

Deliberation 2021-097 of August 6, 2021 Commission Nationale de l'Informatique et des Libertés Nature of the deliberation: Opinion Legal status: In force Date of publication on Légifrance: Thursday August 12, 2021 NOR: CNIX2124628V Deliberation n° 2021-097 of August 6, 2021 providing an opinion on a draft decree amending decree no. 2021-699 of June 1, 2021 prescribing the general measures necessary for managing the end of the health crisis and decree no. 2021-901 of July 6, 2021 relating to the automated processing of personal data referred to as "Certificate converter" (request for opinion no. 21013690)

The National Commission for Computing and Liberties, Seizure by the Minister for Solidarity and Health of a request for an opinion relating to the draft decree amending the decree n° 2021-699 of June 1, 2021 prescribing the general measures necessary for the management of the end of the health crisis and decree n° 2021-901 of July 6, 2021 relating to the automated processing of personal data referred to as Certificate Converter; 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 circulation of this data, and repealing Directive 95/46/EC (general regulation on data protection); Having regard to decree n° 2021-699 of June 1, 2021 prescribing the general measures necessary for the management of the end of the health crisis, in particular its article 2-3; Having regard to Decree No. 2021-901 of July 6, 2021 relating to the automated processing of personal data called Certificate Converter; After having heard the report of Mrs Marie-Laure DENIS, President, and the observations of Mr Benjamin TOUZANNE, Government Commissioner, Issues the following opinion: The National Commission for Computing and Liberties (hereinafter the Commission) was seized urgently, on July 27, 2021, by the Minister for Solidarity and Health, then on August 3, 2021 by corrective referral, of a request for an opinion relating to a draft decree amending, on the one hand, Decree No. 2021-699 of June 1, 2021 prescribing the general measures necessary for managing the end of the health crisis and, on the other hand, Decree No. 2021-901 of July 6, 2021 relating to the automated processing of personal data. personal character referred to as Certificate Converter. This modification is part of the law relating to the management of the health crisis, which provides in particular for a very substantial extension of the scope of the health pass. In a context of epidemic resumption, the Government has chosen to extend the system, initially limited to certain trips abroad or outside France and to events bringing together a large number of people present, to certain places of activities of daily living (restaurants, pubs, long-distance interregional public transport, etc.), regardless of the number of people present. The Commission notes that the Constitutional Council has validated the provisions relating to the health pass, with the exception of those relating to the creation of a new ground for early termination applicable to fixed-term contracts and assignment contracts

but whose censorship does not impact not the draft decree submitted for the opinion of the Commission. The significant extension of the compulsory use of the health pass raises new and complex questions of articulation between the protection of public health and the exercise of fundamental freedoms. As noted by the CNIL college in its previous opinions on the health pass dated May 12 and June 7, the implementation of a health check at the entrance to certain places or means of transport questions the boundary between what is individual responsibility and what is social control. The use of the health pass for places of daily life also entails the implementation of large-scale automated processing of health data. In this respect, the Commission warns of the risk of addiction and trivialization of such privacy-invading devices and sliding, in the future, and potentially for other considerations, towards a society where such controls become the norm and not the exception. Thus, it considers that the health context can justify exceptional measures only if, on the one hand, these measures are limited in time and, on the other hand, if it is demonstrated that their implementation is necessary to fight against the rebound of the epidemic and avoid measures that are even more detrimental to freedoms, in particular a new confinement. In any case, these measures must be limited to what is strictly necessary, whether in terms of their duration, the persons or the places where they apply, and be accompanied by safeguards such as to effectively prevent abuse. If the law relating to the management of the health crisis provides that the system must end on November 15, 2021, subject to an extension which could only take place following new parliamentary debates, the Commission draws the attention of the Ministry to the fact that the proliferation of digital devices implemented in the context of the management of the epidemic makes absolutely necessary a quantified and objective evaluation of their effectiveness in the fight against covid-19, which it has reiterated on numerous occasions since the beginning of the epidemic in order to ensure that the use of these devices ends as soon as this need disappears. It considers that this exercise is becoming an imperative requirement with the new health pass project envisaged only a few weeks after the creation of the previous one, and without the knowledge and documentation of any shortcomings of the current system and/or the comparative advantages of its extension in itself. or compared to other methods to avoid a new rebound of the pandemic (general vaccination obligation, total or partial containment measures, rigorous tracing, etc.). In view of the elements recalled above, the Commission makes the following observations. On the provisions amending Decree No. 2021-699 of June 1, 2021 prescribing the general measures necessary for managing the end of the health crisis possible to reading devices other than the TousAntiCovid Verif application Paragraph III of draft article 2-3 of decree no. health, to use other reading devices than the application called TousAntiCovid Verif, provided that these meet the conditions set by an order of the Minister

for Health. It also specifies that the people and services who use these alternative devices for the control of the health pass must inform the ministry. Such an opening must allow, on the one hand, the verification of supporting documents on terminals not having application stores in which the TousAntiCovid Verif application is currently available and, on the other hand, an online check of the health pass (for example, when checking in online as part of a trip) in order to facilitate verification in certain environments characterized by a large volume, in particular in order to reduce queues (airports, stations, etc.). Firstly, the Commission recalls that the compulsory use of a single instrument for reading health passes, developed under the control of the public authorities and easily identifiable by citizens, constituted an important guarantee to avoid misappropriation of data. While it considers it legitimate for other instruments to be used for use cases that the government application cannot meet, it notes that these devices must, in any case, meet the conditions set by decree. It recommends that the decree set a condition for the use of alternative devices, either that the use of TousAntiCovid Vérif proves to be materially impossible (for example, in cases where the controllers are equipped with terminals that do not access the data stores). above-mentioned applications), or that the choice be offered, to the persons concerned by the control of their sanitary pass, to use one or other of the devices (for example, online registration with an alternative device before take a plane or check at the airport by people using the TousAntiCovid Verif application). Secondly, the draft decree does not specify the conditions that must be met by alternative reading devices to the TousAntiCovid Verif application and refers, on this point, to an order of the Minister for Health. The Commission takes note of the clarifications provided by the Ministry according to which the specifications defining the elements taken into account in the evaluation of these devices is currently being finalized and will take into account compliance with the obligations established by the texts governing the health pass , compliance with the General Data Protection Regulation (GDPR) as well as elements relating to the security of information systems. While it welcomes these clarifications, the Commission considers that they call for the following observations. First of all, the Commission considers that the draft decree should be supplemented in order to specify that the conditions set by the decree mentioned above will be checked by the Ministry before the reading device is connected to the National Printing Office system (in order to recover the public signature keys of the States using the DCC format for their certificates, and thus to allow the verification of their validity) and can therefore be operational. It considers that the ministry should check, at a minimum, compliance with all the conditions laid down by the law and the implementing decree, the justification of the level of security with regard to the requirements of Article 32 of the GDPR as well as the Absence of illicit transfer of personal data pursuant to Chapter V of the GDPR.

verification of the health pass online, such as the impossibility, for the device concerned, of keeping the data beyond what the texts allow, of transmitting them to third parties or of modifying them. The security measures of these devices must comply with Article 32 of the GDPR, in particular concerning the use of robust encryption algorithms deemed to be state-of-the-art. In addition, it invites the ministry to ensure that the approved reading devices comply with the general security reference system (RGS). The Commission also draws the Ministry's attention to the need to ensure that the devices assessed do not result in the transfer of data outside the European Union as part of the verification operation or, failing that, check that these transfers are subject to a framework, both legal and technical, making it possible to guarantee their legality. In addition, it invites the Ministry to provide additional guarantees to ensure the transparency of the system as a whole: these could include the publication, on the ministry's website, of an official list of the reading devices for which the ministry has deemed that they meet the conditions defined by the decree mentioned above after verification, as well as than a publication of the people or services using these alternative devices. It also considers that the publication of the source code of these devices should be systematic in order to provide strong guarantees in terms of transparency. Finally, the Commission considers that the Ministry will have to significantly strengthen its educational efforts with regard to professionals in order to ensure compliance with the obligations imposed on them by the texts, and in particular the use of the TousAntiCovid Verif application or a reading device in accordance with the conditions set by decree. In this regard, it has been brought to the attention of the Commission that the TousAntiCovid application could be used, by mistake, to control the health pass. The TousAntiCovid application is not, unlike TousAntiCovid Verif, a device for reading the health pass and should not, under any circumstances, be used in the context of control operations since it would allow illegitimate access to data and unlawful retention of supporting documents. It asks the ministry to identify technical and functional solutions, in addition to raising the awareness of the professionals concerned as mentioned above, in order to considerably minimize the risk of error. Furthermore, as regards the possibility of verifying that the holder of the health pass is legitimate, the Commission considers that the controller should only be able to demand additional information in the event of doubt based on objective elements.

On enlargement data accessible to persons or services authorized to check the health pass in the context of certain trips

Article 1 of the draft decree amends paragraph III of article 2-3 of decree no. expand the data to which personnel and services authorized to check the health pass required pursuant to 1° of A of II of Article 1 of the law of 31 May 2021 as amended by law no. 2021-1040 of August 5, 2021. Indeed, while the decree currently in force only provides for limited access to the surnames, first names, date of birth of the person

concerned as well as to the positive or negative result of holding a just compliant, the provisions referred to above now provide that these actors will also have access to information relating to the screening examination or the vaccine carried out. The Commission notes that such an extension is permitted by the law on crisis management sanitary, provided that access to this data is strictly necessary for the control of the sanitary pass in this context. The Commission specifies that the relevant provisions of the law and of the draft decree must be understood, according to it, as designating direct access to data by natural persons controlling the health pass: in all cases, all the data is read and processed by the IT tools used for control. It takes note of the Ministry's clarifications that these legislative and regulatory changes are linked to the fact that control operations during trips abroad sometimes require the controller to itself ensures compliance with the various rules imposed by the countries to which people travel, these rules being very variable and subject to frequent modification. The Commission considers that these elements are such as to justify that only the actors in charge of checking the health pass when traveling abroad have broader access to the personal data present on the supporting documents than the persons and services authorized to control the health pass linked to activities whose rules are not specific from one activity to another and are not intended to change. Nevertheless, the Commission notes that the reference to the control of the health pass required pursuant to 1 ° of A of II of article 1 of the law of May 31, 2021 as amended by law n ° 2021-1040 of August 5, 2021 refers, on the one hand, to the control of persons aged at least twelve years when traveling to or from France, Corsica or the Overseas Territories (hereinafter the travel health pass) and, on the other hand, to that of personnel involved in the transport services concerned. It considers that with regard to the justification provided, only travelers wishing to travel abroad should be affected by such an extension, to the exclusion of both people traveling to or from Corsica or the Overseas -mer than personnel involved in these transport services. In addition, it invites the Ministry to reflect on the possibility of developing a system in which the management rules could be automated, so that the people in charge of verifying the certificates have more limited access to data, in the same way as in the context of the health pass aimed at regulating access to certain places, establishments, services or events. This objective seems possible in particular for the rules enacted by the member countries of the European Union. On the absence of retention of data in the context of the verification of the medical pass Paragraph 4 of paragraph III of draft article 2-3 of decree no. 2021-699 of 1 June 2021 as amended provides that if the data is not stored in the TousAntiCovid Vérif application, it may however be stored temporarily by the other reading devices mentioned above and only for the duration one and the same control of movement or access to a place, establishment or service covered by the

obligation to present the health pass. data is justified by the fact that the verification of the online health pass is carried out upstream (sometimes up to a few days) of a trip or access to the place, establishment or service concerned. While it does not question the usefulness, in certain cases, of storing information temporarily, for example between online check-in and the boarding of a passenger, the Commission nevertheless considers that only the result of the verification carried out should be concerned, in accordance with the principle of data minimization enshrined in Article 5.1.c of the GDPR. It therefore invites the Ministry to modify the draft decree on this point. On the provisions amending decree no. 2021-901 of July 6, 2021 relating to the automated processing of personal data referred to as certificate converter decree provides for the extension of the certificate converter to the conversion of international proof certificates into certificates meeting European or national standards and which can be produced within the framework of the health pass. The aim here is to allow French nationals living abroad as well as foreigners to be able to obtain a certificate that can be recognized in France or within the European Union and this, in a context where access to a the greatest number of places, establishments and events will be subject to the presentation of the health pass. The 2° of paragraph I of the draft article 2 of the decree n ° 2021-901 of July 6, 2021 modified thus specifies that the converter of certificates is now available via a dedicated entry portal on which entry is made on the basis of a certificate in international format which allows its users, who are acting on behalf of a third party, to convert it into a format respecting European or national standards. As a preliminary point, the Commission takes note of the clarifications of the Ministry according to which, in practice, the persons concerned will have to send, by e-mail, the data necessary for the generation of the certificate of ccination in DCC format as well as an identity document, proof of the country of residence and their dates of travel in France. Upon receipt of these elements, sworn agents from the Ministry for Europe and Foreign Affairs (MEAE) and the National Health Insurance Fund (CNAM) will enter the information strictly necessary for the generation of the certificate on the dedicated portal mentioned above. above, in order to obtain a version in DCC format. It also notes that the Ministry has specified that the conversion service could be offered to foreign tourists at the tourist information points open in Paris airports and managed by the regional tourism committee (CRT) of Ile-de- -France ; specially authorized agents of the CRT could therefore use the dedicated portal on behalf of foreign tourists. Firstly, the Commission considers that the wording of the draft decree should be clarified on this point. It thus invites the Ministry to specify that the users targeted in this case are public or specially authorized officials who act on behalf of the applicants (in particular French nationals living abroad). Secondly, the Commission takes note of the Ministry's clarifications that the certificate converter, via the dedicated portal, is intended to

enable the conversion of vaccination and recovery certificates as well as contraindication certificates introduced by Law no. ° 2021-1040 of August 5, 2021 relating to the management of the health crisis. It stresses, in this respect, that the draft decree will have to be supplemented, on the one hand, in order to provide for the integration of the contraindication certificate under the certificates referred to in Article 1 of Decree No. 2021-901 of July 6, 2021 and, on the other hand, in order to mention the data strictly necessary for the conversion of the reinstatement and contraindication certificates to article 2-II of the aforementioned decree. In addition, it wonders about the advisability of also modifying the aforementioned decree n° 2021-699 of June 1, 2021 in order to add the certificate of contraindication to the health pass, in view of the possibility of producing such a certificate. in the context of the health pass linked to the activities in accordance with J of paragraph II of article 1 of the law of May 31, 2021 as amended by law no. 2021-1040 of August 5, 2021. Thirdly, the Commission recalls the need to ensure that the documents and data communicated by the applicants are deleted once the conversion has been carried out and the certificate sent to their holders, in accordance with the principle of limitation of data retention set out in Article 5.1.e of the GDPR. Fourthly, it draws the Ministry's attention to the importance of raising the awareness of the agents in charge of data entry of their obligations in terms of respect for the protection of personal data, in particular respecting the confidentiality of the data processed and the need to delete the elements transmitted at the end of the conversion operation. Lastly, the Commission considers that this procedure falls within the scope of the reference system general safety rules applying to teleservices. However, this prohibits the transmission of such data, in particular health data, by simple e-mail. It therefore invites the Ministry to restrict the transmission of the data needed to generate a health pass in DCC format to a transmission channel other than email, such as a secure and easy-to-use web portal, so that that it is not necessary to ensure the security measures offered by the e-mail provider of the person concerned, in particular concerning the encryption implemented during the transmission of the data. On data transfers outside the European Union The Commission takes note of the clarifications provided by the Ministry according to which end-to-end encryption has been put in place for the certificates to be converted during their transmission, in order to guarantee the conformity of the data transfers made as a result of the use of a US provider. It notes that the encryption method used complies with recommendations 01/2020 of the European Data Protection Board when the data may be subject to access by the authorities of the country of destination and that the latter does not offer an essentially equivalent level of protection. Furthermore, the Commission also takes note of the Ministry's confirmation that the US service provider is to be replaced, in the coming days, by a service provider subject to jurisdictions exclusively within

the European Union The situation therefore seems to him to be in conformity with Chapter V of the GDPR. The President,M.-L.

Denis