

Deliberation 2020-108 of November 5, 2020 Commission Nationale de l'Informatique et des Libertés Nature of the deliberation:

Opinion Legal status: In force Date of publication on Légifrance: Tuesday November 17, 2020 NOR:

CNIX2031231X Deliberation n° 2020-108 of November 5, 2020 providing an opinion on a draft decree amending decree no. 2020-551 of May 12, 2020 relating to the information systems mentioned in article 11 of law no. 2020-546 of May 11, 2020 extending the state of health emergency (request for Opinion No. 20018458) The National Commission for Computing and Liberties,

Seizure by the Minister for Solidarity and Health of a request for an opinion concerning a draft decree relating to the information systems mentioned in Article 11 of Law No. 2020-546 of May 11, 2020 extending the state health emergency and supplementing its provisions;

Having regard to Convention No. 108 of the Council of Europe for the protection of individuals with regard to automatic processing of personal data;

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;

Considering the law n° 78-17 of January 6, 1978 modified relating to data processing, files and freedoms;

Having regard to Law No. 2020-546 of May 11, 2020 extending the state of health emergency and supplementing its provisions, in particular Article 11;

Having regard to law n° 2020-856 of July 9, 2020 organizing the end of the state of health emergency;

Having regard to decree n° 2019-536 of May 29, 2019 as amended, taken for the application of law n° 78-17 of January 6, 1978 relating to data processing, files and freedoms;

Having regard to Decree No. 2020-551 of May 12, 2020 relating to the information systems mentioned in Article 11 of Law No. 2020-546 of May 11, 2020 extending the state of health emergency and supplementing its provisions;

Having regard to decree n° 2020-1018 of August 7, 2020 taken pursuant to article 3 of law n° 2020-856 of July 9, 2020 organizing the end of the state of health emergency and modifying decree n° 2020-551 of May 12, 2020 relating to the information systems mentioned in Article 11 of Law No. 2020-546 of May 11, 2020 extending the state of health emergency and supplementing its provisions;

Having regard to the amended decree of July 10, 2020 prescribing the general measures necessary to deal with the covid-19 epidemic in the territories that have emerged from the state of health emergency and in those where it has been extended;

Having regard to the decree of October 9, 2020 modifying the decree of July 10, 2020 prescribing the general measures necessary to deal with the covid-19 epidemic in the territories emerging from the state of health emergency and in those where it has been extended;

Having regard to the decree of October 16, 2020 amending the decree of July 10, 2020 prescribing the general measures necessary to deal with the covid-19 epidemic in the territories emerging from the state of health emergency and in those where it has been extended;

Having regard to deliberation no. 2020-051 of May 8, 2020 providing an opinion on a draft decree relating to the information systems mentioned in article 6 of the bill extending the state of health emergency;

Having regard to deliberation no. 2020-083 of July 23, 2020 providing an opinion on a draft decree issued pursuant to article 3 of law no. 2020-856 of July 9, 2020 organizing the end of the state of health emergency relating to the retention period of pseudonymised data collected for the purposes of epidemiological surveillance and research on the covid-19 virus;

Having regard to deliberation no. 2020-087 of September 10, 2020 issuing a public notice on the conditions for implementing information systems developed for the purpose of combating the spread of the covid-19 epidemic (May to August 2020);

After having heard Mrs. Valérie PEUGEOT, commissioner, in her report, and Mr. Benjamin TOUZANNE, government commissioner, in her observations, Issues the following opinion: , a draft decree amending decree no. 2020-551 of May 12, 2020 setting the terms under which the information systems provided for in article 11 of law no. 2020-446 of May 11, 2020 extending the state of health emergency can be implemented.

It emphasizes that this opinion relates to a draft decree which will be issued pursuant to a bill amending the law extending the state of health emergency still under discussion in Parliament. The observations it makes are therefore only valid subject to the adoption of the bill authorizing the extension of the state of health emergency and laying down various measures for managing the health crisis, and on the condition that the latter authorizes what appears in the draft decree.

The draft decree provides in particular:

- the extension of the duration of implementation of the Contact Covid and SI-DEP information systems until the date mentioned in article 11 of law n ° 2020-546 of May 11, 2020 as it will be modified by the bill authorizing the extension of the

state of health emergency and carrying various measures for managing the health crisis;

- the extension of the retention period of pseudonymised data processed for the purposes of epidemiological surveillance and research on the virus until the date mentioned in Article 11 of Law No. 2020-546 of May 11, 2020 as provided it will be modified by the bill authorizing the extension of the state of health emergency and carrying various measures for managing the health crisis;

- the extension of the reporting of results to all screening examinations (serological or virological) carried out by health professionals appearing on a list provided for by decree and authorized to carry out these tests.

As a preliminary point, the Commission wishes, like the remarks made in its opinion of May 8, 2020 relating to information systems, to recall:

- the sensitive nature, by nature, of the implementation of such systems which allow in particular the processing and sharing of health data, which can be consulted by a large number of actors and require additional protection;
 - that the invasion of privacy by this processing is only admissible if this policy constitutes an appropriate and necessary response to slow the spread of the epidemic. The Commission therefore requests that the need for this processing of personal data be periodically reassessed in the light of the evolution of the epidemic and scientific knowledge;
 - that, whatever the emergency context, sufficient guarantees with regard to respect for the fundamental principles of the right to the protection of personal data must be provided.
- Concerning the processing Contact Covid On the purposes

The Commission notes that the purpose of the processing, relating to the identification of infected persons and the ordering and carrying out of biological tests, is extended to the ordering and carrying out of serological or virological screening tests, in order to take into account the development of methods for carrying out screening examinations by authorized health professionals.

The Commission considers that this modification, which is in line with those provided for in draft article 11 of the law of 11 May 2020 currently under discussion within the framework of the draft law authorizing the extension of the state of health emergency and carrying various health crisis management measures, complies with the provisions of Article 5-1-b of the General Data Protection Regulation (GDPR). On the categories of data collected

The draft article 2 of the decree of May 12, 2020 plans to complete the list of categories of data collected.

The Commission notes that a large part of the categories of data covered by the draft decree relate to the history of the last

fourteen days concerning travel (national and international), places visited, quarantine measures followed, contacts with a person who is infected or has symptoms.

In addition, the draft decree provides for specifying the date and the nature of the gatherings of more than 10 people which the person has attended in the last fourteen days as well as the precision relating to the intervention of the screening examination within the framework of a campaign organized by a regional health agency.

Furthermore, the Commission notes that the project provides for the collection of patient zero consent with a view to communicating their identity and contact details to the competent body for the organization of social support.

She finally notes:

- that a distinction is made between collective accommodation structures and other collective structures;
- that the list of collective accommodation structures or places covered by the decree has been specified.

The list of gatherings of more than ten people in which the persons concerned have participated in the last fourteen days is not, however, exhaustive. In this respect, the Commission notes that no comment area or notepad area likely to contain irrelevant data, as it was able to indicate in its opinion of May 8, 2020, will be implemented. It recalls that when a multiple choice is necessary, it must be offered by means of graphic interface elements offering objective information and assessments.

Subject to this reservation relating to the implementation of the decree, the Commission considers that these data are adequate and relevant with regard to the purposes for which they are collected pursuant to Article 5-1-c of the GDPR. pseudonymised transmitted for purposes of epidemiological monitoring and research

The Commission takes note of the modifications made to draft article 3 of the decree of 12 May 2020, in order to set the precise list of pseudonymised data transmitted for the purposes of epidemiological surveillance and research, which responds to the requests made in its opinions of 8 May 2020 and July 23, 2020.

As such, it notes that all data collected in Contact Covid will be transmitted with the exception of:

- identification data of the infected person, of the contact cases and of the health professionals or establishments responsible for recording the data;
- the postal, telephone and electronic contact details of the infected person, of the contact cases and of the professionals or establishments responsible for recording the data;

- data relating to the identification of the affiliation organization ensuring the coverage of the health costs of the infected person and of the contact cases;
- the contact details and specialty of the doctor who registered the infected person;
- the contact details of the attending physician or of the physician designated by the contact person;
- the consent of the infected person for the disclosure of his identity to each person evaluated as a contact case. On the persons who can consult, register or be recipients of the data

In general, the Commission recalls that clear and uniform instructions - taking up the instructions of the health authorities - must be given to all stakeholders and their subcontractors as to the definition of the various concepts used in the draft decree which justify data collection. Regular training and awareness-raising of the personnel who are called upon to intervene are indeed essential.

The draft article 3 of the decree of May 12, 2020 adds certain categories of people who will be able to access the information system or be recipients of the data contained in the Contact Covid application. The Commission recalls that the categories added must strictly correspond to those which will be authorized by the law under discussion. of all the data collected

The draft article 3 of the decree of May 12, 2020 provides for allowing national and local health insurance bodies, the national military social security fund and other social protection bodies to use subcontractors and temporary workers.

The Commission notes that the purpose of this addition is to respond to the evolution of the health situation and the increase in the workload of the teams in charge of identifying people infected or presenting a risk of infection.

It acknowledges that the Ministry has undertaken to draw up an exhaustive list of the subcontractors that will be called upon.

The Commission also reiterates its recommendations issued in its opinion of 8 May 2020 and recalls the need for these organizations to put in place additional protective measures such as:

- informing and raising the awareness of staff on the rules of use of the information system and their obligations with regard to the protection of personal data, respect for professional secrecy and the risks of criminal penalties incurred in the event of misappropriation of purpose of processing;
- the need to define a very strict authorization policy for their agents so that only those who need to know have access to Contact Covid. The authorizations issued must be limited in time and regularly reviewed, in particular to integrate any departures of agents or changes of assignment;

- obtaining, prior to authorization, a formal commitment to respect these principles, which must include clear and complete information on the access tracking systems put in place, allowing regular monitoring of the use of the data contained in the treatment.

The Commission recalls that the use of subcontractors must comply with the provisions of Article 28 of the GDPR and that agreements must be concluded before any processing is carried out. It notes that these agreements will provide in particular for the possibility of carrying out audits to ensure the compliance of the processing implemented, and that such audits must be carried out in order to verify the effective application of the obligations provided for in the agreements.

In view of the particular sensitivity of health data and taking into consideration judgment C-311/18 delivered by the Court of Justice of the European Union on July 16, 2020 and order no. 444937 of the Council of State of October 13, 2020, the Commission requests that the data controller use, for the processing of data, subcontractors subject exclusively to the jurisdictions of the European Union and that no transfer of data be carried out outside the European Union. With regard to access by health professionals and staff of health establishments and social and medico-social establishments to the data of the people taken care of by the establishment for the consultation of all the data collected

The Ministry has indicated that this modification is intended to respond to technical difficulties in the use of the Contact Covid teleservice which would not allow all health professionals, members of the care team within the meaning of Article L. 1110-12 of the Public Health Code, to access the information system for the same patient. In order to overcome this difficulty, the current wording of the draft decree authorizes all health professionals and authorized personnel of a health establishment, a social establishment or a medico-social establishment to access the data of all the people treated there, whether they are members of the care team or not.

In this respect, the Commission asks that an appropriate authorization management policy be implemented so that access by authorized personnel and healthcare professionals in the establishments concerned is strictly supervised and limited with regard to the missions entrusted to them. It also invites the Ministry to provide technical and/or organizational measures to guarantee that this access will be carried out under appropriate security conditions. As regards the other categories of persons authorized to record and consult all or part of the data collected

The draft decree provides for authorizing access to Contact Covid data:

- to health professionals and specially authorized personnel from the health services of educational establishments or higher

education establishments, access to which will be limited in order to ensure the sole purposes mentioned in 1° to 3° of III of the article 1. The purposes referred to are the identification of the infected person, the identification of persons presenting a risk of infection, the orientation of these persons according to their situation towards isolation measures and their medical follow-up;

- health professionals and students enrolled in training giving access to the health professions governed by the fourth part of the public health code, access to which will be limited in order to ensure the sole purposes mentioned in 1° to 3° of III of Article 1;

- to healthcare professionals authorized to carry out virological or serological screening examinations and to professionals placed under their responsibility, whose access is limited to the data necessary for carrying out the test(s) covered by health insurance. These are in particular pharmacists, it being specified that the bill, in its current wording, refers to a decree the task of establishing the list of authorized health professionals.

In general, the Commission recalls that the mentions present in article 3 of the decree of May 12, 2020, not modified by this draft, according to which the persons consult or record the data, to ensure the only purposes mentioned in 1° to 3° of III of Article 1, within the limits of their need to know or necessary for carrying out the test(s) covered by health insurance, constitute essential guarantees which must in particular result in access limitations configured in the information system and by usage rules.

With regard to health professionals and students enrolled in training giving access to the health professions, the Commission understands that any student intending to work in a health profession governed by the fourth part of the public health code and any professional exercising such a profession will be authorized to register and consult the data of Contact Covid .

It considers, however, that the access of these students to the data must be strictly supervised and that the missions which will be entrusted to them must be determined with regard to their level of training. social support

The Commission, in its opinion of May 8, 2020, noted a lack of visibility on this aspect of public action and the lack of precision of the term social support, likely to cover many organizations.

In this respect, it notes that the draft article 3-VII of the decree of May 12, 2020 authorizes the transmission of identity data and telephone details of zero patients and contact cases, subject to their consent, to the cells of the prefectures dedicated to the social support of people in the context of the management of the covid-19 epidemic.

It therefore notes that only the prefecture cells dedicated to the social support of people will be recipients of this data and that

the data of people will only be transmitted in the event that they have given their express consent to this transmission. acting on the methods of authentication of authorized users

The Commission recalls that it had pointed out in its opinion of May 8, 2020 the need to implement strong authentication measures comprising several authentication factors. It reaffirms this principle, which stems from the recommendations of the PGSSI-S and the recommendations of the Commission concerning access to health data, and calls on the Ministry to be vigilant on this point. Concerning SI-DEP processing On the purpose of the treatment

The Commission notes that the purpose of the processing has been modified in order to specify that the centralization of the results concerns virological or serological screening examinations, in order to take into account the evolution of the methods of carrying out screening examinations by authorized health professionals. .

The Commission considers that this modification, which is part of those provided for in Article 3-2° of the draft law authorizing the extension of the state of health emergency under discussion, complies with the provisions of Article 5-1-b of the GDPR. On the categories of data collected

The draft article 9 of the decree of May 12, 2020 plans to complete the list of categories of data collected by adding:

- identification data for people who have undergone a virological or serological screening examination for covid-19;
- data relating to international travel (stay abroad and indication of the country if applicable);
- data relating to participation in screening as part of a campaign organized by the regional health agencies (ARS);
- the collection of the postal code of the place where the person will stay during the seven days following the completion of the screening.

The Commission notes that the Ministry indicates that the collection of the postal code is necessary to determine the territorially competent ARS to carry out health surveys and to enable the National Public Health Agency to carry out precise geographical statistics. The Commission takes note of this and invites the Ministry to specify this point in the decree.

The Commission considers that the collection of these data is adequate and relevant with regard to the purposes for which they are processed pursuant to Article 5-1-c of the GDPR.

Also taking note of the details provided concerning the data collected in the context of Contact Covid, the Commission requests that the collection of information relating to possible collective accommodation be limited to a tick box (yes/no). In the event that it is established that these details are necessary with regard to the purpose of the processing, it calls for the

exclusion of the comment areas or notepad areas likely to contain irrelevant data. When a multiple choice is necessary, it must be offered by means of graphical interface elements offering objective information and assessments.

With regard to pseudonymised data transmitted for epidemiological monitoring and research purposes

The Commission takes note of the modifications envisaged by the draft article 10 of the decree of May 12, 2020 setting the precise list of pseudonymised data transmitted for the purposes of epidemiological surveillance and research, which responds to the request made in its opinion of May 8 .

As such, it notes that the following data will be transmitted:

- the sex, age and postal code of the place of residence of the persons who were the subject of a screening examination;
- the information relating to the patient's situation necessary for carrying out the health investigations mentioned in 2° of draft article 9 of the decree of 12 May 2020;
- the technical characteristics of the direct debit mentioned in 5° of the draft article 9 of the decree of 12 May 2020;
- information relating to the results of the screening examinations mentioned in 6° of the draft article 9 of the decree of May 12, 2020. On the persons authorized to provide information or to be recipients of the data

With regard to the recipients of the data in the context of the free distribution to the public of the available care offer

The draft article 10 of the decree of May 12, 2020 provides for adding as recipient of the SI-DEP processing the public health information service (SPIS) mentioned in article L. 1111-1 of the health code. public.

The Commission notes that the SPIS will be the recipient of the personal identification data of the healthcare professionals carrying out the screening examinations (RPPS number, surname, first name, address of the place of practice, secure e-mail address), the type of examination screening carried out and the number of examinations carried out per day.

It notes that the above-mentioned data will be communicated to the SPIS for the purposes of free dissemination on the web of the available care offer, with the exception of the secure e-mail address and data relating to the number of tests carried out per day, which will not be published and will only be used to adjust the rules for displaying the care offer.

It considers that the data whose transmission is planned are relevant with regard to the purpose pursued.

It also takes note of what the Ministry has clarified:

- that the retention period for the data by the SPIS would be seven days before destruction. The Commission asks that these points be clarified in the draft decree;

- that specific information will be issued to professionals in this respect, which will specify in particular their rights and the absence of the right to object to this transmission.

It also recalls that any transmission of data must be carried out under conditions of security making it possible to perfectly ensure its confidentiality.

The draft decree plans to authorize the information of SI-DEP data by health professionals authorized to carry out virological or serological screening examinations and to the personnel placed under their responsibility, in particular pharmacists, it being specified that the draft law, in its current wording, refers to a decree setting the list of authorized health professionals.

The Commission considers that the mention present in article 10 of the decree of May 12, 2020, not modified by this draft, according to which the authorized health professionals or the personnel placed under their responsibility record the data for the sole purpose of providing the results. of their examinations and to send, where appropriate, the results to these same people, to the attending physician and to the physicians who prescribed the examination constitutes an essential guarantee which must in particular result in access limitations configured in the system of information and by rules of use. Concerning the treatments Contact Covid and SI-DEP On the information of the people

The Commission recalls that all the information media relating to the processing must be modified in order to take account of the modifications made and that all the persons concerned must be informed of them. On the retention period

The draft decree provides for the following retention periods:

- until the date mentioned in Article 11 of Law No. 2020-546 of May 11, 2020, currently set at April 1, 2021 by the bill under discussion in Parliament, for pseudonymised data transmitted to purposes of epidemiological surveillance and research on the virus to the organizations receiving this data referred to in the decree of 12 May 2020, of which the National Health Insurance Fund and the Health Data Platform (PDS) belong;

- until the date mentioned in Article 11 of Law No. 2020-546 of May 11, 2020, currently set at April 1, 2021 by the bill under discussion in Parliament, for data relating to update, deletion and consultation of the Contact Covid and SI-DEP processing provided for respectively in Articles 5 and 11 of the aforementioned decree.

In this respect, the Commission notes, first of all, that this date, currently set by the bill under discussion at April 1, 2021, is therefore no longer determined, as previously mentioned in the decree of May 12, 2020 , depending on the end date of the state of emergency.

Secondly, the Commission questions the compatibility of the legal retention period for pseudonymised data from Contact Covid and SI-DEP transmitted for the purposes of epidemiological surveillance and research on the virus with the hypothesis of integration of the latter into the national health data system, the retention period of which is twenty years pursuant to Article L. 1461-1-IV-4° of the Public Health Code, or their retention in a permanent warehouse within the PDS. On the impact analyzes relating to data protection

Finally, the Commission asks that the impact assessments relating to data protection carried out pursuant to Article 35 of the GDPR and updated accordingly be sent to it.

The president,

M. L. Denis