

Deliberation 2021-054 of May 12, 2021 Commission Nationale de l'Informatique et des Libertés Nature of the deliberation: Opinion Legal status: In force Date of publication on Légifrance: Tuesday May 18, 2021 Deliberation n° 2021-054 of May 12, 2021 providing an opinion on the draft implementation of a health pass conditioning access to certain events or establishments involving large gatherings of people (request for opinion no. 21008691) The National Commission for Computing and Liberties, Seized by the Secretary of State in charge of digital and the Minister of Solidarity and Health of a request for an opinion concerning the project to set up a health pass conditioning access to certain places, events or establishments involving large gatherings of people; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (general regulation on data protection); Having regard to law n° 78-17 of January 6, 1978 as amended relating to data processing, files and freedoms, in particular its article 8-I-2°e); After having heard the report of Mrs Valérie PEUGEOT, commissioner, and the observations of Mr Benjamin TOUZANNE, commissioner of the Government, Issues the following opinion: The National Commission for Computing and Freedoms (hereinafter the Commission) was seized, in extreme urgency, by the Secretary of State for Digital Affairs and the Minister for Solidarity and Health, on May 4, 2021, with a request for an opinion relating to the project to set up a health pass. On a preliminary note, the Commission regrets having to make a decision in such a short time, and after the debates at first reading in the National Assembly, given the substantial impacts of this project on the fundamental rights and freedoms of individuals. Although it notes that the Government was not required to seize it, with regard to a government amendment to a bill under consideration, the fact remains that such a mechanism, unprecedented since the intervention of the modified law of January 6, 1978 (hereinafter the Data Protection Act), would have deserved a longer period of reflection, through a bill submitted for its examination and that of the Council of State, this which would have been possible, the principle having been mentioned for a long time. as far as possible, the associated risks of contamination. To this end, the Government plans to make access to certain places, establishments or events involving large gatherings of people conditional on the alternative presentation of the result of a virological screening examination that does not conclude contamination by COVID-19. , proof of the administration of a vaccine against COVID-19 or a document attesting to recovery following contamination by COVID-19. The Government intends to mobilize the tools developed for the implementation of the future digital green certificate proposed by the European Commission, the objective of which is to facilitate the exercise of free movement within the European Union in a context of

health crisis. . This certificate will also be based on the three types of certified evidence or supporting documents indicated above and will allow the crossing of certain borders within the European Union. While the legal and technical terms of this digital green certificate are currently being defined at European level, as part of the negotiations on the proposed regulation establishing it and on which the European Data Protection Board and the European Supervisor of data protection issued a joint opinion dated March 31, 2021, the crossing of certain borders within the European Union is now subject to the presentation of such supporting documents. The Government has thus already initiated the development of a collection of digital evidence certified by the deployment of the TousAntiCovid Carnet functionality. The Commission draws the Government's attention to the technical recommendations made public, on its website, concerning the use of such functionality for journeys requiring health checks. In this context, the Government would like to know the position of principle and the recommendations of the Commission with regard to the mobilization of the certified evidence mentioned above to satisfy the health conditions, which could be laid down by law, in order to secure access to certain places, events or establishments bringing together a large number of people. This Commission opinion aims to provide these elements of response and to enlighten the Government on the analysis of such a system with regard to the provisions applicable to the protection of personal data, both in terms of concerning the admissibility of the invasion of privacy that it generates than with regard to the concrete methods of its implementation. he principle of the health pass to regulate access to certain places, establishments or eventsOn the conditions of admissibility of the health pass:As a preliminary point, the Commission emphasizes the sensitive and novel nature of the planned system, which aims to condition access to certain places, establishments or events to the presentation of proof of the person's state of health. The Commission considers that access to a place cannot, in principle, be conditional on the disclosure of information relating to the state people's health, including places that are not related to daily life. Indeed, if verification of the identity of persons may be required for access to certain places, the requirement to disclose other information relating to the private life of persons, a fortiori sensitive data, cannot be accepted. only with regard to the nature of the place or event attended and within the framework of the strict application of the principle of minimizing the collection of this data. The possibility of accessing places of sociability without having to prove one's state of health is part of the guarantees provided for the exercise of freedoms and helps to draw a reasonable boundary between what falls under individual responsibility and social control. The commission warns of the risk of creating a phenomenon of harmful habituation which could lead to justifying, for example, that access to a cinema is conditional on proof that the person is not a carrier of certain pathologies,

other than COVID. However, the Government's project is part of a very specific context, that of an unprecedented health crisis and the difficult organization of lifting the current restrictions, without compromising the objective of combating the epidemic.

The government has made the choice, which is its own, to promote, as far as possible, the rapid reopening of certain places or events, in particular cultural ones, which present particular health risks. It is in the light of these government objectives that the Commission examines the draft submitted to it. The fight against the COVID-19 epidemic contributes to the constitutional objective of health protection and constitutes a major imperative. such as to justify, under certain conditions, violations of fundamental freedoms and in particular the right to protection of privacy and personal data. As recalled by the Council of State in its opinion of December 20, 2020 on a bill establishing a long-term system for managing health emergencies, the admissibility of such a system depends on the preservation of the balance between principles of constitutional value such as, on the one hand, the objectives of protecting public health and, on the other hand, the effective exercise of certain freedoms.

COVID-19 affects not only the right to privacy of the persons concerned, but also other fundamental rights and freedoms, such as the freedom to come and go, the freedom to do business or the freedom to consent. medical treatment or to undergo a medical procedure. The Commission recalls that the assessment of the overall proportionality between the contribution of a health pass to the protection of the health of the population and these damages does not fall within the scope of the missions entrusted to it by law, but of Parliament, the Government and courts which will have to control its action. It recalls, however, that, within this overall assessment, the right to respect for private life and to the protection of personal data, protected constitutionally and by agreement, in particular by the Charter of fundamental rights of the European Union and by the Convention for the Protection of Human Rights and Fundamental Freedoms, requires that infringements of these rights by public authorities not only be justified by a reason of general interest but also be necessary and proportionate to achieve this objective. It appears to the Commission that the invasion of privacy and the rights and li people's freedoms through this system can only be admissible if the Government can rely on sufficiently relevant and convincing evidence to guarantee that such a system will be necessary for the management of the health crisis, in particular with a view to the reopening of certain places and the resumption of certain activities. It also points out that the device is likely to reveal to third parties data concerning health, benefiting from a specific protection regime provided for by the general regulation on data protection (GDPR) informed by its recital 35, by the Data Protection Act and, depending on the intended uses, by the specific provisions of the Public Health Code. The Commission considers that, regardless of the context of an emergency or health crisis , sufficient safeguards

to protect the rights and freedoms of individuals must be provided to the device, in particular in order to strictly limit the disclosure of private information and to avoid any risk of undue discrimination, due to the state of health but also due to the ability to access and use digital tools. It is in the light of these general principles that it is necessary to assess the use of the health pass described in the referral. Commission's assessment of the Government's project The Commission considers that the implementation of such a system must be considered with great caution, in a completely exceptional, given the scale of the current health crisis and for a temporary period. On the need for the system The Commission underlines, while recalling that it is not for it to comment on the scientific usefulness of a such a device, which the Scientific Council in its opinion of May 3, 2021, considered useful the introduction of a health pass used on a temporary and exceptional basis, considering that its use can promote the resumption of certain activities, in particular the organization of gatherings, under conditions favoring a reduction of the risks of contamination. Such a device, if it does not eliminate the risk of transmission of the virus during these events, seems likely to reduce it substantially. The current health crisis seems to be able to justify the implementation of such a device, which would allow the holding and the attendance of events or places bringing together a large number of people who, failing this, may not be present in view of the risk of contamination. On the other hand, the use of this type of device cannot in any case be maintained beyond the health crisis. Indeed, the maintenance of the system must be limited to the duration strictly necessary for the response to the exceptional health situation, taking into account the relevant epidemiological parameters available, and must, in any event, end as soon as this need disappears. A regular reassessment of this need is imperative. In this respect, the Commission considers that the impact of the system on the overall health strategy must be studied and documented frequently, at regular intervals and on the basis of objective data so that the usefulness and its proportionality over time can be assessed. It requests that these analyzes be communicated to it, if necessary, in order to enable it to carry out its mission of monitoring the compliance of the implementation of the planned system. On the proportionality of the system With regard to the proportionality of the plan, the Commission notes that the Government is considering a number of guarantees. Nevertheless, it considers that these must be specified in the law and that additional safeguards should be implemented effectively in order to limit the infringements of the right to data protection likely to be caused by such a device. Firstly, the Commission notes that the choice was made to restrict the use of the health pass to places, establishments and leisure events (performance halls, festivals, etc.) as well as to fairs and trade shows allowing the presence simultaneous use of a large number of people, according to a threshold which could be envisaged at 1,000 people. people present, to exclude

places related to daily activities (restaurants, workplaces, shops, etc.) where it is difficult not to go, and to exclude Finally, the places that are linked to certain usual manifestations of fundamental freedoms (in particular the freedom to demonstrate, political or trade union meetings and freedom of religion) are guarantees likely to minimize the impact of the system on the rights and freedoms of persons. The Commission regrets the absence of a more precise definition of the nature of the places, establishments and events concerned. Although it takes note of the clarifications provided by the Government according to which these will be precisely defined by regulatory means, it nevertheless considers that the minimum attendance threshold beyond which the health pass could be implemented, and the methods of evaluation of it, should also be framed by legislation. It considers, moreover, that the provisions of the law should explicitly prohibit the possibility for the persons in charge of the places which are not covered by the system to subordinate, on their own initiative, their access to the presentation of digital evidence. Secondly, the Commission emphasizes the importance of not allowing discrimination between different types of certified evidence. It considers that the texts should specify the prohibition for the places, establishments and events concerned to select the types of certified evidence that they accept. Thirdly, the Commission stresses that the implementation of a health pass making it possible to regulate access to certain places, establishments and events, in principle free, is only justified in addition to an active and equitable policy of access to tests and vaccines, this system must be part of a global health policy and fourth and lastly, it draws the Government's attention to the need to guarantee the availability of certified evidence in paper format, in particular to ensure that the difficulties of accessing and using digital tools do not result in the exclusion of part of the population from the scheme. scientific elements presented to it, the Commission considers that if these were all lifted, the use of a health pass seems possible for the places, establishments and events mentioned. On the legislative and regulatory provisions governing the health pass The principle of the health pass health is currently the subject of debate in Parliament, within the framework of the amendment tabled by the Government to the bill relating to the end of the state of health emergency. Firstly, as noted by the Committee European Data Protection and the European Data Protection Supervisor in their joint opinion on the proposal for a regulation relating to the digital green certificate, the establishment of such a system requires a legal basis in national law, within the meaning of GDPR. This legal provision, which is based on an objective of public interest, must at least specify the purposes of the processing, the nature of the activities or places concerned, and frame the content of the regulatory provisions. As mentioned above, the law should regulate the attendance threshold and prohibit the possibility, in cases not covered by the system, of making access conditional on the presentation of certified digital

evidence. In addition, regulatory provisions should come specify, at a minimum: the scope and extent of the processing of personal data; the person(s) responsible for the processing of personal data. On this point, the Commission wonders about the sharing of responsibilities between the various players involved in the system; the categories of users and recipients authorized to check the evidence when accessing the places, establishments and events concerned; safeguards necessary to prevent discrimination and abuse, taking into account risks to the rights and freedoms of data subjects, such as the lack of retention of data as part of the verification process and the lack of possibility of re-use of data for other purposes; the duration of the device. The Commission considers that the provisions could also provide for the destruction of evidence stored in users' TousAntiCovid applications. On the concrete methods for implementing the system The Commission notes that the exact methods for implementing the system, both legal and technical, are likely to change due, on the one hand, to ongoing debates within Parliament and, on the other hand, to European negotiations on the proposal for a regulation relating to the digital green certificate. In any event, it draws the Government's attention to the need for the controller(s) to carry out a data protection impact analysis (DPIA), before any implementation of such a device, when the processing of such data is likely to create high risks for the rights and freedoms of natural persons (health data, large-scale use, use of a new technological solution). It requests that this analysis be sent to it, if necessary, in parallel with any new referral relating to this system and in particular in the event of a modification of the TousAntiCovid decree. For the purposes of readability, the Commission suggests that the Government carry out a separate DPIA from that of the contact tracking functionality, since these processing operations, although carried by the same application, appear to be disjoint by nature. It also recommends their publication, for purposes of transparency and with regard to the current context. use of the power of control entrusted to it by the legislator. On the access, by the persons in charge of verifying the evidence, to the personal data of the persons concerned The Government indicates that, if the law were passed, it would have recourse to the evidence available in the TousAntiCovid Carnet functionality already used for border crossings. He wonders about the relevance of implementing a solution for reading certified digital proofs which would process the information contained in the digital certificates in order to only display on the screen, during the verification, a compliance result (color green or red) in addition to the identity of the person concerned, without appearing the category of evidence used. The Commission considers that a system aimed at allowing verification only on the basis of a compliance result would considerably reduce the data accessible to persons authorized to verify the status of the persons concerned, and in particular not to indicate whether they have been vaccinated, have had a test or have recovered from a previous infection

with COVID-19, in accordance with the principle of data minimization. It therefore welcomes the Government's proposal and invites it to implement this functionality as soon as possible, in the event that Parliament enshrines the principle of the health pass in law.

verifiers, an application allowing to decode the signals, probably in the form of QR-code, which will contain the information allowing to show a green or red result and to verify the authenticity. In the event that this QR code corresponds to the codes currently available in the TousAntiCovid Carnet functionality, the Commission notes that it contains more information (last name, first name, date of birth, date of examination, type of examination , results). It is therefore possible, in this case, that such a device is hijacked so that the reader (telephone or dedicated reader) reading the QR code can access more information than a simple compliance result (color green or red). It invites the Government to ensure the implementation of operational measures and to provide the persons managing the places, events and establishments with all necessary documentation (communication on the places, establishments or events subject to the system, implementation of visible signage on site, etc.) to guard against this risk.

On the guarantees to be provided for certified evidence presented outside the TousAntiCovid application The Commission is asking the Government to consider 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 of personal data. In particular, the system implemented should guarantee that people who do not have proof integrated into the TousAntiCovid application (paper proof or proof in PDF format) should be able to present only the QR code containing the digital data when checking their health status.

On the responsibility for processing, information and the rights of data subjects Although proof of vaccination, non-contamination or recovery may be intended to be called up on a smartphone by the data subject , the Commission considers that the responsibility for data processing will fall to the public authority which will have implemented this system. The Commission recalls that under the GDPR, the persons managing the places, establishments or events which will be conditioned on the presentation of this health pass will be responsible for processing data as part of the verification operation. In this respect, it draws attention to the need for the latter to make the persons authorized to check the evidence, whether they are professionals or volunteers, aware of their obligations with regard to compliance with data protection. of a personal nature. With regard to compliance with transparency obligations, appropriate information must be provided by these data controllers to the persons concerned, in compliance with Articles 12 to 14 of the GDPR. The Commission specifies that information, understandable by the greatest number, should in particular be available as far upstream as possible from the verification (for example, on the websites for booking a concert, etc.) and placed in places

accessible and visible when accessing the place, establishment or event concerned by the device. The Commission requests, in order to ensure the homogeneity and compliance of these information measures with Articles 12 and 13 of the GDPR, that information models be made available by the Government to the professionals concerned. It recalls that situations such as the current health crisis can neither suspend nor restrict, in principle, the possibility for data subjects to exercise their rights over their personal data, in accordance with the provisions of Articles 12 to 22 of the GDPR. On the security of the device As the detailed technical details of the planned device have not yet been defined, the Commission is only presenting at this stage the lines of thought intended for the Ministry. The AIPD of the digital evidence management functionality must take into account the risks related to the entire information processing chain necessary for the implementation of the health pass, from the information systems already implemented and allowing the generation of passes up to the verification application entitled TousAntiCovid-Verif . This analysis must in particular include a detailed examination of the data flows, from their collection to their destruction, as well as the processing operations of this data, including during the proof verification process by TousAntiCovid-Verif. The AIPD will also have to identify the risks linked to the processing of the health pass for the confidentiality, integrity and availability of the data as well as their impacts on the privacy of the users of TousAntiCovid, including during the process of verifying evidence via the TousAntiCovid-Verif tool, and take into account the additional risks linked to the benefits provided by this health pass for their bearer. The Commission draws the Ministry's attention to the fact that the risks resulting from the fraudulent issue, fraudulent use or even falsification of the digital evidence contained in the certificates must be taken into account in the analysis, if these risks have an impact on the rights and freedoms of people wishing to access places, establishments or events whose access is conditional on a verification of their health status. Finally, the DPIA must list the technical and organizational measures planned to minimize the identified risks. The Commission recalls that it is necessary for the residual risks to be reduced to the lowest possible level in order to be acceptable. practical implementation of the health pass, which it considers to be expected requirements for processing that respects the principle of data protection by design and data protection by default. Firstly, the Commission emphasizes that the health pass system, including the TousAntiCovid-Verif tool, should not lead to the creation of a centralized database grouping together the data processed as part of the certificate verifications. In this respect, while it is obviously possible to verify the validity of the evidence presented by the persons, no trace of this verification should remain once it has been carried out. Secondly, the Commission insists on the importance of guaranteeing that the information present in the health pass and allowing the

definition of the status correspond to those of the person concerned, that they are correct and tamper-proof. In this respect, the Commission notes that the evidence will be provided by a health authority and that it will be cryptographically signed. The algorithms used to verify the integrity and authenticity of the evidence must be robust and up to date. art, and associated with adequate management of cryptographic keys. Thirdly, the Commission notes that the digital tool, called TousAntiCovid-Verif, dedicated to reading the health pass, can only have access to information from it. 'read-only. Finally, the Commission invites the Ministry to approach the National Information Systems Security Agency (ANSSI) so that audits and technical tests are carried out to guarantee the security and resilience of the mechanism envisaged. The President Marie-Laure DENIS