

Deliberation 2020-136 of December 17, 2020 National Commission for Computing and Liberties Nature of the deliberation:

Opinion Legal status: In force Date of publication on Légifrance: Saturday March 13, 2021 Deliberation No. 2020-136 of December 17, 2020 providing an opinion on a draft decree relating to the use of smart video to measure the rate of wearing a mask in transport (request for opinion no. 20019694) The National Commission for Computing and Liberties, Seized by the Ministry responsible for transport, in application of the provisions of 4° under a) of article 8 of law n° 78-17 of January 6, 1978 as amended, of a request for an opinion on a draft decree relating to the use of intelligent video to measure the rate wearing a mask in transport; 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 Council of April 27, 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 (RGPD); Having regard to Law No. 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms; Considering emergency law n° 2020-290 of March 23, 2020 to deal with the COVID - 19 epidemic, in particular its article 4; Having regard to law n° 2020-546 of May 11, 2020 extending the state of health emergency and supplementing its provisions; Having regard to articles L. 3131-12 and following of the public health code; Having regard to decree n° 2020 -1257 of October 14, 2020 declaring a state of health emergency; Having regard to decree n° 2020-1262 of October 16, 2020 prescribing the general measures necessary to deal with the COVID-19 epidemic within the framework of the state health emergency; Considering the decree n ° 2019-536 of May 29, 2019 modified taken for the application of the law n ° 78-17 of January 6, 1978 relating to the inform atic, files and freedoms; After hearing Mr. Bertrand du MARAIS, Commissioner, in his report, and Mr. Benjamin TOUZANNE Government Commissioner, in his observations, Issues the following opinion: The referral to the Commission intervenes in the context of the COVID-19 epidemic and the obligation, since May 11, 2020, for users of collective public transport to wear a protective mask. The draft decree aims to allow operators of public passenger transport services to implement devices for measuring the rate of wearing a mask by means of the automated processing of images from existing video protection cameras, excluding the right to objection by data subjects to the processing of their data. COVID-19 and the need for the Government to take the necessary measures to protect the population. This project is part of its action to fight the epidemic, and reflects the desire not to leave aside any tool to stem the spread of the disease. However, the large-scale implementation of so-called smart video in public space raises important issues in terms of privacy protection. The public space is a place where many individual freedoms are exercised (right to privacy, protection of personal data,

freedom to come and go, freedom of expression, etc.). The preservation of anonymity in the public space is an essential dimension for the exercise of these freedoms; the systematic capture and analysis of the image of people in these spaces undoubtedly entails risks for their fundamental rights and freedoms. The fight against the COVID-19 epidemic, which falls within the constitutional objective of protecting of health, constitutes moreover a major imperative likely to justify, under certain conditions, temporary infringements of the right to the protection of private life and personal data. Constitutional and conventional protections of the right to respect for life privacy and the protection of personal data, based in particular on the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, however, require that violations of these rights by the public authorities are not only justified by a reason of general interest, but are also necessary and proportionate born to achieve this objective. The draft decree therefore calls for the following observations from the Commission. On the purpose of the devices for detecting the wearing of masks provided for by the draft decree The draft decree provides in its 1st article that, when a law or decree imposes the wearing of a protective mask in public transport, the operators of public collective passenger transport services may use video protection systems authorized on the basis of Article L. 252 -1 of the Internal Security Code for the purpose of statistically assessing compliance with the obligations to wear a mask and adapting their public information and awareness actions. The Commission notes that these devices have not purpose, nor can technically allow the identification of persons and are therefore not intended to process biometric data. The Commission also takes note of the clarifications provided by the Ministry concerning the purposes of these devices, which are not intended to prosecute violations of the regulations relating to the wearing of masks, but to allow the dissemination of standard and non-targeted announcement messages in places where a average rate of insufficient mask wearing. The ministry also indicated that the devices are not intended to allow the immediate deployment on the premises of agents responsible for compliance with the regulations relating to the wearing of masks, but to redeploy information agents in order to raise awareness. users to their obligations. The Commission considers this purpose to be determined, explicit and legitimate within the meaning of Article 5.1.b of the GDPR. On the exclusion of the right of opposition of data subjects under Article 23 of the GDPR draft decree also provides, in a relatively new way, in II of its article 1, that when public transport service operators choose to use these devices, the right of opposition of persons whose images will be captured, provided for in Article 21 of the GDPR does not apply to this processing. This option is offered by articles 23 of the GDPR and 56 of the Data Protection Act which refers to it. The exclusion of a right provided for by the GDPR must meet

several criteria. On the justification for the exclusion of the right to opposition Article 23 of the GDPR requires a text of Union or Member State law in particular to limit the scope of the rights provided for in Articles 12 to 22 of the GDPR, provided that such a limitation respects the essence of the freedoms and fundamental rights and that it constitutes a necessary and proportionate measure in a democratic society to guarantee in particular important objectives of general public interest of the Union or of a Member State, in particular an economic or financial interest [...] including in the fields [...] of public health and social security (article 23.1.e) or to guarantee the protection of the persons concerned (article 23.1.i). The ministry specified that, in accordance with article 23.1 of the GDPR, the right to oppose one could be excluded from the processing envisaged since the latter makes it possible to guarantee important objectives of public interest, in this case a public health objective and the protection of the data subjects, more particularly the protection of their health. regard that the measures envisaged, which are part of a broader plan to combat the COVID-19 epidemic, are expressly linked by I of article 1 of the draft decree to the existence of an obligation to wearing the mask. It considers that these devices pursue public health and personal protection objectives, making it possible to consider limiting their rights. systematic analysis of the image of individuals traveling in public transport and detection of some of their attributes. Even if it is limited to the framework of the state of health emergency, such a deployment presents the real risk of generalizing a feeling of surveillance among citizens, of creating a phenomenon of habituation and trivialization of intrusive technologies and, in definitively, to generate increased surveillance. On the guarantees provided for processing operations from which the right to object is excluded taken to this effect must contain certain minimum specific provisions listed in Article 23.2 of the GDPR and, on the other hand, that Article 56 of the law states that such exclusion must be provided for by an express provision of the act establishing the processing. It considers that the draft decree submitted to it should be supplemented on two points in order to fully meet the requirements of these articles. Firstly, the Commission considers that the draft decree does appear to constitute an act establishing processing within the meaning of Article 56 of the law. Indeed, this expression may refer, in the case of processing implemented by public authorities, to standards containing all the regulations governing processing, in particular pursuant to Article 35 of the Data Protection Act. . With regard to processing decided and implemented by private operators – which may be the case in this case for private persons entrusted with a public service mission by the competent authorities in the field of collective public passenger transport – , the limitation of the right to object must then be provided for in a legislative or regulatory act authorizing the implementation of processing by these operators, which must also include the specific provisions prescribed by Article 23.2

of the GDPR. and the essential characteristics of these treatments must be described with sufficient precision. In this case, the decree indicates that the video protection systems authorized on the basis of Article L. 252-1 of the Internal Security Code may be used for the purpose of statistically evaluating compliance with the obligation to wear the mask, without however specifying that this statistical detection of the wearing of a mask will be done automatically through algorithmic processing. In this respect, the Commission takes note of the details provided by the Ministry concerning the implementation of the devices referred to the integration of software processing into pre-existing video protection cameras, analyzing the video stream in real time, and notes that it would be preferable to include such details in the draft decree in order to avoid any ambiguity as to the nature of the devices deployed and thus the data processing involved. Secondly, the draft decree clearly specifies all the specific provisions provided for in points a) to g) of the Article 23.2 of the GDPR, with the exception of point h) relating to the right of data subjects to be informed of the limitation of their right. The Commission considers that such information is necessary insofar as it does not appear that it could harm the purpose of this exclusion, persons having in any case the obligation to wear a mask in transport . It takes note of the ministry's commitment to add a statement to the decree requiring data controllers, through the information they will provide in application of the GDPR, to specify that the right of opposition is not open. The Commission recalls that such information is all the more important since, beyond the exclusion of the right of opposition, the controller will not be able to ensure the exercise of the rights of access, rectification, deletion or limitation of the persons concerned due to the very short notice of the deletion of the images from the video streams. On the duration of application of the decree The draft decree provides in its article 2 that the decree will apply for a period of one year from its publication. The Commission thus takes note of the application of this text for a maximum period of one year and considers that this limitation of duration appears necessary in view of the potentially intrusive nature of the devices of which it allows the dep law and the strong derogation from the right of opposition of the persons concerned that it establishes in this context. It also notes that pursuant to I of article 1 of the draft decree, these devices may cause, be used only as long as a law or decree imposes, as part of the current fight against the COVID-19 epidemic, the wearing of a protective mask in transport. Otherwise, the decree would prove to be pointless and the measures envisaged could not be implemented. It therefore recommends that the impact of such measures on the overall health strategy be assessed and documented on a regular basis, so that the effectiveness and their relevance over time can be assessed. The Commission recommends that these analyzes be communicated to it, when they are available, in order to enable it to carry out its mission of monitoring the compliance of the implementation of the

planned systems. The President Marie-Laure DENIS