

Deliberation 2019-151 of December 12, 2019 National Commission for Computing and Liberties Nature of the deliberation:

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No. 2019-151 of December 12, 2019 providing an opinion on a draft decree of the Conseil d'Etat on the transparency of links of

interest between companies producing or marketing health products for human use and influencers (request for opinion no.

19020623) The National Commission for Information Technology and freedoms,

Seizure by the Ministry of Social Affairs and Health of a request for an opinion concerning a draft decree in Council of State

relating to the transparency of links of interest between companies producing or marketing health products for human use and

influencers;

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 public health code, in particular its articles L. 1453-1, L. 5311-1, R. 1453-2 and following;

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

Having regard to Law No. 2019-774 of July 24, 2019 relating to the organization and transformation of the health system;

Having regard to decree no. 2016-1939 of December 28, 2016 relating to the public declaration of interests provided for in

article L. 1451-1 of the public health code and to the transparency of the advantages granted by companies producing or

marketing products for health or cosmetic purposes;

Considering the decree n° 2019-536 of May 29, 2019 taken for the application of the law n° 78-17 of January 6, 1978 relating

to data processing, files and freedoms;

Having regard to the amended decree of 3 December 2013 relating to the operating conditions of the single public website

mentioned in article R. 1453-4 of the public health code;

Having regard to deliberation no. 2016-242 of July 21, 2016 providing an opinion on a draft decree by the Council of State

relating to the public declaration of interests provided for in article L. 1451-1 of the public health code and the transparency of

the advantages granted by companies producing or marketing products for health and cosmetic purposes intended for

humans. On the proposal of Mrs Valérie PEUGEOT, commissioner, and after having heard the observations of Mrs Nacima BELKACEM, government commissioner,

Gives the following opinion:

The draft decree submitted for the opinion of the Commission (hereafter the draft) is intended to define the conditions of application of article L. 1453-1 of the CSP concerning the links of interest between companies producing or marketing health products for human use and persons who, in the media or on social networks, present one or more health products in such a way as to influence the public. As such, the draft defines the nature of the information that must be made public on the Transparency Health website with regard to these influencers in order to take into account the legislative changes resulting from the law of July 24, 2019.

Pursuant to these new provisions, the aforementioned companies are required to make public the existence of the agreements they conclude with these persons. These companies will also have to make public, beyond a threshold set by the decree whose modification is envisaged, the remuneration paid and the advantages granted to them.

On the scope of Article L. 1453-1 of the CSP:

Article L. 1453-1 of the CSP states that: Companies producing or marketing the products mentioned in II of Article L. 5311-1 with the exception of those mentioned in 14°, 15° and 17° or ensuring services associated with these products are required to make public, on a single public website, the precise object, the date, the direct beneficiary and the final beneficiary, and the amount of the agreements they conclude with: (...)

7° bis Persons who, in the media or on social networks, present one or more health products in such a way as to influence the public;

Article 1 of the draft specifies the information that must be made public by these companies for past agreements when it is an influencer within the meaning of 7° bis of I of article L. 1453-1 of the CSP .

The Commission therefore notes that the decree summarizes the definition laid down by law by the term "influencer", of which it thus endorses the legal definition.

On the nature of the information made public:

Article 1 of the draft text provides for supplementing Article R. 1453-3 of the CSP by specifying the nature of the influencer's identification data which must be made public when companies producing or marketing health products for human use enter

into agreements, pay remuneration and benefits to them.

The draft article R. 1453-3 of the CSP provides that, in addition to the identity of the company including its corporate name, its corporate purpose and the address of the registered office, the name under which the influencer exercises his activity of influence. Added to this is the date of signature of the agreement, its expiry date, its precise purpose and its total amount as well as the nature and amount of the benefits in kind and compensation granted.

Insofar as the identification data published, with regard to health professionals and students, who are natural persons, are in particular the surname, first name, professional address or, for students, that of the establishment of education or organization and, where applicable, the personal identifier in the shared directory of health professionals, the Commission wonders about the scope of the notion of name with regard to influencers, which would be the only data of identification made public concerning them.

She also wonders about the use of the term denomination, more commonly used to designate an element of a trademark, within the meaning of the provisions of Article L. 711-1 of the Intellectual Property Code or to designate a moral person.

It recommends, insofar as the information which seems to have to be made public could be similar to a pseudonym within the meaning of the provisions of Article L. 113-6 of the Intellectual Property Code, that particular vigilance be given the maintenance of the confidentiality of the data allowing the direct identification of the persons concerned, in particular when the latter do not carry out their activity under their civil identity.

The other articles of the draft decree do not, as they stand and with regard to the amended law of 6 January 1978, call for any further observations by the Commission.

For the President:

Deputy Vice-President,

S. Lambremon