Deliberation 2019-141 of December 5, 2019National Commission for Computing and LibertiesNature of the deliberation: OpinionLegal status: In force Date of publication on Légifrance: Saturday August 01, 2020Deliberation n° 2019-141 of December 5, 2019 providing an opinion on a draft Order of the Ministry of Solidarity and Health approving the "National Health Identifier" reference system (request for opinion no. 19019164) The National Commission for Computing and Liberties, Seizure by the Ministry of Solidarity and Health a request for an opinion on a draft decree approving the national health identifier reference system; Having regard to Convention No. 108 of the Council of Europe for the protection of individuals with regard to automatic processing of personal data personal; Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC; Having regard to the Public Health Code, in particular its Articles L. 1111-8-1 and R. 1111-8-1 et s. ;Having regard to law n° 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms, in particular its article 8-I-2°-e);Having regard to decree n° 2017-412 of March 27 2017 relating to the use of the registration number in the national identification directory of natural persons as a national health identifier; Considering decree n ° 2019-536 of May 29, 2019 taken for the application of law n ° 78- 17 of January 6, 1978 relating to data processing, files and freedoms; Having regard to decree n ° 2019-1036 of October 8, 2019 modifying decree n ° 2017-412 of March 27, 2017 relating to the use of the number of registration in the national directory for the identification of natural persons as a national health identifier and articles R. 1111-8-1 to R. 1111-8-7 of the public health code; Having regard to deliberation no. 2014-343 of 18 September 2014 providing an opinion on a bill relating to health; Having regard to deliberation no. 2017-014 of January 19, 2017 providing an opinion on a draft decree relating to the use of the registration number in the national identification directory of natural persons as a health identifier; Having regard to deliberation no. 2019-102 of July 18, 2019 issuing an opinion on a draft decree amending decree no. March 27, 2017 relating to the use of the registration number in the national identification directory of natural persons as a national health identifier and Articles R. 1111-8-1 to R. 1111-8-7 of the Health Code public; Considering the file and its supplements; Having heard Mrs. Valérie PEUGEOT, commissioner, in her report and Mrs. Nacima BELKACEM, government commissioner, in her observations, Issues the following opinion: Law n° 2016-41 of 26 January 2016 modernization of our health system enshrined the principle of using the registration number in the national identification directory of natural persons (NIR) as a national health identifier (INS) in order to facilitate, without risk of error and in the interest of patients, exchanges and sharing of health information between the multiple actors in the health and

medico-social sphere. The interoperability of the processing of administrative data and health data, which results from the application of this principle, must make it possible to coordinate the care provided to patients in an effective manner. ° 2019-1036 of October 8, 2019 mentioned above, codified in Articles R. 1111-8-1 et s. of the Public Health Code (CSP), have regulated the use of the INS by subjecting it in particular to compliance with the following fundamental guarantees: the INS is used to reference the health data and administrative data of any person benefiting or called upon to benefit from a diagnostic, therapeutic, prevention, pain relief, disability compensation or loss of autonomy act or interventions necessary for the coordination of several of these acts and for exclusively health or medico-social; the actors directly concerned by the obligation of referencing are the professionals, establishments, services or organizations mentioned in article L. 1110-4 of the CSP and the professionals constituting a care team and intervening in the health or medico-social care of the user; for people awaiting allocation of an NIR and until the allocation of the NIR, the INS is the identifying number of the tent (NIA); any other identifier can only be used if it is impossible to access the INS; access to the INS and its verification are carried out by teleservices (one of research and the other for verification), hereinafter referred to as INSi teleservices and implemented by the National Health Insurance Fund (CNAM). The draft decree approving the national health identifier reference system, submitted for examination by the Commission, is intended to make the reference system it contains enforceable. It determines, from the point of view of the security of personal data, the conditions of use of the INS. It also presents the overall architecture of the system necessary for the use of the INS. Given the challenges of data referencing by the INS, the ministry has undertaken to support, during the year 2020, the actors concerned and their relays (federations, orders, etc.), institutions (regional health agencies, High Authority for Health, etc.) as well as publishers of software solutions, to update the texts (in particular circulars, instructions, etc.) as well as to produce various guides and documents. Workshops for publishers of software solutions and players concerned by referencing were organized in 2019. That being said, the Commission considers that the use of the INS requires high-level legal and technical security, and adapted to its system. particular. It considers that the specificities of the NIR, in particular its significant character, easy to reconstruct from civil status elements, justifies that the use of this identifier be strictly framed by the regulations on the protection of personal data and confined to the purposes for which its use is permitted. Indeed, because it makes it easier to reconcile files and it facilitates the search and sorting of information in files, the NIR remains associated with the risk of generalized interconnection and misuse of files. This risk is all the greater since health data is sensitive data. Also, the Commission wishes to recall that it was in favor, in 2013, of the use of the NIR in the health and

medico-social sphere, once sufficient guarantees would be put in place. In this context, it makes the following observations. On the categories of actors involved in the referencing of data (responsible for the referencing operation, subcontractors, joint processing managers and managers of online access and verification services of the INS): Firstly, with regard to the actors directly involved in the referencing operation stricto sensu, the draft decree recalls the prohibition to carry out the referencing of personal data from the INS except for the circle of actors directly concerned by the obligation of referencing (eg: health professionals, health establishments, retirement homes, etc.) and for those who would be authorized to do so by a special legal provision. The draft decree also envisages that the referencing operation can be carried out within the framework of subcontracting or joint processing responsibility. The Commission observes that subcontracting is characterized when a third parties not belonging to the circle of actors concerned by the referencing obligation processes personal data on behalf of the data controller whose purpose is the referencing operation. It recalls that, given the nature of the data processed, the processor must, under Article 28 of the General Data Protection Regulation (GDPR), put in place sufficient guarantees with regard to the measures technical and organizational so that the processing for the purpose of referencing meets the requirements of the GDPR and guarantees the protection of the rights of the users concerned. He must also enter into a subcontracting contract (or another legal act) with the data controller formalizing the respective roles, obligations and responsibilities of the subcontractor and the data controller. In order to secure the use of subcontracting, the Commission recommends that the contract awarded include a commitment to compliance, on the one hand, with the reference system contained in the draft order and, on the other hand, with the general health information systems security policy (PGSSI-S) and acknowledges the ministry's commitment to include this recommendation in the draft decree. On the other hand, the Commission does not identify the hypotheses in which could be recognized as joint processing responsibility within the meaning of Article 26 of the GDPR and requests that these hypotheses be clarified in the draft decree. to use the NIR for INS purposes on the basis of a specific legal provision, the Commission indicates that it will be particularly vigilant to strictly limit the NIR used as INS for the purposes of health or medico-social care. second place, in With regard to the responsibility for processing INS access and verification teleservices, Article R. 1111-8-6 of the CSP mentions that these teleservices are implemented by the CNAM. The Ministry clarified that this article does not designate the CNAM as the sole data controller and that no regulatory act explicitly sets the legal qualification of each of the actors. It indicates that, if the CNAM managed the IT developments necessary for the implementation of teleservices, the use cases (purposes), the functional specifications, the

data and the security means retained were jointly defined with the ministry and ASIP. It considers in this respect that there is a joint responsibility for processing shared between these three players, the formalization of which is in progress. However, the Commission notes that the draft decree mentions that the CNAM is responsible for processing the INSi Sans call into question the qualification adopted by the Ministry, the Commission draws the latter's attention to the fact that work devoted to updating the G29 guidelines relating to the notions of controller and processor (opinion 1/2010 of 16 February 2010) are being carried out at the level of the European Data Protection Board and that the conclusions of this work concerning the criteria to be used to establish joint processing responsibility are currently the object of exchanges between data protection authorities. Furthermore, it recalls that, pursuant to the provisions of Article 26 of the GDPR, the joint data controllers must define by agreement, in a transparent manner and prior to the implementation of the processing, their respective obligations for the purposes ensure compliance with GDPR requirements; it notes that such an agreement has not been concluded. Also, if the ministry chooses to retain joint responsibility, the Commission points out that modifications must be made to the draft order, insofar as it designates the CNAM as the sole data controller, and takes note of the Department's commitment to make the necessary changes. In addition, it requests that the agreement provided for in Article 26 of the GDPR for the purpose of formalizing relations between the joint data controllers be finalized prior to the deployment of teleservices. On the use of identifiers other than the INS: In the version submitted for examination by the Commission, the draft decree aims to maintain local identifiers in addition to the INS for the purposes of health or medico-social care, beyond January 1, 2021, without this maintenance being expressly limited in duration and without reference being made to particular circumstances which would justify the maintenance of local identifiers. Indeed, article 4.3.3 of the draft decree mentions: the obligation of referencing by the INS (R. 1111-8-3 III) does not imply the deletion of any other local identifier (example: IPP) to replace it with the INS. Nor is it required by the legislator to replace the identity elements managed in the SIS with data from the reference bases. The INS (and the identity elements from the reference bases defined in the following section) are added to the data already managed in the SIS or can replace them (see chapter 5.3.3 of this reference system). In addition, an accompanying guide specifying the path of integration of the INS into health information systems has been announced. The Commission recalls that Articles L. 1111-8-1 and R. 1111-8-1 I of the CSP establish the principle according to which the INS is the NIR. Article R. 1111-8-1 II of the CSP specifies that any other identifier can only be used for referencing in the event of impossibility of access to the national health identifier, in order not to prevent the taking in charge of health and medico-social care of people and that the

data is referenced (…) with the national health identifier as soon as it is possible to access it. Furthermore, article R. 1111-8-1 III of the CSP adds that when the identification of a person by a professional, establishment, service or organization (…) is necessary for their treatment at health or medico-social purposes, this identification can only be made by the national health identifier (…). Finally, Article 2 of Decree No. 2017-412 of March 27, 2017 amended by Decree No. 2019-1036 of October 8, 2019 referred to above provides that the professionals, establishments, services and bodies mentioned in Article R. 1111- 8-3 of the Public Health Code are required to comply with the provisions of Articles R. 1111-8-1 to R. 1111-8-7 of the same code (obligation to use the INS to reference the data) before January 1, 2021 . In view of these elements, the Commission indicates that the maintenance of local identifiers by the actors concerned can only be justified beyond 1 January 2021 to take into account situations where it is impossible to collect the INS to reference administrative data and health data for the purposes of health or medico-social care (e.g.: tourists who do not have a NIR, person treated in an emergency whose identity is unknown, occasional unavailability of INSi teleservices, etc. ) or even for situations unrelated to health or medico-social care (e.g.: identifier used for hotel management). It considers that any other use of maintaining local identifiers, beyond the transitional period ending on January 1, 2021, would be contrary to the aforementioned provisions of the CSP and of decree no. 2019-1036 of October 8, 2019 referred to above and would therefore likely to call into question the stated objective of using a reliable and uniform number allowing the interoperability of the information systems used locally. Under these conditions, the Commission asks the Ministry to modify the draft decree, in particular its paragraph 4.3.3, to remove any ambiguity and limit the maintenance of local identifiers, beyond the period of January 1, 2021, to situations impossibility or to situations that do not fall under the referencing of administrative data or health data for health or medico-social care. On the rights of individuals: The draft decree aims at the principle of informing people and the absence of the right to object. of the CSP, the data referencing operation is necessary to comply with a legal obligation and that the conditions for exercising the rights of users must be examined on this basis. Consequently, it invites the Ministry to present to the data controllers concerned the complete system applicable to the exercise of users' rights in order to take into account the provisions of the GDPR. It requests that the draft order be supplemented to include the specific procedures for exercising the rights that the persons concerned by the referencing operation may avail themselves of, such as these rights appear in Articles 12 et seq. of the GDPR (in particular right of access, rectification, right to limit processing). On controlling the risk of error in the identification of persons: The draft order requires having an INS and qualified identity traits. In this perspective, it imposes in particular, in terms of identity

monitoring, to control the identity of the user by respecting the local procedures planned by the actors and to exclude any use of the INS in case of doubt on the identity. of the user. The Commission notes that the new article R. 1111-8-6 of the CSP mentions that the use of teleservices does not exempt the above-mentioned persons (the actors concerned by the referencing obligation) from setting up any procedure for monitoring, correcting and preventing errors relating to the organization of the care of people and contributing to controlling the risk of error in the identification of people . The Commission also takes note of the Ministry's desire not to repeat in their entirety all the measures applicable in terms of identity vigilance to which the use of the INS is necessarily subordinate and to include only those of between them that should be respected for the particular case of the INS. Indeed, identity vigilance remains the responsibility of each of the actors concerned and its framework must be defined locally within the framework of procedures. However, the Commission considers, as it has already indicated in deliberation no. 2019-102 of the July 18, 2019 referred to above, that health data and administrative data, where applicable, their exchange and sharing must be based on a reliable indexing system, which implies having the exact identity of the user, in accordance with the provisions of Article 5-1-d) of the GDPR, in particular in health establishments, both during admission and throughout the course of care, in order to avoid any risk of identity confusion whose consequences could be particularly serious. It recalls that an identity collection, which would not be sufficiently reliable, would call into question not only the resulting referencing operation but also the entire chain of processing of health data and administrative data indexed on the INS at from this reference. Insufficiently reliable collection of identity would also constitute a significant risk for the interoperability of local information systems, even though this interoperability had initially been designed by the Ministry to facilitate the decompartmentalization of care pathways and avoid duplicate records. as well as identity collisions leading to linking data from one person to another. Thus, it could be a significant obstacle to the deployment of reforms carried out by the public authorities, such as that recently introduced by article 45 of law n° 2019-774 of July 24, 2019 relating to the organization and transformation of the health system providing for the creation of a digital health space designed to allow everyone to build a coordinated care pathway between actors in the health and medico-social sectors. More broadly, it would affect the quality and safety of the care provided to users. Also, given the stakes, the Commission calls for the draft order not to refer simply to local identity monitoring procedures but to specify the methods of verification the identity of the users concerned by the referencing operation. The other provisions of the draft order do not call for comments from the Commission. President M-L. DENIS