Deliberation 2021-144 of December 2, 2021Commission Nationale de l'Informatique et des LibertésNature of the deliberation:

OpinionLegal status: In force Date of publication on Légifrance: Saturday December 18, 2021NOR:

CNIX2137903XDeliberation n° 2021-144 of December 2, 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 and decree no. 2020-1690 of 25 December 2020 authorizing the creation of personal data processing relating to vaccinations against covid-19 (request for opinion no. 21020478) The National Commission for IT and of freedoms, Seizure by the Minister of Solidarity and Health of a request for an opinion concerning a decree amending decree no. 2020-551 of May 12, 2020 relating to the information systems mentioned in article 11 of the law No. 2020-54 6 of May 11, 2020 extending the state of health emergency and supplementing its provisions, and decree no. 2020-1690 of December 25, 2020 authorizing the creation of personal data processing relating to vaccinations against covid-19. 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 the Directive 95/46/EC (General Data Protection Regulation); Considering the modified law n° 78-17 of January 6. 1978 relating to data processing, files and freedoms; Issues the following opinion: The Committee, having received a corrective referral the day before the meeting relating to the addition of data relating to the recording in the file in question of data relating to vaccinations against influenza concomitant with vaccination against covid-19, believes that these new provisions raise delicate questions. They require that the government provide certain details and that the CNIL has additional instruction time. Since the CNIL is not in a position to issue an informed opinion on this rectifying referral in this deliberation, it postpones this question to a later meeting and only decides on the provisions of the initial referral, the Commission notes that Decree No. 2020-1690 of December 25, 2020 relating to Covid Vaccine processing does not regulate the retention period of the data recorded therein. Although these durations were presented to it when the initial decree creating the processing was referred to it and although the opinion issued at the time did not raise this point, the Commission considers that it would be preferable for the decree to provide for durations storage required. When processing is governed by a regulatory act, the Commission considers that this act must establish, under the rules of organization of the public service in question, the main characteristics of the processing of personal data carried out by the administration within the framework of its missions. As such, and although Article 35 of the Data Protection Act does not specifically provide, for the processing it concerns, that the

regulatory act authorizing the processing governs the retention periods, the CNIL considers, constant doctrine, that the registration of such durations constitutes in principle an essential guarantee. It therefore invites the government to supplement the decree on this point. On the issue of supporting documents and the generation of QR codes from SI-DEP processing and Covid Vaccine: The draft provides for the modification of the provisions applicable to SI-DEP processing, which contains in particular the results of covid-19 tests, in order to allow the generation of several QR codes and certificates. Thus, it modifies articles 8 and 9 of the decree of May 12, 2020 so that this processing allows the generation and sending proof of absence of contamination with the SARS-CoV-2 virus or a certificate of recovery, in order to meet the obligations mentioned in II of article 1 of law n ° 2021-689 of May 31, 2021 relating to management of the end of the health crisis and in chapter II of law n° 2021-1040 of August 5, 2021 relating to the management of the health crisis. Article 9 of the decree currently in force allows, in the event of an examination of positive screening, to send to the person nne concerned a random QR code not concerning any information making it possible to identify it affixed on the results of the screening examinations. After modification by the draft decree, the SI-DEP treatment would allow: in the event of a negative result of a virological screening examination for the SARS-CoV-2 virus, to affix to any negative screening examination result, the codes following QR codes, containing identifying data (surnames, first names and date of birth of the person concerned, information relating to the screening examination): a QR code serving as proof of absence of contamination by covid-19 or certificate of recovery, that may be presented to meet the obligations mentioned in II of article 1 of law no. August 5, 2021 relating to the management of the health crisis; as well as a QR code allowing the import of this proof or certificate into the mobile application mentioned in article 1 of the aforementioned decree of May 29, 2020; in the event of a result positive from a screening test vi rological to the SARS-CoV-2 virus, to affix to any positive result of a screening examination a randomly generated QR code containing no information allowing the person concerned to be identified. This QR code will be sent to the person concerned so that they can add it to the Tous Anti Covid (TAC) application in order to inform other people using TAC that there is a risk that they have been contaminated by the SARS-CoV-2 virus due to the fact that they were close to a user of this application who had been diagnosed or tested positive for this pathology. The draft modifies article 1 of the decree of December 25, 2020 in order to that the COVID vaccine treatment allows the delivery of proof of vaccination status that can be presented to meet vaccination obligations or the presentation of the health pass. The Commission considers that these additions are legitimate and make it possible to generate for the benefit of the persons concerned all the arising from the information kept in the file that they would

need with regard to the legislation in force. On other modifications to SI-DEP processing: On recipients he draft decree modifies article 10 of the decree of May 12, 2020 in order to complete the list of recipients of certain data contained in the SI-DEP processing. On the one hand, according to the draft decree, attending physicians and prescribing health professionals will be able to access certain information from SI-DEP. The Commission invites the Ministry to specify that the prescribing health professionals concerned are those prescribing virological or serological screening examinations. in the SI-DEP processing (identification data, technical characteristics of the sample, information relating to the results of the virological or serological screening examinations) in order to feed the shared medical file (DMP) of the persons concerned. According to the details of the Ministry, such a supply will make it possible to preserve the dated history of the results of related screening tests. The Ministry indicates that, although Article R. 1111-30 of the Public Health Code (CSP) provides that medical biology reports are entered into the DMP, less than approximately 5% of reports from laboratories of medical biology directly taking care of the patient are actually paid into it. The project therefore aims to ensure the completeness of the DMPs, through a centralized payment made by the CNAM. If this mode of supply seems acceptable in view of the circumstances, the Commission considers, in view of the risks that this supply derogating from the mode of nominal operation of the DMP, that it can neither be generalized, nor last beyond the use of SI-DEP, nor be extended to other data flows; it considers it essential that the DMP remain nominally supplied by healthcare professionals, in accordance with the provisions of the applicable CSP. The Commission also invites the Ministry to determine a retention period specific to the SI-DEP data uploaded in the DMP. In accordance with Article L. 1111-14 of the CSP, the DMP is opened automatically, unless the person concerned objects or of its legal representative, since July 1, 2021. According to the details of the ministry, only data relating to people who have not opposed the creation of their DMP can be added to it. The Commission invites the CNAM to take the necessary measures to ensure that the data of people who do not have a DMP are immediately erased upon receipt according to an appropriate procedure. On the identification data of healthcare professionals The draft amends Article 9 of the decree of the decree in order to add the ADELI number to the identification data processed concerning health professionals. As the ADELI directory lists professionals who are not in the shared directory of professionals working in the health system (RPPS), this development does not call for any comments from the Commission. automatic device connected to SI-DEP by professionalsThe draft modifies article 10 of the decree in order to impose on professionals using an automatic device to provide the results of virological or serological screening examinations in the SI-DEP treatment, that this appears on a published list of devices

complying with the safety conditions set by order of the Minister for Health issued pursuant to III of Article 11 of Law No. 2020-546 of 11 May 2020. The Commission notes that at the date of its opinion, the order has not been published and invites the Ministry to publish it as soon as possible. The Commission welcomes this modification, but notes that the wording adopted may it suggests that the compliance of the chosen system weighs entirely on the professional users. If, in their capacity as data controller, the choice of the device is indeed up to them, the Commission nevertheless suggests that the Ministry make it clearer that the burden of referencing rests on the service providers offering these devices, in their capacity as subcontractor. It therefore invites the ministry to modify the draft decree so that it requires the publishers of these automatic devices to obtain their referencing on the list, prior to their marketing, article 3 of the decree of December 25, 2020 in order to specify that health professionals, as well as the persons placed under their responsibility, can access certain information from the COVID vaccine treatment in order to carry out the recall of persons for whom the injection of a additional dose of vaccine is recommended and to issue proof of vaccination status. The Commission takes note of this. The draft decree also modifies Article 1 of the same decree in order to extend the use of the treatment within the framework of the control of the vaccination obligation of the persons subject to it. The decree, in its current version, provides that the purpose of the COVID vaccine processing is to provide data allowing the control of the vaccination obligation of the persons mentioned in the second paragraph of II of article 13 of the law. no. 2021-1040 of August 5, 2021 relating to the management of the health crisis. The changes envisaged, in order to provide that Vaccin COVID can be used for the purposes of monitoring the vaccination obligation of the persons mentioned in I of article 12 of law n° 2021-1040 of August 5, 2021 relating to the management of the health crisis, as provided for in II of Article 13 of the same law, would allow direct consultation of this treatment by the persons responsible for verifying compliance with the vaccination obligation. article 3 of the decree in order to add among the recipients of the data processed in COVID Vaccine the managers of structures in the field of health mentioned in 1° of I of article 12 of law n° 2021-1040 of August 5 2021 modified whose personnel are subject to the vaccination obligation, and the agents they authorize to access certain data of these personnel (identification, contact details and data relating to the performance of the vaccination). The Commission understands that these amendments to the decree aim to allow, within the framework of the control of the vaccination obligation, two types of access: one direct, for employers of structures in the field of health, and one indirectly via regional health agencies for other employers. If the Commission notes that Article 13 of Law No. 2021-1040 of August 5, 2021 on the management of the health crisis, amended by the Law of November 10, 2021, provided that employers, and thus the

managers of structures whose staff are subject to the vaccination obligation, could monitor compliance with this obligation, it underlines that the legislator provides that it is also up to the persons concerned to justify that they have effectively complied with their obligations. The Commission recalls that the COVID Vaccine system contains information covered by the medical secrecy provided for in Article L. 1110-4 of the CSP. The legislator has expressly provided, in II of article 13 of the aforementioned law, that the provisions of article L. 1110-4 of the CSP do not preclude the monitoring of compliance with the obligation by the employer. Commission deduces from the combination of these provisions that the control by direct consultation of the COVID Vaccine system, which would in practice only be open to certain categories of specific employers who have access to this file for other missions, should present a subsidiary nature, in particular when no proof has been produced by the employee, for example in the event of an emergency or suspicion of a false health pass, access to the COVID Vaccine, and the structures benefiting from direct access to the COVID Vaccine to authorize only people whose missions are related to the management of staff activities. On the information of the people concerned The project of decree, provides in its article 3, that the persons whose data were collected prior to its entry into force are informed without delay of the modifications made to the devices concerned by the data controllers who provide this information on their respective websites, or by any other means allowing this information to be brought to the attention of the persons concerned. The Committee welcomes this change. On the safety of the COVID vaccine and SI-DEP systems These systems, set up urgently and not intended to be implemented on a permanent basis, have seen their existence regularly extended due to the health crisis. The Commission therefore invites the data controllers concerned to raise the level of security of these systems so that the measures applied are in line with current and future threats. The Commission also invites the data controllers concerned to update their data protection impact analyses. Finally, more specifically, the Commission invites data controllers to strengthen the security measures governing data exchanges and, in particular, to deploy defense in depth mechanisms in the event of failure of a security measure. The President Marie-Laure DENIS