronic communications operators to adopt security measures, including procedures aimed at detecting incidents which must then be notified to the Government Center for Surveillance, Alert and Response to Attacks computers. In addition, Italian telecommunications operators are also required to deploy specific technical marking defined by the Cybersecurity Agency within their detection tools in specific situations.**

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## 2. NECESSITE DE LEGIFERER ET OBJECTIFS POURSUIVIS

### 2.1. NEED TO LEGISLATE

**The system provided for in Article L. 33-14 of the CPCE has not produced all the expected effects in terms of securing telecommunications networks and detecting cyber threats.**

**On the one hand, it relies entirely on the operators' existing detection capabilities. However, these are very heterogeneous and are generally not sufficient to carry out precise and targeted detection actions on the basis of the markers provided by ANSSI.**

**On the other hand, the operators have not developed their capacities in terms of detection, insofar as the device is not mandatory and its implementation requires investments at their expense. In the absence of a real legal obligation, they do not consider it a priority to make the investments necessary to put in place an adequate detection capacity to make the system work fully.**

**Only legislative intervention is likely to impose binding measures on OCEs that have been designated OVIs to implement systems for exploiting the technical markers provided by ANSSI. In addition, the planned measure modifies the legislative part of the postal and electronic communications code.**

### 2.2. OBJECTIVES PURSUED

**Given the development of the cyber threat, it is essential to rely more on operators. Indeed, a cyberattack always passes through an operator's network, hidden in a massive flow of data. Developing the ability of operators to effectively detect traces of cyberattacks would be a major step forward in the fight against cyberattacks affecting French businesses and administrations.**

**Thus, while it contributes to strengthening the cybersecurity offered by ECAs to their subscribers, the development of their detection capabilities essentially aims to meet the needs of defense and IS security by allowing the exploitation of cybersecurity markers. 'ANSSI.**

## 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

### 3.1. OPTIONS ENVISAGED

**One option considered was to make it mandatory for all operators to implement systems on their networks to detect computer attacks targeting their subscribers. However, it turns out that with regard to the objectives pursued (detection of attacks on large flows), such an obligation would prove disproportionate for ECAs that have not been designated OIV. This option was therefore discarded.**

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### 3.2. SELECTED OPTION

**It is therefore proposed to make the implementation of computer attack detection systems mandatory only for OCEs designated OIV. In fact, the larger the operator, the greater the flows transiting through its network, which makes it possible to maximize the effectiveness of the markers provided by ANSSI.**

**For legal reasons, the proposed provision refers to the operators mentioned in Article L. 1332-1 of the Defense Code, designated by virtue of their activity as operator of an electronic communications network open to the public.**

## 4. ANALYSE DES IMPACTS DES DISPOSITIONS ENVISAGEES

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**The proposed measure involves the modification of article L. 33-14 of the CPCE.**

#### 4.1.2. Articulation with international law and European Union law

**The measure envisaged, in that it modifies Article L. 33-14 of the CPCE, complies with the European framework for electronic communications transposed into the CPCE, which makes the detection of computer attacks a legitimate reason for processing electronic communications.**

**Like the system provided for in Law No. 2018-607 of July 13, 2018 relating to military programming for the years 2019 to 2025 and containing various provisions relating to defence, the implementation of these detection systems, distinct traffic management measures, is justified by the necessary protection of the security and integrity of networks in order to prevent cyberattacks. It will therefore constitute a proportionate measure with regard to the provisions of Regulation 2015/2120 establishing measures relating to open internet access.**

**The Council of State in an appeal for excess of power directed against the implementing decree of Article L. 33-14 of the CPCE dismissed all the pleas based on ignorance of European Union law directed, by way of exception, against it (EC, 30 Dec.**
**2021, La Quadrature du Net and others, no. 428028). The constitutionality and conventionality of the mechanism provided for in the aforementioned Article L. 33-14 are therefore now well established.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

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**If the law required ECAs to develop their detection capabilities, it would be desirable for a European industrial offer to emerge to ensure the implementation of Article L. 33-14, paragraph 2, of the CPCE. Developing the detection capacities of ECAs can make it possible to diversify the technological offer and support the French or European industrial fabric in this area, which would in turn strengthen the competitiveness of French companies and digital sovereignty. Nevertheless, to date, any type of supervision capacity allowing the injection of ANSSI markers must be considered.**

#### 4.2.2. Business impacts

**Existing systems have not allowed the development, even gradual, of OCE detection capabilities. It is important that they make the necessary investments to meet ANSSI's demands.**

**This measure will therefore induce costs which will be offset by means of financial aid in fair remuneration, as are the systems carried out via the one-stop shop of the Commissariat aux Communications Electroniques de Défense (CCED). ANSSI has expressed new budgetary needs to take account of the evolution.**

#### 4.2.3. Budgetary impacts

**The development of ECA detection capabilities will be subject to full financial compensation from the State.**

**This measure could lead to additional administrative burdens in terms of funding assistance, with the integration of a new system within the one-stop shop of the CCED. This option, however, makes it possible to share the administrative burden with other systems and avoids the creation of a redundant window by ANSSI.**

**The financial compensation for such a device was estimated by ANSSI during the deployment of France Relance, which did not, however, make it possible to finance such capacities. In view of the specific needs and the necessary operational exchanges between the operators and the ANSSI, it will have to extend over several years, even if rapid initial investments are possible. The model proposed by ANSSI estimates the approximate cost of the measure at one million euros per year. These budgetary needs were expressed by ANSSI during budgetary work and estimates of financial trajectories for the period 2023-2027.**

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**Not applicable.**

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### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

**Not applicable.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

**This measure should contribute to strengthening the security of information systems in France.**

#### 4.5.2. Impacts on people with disabilities

**Not applicable.**

#### 4.5.3. Impacts on equality between women and men

**Not applicable.**

#### 4.5.4. Impacts on youth

**Not applicable.**

#### 4.5.5. Impacts on regulated professions

**Not applicable.**

### 4.6. IMPACTS ON INDIVIDUALS

**These detection capabilities will better protect all users, not only administrations, OIVs and OSEs, but also individuals.**

## 5. CONSULTATIONS ET MODALITES D'APPLICATION

### 5.1. CONSULTATIONS CONDUCTED

**In accordance with Article L. 36-5 of the Postal and Electronic Communications Code, this provision was presented to ARCEP, which issued its opinion on March 9, 2023[392] .**

[392] **Opinion n° 2023-0542 of the Regulatory Authority for Electronic Communications, Posts and Press Distribution dated March 9, 2023 on provisions relating to the security of information systems within the framework of the bill relating to military programming for the years 2024-2030.**

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## 5.2. TERMS OF APPLICATION

### 5.2.1. Application over time

**These provisions will enter into force the day after the publication of the law in the *Official Journal.* of the French Republic.**

### 5.2.2. Application in space

**This provision shall apply throughout the territory of the Republic.**

**For article L. 33-14 of the CPCE, the overseas application conditions are specified in article L. 33-15 of this code.**

**For Article L. 2321-3 of the Defense Code, the conditions of application in Overseas France are provided for in Article L. 1: *"The Defense Code is automatically applicable to the entire territory of the Republic, unless it provides otherwise* ".**

### 5.2.3. Application texts

**The conditions of application of the proposed system, and in particular the fair remuneration linked to the obligation incumbent on the OCE designated OIV to implement the detection systems, will be defined by decree in Council of State.**

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## C- Extend to data hosts the obligation of communication for the exclusive purpose of alerting users of vulnerable or attacked systems, extend communication to those of technical data from subcontractors of public authorities, OIV and OSE and rationalize the said procedure by removing the swearing in of agents of the national information systems security authority

### 1. STATE OF PLAY

#### 1.1. CONTEXT

**The constantly changing digital world uses innovative technologies or new types of architectures or organizations aimed at rationalizing the management of the mass of digital data and pooling hosting and operating costs or promote dynamic economic models such as subcontracting.**

**The example of *cloud computing* is particularly relevant in this regard. It offers benefits to users in terms of cost savings, flexibility, efficiency, security and adaptability393. Many service offerings are now available on the market, whether for infrastructure hosting (IaaS – *Infrastructure as a Service),* the supply of development platforms (PaaS – *Platform as a Service)* or software in line (SaaS – *Software as a Service).* These offers are offered in** public ***clouds*** **(service shared and pooled between many customers), private *(cloud* dedicated to one customer) or hybrid (combination of public and private models)394 .**

**Having become a legal object395, the *cloud* is above all an economic and commercial reality396 which concerns companies as much as public authorities. Cloud computing is even now at the heart of the State's digital strategy. With the adoption of the *cloud*** doctrine **at the center, the Government has made the *cloud* " *a prerequisite for any new digital project within the State or substantial overhaul of the existing application architecture* "397**

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**393 Data Protection** Code of Conduct for ***Cloud*** **Infrastructure Providers** 9 February 202;

**394 cloud *computing ;* Recommendations for companies considering subscribing to cloud computing services , CNIL;**

**395 "Digital technology, and in particular the *cloud,* testifies to one of these accelerations of history which, according to Dean Savatier, forces the jurist to continuously adapt the right to social reality", Speech by Jean-Marc Sauvé, Vice-President of the Council of State, on October 18, 2018;**

**396 For example, the global** public ***cloud*** market **grew from $196.7 billion to $354.6 billion from 2020 to 2022, Sophy Caulier, "Digital: the *cloud,* a sovereignty issue *", Le Monde,* February 16, 2020; According to the Gartner Group, by 2025, 51% of the budget of French companies will be devoted to *cloud computing*** solutions **rather than traditional computing; if 58% of these companies are turning to the *cloud* for their application software in 2022, this figure would exceed 66%, or two out of three companies, in 2025.**

**397 National Cloud Strategy, Press Kit, May 17, 2021.**

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**Quite logically, cyberattackers are seizing on this new reality. This must therefore be apprehended in its entirety by ANSSI's means of action. The Agency relies on the contribution of operators able to provide it with data allowing it to identify these victims for the purpose of alerting them. Data hosts are key players with unique visibility of their customers. This visibility makes it possible to uncover more victims, but also entire sections of attack infrastructure.**

**Finally, the subcontractors of public authorities, OIVs and OSEs hold data that is just as sensitive as their principals. Cyberattackers immediately identified them as being able to serve as relays for attacks *ultimately* targeting the aforementioned public authorities and operators. They must, therefore, benefit from the same protection as the latter.**

#### 1.2. GENERAL FRAMEWORK

**Law No. 2013-1168 of 18 December 2013 mentioned above398 created a system to ensure the cybersecurity of activities of vital importance. Security measures apply both to operators of vital importance (OIV) or operators of essential services (OSE) and to public or private operators who participate in these systems399 .**

**In particular, this law created Article L. 2321-3 of the Defense Code, which was supplemented by Law No. 2018-607 of July 13, 2018400 , which specifies in which cases the National Security Agency Information Systems (ANSSI) may request information from electronic communications operators (OCE):**

- **the first paragraph provides that, for the purposes of the security of the IS of an OIV, an OSE or a public authority, the ANSSI may ask the OCE for the identity, postal address and the email address of vulnerable, threatened or attacked users or holders of information systems (IS). The goal is to alert them to the vulnerability or attack on their system;**
- **the second paragraph provides that, when ANSSI is informed, pursuant to Article L. 33-14 of the CPCE, of the existence of an event affecting the security of the IS of an OIV, an OSE or a public authority, its authorized and sworn agents can obtain from the OCE the technical data strictly necessary for the analysis of this event, this data can only be used for the sole purpose of characterizing the threat affecting security. of these systems, to the exclusion of any other exploitation.**

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398 Law No. 2013-1168 of 18 December 2013 relating to military programming for the years 2014 to 2019 and containing various provisions concerning defense and national security.

399 Article L. 1332-6-1 of the Defense Code for OIVs and Article 7 of Decree No. 2018-384 of 23 May 2018 for OSEs.

400 Law n° 2018-607 of July 13, 2018 relating to military programming for the years 2019 to 2025 and containing various provisions relating to defence.

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### 1.3. CONSTITUTIONAL FRAMEWORK AND INTERPRETATION OF THE COUNCIL OF STATE

#### 1.3.1. Communication of data by the hosts

**The data mentioned in the first paragraph of Article L. 2321-3 of the Defense Code are those that the hosts already collect, in accordance with Decree No. 2021-1362 of October 20, 2021 relating to the retention of data making it possible to identify any person who has contributed to the creation of online content, taken pursuant to II of article 6 of law n° 2004-575 of June 21, 2004 for confidence in the digital economy (LCEN).**

**This decree repealed decree no. 2011-219 relating to the retention and communication of data enabling the identification of any person who contributed to the creation of content posted online. This repeal had been made necessary by the decision of the Assembly of the Council of State of 21 April 2021[401], which itself drew the consequences, in domestic law, of the decisions of the Court of Justice of the European Union (CJEU) prohibiting the generalized storage of data[402], and more particularly that rendered on its preliminary question, *La Quadrature du Net,* of October 6, 2020. In particular, the Council of State considered that the generalized storage currently imposed on operators by law French is well justified by a threat to national security, as required by the CJEU. In accordance with the requirements of the Court, it required the Government to carry out, under the control of the administrative judge, a periodic re-examination of the existence of such a threat and deemed illegal the obligation of general retention of data (apart from the data not very sensitive: civil status, IP address, accounts and payments) for purposes other than those of national security, in particular the prosecution of criminal offences, which is why Decree No. 2011-219 was repealed and replaced by the Decree of October 20, 2021.**

**In any event, the data collected by ANSSI under the conditions of II *bis* of the modified article L. 34-1 of the postal and electronic communications code are not all the data kept by the hosts, but only the data mentioned in articles 2 and 5 (with regard to article 5, only the source IP addresses and associated port) of decree no. 2021-1362 mentioned above. These data were considered to be the least sensitive since they are kept by the OCEs and the hosts in a generalized and undifferentiated way for a limited period of time defined by the texts. There is therefore no additional infringement of a constitutionally protected right or freedom.**

#### 1.3.2. The swearing in of officers

**The ANSSI agents to whom the OCE communicate the information requested under Article L. 2321-3 of the Defense Code are specially authorized and sworn.**

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[401] ***French data Network et a.,* n° 393099, 394922, 397844, 397851, 424717, 424718.**

[402] **CJEU, 21 Dec. 2016, *Télé2 Sverige AB,* n° C-203/15 and C-698/15; CJEU 2 Oct. 2018, *Ministerio fiscal,* n° C 207/16 and CJUE 6 Oct. 2020, *La Quadrature du Net et a.,* n° C-511/18, C-512/18 and C-520/18.**

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**The swearing-in is a guarantee required by the Constitutional Council only in the case where the agents concerned have the task of researching or prosecuting criminal offences, insofar as the acts they take have the character of findings and can result to penalties403**

**In the same way, the report of the Council of State on the powers of investigation of the administration dating from April 2021 specifies the role of the oath (pages 84 to 86): "[...] the law provides that *the authorized, commissioned or approved agents must be sworn in to be able to investigate and record criminal offences. Taking the oath constitutes the agent's solemn commitment, generally made before the president of the judicial court within the jurisdiction of his assignment, which is a manifestation of the judicial nature of the functions he exercises, to fulfill his functions well and to respect the ethical rules inherent in their exercise. […] This oath is a condition of the regularity of the acts that the agent will then perform. According to very old case law of the Court of Cassation, the minutes drawn up by an unsworn agent are null and void* "404. The Council of State has extended this requirement to administrative checks405**

## 2. NEED FOR LEGISLATION AND PURSUED OBJECTIVES

### 2.1. NEED TO LEGISLATE

**The current provision of Article L. 2321-3 of the Defense Code needs to be improved for organizational, operational and procedural reasons.**

#### 2.1.1. On the organizational level

**ANSSI can currently only use the provisions of Article L. 2321-3 paragraph 2 when dealing directly with public authorities, operators of vital importance or operators of essential services, even when they have entrusted the operation of their systems to a third party. Practice shows that this mechanism should be extended to public or private operators who participate in the information systems of public authorities, OIVs and OSOs.**

**Indeed, these subcontractors, when they work for the benefit of public authorities, OIVs and OSEs, have access to information that is as critical as that handled by their principals. ANSSI then noted that public or private operators who participate as subcontractors in the systems of public authorities, OIV and OSE, represent a preferred gateway for cyber-attackers who target, by rebounds, the information systems of the most critical entities (public authorities, OIV, OSE, etc.).**

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[403] See, for example, decision no. 2020-841 QPC of May 20, 2020, *La Quadrature du Net and others,* relating to agents of the HADOPI for the observation of acts of counterfeiting, points 9 and 10.

[404] The investigative powers of the administration, report of the Council of State of April 2021.

[405] CE, 17 Nov. 2017, n° 400976.

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**These subcontractors are moreover already subject to compliance with the safety rules provided for in Articles L. 1332-6-1 and R. 1332-41-2 of the Defense Code with regard to OIV service providers and by Articles 7 and 17 of Decree No. 2018-384 relating to the security of the networks and information systems of operators of essential services and digital service providers with regard to OSEs.**

#### 2.1.2. Operationally

**ANSSI is faced with two major changes: on the one hand, network design practices are changing rapidly; on the other hand, the use of cloud technologies *is* exponential.**

**These developments change the uses of users and potential victims. Today, OCE customers are no longer the only victims of malicious activity. Now, the services provided by data hosts (server management, virtual machines, etc.) are also the subject of cyberattacks; their customers must be considered as victims, like the subscribers of OCE[406] .**

**In its current wording, Article L. 2321-3 paragraph 1 of the Defense Code refers to the CPCE for its application and therefore limits the applicability of the system to OCEs. To take into account the evolution of practices, it is therefore proposed to extend to data hosts the system provided for OCEs. ANSSI must be able to obtain the same information from data hosts as from OCEs. Thus, it is necessary to include in the system provided for by article L. 2321-3 paragraph 1 the data hosts referred to in 2 of I of article 6 of the LCEN.**

**The connection data kept by data hosts is listed in a specific implementing decree[407]. These are both identification data and payment data. However, ANSSI will only access the data allowing the identification of the victim (article 2 of decree n° 2021-1362) from source IP addresses with associated port (article 5 of decree n° 2021-1362 ). As for the system in place with the OCE, it is a question of pursuing a protection objective, by making it possible to alert the victim.**

**The addition of hosts to the first paragraph of Article L. 2321-3 of the Defense Code requires compensation for the identifiable and specific additional costs of the services they will ensure.**

**Furthermore, to ensure consistency, with regard to the compensation of ECAs, between the system provided for in the first paragraph of Article L. 2321-3 and that provided for in its second paragraph, it should also be provided that the identifiable additional costs and specific services provided by electronic communications operators at the request of ANSSI in application of the second paragraph will be compensated according to the procedures provided for by decree in Council of State.**

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[406] **Overview of the 2022 cyber threat.**

[407] **Decree No. 2021-1362 of October 20, 2021 mentioned above.**

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#### 2.1.3. Procedurally

**The swearing in of agents having access to information from these systems implies an obligation of professional secrecy, non-compliance with which is punishable by the penal code (article R. 2321-5 of the defense code) for these sworn agents. As applied today, this device is not suitable.**

**Swearing in is a guarantee required for agents whose mission is to investigate or prosecute criminal offences, insofar as the acts they take have the character of findings and may lead to sanctions. However, these missions are not those of the ANSSI agents, who use the information collected from the OCEs for the sole purpose of identifying and alerting the victims of computer attacks.**

**Because it presupposes a trip by the agent to the Paris Court of Justice for the taking of the oath, the current system is extremely cumbersome to put in place, given the number of agents likely to manipulate the data to analyze and qualify (analysts in charge of knowledge of the threat, liaison with operators, liaison with victims, tool administrators, etc.), as well as the regular renewal of agents within the ANSSI departments concerned. All of the agents of the SDO effecting offices are likely to belong to this category, i.e., in the current state of the workforce, nearly 200 agents out of a total of 280.**

**In addition, the data received from ECAs is not always sufficient to identify a victim and result in a relevant report. In certain situations, ANSSI analysts must therefore carry out additional research, on online and offline services, to supplement the elements obtained and direct their work (by confirming that the victim is not French, by seeking to better understand the status of the company, etc.). The simple internal transmission to other ANSSI analysts of the data received by the OCEs, even specially authorized and aware of the particular status of this data, exposes the sworn agents, even though this transmission is necessary to qualify the information and ensure quality reporting.**

**Finally, it should be noted that, compared to the general authorization system set up by ANSSI for all of its operational systems, this certification system does not provide any additional guarantee.**

### 2.2. OBJECTIVES PURSUED

**The objective pursued by this measure is to extend the coverage of ANSSI's means of action in order to be able to deepen knowledge of the operating methods of cyberattackers and identify and alert the victims of cyberattacks in an extensive manner, thanks to the extension of the scope of operators able to provide elements of identification of these victims, the extension of the agency's action to subcontractors of public authorities, OIVs and OSEs to deepen that carried out with regard to donors of order and counter the rebound effect of cyberattacks.**

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### 3. POSSIBLE OPTIONS AND SELECTED MECHANISM

- **Regarding the extension of the system to subcontractors of public authorities, OIV and OSE, it is necessary to supplement Article L. 2321-3 paragraph 2 of the Defense Code.**
- **Concerning the extension of the system to data hosts, the addition of the possibility for ANSSI to request the information necessary to identify the victim from this category of actors defined by the LCEN is necessary.**
- **Concerning the change relating to swearing in, one possible option was to remove the criminal penalty at the regulatory level, insofar as ANSSI agents, by virtue of their statutes, are already subject to an obligation of professional secrecy and of professional discretion. These obligations are provided for in the following texts:**
  - **Articles L. 121-6 and L. 121-7 of the general civil service code for any agent audience ;**
  - **Article L. 4121-2 of the defense code for the military.**

  **However, it is necessary to guarantee to ECAs that the secrecy of the information they communicate to ANSSI will be preserved, especially since it concerns personal data.**

  **Another option would have been to swear in all analysts likely to process the data, including the chain of command. However, the swearing in involves a cumbersome organization that is not compatible with the number of agents that can intervene within the operations sub-directorate (SDO) of ANSSI. What's more, the high turnover of SDO's staff would risk altering its capacities and would represent a real constraint.**

  **It is therefore proposed to abolish the sworn statement while maintaining the special authorization for the agents required to handle the data provided by the OCEs. Indeed, the objective pursued by article L. 2321-3 of the CODEF consists in warning users or holders of IS that are vulnerable, threatened or attacked, in order to alert them of the vulnerability or the attack on their system. It is not a matter of researching or prosecuting criminal offences, for which a sworn statement would prove necessary with regard to the case law of the Constitutional Council or the Council of State.**

**The abolition of the oath and the maintenance of the special authorization of ANSSI agents makes it possible to guarantee a higher level of protection of the data communicated by the ECAs to the ANSSI, since this leads to making criminally responsible, no longer the only agents in contact with the ECAs, but indeed the entire data processing chain within ANSSI.**

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## 4. ANALYSIS OF THE IMPACTS OF THE ENVISAGED PROVISIONS

### 4.1. LEGAL IMPACTS

#### 4.1.1. Impacts on the internal legal order

**This provision modifies Article L. 2321-3 of the Defense Code.**

#### 4.1.2. Articulation with international law and European Union law

**The planned amendments to Article L. 2321-3 have no additional effect under international law and European Union law unless the system has been adopted under Law No. 2018-607 of July 13, 2018 relating to military programming for the years 2019 to 2025 and containing various provisions relating to defence.**

### 4.2. ECONOMIC AND FINANCIAL IMPACTS

#### 4.2.1. Macroeconomic impacts

**Not applicable.**

#### 4.2.2. Business impacts

**Data hosts will be subject to new obligations to contribute to cybersecurity and the identification of victims of cyberattacks. As in the context of other arrangements involving hosts and like OCEs in the context of the existing arrangement, they may be compensated for their actions. In addition, user identification data is already kept by hosts for their own billing or as part of pre-existing legal obligations. Thus, no new financial investment is to be expected on their part before being able to respond to ANSSI's requests.**

#### 4.2.3. Budgetary impacts

### 4.3. IMPACTS ON TERRITORIAL COMMUNITIES

**Not applicable.**

### 4.4. IMPACTS ON ADMINISTRATIVE SERVICES

#### 4.4.1. Impacts on ANSSI

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**The proposed changes to the legislative framework aim above all to better meet operational needs. This is an adjustment that will promote, on the one hand, knowledge and monitoring of the attackers' operating methods and, on the other hand, will limit the pressure exerted on the Government Monitoring, Alert and Response Center computer attacks (CERT-FR) in terms of reporting on entities not directly falling within the critical scope of ANSSI.**

#### 4.4.2. Impacts on ARCEP

**ARCEP already has full and permanent access to data collected or obtained pursuant to Articles L. 2321-2-1 and paragraph 2 of L. 2321-3 of the Defense Code, as well as to systems for tracking the data collected. In addition, it can request from ANSSI all the elements necessary for the accomplishment of its mission (article L. 36-14 of the CPCE).**
**Concerning the control of ARCEP on the application of article L. 2321-3 paragraph 2 of the CODEF, ANSSI will provide the list of specially authorized agents allowing it to ensure that only these agents have access to the data communicated. . This measure should have a limited impact on ARCEP's resources.**

### 4.5. SOCIAL IMPACTS

#### 4.5.1. Impacts on society

**This measure will contribute to strengthening the security of information systems in France.**

#### 4.5.2. Impacts on people with disabilities

**Not applicable.**

#### 4.5.3. Impacts on equality between women and men

**Not applicable.**

#### 4.5.4. Impacts on youth

**Not applicable.**

#### 4.5.5. Impacts on regulated professions

**Not applicable.**

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### 4.6. IMPACTS ON INDIVIDUALS

**This measure will make it possible to more effectively identify the victims of computer attacks, and therefore to better fight against computer attacks.**

### 4.7. ENVIRONMENTAL IMPACTS

**Not applicable.**

## 5. TERMS OF APPLICATION AND CONSULTATIONS CONDUCTED

### 5.1. CONSULTATIONS CONDUCTED

**In accordance with Article L. 36-5 of the Postal and Electronic Communications Code, this provision was presented to ARCEP, which issued its opinion on March 9, 2023[408] .**

### 5.2. TERMS OF APPLICATION

#### 5.2.1. Application over time

**These provisions will enter into force the day after the publication of the law in the *Official Journal.* of the French Republic.**

#### 5.2.2. Application in space

**The provisions will apply throughout the territory of the Republic.**

#### 5.2.3. Application texts

**The methods of compensation for the identifiable and specific additional costs of the services provided by the hosts at the request of ANSSI will be defined in a decree in Council of State.**

[408] **Opinion n° 2023-0542 of the Regulatory Authority for Electronic Communications, Posts and Press Distribution dated March 9, 2023 on provisions relating to the security of information systems within the framework of the bill on military programming for the years 2024-2030**