

Deliberation 2021-006 of January 19, 2021 Commission Nationale de l'Informatique et des Libertés Nature of the deliberation: Opinion Legal status: In force Date of publication on Légifrance: Friday January 22, 2021 NOR: CNIX2102174V Deliberation n° 2021-006 of January 19, 2021 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 and supplementing its provisions (request for opinion no. 21000444) The National Commission for Computing and Liberties,

Seizure by the Minister of Solidarity and Health of a request for an opinion concerning a draft decree amending the decree relating to the information systems mentioned in article 11 of law n° 2020-546 of May 11, 2020 extending the state of health emergency and supplementing its provisions;

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;

After having heard Mrs. Valérie PEUGEOT, commissioner, in her report, and Mr. Benjamin TOUZANNE, government commissioner, in her observations, Issues the following opinion:

The modifications envisaged by the draft decree aim to:- strengthen the system for tracing the chains of transmission of the virus, in particular with regard to asymptomatic people;

- identify the places and events for which there is a high risk of spreading the virus, in order to guide public policies for crisis management, by providing useful data for the opening and closing policies of places open to the public . In this respect, the Commission invites the ministry to specify it in the note of the text;

- strengthen social and health support in the event of isolation of individuals. The Commission stresses that the draft decree provides for a considerable and substantial extension of the information collected in the information system. It notes, however, that this system remains conditional on the voluntary participation of the persons questioned. On the extension of the

categories of persons concerned by the processing The Commission draws the attention of the Ministry to the need to harmonize the terms used in the decree. It notes in fact that reference is sometimes made to a person assessed as a contact at risk of contamination or as a contact case. Therefore, in order to guarantee the legibility of the decree, it invites the Ministry to use, to designate the persons concerned, only the terms which have been defined in Article 1. Concerning co-exposed persons The draft article 1.II.2 bis provides for the extension of the Contact Covid information system to co-exposed persons in order to allow their identification and to proceed with the collection of data concerning them. This modification will lead to a significant extension of the number of people whose data will be processed in Contact Covid, data which will be identical to that concerning contact cases.

The Commission notes that the notion of co-exposed person refers to a person who has been in the same place, gathering or event, where the barrier gestures could not be fully respected, identified by patient zero as being at the origin possible contamination. It invites the Ministry to: - clarify the definition of the notion of co-exposed person, in order to clearly show its criteria for distinguishing it from that of contact case, in particular by the absence of proven direct contact with a person diagnosed positive;

- specify the durations of co-presence to which the notions of attendance and participation refer;
- specify the cases in which it may be considered that the barrier gestures could not be fully respected. The Commission invites the Ministry to disseminate this information, for example by making it public on its website.

The Commission notes that it is planned to delete 3° of Article 1 of the amended decree of 12 May 2020 providing for the use of the recommendations of the High Council for Public Health (HCSP) for the assessment of a person as a contact at risk of contamination. The ministry has indeed specified that the notions of contact case and co-exposed person allowing the application of the amended decree of May 12, 2020 have been defined by the National Public Health Agency (ANSP or Public Health France). The Commission invites the Ministry to include this clarification in the decree. Concerning the persons in charge of places, gatherings, events or activities The draft article 1.I.4° of the decree provides for the collection of data relating to the person in charge of the place, gathering, of the event or activity in which the data subjects participated. The ministry clarified to the Commission that the term responsible corresponds to the person able to provide information on the people who participated in a gathering, an event or an activity (operational responsible), who is not necessarily the legal responsible. The Commission invites the Ministry to specify these elements in the decree. On the addition of new categories of data Concerning

the collection of new categories of data common to all the persons concerned (zero patients, contact cases and co-exposed persons) The Commission notes that the draft articles 2.II.1°.k and l as well as the draft articles 2.II.2°.k and l provide that information relating to the frequentation of a place open to the public or the participation in a gathering, event or activity will be collected as soon as contamination may occur. It invites the ministry to detail the criteria according to which the possibility that contamination has taken place will be established.

The Commission recalls that the information collected cannot be used for purposes other than those provided for in the decree and in particular cannot be used for the purpose of monitoring compliance with the measures aimed at combating the covid-19 epidemic.

It notes that the draft articles 2.II.1°.k and l as well as the draft articles 2.II.2°.k and l provide for the collection of the nature, the date of attendance, the postal address and the name: - of certain places and structures frequented in the last fourteen days by the persons concerned;

- certain gatherings, events or activities in which the persons concerned would have participated in the last fourteen days. On the places and structures With regard to the places, the ministry specified that their identification by the postal address and the name will allow the regional agencies to (ARS), in addition to surveys on contamination chains and clusters, to carry out targeted actions with certain organizations or certain categories of organizations (reminder of health protocols, etc.). The Commission takes note of this. It nevertheless recalls that measures likely to guarantee the confidentiality of the information collected must be provided for. On gatherings, events or activities The draft articles 2.II.1°.l and 2.II.2°.l provide for the collection information relating to a large number of gatherings, events, such as family reunions, friendly or other meetings, events related to the professional framework or participation in a gathering during which the contaminations can take place can be collected. This concerns events or activities involving more than six people, compared to ten previously. The ministry clarified to the Commission that everyone (including minors) had to be counted and that this threshold was valid for gatherings, events or activities bringing together at least two different households. The Commission invites the Ministry to specify these elements in the decree.

The Commission first notes that the draft provides for the possibility of collecting the name of the gathering, event or activity. The use of the term name is likely to create confusion with the places in which the gatherings, events and activities take place as well as the name of its leader. The Commission understands this to refer to the title of the gathering, event or activity.

Although it understands the need to have certain details in order to carry out health investigations, the Commission nevertheless draws the Ministry's attention to the risk created in terms of protecting the privacy of the persons concerned, all the more so in the event that the name of the gathering, event or activity would likely result in the processing of data mentioned in Article 9 of the GDPR. In this respect, the Commission recalls that the Ministry itself intended to limit the collection of information relating to their nature by providing that the selection of an event in the information system will be done using a menu drop-down and that no free field allowing to qualify the nature of the event would be open. The Commission infers from this that the entry of the title implies the existence of a free field.

It therefore considers that the collection of the name of the event, gathering or activity, insofar as it is likely to reveal its exact nature and in the absence of specific justification on the part of the ministry, is not does not comply with the provisions of article 5-1-c of the GDPR. In the event that specific justification is provided, the Commission invites the Ministry to specify that the name of the event, gathering or activity should only be collected if the information is absolutely necessary for the performance of the activity. second, the Commission notes that draft Articles 2.II.1°.I and 2.II.2°.I provide for the possibility of adding to the information system:- the information that the person concerned participated in a worship gathering. In this regard, the Commission notes that the mention of this information implies the processing of data mentioned in Article 9 of the GDPR. It notes that the Ministry has undertaken to modify the project so as not to provide for the collection of this information;

- information concerning prolonged presence in a means of public transport or in a waiting room. The Commission invites the Ministry to specify how it intends to characterize a prolonged presence and to disseminate this information, for example on its website;

- information relating to the prolonged presence in a waiting room by the persons concerned. The Commission wonders about the connection between the possible communication of the list of persons present and the secrecy to which certain professions are bound (doctors, lawyers, etc.). It recalls that these regulatory provisions cannot release the professionals concerned from their obligation secrecy. On the residence address of the person in charge of a gathering, an event or an activity Regarding the residence address mentioned in the draft articles 2.II.1°.I and 2.II.2°.I, the Commission understands that it is planned to collect the address of the personal place of residence of the person responsible. The ministry clarified that it only intends to allow the official's residence address to be collected if he or she is the organizer of a gathering, event or activity. The Commission therefore invites him to clarify the decree on this point.

In addition, it believes that collecting the postal address of the place of gathering, event or activity should not involve the systematic collection of the personal residence address of the leader or organizer and should not be collected only as a last resort, for example in the absence of an e-mail address or telephone number. It also wonders about the methods of collection, and in particular the source, of such information. Concerning the collection of data relating to patient zero and the disclosure of his identity The draft article 2.II.1°.j provides, within the information system, the identification of the railway, bus or maritime stations or airports through which the persons concerned have transited on their return from a stay in a department or community mentioned in Article 72-3 of the Constitution or in a State, other than those of residence, in which they have visited during the last fourteen days. The operators of the means of transport with which they traveled are also identified.

In the context of exchanges with the Ministry, the Commission was told that this information will allow the identity of patient zero to be transmitted, without his consent being obtained for this purpose, to the operator concerned in order to allow the identification of contact cases or people co-exposed during a trip. The Commission considers that, to do this, the decree must explicitly indicate the operator among the possible recipients of this data. It also calls on the Ministry to consider the scope of the derogation from medical secrecy provided for by Article 11 of Law No. 2020-546 of May 11, 2020 extending the state of health emergency and supplementing its provisions, to ensure that it covers this scenario.

Draft article 2.II.1°.o provides for extending the possible disclosure of the identity of patient zero, with their consent and when necessary for the implementation of a health investigation, to:- co-exposed people;

- managers or organizers of a place or structure open to the public, a gathering, an activity or an event that the patient has attended or in which he has participated in the last fourteen days;

- people and authorities with relevant information for the search for contact cases and co-exposed people. The Commission recalls first of all that the communication of the identity of patient zero involves the transmission of information covered by secrecy doctor mentioned in article L. 1110-4 of the public health code. While it notes that this disclosure is conditional on the expression of the consent of the person concerned, it recalls that the latter must be clearly informed of the persons to whom their identity is likely to be revealed. The Commission also notes that a patient zero could consent to his identity being revealed to all the categories of persons mentioned in draft article 2.II.4°. The Commission therefore invites the Ministry to suggest that the patient give his consent to the disclosure of his identity for each category of recipients and not to express an overall consent.

In this respect, the Commission recalls that the consent of patient zero must be expressed freely, after precise information on the terms of this disclosure.

It insists on the fact that the consent given to the disclosure of identity should not lead to the systematic disclosure of it to any person contacted in the context of an investigation and that this disclosure should only take place when it is useful to its realization.

The Commission therefore invites the Ministry to draw the attention of persons having access to data in order to carry out health surveys, of the need to preserve the confidentiality of the data to which they have access and to specify, for example by drawing up cases of use, the situations in which the disclosure of the identity of patient zero may occur.

It specifies that the persons in charge of the investigations should also remind anyone to whom the identity of patient zero is revealed of the confidential nature of this information. Concerning the collection of data relating to contact cases and co-exposed persons The draft article 2.II.2° provides for the collection of the existence of a previous infection with the virus in the period of the previous two months as well as the existence of a vaccination against covid-19.

Regarding the mention of a previous infection, the ministry indicated that the collection of this information would make it possible to qualify people who have been infected for less than two months as negligible risk contacts as defined by the ANSP. The Commission invites the Ministry to specify this in the decree.

Regarding the data relating to vaccination, the ministry specified that it had asked the HCSP to determine more precisely the information related to the vaccination data to be collected (doses, dates, period of immunity, etc.). The Commission invites the Ministry to specify them in the text as soon as they are determined or, where appropriate, to publish them on its website. It recalls that only data that is adequate, relevant and limited to what is necessary with regard to the purposes for which they are processed should be collected, in accordance with the provisions of Article 5-I-c of the GDPR.

Finally, with a view to carrying out an analysis of feedback from the use of the TousAntiCovid application, the Commission invites the Ministry to provide for the collection of information making it possible to determine the method or methods by which the person was informed of their status. contact case or co-exposed person. It stresses, however, that the concept of co-exposed person is not mentioned in decree no. article 2.I.4° widens the possibilities of collecting data from the persons in charge or organizers of activities, gatherings or events listed, or from any person or authority having relevant information for the search for contact cases and co-exposed persons The Commission recalls that the categories of data that may be

collected in this context must be limited to those provided for by the amended decree.

The Commission notes that the draft decree does not require the persons referred to in draft Article 2.I.4° to communicate data relating to contact cases and co-exposed persons to persons specially authorized to register them. use of information collected pursuant to Article L. 114-12 of the Social Security Code and the use of third parties Draft Article 2.III provides for the possibility, in the absence in the information system of contact details zero patients, contact cases and co-exposed persons, to obtain this information from third parties, in particular within the framework of article L. 114-12 of the social security code.

The Commission notes that the processing referred to in Article L. 114-12 of the Social Security Code (CSS) allows organizations responsible for the management of a compulsory social security scheme, the collection of social security contributions or the allowances and services mentioned in this code, the funds providing the paid leave service, Pôle emploi and the State administrations to communicate to each other the information necessary or which allows: - the assessment of rights or the execution of obligations entering into the normal operation of the public service for which these bodies are responsible;

- informing people of all their rights;
- the control, the justification in the constitution of the rights and the justification of the liquidation and the payment of the benefits for which these organizations are responsible respectively;
- the establishment of compliance with the residence conditions laid down for the opening of rights and the provision of benefits. article L. 114-12 of the CSS.

With regard to the notion of third party, the ministry specified that the contact details of the persons concerned could be requested from the bodies responsible for the management of a compulsory social security scheme as well as from the general directorate of public finances. The Commission therefore invites the Ministry to replace the term third party with the exhaustive list of third parties that may be called upon for the purpose of searching for missing contact details and recalls that the purposes of the processing operations consulted must be compatible with this objective. On the persons authorized to register and consult the data of the persons concerned Draft article 3.III provides for new conditions of access to data:

- the data collected within Contact Covid may be consulted for health and social support purposes. The Ministry indicated that this change was intended to facilitate contact and organization of the visit to the person's home for professionals involved in health support;

- persons placed under the responsibility of health professionals will be able to save or access the data. The ministry indicated in particular that it could be mediators in the fight against covid-19 as mentioned in article 25-1 of the decree of July 10, 2020 prescribing the measures for the organization and operation of the system of necessary to deal with the covid-19 epidemic in the context of the state of health emergency. The Commission takes note of this and considers that their access must be strictly regulated and that the missions entrusted to them must be determined with regard to their skills. In addition, it invites the Ministry to specify the categories of persons thus referred to in the decree. On information relating to health and social support needs The Commission notes that the data whose collection is envisaged by the draft decree does not will not be limited to the simple expression of a support need. According to the indications of the ministry, the social and/or health support for the isolation of a person within the framework of a local initiative as well as the effective implementation of the measures for which a need has been expressed will be indicated in the IF Contact Covid .

The Ministry also indicated that health support during isolation would take the form of a home visit by a health professional, for example a private nurse, for the purposes of isolation education, screening for members of the household and identification of any need for additional social, material or psychological support. The Commission takes note of this.

The Commission notes that draft Article 3.VII provides that the prefecture units dedicated to social support will be communicated, subject to the consent of the person concerned:

- their electronic and postal contact details;
- his declarations of a need for social support and support and/or a need for health support in isolation. The ministry specified that the collection of this data was necessary to allow the territorial cells to isolation support:
- identify the nature of the support requested;
- organize the implementation of social support;
- to coordinate the various actors intervening for this purpose. social and health support will be carried out under appropriate conditions of confidentiality and security. It also recalls that only authorized persons may have access to the data, within the strict limit of their need to know for the exercise of their missions.

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



are indeed essential. The President,

M. L. Denis