

THE FRENCH ADAPTATION OF THE GDPR



by **PhD Olivia Tambou**

Associate Professor at the Université Paris-Dauphine, PSL Research University, Cr2D

I-INTRODUCTION

On 14 May 2018, the *Assemblée Nationale* adopted the new Personal Data Protection Act¹ (hereinafter NDPA), which adapts the French law to the General Data Protection Regulation (GDPR)². The first legislation adopted in France regarding Personal Data Protection was the Act n°78-17 dating from 6 January 1978³. Despite the appearance of the Internet, the Act n°78-17 had not been modified for 25 years. The first modification⁴ was adopted only on 6 August 2004⁵ in order to transpose Directive 95/46 EC⁶. At this time, Member States were given three years for this implementation. In France, it took almost nine years because it needed a far-reaching reform of the Act n°78-17, which was focused on the public sector. The NDPA is the second most important reform of the Act n°78-17. Nevertheless, at the time of writing, the NDPA has not yet entered into force because sixty senators referred it to the Constitutional Council (hereinafter CC), arguing that it was not conform to French constitutional law. According to Art. 61 §2 of the French Constitution, the CC has one month to deliver its decision. Thus, it is possible that France might need to review some elements of its NDPA. This paper gives a brief presentation of the accelerated adoption of the NPDA in a first part. It presents an overview of the formal French approach to the adaptation of

the GDPR in the second part. The third part gives a first assessment of the NDPA by highlighting that the French Government has used its margin of manoeuvre moderately. In so far, the French Bill respects the rationale of the GDPR reform. The fourth part details some specific illustrations on the most disputed points during the adoption.

II-THE ACCELERATED ADOPTION OF THE NPDA

The Bill was only proposed by the Government on 23 December 2017⁷ after the consultation of the *Conseil d'État*⁸ and the French Data Protection Authority (*Commission Nationale de l'Informatique et des Libertés*, CNIL)⁹. This delay was due to the French presidential and legislative elections, which took place in June 2017. Unlike what happened in Germany, the French government in charge when the GDPR was adopted, decided to let the adoption of the French national adaptation to the future elected political majority. Nevertheless, some former parliamentary works had facilitated the adoption of the NDPA. Firstly, data protection and the forthcoming GDPR was at the core of the adoption of the Digital Republic Law¹⁰. This law introduced in anticipation some news rights for the data subject¹¹, a collective redress in data protection and stronger enforcement power of the CNIL.

1 Loi relative à la protection des données personnelles text is available at <http://www.assemblee-nationale.fr/15/ta/tap0113.pdf>

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1.

3 Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés ; an English but not updated version is available at <https://www.cnil.fr/sites/default/files/typo/document/Act78-17VA.pdf> accessed 1 March 2018.

4 The Act n°78-17 has been modified by 15 laws since its adoption.

5 Act n° 2004-801.

6 Directive 95/46 EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/0031.

7 Projet de loi n° 490 relatif à la protection des données personnelles, adopted on 13 December 2017.

8 Avis du Conseil d'État adopté on 7 December 2017 <http://www.conseil-etat.fr/Decisions-Avis-Publications/Avis/Selection-des-avis-faisant-l-objet-d-une-communication-particuliere/Adaptation-au-droit-de-l-Union-europeenne-de-la-loi-n-78-17-du-6-janvier-1978-relative-a-l-informatique-aux-fichiers-et-aux-libertes> accessed 1 March 2018. In France the Conseil d'Etat is both an administrative Court and an administrative body in charge of giving opinions to the Government including on laws in the legislative procedure.

9 Statement of CNIL, 30 November 2017 (avis de la CNIL Délibération n° 2017-299 du 30 novembre 2017 portant avis sur un projet de loi d'adaptation au droit de l'Union européenne de la loi n°78-17 du janvier 1978) https://www.cnil.fr/sites/default/files/atoms/files/projet_davis_cnil.pdf accessed 1 March 2018.

10 Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique, <https://www.legifrance.gouv.fr/affichLoiPubliee.do?idDoc=JORFDOLE000031589829&type=general&legislature=14>
11 i.e. a right to be forgotten for the minors.

THE FRENCH ADAPTATION OF THE GDPR, by PhD Olivia Tambou

Furthermore, the Assemblée Nationale (first chamber of the French Parliament) adopted in February 2017 a report on the impact of the data protection reform on the French Law¹².

The NDPA was adopted in five months through an accelerated procedure. This was possible because the parliamentary majority gave strong support to the government and the *Assemblée Nationale* overrode the opposition of the *Sénat*.

III-FRENCH FORMAL APPROACH OF THE NATIONAL ADAPTATION OF THE GDPR

France is part of the group of the Member States¹³ which decided to adopt one bill both for the adaptation of the GDPR and the transposition of the Police Directive.¹⁴ Therefore, Part I of the NDPA contains common provisions for the adaptation of the GDPR and the Police Directive. Part II focuses on the use of the margin of manoeuvre. Part III deals with the transposition of the Police Directive.

The implementation of the data protection package will take the form of a significant reshaping of the Data Protection Act of 1978. The solution is to keep this text, which has a symbolic importance¹⁵ for France. The Government intends to proceed into three different stages. The adoption of the NDPA, which will amend the Data Protection Act of 1978 and is now under scrutiny of the CC. After the entry into force of the NDPA, the Government will have a delegation of law-making authority for six months to

rewrite with an ordinance the Data Protection Act of 1978. Simplification, consistency and extensions to overseas territories are the arguments for the use of this legislative technique. The Government specified that the ordinance should lead to a French 'Personal Data Protection Code'. Apparently, the drafting of the ordinance is fairly advanced, but it has not been transmitted to the Parliament or made public. Thus, it is still not clear in what way it will harmonize the domestic legislation on subjects, which are not within the scope of the GDPR and the Police Directive.¹⁶ In addition, the complete French adaptation of the data protection package will need around 13 Governmental decrees.

Two observations can be made about this French approach. Firstly, currently the stakeholders do not have a clear access to the national adaptation of the GDPR in France. This creates legal uncertainty. Secondly, the NDPA respects the formal obligations of drafting without repeating the text of the GDPR. The NDPA is a compact text of 37 articles¹⁷, with 60 cross-references to the GDPR provisions including the part focused on the transposition of the Directive. Thus, the NDPA is currently unreadable. The result of this imposed drafting method by the specific nature of the GDPR has been globally criticized. The French *Conseil d'État* proposed the introduction of hypertext links to the concerned GDPR provisions when the final text will be published in the digital French Official Journal.¹⁸ The senators argue before the CC that this approach is a clear violation of the constitutional objective of accessibility and the comprehensibility of the law¹⁹. The senators listed several inconsistencies between the wording of the 1978 Act in its reformed version by the NDPA and the RGPD. They consider that this clearly "could confuse the legal subject regarding the scope of their rights and obligations". Furthermore, as representative of the regional and local authorities, the senators point out the difficulties for the French Overseas Countries and territories in which the GDPR should not apply. In such territories, the former version of the 1978 Act should apply until the future ordinance.

12 Rapport Assemblée nationale n°4544, sur les incidences des nouvelles normes européennes en matière de protection des données personnelles sur la législation française, A.Yvonne le Dain et P. Gosselin, 22 Février 2017, <http://www.assemblee-nationale.fr/14/rap-info/i4544.asp>

13 This is also the choice of other countries such as Bulgaria, Czech Republic, Greece, Ireland, UK, Slovenia and Slovakia. Other Member States will adopt two laws (one for the GDPR, one for the Police Directive) such as Cyprus, Spain, Denmark, Finland, Hungary, Italia, Lithuania, Luxembourg, Malta, Netherlands and Sweden. See Transposition of the Directive (EU) 2016/680 State of play in the Member States February 2018, <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=12946>

14 Directive EU 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119/89.

15 The Data Protection Act of 1978 has a symbolic significance in French Law, because it deep roots French Data Protection Law in the Freedoms and Liberties of French Citizens. This echoes to the widespread definition of France as the country of the Human Rights and clearly explains why this pioneer and well-known Act is part of the French collective imaginary. This is why the 40th Anniversary of the Act was celebrated with the motto '40 years and always up to date', see <https://www.cnil.fr/fr/janvier-2018-40-ans-et-toujours-dans-lair-du-temps> accessed 1 March 2018.

16 During the debate at the *Assemblée Nationale* it was only stated that the French Government does not intend to align the legal framework of National Security files with the European Reform package. The CNIL should still not be in charge of the control *a posteriori* of those files according to Article 44-IV of the Data Protection Act of 1978. See Rapport de l'Assemblée Nationale n°592, 44.

17 In order to facilitate the future drafting work by the above-mentioned ordinance the Directive Police has been transposed in two articles. The article 30 includes in reality art. 70-1 to 70-27 of the future French code of Data protection. Thus, in praxis the NDPA has 62 provisions.

18 Opinion of the French *Conseil d'Etat* mentioned above in n 9.

19 Those principles are provided by articles 4, 5, 6 and 16 of the French constitution.

THE FRENCH ADAPTATION OF THE GDPR, by PhD Olivia Tambou

IV-RESPECT OF THE RATIONALE OF THE GDPR REFORM

The NDPA respects the rationale of the GDPR reform, by reinforcing the CNIL, by reducing prior formalities for processing of data and by using in moderation its margin of manoeuvre.

A-Strengthening the CNIL

The first articles of the NDPA provide one of the most important reforms regarding the CNIL.

Firstly, the NDPA provides the CNIL with new powers in order to guide the stakeholders towards compliance with the GDPR. The NDPA formalizes the enlargement of the CNIL's powers of elaborating soft law²⁰ such as guidelines, recommendations, standards (*'référentiels'*) for the elaboration of the privacy impact assessment.²¹ The CNIL may prescribe additional technical and organizational measures for the processing of specific sensitive data such as biometric, genetic, health data and processing of personal data relating to criminal convictions and offences.²² Then, the CNIL is provided with a direct power for certification of persons, goods or data systems and processes in order to recognize their compliance with the GDPR or the French Data Protection Law. In addition, the CNIL has the possibility to accredit certification bodies for the same purposes including with additional requirements in comparison to the national accreditation body, which is in France the *Comité Français d'Accréditation* (COFRAC).²³ During the parliamentary discussions the Bill was amended in order to specify that the CNIL should have a specific personalised support mission for SMEs, and for the local and regional authorities.²⁴

Secondly, the investigation powers of the CNIL are increased. The agents of the CNIL will have a broader right to control and investigate in buildings used for the processing of personal data by the data controller or processor. It includes not only professionals' premises but also common spaces such as corridors. Only professional secrecy between a lawyer and his client, the confidentiality of journalists' sources, and under certain conditions medical secrecy can be invoked against such controls.²⁵ Furthermore, the NDPA authorizes CNIL agents to use a covert identity for their

online investigations. In addition, the NPDA provides the framework for European investigations. The agents of other DPAs will be able to participate actively in joint operations with the CNIL agents, and to take part in the audition of data controllers or processors in France. The President of the CNIL will be in charge to clarify for each investigation the powers of the European agents. In any case those agents should not have more investigation powers than the CNIL agents could have. The recognition of a potential active participation of agents of other European Member States aims at promoting the mutual trust with other DPAs, and basis for a mutual recognition. The NPDA also details the interaction between the CNIL and other DPAs when the CNIL will be lead DPA in the one-stop-shop mechanism. However, the implementation of this cooperation will need a decree of the *Conseil d'Etat* adopted after the opinion of the CNIL on procedural guarantees for controllers or processors. When the CNIL is the local authority in the mechanism of consistency, the Chair will be in charge of asking the pertinent structure to answer the lead authority. According to the internal distribution of the competences, the decision could be from the Chair²⁶ or a restricted Committee²⁷.

Thirdly, the sanction powers of the CNIL are adapted. According to the GDPR, administrative fines can go up to €20 million or 4% of annual global turnover. The NDPA gives the CNIL the possibility to join a periodic penalty (with a maximum limit of €100,000 per day) to the administrative fines. However, it will not be possible to impose administrative fines for processing of the State²⁸.

Fourthly, the CNIL obtains the right to refer to the judge in two cases. On the one hand, in a *Schrems* case²⁹ situation, when the CNIL receives a complaint from a data subject about the validity of an adequacy decision.³⁰ On the other hand, the CNIL will have the possibility to present observations before a judge in litigation regarding the GDPR or the NDPA.

Fifthly, the tasks of the CNIL are enlarged. The *Assemblée Nationale* amended the French Bill in order to give to the CNIL the task of awareness-raising activities among consumer mediators and public ombudsmen.³¹ This change takes into account that the mediators are more and more confronted with issues relating to personal data protection in conflicts

20 In the last years the CNIL has already developed the elaboration with the stakeholders several sectorial 'pack de conformité' (Conformity Pack) such as the Conformity Pack on connected cars, on insurances, on social housing, on smart metering.

21 See art 1 of NDPA.

22 In relation to art 10 GDPR.

23 This will need a decree adopted in the *Conseil d'Etat* and after the opinion of the CNIL. The possibility of additional requirements established by a DPA of the accreditation of a certification body is provided by art 43(1) GDPR.

24 See the new art. 110f of the 1978 Act.

25 See art 5 of the NDPA.

26 This is the case for a warning or a formal notice.

27 This is the case for a reminder, an injunction to ensure conformity, the withdrawal of a certification or a BCR, of the suspension of a data transfer to a third country, the imposition of administrative fines.

28 This notion is defined strictly does not comprise the processing of the regional and local authorities contrary to what the senators had wanted.

29 Case C-362/14 *Schrems* (2015) ECLI:EU:C:2015:650.

30 See art 27 of NDPA.

31 See art 11 j) NDPA.

THE FRENCH ADAPTATION OF THE GDPR, by PhD Olivia Tambou

between consumers and professionals or between administrations and users. The CNIL should train and educate these mediators/ombudsmen about the rights of the data subject and the new rules provided by the GDPR or the NDPA. In addition, the CNIL obtains the right to be consulted not only by the Government on a bill, but also by the Parliament on a draft law related to personal data protection or the processing of personal data. The *Assemblée Nationale* enlarged this possibility by providing this right not only to Parliament Committees but also to political groups³². Thus, the parliamentary opposition could require an opinion of the CNIL regarding a bill on personal data protection or on the processing of personal data³³.

Finally, the French Bill improves internal rules of procedure of the CNIL. In order to comply with the independence criteria, members of the CNIL will deliberate without the presence of the agents of the CNIL and the Government Commissioner will not be present in the deliberation. The *Assemblée Nationale* adds the obligation for the CNIL to publish the agenda of the plenary Commission in order to improve the transparency.

During the parliamentary debate, this reinforcement of the CNIL raised the question of its capacity to assume its new role in particular regarding its human and financial resources³⁴. However, the French Government underlined that the means of the CNIL have increased since 2010. The amount of the budget of the CNIL for 2018 is €17.6 million, an increase of €600,000 compared to 2017. The CNIL employed 198 staff in 2017.

Furthermore, the senators raise an interesting point in their request before the CC. They argue that the increase of the power sanctions of the CNIL questions its impartiality and independence. They almost require an organic separation between the regulatory function

and the repressive function of the CNIL. They underline that this kind of separation has been provided for other French independent administrative authorities such as the Commission for Energy Regulation (Commission de la Régulation de l'énergie) or the financial markets authority (Autorité des Marchés Financiers).

B-Moderate Uses of Margin of Manoeuvre

The European data protection reform leads to a deep transformation of national data protection laws, which will be now mainly competent for specific situations. This causes fragmentation between national and European provisions, between a general and sectorial legal framework regarding certain types of data (sensitive data, health data, personal data relating to criminal convictions and offences) or certain activities in a sector (police, justice, marketing, employment, etc.) or certain categories of controllers (public authorities) and/or certain purposes of processing (journalistic purposes, archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, etc.). These specific situations will not be analysed here³⁵. This paragraph will rather present some specific illustrations of the French uses of the margin of manoeuvre.

a) The Limitation of the Prior Formalities

Only processing on genetic and biometric data of the State acting in the exercise of its public powers will need a prior authorization³⁶. This is the counterpart of the principle of accountability of the controller and processor introduced in the GDPR.

b) Provision on the Law Applicable in Cross-Border Cases

France added a provision regarding the law applicable in cross-border cases in the exercise of the national margin of manoeuvre³⁷. This provision aims at resolving potential horizontal conflicts between national laws regarding the implementation of opening clauses. The NDPA uses the residence criteria in order to protect the fundamental rights of the data subject. The NDPA provides an exception for processing carried out for journalistic purposes. In this situation, the establishment criterion will apply. This provision could produce a conflict with Member states, which will use an alternative criterion. This also creates a complex fragmentation of the territorial scope of the data protection rules.

c) A Derogation for the Communication of Personal Data Breach

The NDPA uses in moderation the possibilities of

³⁵ The NDPA also introduces a special legal framework for health data that will be presented by Vlad Titerlea in future post.

³⁶ Art. 11 NDPA.

³⁷ Art. 10 NDPA.

³² According to the French law, a political group is formed with a minimum of 15 Parliament Members.

³³ The modalities of the new consultation had been discussed between the two assemblies. The senators would have liked a more effective right to consultation including simply provision related to Data protection Law such as an amendment presented during the discussion. The insufficient clarification of this right to consultation is also one of the arguments of the request before the CC. The senators argued that it would be up to the legislator to define when the request of consultation should be introduced and the deadline for the response of the CNIL, as it is the case for the consultation of the CNIL by the government.

³⁴ A recent study pointed out important national differences regarding the DPA Budget and staff in the world. According to this study the DPAs located in North America have the highest budget and most staff. However this study does not take really into account the specificities of the European Member States of the EU and give a partial overview of this matter. See Müge Fazlioglu, How DPA Budget and Staffing Levels Mirror National Differences in GDP and Population available at <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/01/DPA-Budget-and-Staffing-White-paper.pdf> accessed 1 March 2018.

THE FRENCH ADAPTATION OF THE GDPR, by PhD Olivia Tambou

restrictions of data subject rights laid down in Article 23 GDPR. Article 24 NDPA provides a legal basis for no communication of data breaches to the data subject. However, this could occur only when the processing is covered by a legal obligation, and when it is necessary for the exercise of a mission of public interest and if there is a risk for national security, national defence or public security. In addition, a decree should provide a list of processing to which this strict derogation could apply.

IV-MOST DISPUTED TOPICS REGARDING THE ADOPTION OF THE NDPA

This section of the report presents a selection of five topics, which have been at the core of the discussion.

1. The Uses of the Openings Clauses in the Context of the Algorithmic Decisions

The provision on automated individual decisions, which adapts Article 22 GDPR, has been at the core of the French debate. Each paragraph of this art. 21 NDPA have been strongly discussed between the government and the assemblies. The only exception is the prohibition of automated decision-making of judicial decisions consisting of the use of personal data to evaluate certain personal aspects relating to a natural person and which produces legal effect on the data subject or similarly affects him. This prohibition was already laid down by art. 10 of the 1978 Act.

The wording of Art. 21 opts for a prohibition approach³⁸ of the decisions based solely on automated processing. Such decisions are prohibited as a principle without requiring a specific action of the data subject. Nevertheless, the rationale of this provision is to secure the development of the practical need of algorithmic decisions by adding measures to safeguard data subject's rights. Therefore, Art. 21 sets up a general legal framework for the processing of individual decisions solely based on automated processing in relation to Art. 22 (2) GDPR and its opening clauses. Furthermore, art. 21 provides a specific legal basis for a systematic use of administrative individual decisions solely based on automated processing.

a) General Legal Framework for the Implementation of the Individual Decisions Solely Based on Automated Processing

The NDPA introduces two kinds of guarantees in order to give to the data subject a comprehensive overview of the implementation of individual decisions solely based on automated processing.

³⁸ The wording does not refer to the right not to be subject to a decision based solely on automated processing including profiling. Nevertheless this prohibition approach had been clearly endorsed by the G29 and now European Data Protection Board see WP251 Rev. 01, *Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679*, Adopted on 3 October 2017 as Last Revised and Adopted on 6 February 2018, p. 19.

Generalization of the right to obtain a human intervention

The Bill did not refer to the right to have a form of human intervention on the part of the controller so that the data subject could express his point of view or contest the decision. The Government seemed to consider that this obligation concerned only the contractual or explicit consent derogations according to Article 22 (2) a) and c), but not the situation of the legal derogations of Article 22 (2) b). It is true that Article 22 (2) b) only refers to the need to lay down 'suitable measures to safeguard the data subject's right and freedoms and legitimate interests'. However, this interpretation was questionable. One could argue that the right to obtain a human intervention should be at least one of these suitable measures. Therefore, the final version of Art. 21 NDPA required explicitly the same guarantees for all individual decisions solely based on automated processing which produces legal effect on the data subject or similarly affects him.

Introduction of a Real Right to Explanation

There has been some debate on whether Art. 22 GDPR includes a "right to explanation" of the decisions solely on automated processing including profiling³⁹. This right to explanation should go further than "the right to meaningful information about the logic involved", provided by Art. 13 and 14 GDPR. Those provisions contain only a right to an ex-ante explanation of the functionality of the machine decision in abstract. A real right to explanation should grant ex-post information on how including why a specific individual automated decision has been made. The main argument to reject the creation of such right to explanation is based on the evolution of the wording of Art. 22 (3) during the negotiation. The explicit introduction of a right to explanation by the European Parliament⁴⁰ has been deleted in the final version. Thus, recital 71 contains the unique reference to a right to explanation⁴¹.

³⁹ See eg Bryce Goodman and Seth Flaxman, 'EU Regulations on Algorithmic Decision-Making and a "right to Explanation"' [2016] arXiv:1606.08813 [cs, stat] <<http://arxiv.org/abs/1606.08813>> accessed 24 August 2017; Wachter S, Mittelstad B, Floridi L (2017) Why a right to explanation of automated decision-making does not exist in the General Data Protection Regulation. *International Data Privacy Law* 7, n°2, p. 76.

⁴⁰ See European Parliament Art. 20 5) adopted on the 12 March 2004 on its first reading : *Profiling which leads to measures producing legal effects concerning the data subject or does similarly significantly affect the interests, rights or freedoms of the concerned data subject shall not be based solely or predominantly on automated processing and shall include human assessment, including an explanation of the decision reached after such an assessment*. The suitable measures to safeguard the data subject's legitimate interests referred to in paragraph 2 shall include the right to obtain human assessment and **an explanation of the decision reached after such assessment**. [Bold added]

⁴¹ "In any case, such processing should be subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his

THE FRENCH ADAPTATION OF THE GDPR, by PhD Olivia Tambou

Nevertheless, recitals, although not legally binding⁴², are important in European Law⁴³.

Art. 11 NPDA clearly set an ex-post right to explanation. The rules regarding the processing and the main features of its implementation should be communicated by the controller to the data subject. This includes the possibility to have access to the source code of the algorithm in order to assess it. However, the communication needs a request from the data subject. This is why it is important that the data subject have correct prior information of the existence of the automated processing decision. Furthermore, the controller can refuse the communication when it interferes with secrecy covered by law.

Nevertheless all these guarantees, this right to explanation raises the issue on how the data controller and processor will implement it and whether it will be effective for the data subject.

b) A Legal Basis for a Systematic Use of Administrative Individual Decisions Solely Based on Automated Processing

Art. 21 NDPA provides a legal basis for a systematic use of administrative individual decisions solely based on automated processing. The purpose is to create a legal framework in coherence with the practical need of administrative algorithmic decisions in order to improve its efficiency. The final version provides following guarantees.

Firstly, Art. 21 NDPA lays down such administrative individual decisions solely based on automated processing are excluded in various situations. The use of automated decisions for the processing of sensitive data is excluded. This should not concern the administrative complaints ("recours gracieux")⁴⁴.

Secondly, it recalls transparency rules introduced by the Digital Law Republic from 2016⁴⁵. The administrative algorithmic decisions need to have an explicit reference to its automated-processing decision nature. The lack

of this explicit reference is a cause for annulment of the administrative decision.

Thirdly, controllers have an obligation to control the algorithm and its development. This obligation aims at allowing the data controller to explain in detail and in an intelligible manner the implementation of the processing to the data subject.

The will of the French legislator is to design a model of transparency of the algorithmic decisions in coherence with its political commitment to an Open government⁴⁶. One year later, the implementation of the guarantees introduced by the Digital Republic Law seems to still be problematic. It requires a huge change in both the French administrative culture and resources.

The implementation of a platform for the inscription at the University by the Minister Ministry of Higher Education has been at the core of the debate on administrative algorithmic decisions. The first platform called *APB* was invalidated by the CNIL⁴⁷ because it did not conform to the prohibition of administrative individual decisions solely based on automated processing. The algorithm made decisions on the degree that the students had to follow without human intervention. The new platform called *Parcoursup*, improves the former one by offering two kinds of possibilities of human intervention. It only collects the data and the wishes of the future students. Nevertheless, the universities have to list the candidates they accept taking into account the prerequisite needed for performing the degree and logistic considerations⁴⁸. In other words, the Ministry tasks the University with a new mission of management of the "selection" of the candidates⁴⁹ who can register in their universities after the baccalaureate. *Parcoursup* was authorized by a ministerial ruling⁵⁰ after a positive opinion delivered by the CNIL during the parliamentary debate of the NDPA⁵¹. The government made public the code new algorithm afterwards in May⁵². 900 000 aspiring students used *Parcoursup*. 7 millions of wishes needed to be processed. In order to face this new mission,

or her point of view, **to obtain an explanation of the decision reached after such assessment [Bold added]** and to challenge the decision."

42 see, e.g., ECJ Case C-308/97, 25 November 1998, *Giuseppe Manfredi v. Regione Puglia*, para. 29–30, ECLI:EU:C:1998:566; ECJ Case C-162/97, 19 November 1998, *Criminal Proceedings against Nilsson, Hagelgren & Arrborn*, para. 54, ECLI:EU:C:1998:554.

43 K. Tadas and J. Vaisciukaite, *The Law of Recitals in the European Community Legislation*, ISLA Journal of International & Comparative Law, Vol. 15, 2008, Available at SSRN : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159604, accessed 24 August 2017

44 In French administrative law « recours gracieux » are petitions against an administrative decision that the data subject can bring before the same administrative authority which takes the decision, and then appeal to the hierarchical authority.

45 Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique.

46 See <https://www.etalab.gouv.fr/gouvernement-ouvert>.

47 Décision n°2017-053 du 30 août 2017, mettant en demeure le ministère de l'Enseignement supérieur de la Recherche et de l'Innovation.

48 In particular their capacities.

49 This became one reason for a strike movement in universities which blockage in exam periods. See for instance https://www.huffingtonpost.fr/2018/04/13/greve-des-universites-mais-que-rec-lament-les-etudiants_a_23410458/

50 Arrêté du 19 janvier 2018 autorisant la mise en œuvre d'un traitement automatisé de données à caractère personnel dénommé *Parcoursup*.

51 Décision n°2018-119 du 22 mars 2018 portant avis sur le projet d'arrêté autorisant la mise en œuvre d'un traitement de données à caractère personnel dénommé *Parcoursup*.

52 See <http://ingenuingenieur.blog.lemonde.fr/2018/05/29/parcoursup-2018-les-dessous-de-lalgorithme-racontes-par-ses-createurs/>

THE FRENCH ADAPTATION OF THE GDPR, by PhD Olivia Tambou

Universities developed local algorithms. This has raised the issue of whether these algorithms also need to be made public. The new law regarding the orientation and success of the students adopted in March 2018 gave some margin of manoeuvre of the universities. Art. L-612-3 of the code of Education provides that the rules of transparency of the algorithms are satisfied when “*the candidates are informed of the possibility to obtain the communication of the information regarding the criterion and the modalities of their applications and the pedagogical grounds of the final decision*”. This provision has been seen by the senators as an exception of transparency principles of the Digital Law Republic. The senators challenged its compatibility with the principle of accessibility and intelligibility of the law. It is also not very clear whether it is conform to the GDPR. The only guarantee introduced is that an ethic and scientific committee should annually inform the Parliament on the implementation of *Parcoursup*. This committee can make proposals in order to improve the transparency of the system.

In conclusion, it is most likely that the pressure on the administration to comply with those obligations of information and explanation of the administrative algorithmic decisions will be reinforced within the application of the GDPR.

2. The Impact of the GDPR on Specific Situations

a) The Need to Consider the Protection of the Child

Age of Consent for Children in Relation to Information Society Services: As in other countries, the determination of the age of consent for the child in relation to information society services was strongly discussed in France. The French Bill provided no specification on this matter. The French Government and the Senat wanted to apply the limit of 16 years old as laid down in Article 8(1) GDPR. The *Assemblée Nationale* proposed to reduce the threshold to 15 years old, which is the final solution adopted.⁵³ The change has been founded on the need to align the age limit with the sexual majority and the age of the validity of the minor's consent regarding health data. Nevertheless the final version of Art. 20 NDPA also provides that when the minor is less than 15 years old, both the parental authorities and the child should give consent. This double consent seems to go beyond the conditions of the Art. 8 GDPR, as the senators argue in their request before the CC.

⁵³ In the debate, the European Affairs Committee proposed to lower the age threshold to 13 years old, in order to converge with other Member States choices and curiously to avoid technical difficulties for the controller to assess the real age of the minor. See Avis n° 577, 20-21. For a recent report of the age of consent chosen across the EU Member States, see Ingrida Milkaite and Eva Lievens, ‘Updated mapping of the age of consent in GDPR’ (8 February 2018) <https://www.betterinternetforkids.eu/web/portal/practice/awareness/detail?articleId=2733703> accessed 1 March 2018.

Some additional guarantees try to take into account the reality of the digital uses by minors. The controllers have an obligation to inform the data subjects aged less than 15 years old in a ‘clear and easily accessible language’ when they collect their data.⁵⁴

Register of the processing of the public schools: Art. 22 introduces a new obligation for public schools to make at the disposal of the public the register of their processing.

The promotion of code of conduct: Art. 1 NDPA provides that the CNIL should encourage the elaboration of code of conduct regarding the obligations of the controller for protecting the children.

b) The Local and Regional Entities Concerns

The *Sénat* did not succeed in introducing in the NDPA some financial compensation in order to support the economic impact of the implementation of the GDPR on the regional and local entities. Furthermore, the NDPA authorizes administrative sanctions against regional and local entities, where such sanctions are excluded for processing of the State.

Nevertheless, the *Sénat* obtained small compensations. 31 NDPA foresees the possibility of these entities to conclude between themselves an agreement to provide services regarding processing of personal data. The regional and local entities are also allowed to create a unified department in order to assume in common the charges and the obligations related to personal data processing.

3. The “Qwant” Amendment

Art. 28 NDPA, aims at giving more control of the data subject on the choice of the application he can use on terminals such as a smartphone, a laptop, a digital tablet, etc. It fights against the generalization of the pre-installation of applications without alternative services, which could be more privacy friendly. It clarifies that the consent is not freely, informed and specific consent when the choice of the final consumer is limited by imposing settings of applications without legitimate interest, technical or security reasons. This amendment is often described as a way to impose the French search engine, Qwant, which presents itself as an alternative to Google with more data protection priorities. It goes further beyond. It could have a strong impact on the developers, the operators, who should introduce options for all kinds of applications. This occurs some practical difficulties, and maybe some irritations of the consumer who could at the end have to endorse the cost of business model transformation of the applications ⁵⁵.

⁵⁴ See art 14 bis nouveau of the proposal adopted by the *Assemblée Nationale*.

⁵⁵ See for instance Benoit Felten, Données personnelles ne fragilisons pas l'écosystème mobile, *Les Échos* 11 May 2018, <https://>

4. The Introduction of a Collective Action for Damage

The *Assemblée Nationale* introduced the possibility of a collective action for damage⁵⁶, where the Government did not use its margin of manoeuvre laid down by Article 80 GDPR. The purpose of this collective action is to receive compensation for material and non-material damages. This change was expected. The '*action de groupe*' has been introduced in French Law first in 2014⁵⁷ for consumer litigation. It is only recently, in 2016, that the scope of the collective actions has been extended to various sectors including personal data protection.⁵⁸ However, the scope of this collective action was limited to the cessation of the violation. The status quo was proposed by the Government and the *Sénat*. The *Assemblée Nationale* motivated the enlargement of the collective action to receive compensation for three reasons. Firstly, the collective action in data protection was the only one under French law to be limited to the cessation of the violation. Secondly, the enlargement should improve the effectiveness of the collective action in France. Thirdly, this change aims at aligning the rights given by the GDPR to the data subjects. It had been argued that some Member States have already such collective action for damages. The individual procedure of compensation for damages will apply.⁵⁹ It would be up to the individual, after the decision of the judge on the liability, to ask the data controller for damages. The Art. 25 NDPA clarifies that this collective action can only apply to damages having occurred after May 25, 2018.

The actions introduced by the Quadrature du Net on Monday 28 May⁶⁰ are based on the possibility according to 77 GDPR to introduce a complaint against a data controller before the CNIL⁶¹.

5. The processing of personal data relating to criminal convictions and offences

France used the opening clauses including Art. 10 GDPR. The NDPA provides two set of rules regarding that processing.

Firstly, art. 13 NDPA provides a legal basis in order to enlarge the processing of personal data relating to

criminal convictions and offences or related security measures based on art. 6 (1) GDPR beyond public authorities. Art. 13 NDPA opens two possibilities of such processing for private entities. It could be a legal person in cooperation with the Justice system. In such situation two guarantees have been introduced. This private legal person should be listed under a future decree which needs to be adopted in the *Conseil d'Etat* after the publicity of the opinion of the CNIL. Furthermore, the processing should be restricted to the necessity of the mission of this legal person. Art. 13 NDPA adds the possibilities to the legal and natural person to make such processing in order to exercise a judicial action. This is limited to processing realised by the victims or his representatives. A cumulative condition has been added. The purpose of the processing should be the enforcement of a judicial decision. The data retention is strictly limited to these purposes. No transmission to third parties is allowed except if those same conditions are fulfilled.

The senators argued before the CC that this is an excessive enlargement to private entities of the criminal processing which is not conform to the French constitutional identity and that more guarantees need to be put in the law itself. They consider in particular that those processing should be authorized by the CNIL as a prior formality.

Secondly, a special provision for the Legal tech has been introduced. It only recalls that the reuse of public judgements is allowed if the re-identification of the person is not possible.

V-CONCLUSION

In conclusion, the NPDA is based on a balanced approach, which tries to compensate for the limitations of data subject rights by introducing guarantees. The reinforcement of the CNIL respects the rationale of the law enforcement focus of the European data protection reform. Nevertheless, this could lead to an organic separation between its regulatory and repressive function as the senator request before the CC. The opening clauses are mostly used for the benefit of the public authorities as the authorization for a systematic use of administrative individual decisions solely based on automated processing illustrates. The added value of the *Assemblée Nationale*'s amendment decision is the introduction of a collective action for damage, which could benefit to the data subject. The NDPA also tries to launch a pragmatic, realistic approach of the European data protection reform. This is why the *Assemblée Nationale* introduced provisions in order to take into account the SMEs and lowered the threshold for the child's consent to 15 years old. Nevertheless, there are still a lot of legal uncertainties. Firstly, we need to wait for the decisions of the CC, which has been seized by senators in order to assess the constitutionality of the NDPA. It is most likely that

www.lesechos.fr/idees-debats/cercle/0301665742032-donnees-personnelles-ne-fragilisons-pas-lecosysteme-mobile-2175257.php

56 See art 16 A nouveau of the proposal adopted by the Assemblée Nationale.

57 Loi n° 2014-344 du 17 mars 2014 relative à la consommation

58 Title V of the law n° 2016-1547 of November 18th, 2016 of modernization of justice of the 21st century (loi de modernisation de la justice du XXIe siècle).

59 See ch X of title VII of Book VII of the Administrative Justice Code (code de justice administrative) and ch I of title V of the law n° 2016-1547 of 18 November 2016 on modernisation of justice of the 21st century (loi de modernisation de la justice du XXIe siècle).

60 See dépôts de plaintes collectives contre les GAFAM, La Quadrature du Net, https://www.laquadrature.net/fr/depot_plainte_gafam

61 See art. 26 NDPA.

THE FRENCH ADAPTATION OF THE GDPR, by *PhD Olivia Tambou*

some provisions will be declared not conform to the French constitution. A modification of the current wording of the NDPA could be needed. Secondly, the complete impact on the European data protection reform on French data protection law should be known only after the adoption of the ordinance that will rewrite the Data Protection Act of 1978 and the implementing decrees.