

Deliberation 2021-067 of June 9, 2021 Commission Nationale de l'Informatique et des Libertés Nature of the deliberation:

Opinion Legal status: In force Date of publication on Légifrance: Thursday June 10, 2021 NOR: CNIX2117676X Deliberation n° 2021-067 of June 7, 2021 providing an opinion on the draft decree implementing II of article 1 of law no. 2021-689 of May 31, 2021 relating to the management of the end of the health crisis (request for opinion no. 21010600) The National IT Commission and Freedoms, Seizure by the Minister for Solidarity and Health and the Secretary of State for the Digital Transition and Electronic Communications of a request for an opinion relating to the draft decree implementing II of Article 1 Law No. 2021-689 of May 31, 2021 relating to the management of the end of the health crisis; Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation); Considering the law n° 78-17 of January 6, 1978 modified relating to data processing, files and freedoms; Having regard to law n° 2021-689 of May 31, 2021 relating to the management of the end of the health crisis, and in particular its article 1. II.E; Having regard to deliberation no. 2021-054 of May 12, 2021 providing an opinion on the project to set up a health pass conditioning access to certain places, events or establishments involving large gatherings of people; After having heard the report of Mrs Valérie PEUGEOT, commissioner, and the observations of Mr Benjamin TOUZANNE, government commissioner, Issues the following opinion: May 2021, by the Minister for Solidarity and Health and the Secretary of State in charge of the digital transition and electronic communications, of a request for an opinion relating to the draft decree implementing II of Article 1 of Law No. 2021-689 of May 31, 2021 relating to the management of the end of the health crisis. It nevertheless wishes to emphasize that the principle of the health pass has certainly been the subject of reflection within the Government for several weeks, even several months. Thus, although the law providing for the adoption of the draft decree before it was adopted on 31 May last, the Commission deeply regrets not having been associated, upstream, with these reflections. This law provides that the Prime Minister may, from June 2 to September 30, 2021 and if strictly proportionate to the health risks incurred, take a number of measures adapted to the management of the health crisis. Among these, the provisions of paragraph II of article 1 of the aforementioned law no. 2021-689, deemed to be constitutional by the Constitutional Council (decision no. 2021-819 DC of May 31, 2021), authorize the Prime Minister to make the presentation of a health pass conditional on the one hand, for certain trips from or to metropolitan France, Corsica or the Overseas Territories and, on the other hand, access to certain places, establishments or events for large gatherings of people. Travel or access is

then only authorized on presentation of three alternative supporting documents: a negative covid-19 screening test, proof of vaccination or a certificate of recovery following contamination. A decree determines, after consulting the scientific council, the elements making it possible to establish these supporting documents. presentation of a health pass and, on the other hand, the decree taken after consulting the scientific council, the E of paragraph II of article 1 of the same law provides that a third decree, taken after consulting the Commission, determines the methods of application of the health pass, for the entire period extending from June 2 to September 30, 2021. This decree must in particular specify the persons authorized to check the supporting documents as well as their authorization methods and the conditions under which the information systems set up within the Member States of the European Union are recognized as presentation media. As a preliminary point, the Commission notes that several of the additional guarantees requested in its deliberation no. 2021-054 of May 12, 2021 providing an opinion on the project to set up a health pass conditioning access to certain places, events or establishments involving large gatherings of people, have been provided for by law no. 2021-689 of May 31, 2021 relating to the management of the end of the health crisis. This is the case, in particular, of the limitation of the disclosure of the information contained in the supporting documents, to the persons authorized to carry out the checks, in compliance with the principle of data minimization as well as the absence of retention of data within the framework of the verification process. Similarly, the law enshrines the absence of the possibility of reusing data for other purposes and explicitly prohibits and under penalty of criminal sanctions, in accordance with the Commission's recommendation, the possibility for those responsible for places which are not targeted by the device to subordinate, on their own initiative, their access to the presentation of certified digital evidence. Finally, the need to guarantee the provision of certified supporting documents in paper format, to ensure the inclusion of everyone in the system, is also provided for by the legislative provisions. The Commission now decides on the implementing decree, the referral of which is provided for by law. On the places, establishments or events likely to be affected by the health pass Firstly, the Government has indicated to the Commission that the list of places, establishments or events concerned by the health pass, as well as the number of people from which the supporting documents will condition access, are intended to be fixed in the decree by which the Prime Minister triggers, in application of the police powers that he conferred the law of May 31 and if necessary, the measure of the health pass. This police act, distinct from the general rules applicable to the medical pass, must enact the only measures strictly proportionate to the health risks, as provided for in paragraph IV of article 1 of the law, and may possibly be modified during the course of the period up to September 30 to take account of changes in the health

situation. The decree referred to the Commission, which supplements the legal framework of the previous one, is intended to apply throughout this period. The Commission does not call into question this reading of Article 1 of the aforementioned law of 31 May 2021 but suggests that the Government clarify the articulation of the texts. Secondly, it takes note of the details according to which the Government plans to limit strictly the scope of mobilization of the health pass for the following places, establishments and events only, when they involve gatherings of more than 1,000 people: - marquees, theaters, sports or cultural performance halls, conference rooms ; - exhibitions and exhibition fairs (per exhibition hall); - stadiums, outdoor establishments and indoor sports establishments; - theme parks for the categories of establishments open to the public that compose it and for which the deployment of the health pass is provided for in common law; - large casinos; - outdoor seated and standing festivals; - outdoor sports competitions if the feasibility conditions are established; - cruises and passenger boats with accommodation for more than 1,000 people; - other events, when they are specifically located. The Commission notes that places relating to daily activities (restaurants, workplaces, shops, etc.) and those linked to certain habitual manifestations of fundamental freedoms (in particular freedom of demonstrations, political or trade union meetings and freedom of religion) are therefore not concerned, in accordance with the Commission's opinion dated 12 May 2021. However, it wonders about the reference to other events, when they are specifically located and considers that such a formulation does not make it possible to assess the types of events concerned, and in particular the events which are excluded from them. At the very least, it should be remembered that these other events can only be, according to the law, leisure events. In addition, it asks the Government to clarify, for theme parks, what the wording covers for the categories of establishments open to the public that compose it and for which the deployment of the health pass is provided for in common law, in particular s concerning the reference to common law. Finally, the Commission takes note of the clarifications provided by the Government according to which the health pass will not be required for cinemas. It nevertheless draws the Government's attention to the fact that certain cinema establishments have a capacity of more than 1,000 people and invites it to specify whether these establishments will have to use the health pass. the gauge triggering the implementation of the health pass (1,000 people), the Commission considers it necessary to specify, in this decree or in the decree which will trigger the obligation of the health pass, the way in which the number of people will be assessed: it must be a number of people that the person in charge of the establishment or event can predict will be present on the site at the same time, either from the reservations made by the people concerned, or from forecasts reasonable. On this point, it considers it essential that the Government clarifies the action to be taken in the event

that the gauge is reached without having been able to reasonably anticipate it and for which it will be difficult, at the last moment, to set up the system and this, in particular in order to guarantee the prior information of the persons concerned as far upstream as possible. Thirdly, it recalls that particular attention must be paid to the uses of the health pass, likely to reveal sensitive information, and in particular the need sanction any fraudulent use by the persons in charge of the places, establishments or the organizers of the events who would not be authorized to use it, as provided for by law n ° 2021-689 of May 31, 2021. Fourthly and finally, the Commission reiterates its observation regarding the need to specify, in the draft text, the sharing of responsibility between the various actors intervening in the provisions itif. On the personal data present on the supporting documents The provisions of paragraph II of article 1 of the draft decree provide that the supporting documents include the surname, first names, date of birth of the person concerned and a code allowing the verification of each of these supporting documents. The Commission notes that the mention of the code refers to the two-dimensional barcode present on the supporting documents, which contains the personal data necessary for checking the health pass. It takes note of the Government's clarifications that these data correspond to the standardized common set of data provided for by the proposed regulation relating to the European Covid digital certificate (previously the digital green certificate) and that the impact analysis relating to the data protection (DPIA), which is currently being drawn up, will refer to the set of data defined at European level. Nevertheless, the Commission observes that while the European Parliament and the Council have voted for a provisional agreement on the proposal for a regulation, this ci has not yet been submitted for adoption and is therefore not yet applicable. In addition, the proposed European regulation has the sole objective of facilitating travel within the European Union (EU) in the context of the health crisis and not to regulate the presentation of supporting documents for other national uses such as the regulation of access to certain places, establishments or events. The Commission therefore considers that, in accordance with the common law on the processing of personal data implemented by public bodies, the terms of which are precisely governed by a regulatory act, the list of data must in principle appear in the deed. Therefore, it asks the Government to supplement the draft decree by detailing, for each of the supporting documents, the categories of personal data included in the code mentioned above. On the persons concerned and the methods of presentation of the health pass On the persons concerned by the requirement to present the health pass The Commission takes note of the clarifications provided by the Government according to which the health pass will not concern employees, organizers and professionals who perform in the places concerned as well as minors under the age of eleven years, but will be asked to visitors, including foreign tourists, wishing to

access the places concerned by the device. The Government clarified that these elements would be included in the decree that will trigger the health pass. However, it considers that this perimeter is not intended to vary over the coming months and falls under the very regime of the health pass. Therefore, these details should be included in the draft decree before it in order to clearly delimit the persons covered by the obligation to present the supporting documents provided for by law. With regard, more particularly, to the application of the health pass to minors over the age of eleven, as specified in the referral letter from the Government, the Commission does not have any information, in particular scientific elements or international comparisons, concerning the justifications which led the Government to retain this limit of even though the processing of data relating to minors must be justified and take special precautions. In addition, the Government recently announced the opening of vaccination to people aged 12 to 18, from 15 June 2021. The Committee therefore wonders, subject to the scientific justifications which motivated the choice of the Government and in order to prevent any risk of discrimination, on the advisability of aligning the age from which the health pass will be applicable to that of vaccination. On the methods of presentation of the health pass Paragraph I of the article 2 of the draft decree provides that supporting documents may be presented in paper or digital form, in accordance with B of paragraph II of law no. 2021-689 of 31 May 2021. With regard, more particularly, to the digital form, the draft decree specifies that the supporting documents can be saved on the TousAntiCovid mobile application or on any other digital medium chosen by the person concerned. The Commission notes that the possibility of storing supporting documents on any other digital medium reinforce the voluntary nature of the TousAntiCovid application, which constitutes an essential guarantee as mentioned on several occasions by the Commission. It reiterates the observations made in its opinion dated May 12, 2021 on the need to reflect on the format and content of certified paper evidence, so that they offer the same guarantees as their digital version in terms of accessibility and protection. personal data (for example, by indicating the folding instructions in a visible manner on the receipt or by providing a second document which would contain only the data necessary for the control, by integrating clear information on the document, etc.). On the methods of checking the health pass On the persons authorized to check the supporting documents and the methods of their authorization The persons and organizations authorized to check the supporting documents, within the limits of what is necessary for the control of travel and access to the places, establishments or events concerned by the health pass, are the following:- operators of health services passenger transport;- persons in charge of border health checks;

- the persons in charge of places and establishments or the organizers of events whose access is subject to their presentation

pursuant to the decree now mentioned in the first paragraph of A of paragraph II of article 1 of law n ° 2021-689 of 31 May 2021;

- control officers empowered to record the offenses provided for in Article L. 3136-1 of the Public Health Code (CSP). Firstly, the Commission wonders about this last paragraph. Indeed, the Commission is wondering about the reasons why control officers, empowered to record offenses relating to the health pass, should also be able to be empowered to check the supporting documents to authorize, outside of their judicial police mission, the travel or access to the places, establishments and events concerned by the health pass, as the wording of the first paragraph of article 2.II of the draft decree seems to assume. It therefore asks the Government to clarify the decree on this point. Secondly, the last paragraph of paragraph II of Article 2 of the draft decree provides in particular that operators of passenger transport services, persons responsible for health at the borders and the managers of the places and establishments or the organizers of the events concerned by the health pass, keep a register detailing the persons authorized by name as well as the days and times of the checks carried out by these persons. The Commission considers that such a system proves to be satisfactory provided that the date of each person's security clearance is added to the information provided, and provided that the managers ensure that the register is regularly updated. . It also recalls that such a register constitutes processing of personal data and that its implementation must comply with the provisions of the General Data Protection Regulation (GDPR), in particular with regard to the obligation to inform individuals and respect the rights granted to them under Articles 15 to 21 of the GDPR. Thirdly and lastly, paragraph IV of Article 2 of the draft decree provides that access to the TousAntiCovid Vérif application is conditional on consent to the legal obligations incumbent on operators of passenger transport services, persons in charge of health checks at borders and managers of the places, establishments and events concerned. As it stands, this paragraph does not explicitly target persons authorized by name to carry out verifications of supporting documents by the organizations mentioned above, whereas in practice, the information will be delivered by the application itself to all of these people. The Commission therefore considers it necessary to modify the wording of the decree on this point. Furthermore, it suggests to the Government that this information include in particular the penal sanctions set by the legislator. It recalls that it will be up to managers to properly train the people they authorize in this control. While the decree rightly provides for appropriate and visible information to be made available at the place where supporting documents are checked, it recalls that, in the interest of the persons checked and the controllers, this information must have been provided on upstream as possible. On the methods of access, by the persons in charge of

checking the supporting documents, to the personal data of the persons concerned. The provisions of paragraph III of article 2 of the draft decree limit the data accessible during the verification of the supporting documents, the surname, first names and date of birth of the person concerned as well as the positive or negative result of holding a compliant document.

The Commission considers that such a system is likely to ensure compliance with the principle of data minimization, by strictly limiting the disclosure of private information to persons authorized to carry out checks, in particular with regard to the nature of the evidence used. , as noted in its opinion dated May 12, 2021. It also notes that this system is intended to apply to all persons authorized to check supporting documents, both for regulating access to premises , establishments and events concerned only for trips that fall within the scope of the health pass, as long as these people are subject to national law. Consequently, it emphasizes that a customs officer from another Member State who checks proof of a French resident could, depending on the provisions applicable to him in the law of his State, view more data, including the nature of the document presented. On the possible checks of the identity of the persons holding the supporting documents The Commission takes note of the Government's clarifications according to which the persons in charge of the checks will have to ask the persons to prove their identity and that the latter will be able to proceed via a proof of identity. The Commission recalls that the person must be able to prove their identity by any means and invites the Government to remind transport service operators and managers of establishments and places concerned, subject to sectoral regulations, of the need to proportion the control to the reality of the risks. It emphasizes in particular that, when access to a place is conditional on the presentation of a nominative ticket, and that an identity check is not usually carried out in principle when there is no pass health, it should be possible to present the pass by simply comparing the ticket and the pass. The persons concerned should be clearly informed of these elements, as far in advance as possible. In any case, the Commission specifies that the supporting documents cannot be kept after they have been consulted. regrets that the Government has sent it neither a technical file nor a DPIA and reminds the Government that this analysis must be finalized before the effective implementation of the system. It notes that the source code of the TousAntiCovid Vérif application, already available on mobile application stores (AppStore and Playstore), has not been made public. The Commission regrets this non-publication and calls on the Government to make public this source code purged, where appropriate, of secrets making it possible to secure data transmissions with central servers. Concerning the operating methods of the TousAntiCovid Vérif application, the Commission takes note that the data relating to the supporting documents presented by the persons will be transmitted to the central server in order to verify their validity. The Government

justifies this mode of operation by the consequences for the persons concerned: the control operations during trips abroad require ensuring compliance with the various rules imposed by the countries to which the persons are traveling, these rules possibly , moreover, undergo frequent modifications. The Commission does not question the compliance of this architecture with the GDPR. However, it reminds that at the end of the verification, no data should be kept by the central server.

Furthermore, in order to set up the most protective architecture possible, the Commission invites the Government to study the setting up of a more decentralized version, in which the management rules could be updated dynamically and proactively by the central server, in order to limit the sending of data to this server while guaranteeing the application of the updated rules. In particular, the Commission considers that the verification of the validity of supporting documents could be carried out locally for health pass relating to large gatherings of people. Indeed, in this case the management rules are simple and controlled by the Government. The Commission therefore considers that there is no obstacle to checking the validity of evidence being carried out locally, the only data that can be exchanged with the central server being the electronic signature of the evidence. It therefore invites the Government to change the operation of the application in order to allow local control of supporting data.

-bars present on the supporting documents and, on the other hand, that the TousAntiCovid Verif application is freely accessible on mobile application stores. It also notes that the codes used for the European certificate will also contain the data in plain text. If these storage methods can be accepted given the technical constraints and the need to implement, in the short term, the system for controlling supporting documents, it nevertheless calls on the Government to put in place measures to inform people, so that they are aware of the sensitivity of the data stored in these codes, in paper or digital form, and that they take care to expose them only to persons specially authorized to control them.

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