

CHAPELLE AVOCAT

Newsletter

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If you have any questions concerning this newsletter, please reach out the firm at cabinet@chappelleavocat.com or by phone 0033 (0)6.99.66.48.50

COLLECTION AND USE OF DATA FROM SOCIAL MEDIA NETWORKS BY THE TAX AND CUSTOMS ADMINISTRATION

On October 30th, 2019, the Law Commission discussed Article 57 of the draft Finance Bill for 2020 proposed by the government, which provides for the experimental collection and use of the freely accessible content published on the Internet by users of platform operators for a trial period of 3 years by means of computerized and automated processing. The aim is to identify people whose lifestyles, as evidenced by their postings on social media, are incongruous with their declared incomes.

Article 57 reads as follows

"(1) I. On an experimental basis and for a period of three years, for the purpose of investigating the offences referred to in Articles 1728(b) and (c) of 1, 179, 1791, 1791b, 3, 8 and 10 of Article 1810 of the General Tax Code, as well as Articles 411, 412, 414, 414-2 and 415 of the Customs Code, the tax administration and the customs and indirect taxes administration may, each as far as it is concerned, collect and use by means of computerised and automated processing not using any facial recognition system the content, freely accessible, published on the Internet by users of the online platform operators mentioned in Article L, paragraph 2(2)(I). 111-7 of the Consumer Code.

(2) The processing operations referred to in the first subparagraph shall be carried out by officials specially authorised for that purpose by the tax and customs authorities.

(3) Where the data collected are likely to contribute to the detection of the infringements referred to in the first subparagraph, they shall be kept for a maximum period of one year to

from their collection and are destroyed at the end of this period. However, when used in criminal, tax or customs proceedings, such data may be kept until the end of the procedure.

(4) Other data shall be destroyed within a maximum period of 30 days from the date of collection.

(5) The right of access to the information collected shall be exercised through the service for the assignment of agents authorised to carry out the processing operations referred to in the second paragraph under the conditions laid down in Article 42 of Law No 78-17 of 6 January 1978 on data processing, files and freedoms.

(6) The right of objection provided for in Article 38 of the same Law shall not apply to the processing operations referred to in the second paragraph.

(7) The conditions for the application of this I shall be determined by decree of the Council of State.

(8) II. The experiment provided for in I shall be the subject of an evaluation, the results of which shall be forwarded to Parliament and to the National Commission for Data Protection and Liberties (CNIL) no later than six months before its completion."

THE IMPLEMENTATION OF A MASS DATAMINING POLICY TO FIGHT TAX FRAUD

This new tool is part of a datamining policy already in place within the tax and customs administration. Until now, the collection and use of data has been limited to data reported to the administration or published by institutional actors. The Bill would thus considerably expand the data that these administrations could collect by allowing them to collect and use data made public by users of social networks and electronic networking platforms.

Through this new tool, the government aims in particular at detecting economic activities on the Internet that are not declared to the tax or customs administration.

However, this tool raises many questions about respect for public freedoms and the prospects of intrusion into people's private lives.

Thus, the system will be deployed in two phases. A first so-called learning phase will allow a self-learning algorithm to determine indicators to target the offences covered by the scheme on the basis of an anonymised database. A second phase will enable the tax administration to collect data on all sites referred to in Article L. 111-7 I 2) of the Consumer Code. This includes sites such as Facebook, Twitter, Youtube, LeBonCoin, eBay, Airbnb, Instagram and more broadly all Amazon-type marketplace sites.

LACK OF STRONG GUARANTEES AND RIGOROUS EVALUATION

The government says it has safeguards in place to limit the invasion of privacy. The collection and use of this data would be on an experimental basis over 3 years and would only concern the most serious breaches. The information collected will be destroyed within 30 days if it is not likely to contribute to the detection of the offences sought and for a maximum of one year if it does not give rise to the opening of criminal, tax or customs proceedings. Only authorised officials of the administrations concerned may carry out the processing operations envisaged and the right of access to the information collected may be exercised with the department to which these officials

are assigned. The government has also provided that the experimental system will be supervised by a decree of the *Conseil d'Etat*, submitted for the opinion of the CNIL and that a report will be submitted to Parliament and the CNIL 6 months before the end of this experiment.

The CNIL issued an opinion on September 12th, 2019 on the mechanism envisaged by Bercy (Deliberation No. 2019-114). The CNIL pointed out that this is a new system that reflects a change of scale in the use of personal data by the administration. It also reflects a change in technical means by allowing the development of algorithms to improve the targeting of tax audits.

While the CNIL recalls the legitimacy of the objectives pursued and notes that the project includes certain guarantees, it is concerned about the "very particular" issues of such a system concerning freedoms in view of its impact on privacy and its possible effects on freedom of expression online.

The CNIL has thus formulated a number of reservations aimed at preserving a balance between the objective of combating tax fraud and respect for rights and freedoms.

INCREASED VIGILANCE IN THE EVENT OF TAX AUDITS AND CRIMINAL PROCEEDINGS

This experimental scheme reflects Bercy's determination to fight tax fraud effectively at the risk of jeopardizing a number of public freedoms. The balance will be difficult to find as the guarantees provided by the government are meagre compared to the risks of such a system.

In the event of a tax audit and criminal proceedings based on the collection and use of data from social networks, it will be necessary to check whether these data have been made public by the person audited by the tax authorities and whether the processing of these data by the tax or customs authorities has complied with the regulatory and legal provisions.