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# What Role for Independent Agencies in Times of Crises? An Analysis Through the French Experience

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Most States currently have independent administrative authorities or equivalents: Regulatory Agencies or Independent Regulatory Commissions in the United States; QUANGOS (Quasi Autonomous Non-Governmental Organizations) in the United Kingdom; Independent Administrative Authorities and Independent Public Authorities in France. From the historical point of view, the first agencies were created in the United States. For example: Interstate Commerce Commission (1887), Federal Trade Commission (1915), Federal Power Commission (1920), Federal Communication Commission (1934), Securities and Exchange Commission (1934). They had a regulatory function in order to reduce governmental centralization or to fight against monopolistic and unfair practices. In a report from 1937 (*Brownlow Report*), these agencies were presented as “a fourth branch of government”. In the years 1960-1970, many agencies were invested with a regulatory power in social and interest fields: Environmental Protection Agency, Consumer Product Safety Commission.

The American experience was brought to the United Kingdom, where have been created the QUANGOS (Quasi Autonomous Non-Governmental Organizations): public persons not under the authority of a minister, but which nevertheless contribute to the implementation of government policy. Three major categories of QUANGOS can be pointed up:

- those which perform administrative functions. These functions are quite varied: operational, regulatory by supervising and controlling activities of general interest, cultural and scientific, advising the central administration;
- the QUANGOS perform functions of an industrial and commercial nature: public enterprises, national companies (Bank of England, British Airways Corporation).
- the QUANGOS having judicial functions.

In France, this type of institutions was created by law n° 78-17 of the 6<sup>th</sup> of January 1978. They were called “Independent Administrative Authority”. By law n° 2017-55 of the 20<sup>th</sup> of January 2017, a significant reform was carried out. First, two categories of authorities were created: Independent Administrative Authorities (IAA)<sup>1</sup> and Independent Public

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<sup>1</sup> Examples of Independent Administrative Authorities: Commission for Access to Administrative Documents (*Commission d'accès aux documents administratifs*); Defender of rights (*Défenseur des droits*); National Commission for Computing and Freedoms (*Commission nationale de l'informatique et des libertés*); General Supervisor of Places of Deprivation of Liberty (*Contrôleur general des lieux de privation de liberté*).

Authorities (IPA)<sup>2</sup>. The difference between the two lies in the fact that Independent Public Authorities have legal personality. That allows them to have their own financial resources and to bring a dispute before a court. The second aspect of the 2017 reform was the reduction in the number of authorities, from 47 to 26 (17 IAA and 9 IPA).

The competences of the Independent Administrative Authorities and the Independent Public Authorities vary from one to the other. In general, four types of skills can be distinguished:

- a power of opinion or recommendation;
- individual decision-making power;
- a power of regulation, consisting in organizing a sector of activity by establishing rules;
- a power of sanction if the rules laid down by these institutions are not respected.

Generally, the health crisis has caused a lot of upheaval in the actions and working methods of the IAA and IPA, but also a more assertive conception of their role. All of them have indeed been impacted by the crisis and have focused most of their actions on the defense of fundamental rights and freedoms undermined during the state of health emergency. Some of them have been particularly at the center of this upheaval and have experienced overactivity and increased visibility due to greater solicitation by the public authorities with regard to the measures taken to deal with the pandemic (hearings, requests for opinions and certification). This was particularly the case of the High Authority for Health, which was strongly called upon to deliver its scientific expertise and support the public authorities in their decision-making.

Faced with the “digitalization of society”, which has placed personal data at the center of the health crisis (information systems to fight against the spread of the virus, medical research, social networks, videoconferencing, online shopping, teleworking, telemedicine, or tele-education), the National Commission for Informatics and Freedoms has also experienced an intensification of its advisory and control activities, as it highlighted in its 2020 activity report<sup>3</sup>.

The IAA and IPA also had an important role to play due to the worsening of certain attacks on rights and freedoms, requiring an adaptation of their means of action. For example, the number of requests addressed to the Defender of Rights (French Ombudsman) increased of around 10%<sup>4</sup>. The General Supervisor of Places of Deprivation of Liberty underlined the difficulties for the institution to carry out effectively its control missions due to the lockdown<sup>5</sup>. However, the different obstacles did not prevent visits to places of deprivation of liberty, the processing of letters or the publication of opinions and recommendations to the Government. Some IAA and IPA have sought to assert themselves by choosing a strong theme linked to fundamental rights. For example, the National Commission for Public Debate

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<sup>2</sup> Independent public authorities: Audiovisual and Digital Communication Regulatory Authority (*Autorité de régulation de la communication audiovisuelle et numérique*); High Authority for Health (*Haute autorité de santé*).

<sup>3</sup> CNIL, *Protéger les données personnelles, Accompagner l'innovation, Préserver les libertés individuelles, Activity report for 2020*, May 2021 : <https://lext.so/7MFhLT>.

<sup>4</sup> DDD, *Activity report for 2020*, March 2021 : <https://lext.so/2EeC4K>.

<sup>5</sup> CGLPL, « Avant-propos », *Activity report for 2020*, June 2021 : [https://www.cglpl.fr/wp-content/uploads/2021/06/CGLPL\\_Rapport-annuel-2020\\_web.pdf](https://www.cglpl.fr/wp-content/uploads/2021/06/CGLPL_Rapport-annuel-2020_web.pdf).

which, in view of the digital divides noted during the health crisis, put forward “the principle of inclusion” to “ensure that environmental democracy is also a reality for remote people and to influence political decisions by communicating the arguments of a large majority of citizens”<sup>6</sup>.

By observing the activity of the French IAA and IPA during the health crisis, it can be noted that they put themselves in a state of emergency (I) in order to ensure a more effective protection of rights and freedoms during this exceptional period (II).

## **I – The particular organization of the activity during the state of health emergency**

From the adoption of the decree n° 2020-260, the 16<sup>th</sup> of March 2020, regulating travel in the context of the fight against the spread of the Covid-19, and the declaration of the state of health emergency by law n° 2020-290, the 23<sup>rd</sup> of March 2020, the Independent Administrative Authorities and the Independent Public Authorities have been reactive in recalling their presence (A) and reinventing their manner of action by setting up new regulation and control tools (B).

### ***A – The institutional adaptation in the context of the health crisis***

The objective pursued by all Independent Administrative Authorities and the Independent Public Authorities was to guarantee the continuity of their activity. Two days after the adoption of the decree n° 2020-260, the Defender of Rights informed on its website that the institution was continuing “to fulfill its mission” by ensuring the continuity of the processing of complaints by the central services and the territorial network available by email and telephone. A web page dedicated to the health crisis has also been created.

In its activity report for 2019, the Defender of Rights included an appendix containing the summary of its actions during the health emergency period, thus demonstrating the responsiveness and continuity of the institution’s action, despite the halving of the number of files to be processed. This appendix was also an opportunity for the Defender of Rights to emphasize “the strategic importance of public services” and the need for exchanges with the administrations to react to exceptional periods.

Then, on the 20<sup>th</sup> of March 2020, the Defender of Rights, the General Supervisor of Places of Deprivation of Liberty and the President of the National Advisory Commission on Human Rights published a joint declaration emphasizing the need to protect the during the health crises<sup>7</sup>. Despite a particular context, the General Supervisor of Places of Deprivation of Liberty has succeeded in maintaining the control by increasing the pressure on the supervisory authorities (Ministry of Justice, Ministry of Home Affairs, Ministry of Solidarity and Health) and by ensuring on-site visits to the administrative detention centers to point out the lack of health security for this vulnerable population and the practical impossibility of respecting barrier recommendations.

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<sup>6</sup> CNDP, *Activity report for 2020*: <https://ltext.so/90LFQi>.

<sup>7</sup> See: <https://www.infomie.net/spip.php?article5781>.

In its turn, the High Authority of Health adopted, in March 2020, a method for developing rapid responses in the context of Covid-19 pandemic. The purpose of this new document was to give a statement to face urgent situations. Considering the evolving context of knowledge relating to Covid-19, rapid responses had to include a disclaimer specifying that they have been “prepared on the basis of knowledge available at the date of their publication [and] are likely to evolve according to new data”. The exercise of the mission of information was very important at that moment because all the people wanted to know more information about Covid-19, the risks for their health and their lives.

### ***B – The deployment of the powers in the context of the health crisis***

First of all, some IAA and IPA had a role of pedagogical regulation and evaluation. For example, the health crisis caused by Covid-19 has led the Superior Council of Audiovisual both to allow and promote the dissemination of good information (prevention advice) and to fight against the fake news. Concerning the fake news especially, the law n° 2018-1202 of the 22<sup>nd</sup> of December 2018 obliges online platform operators to take concrete measures and actions in order to fight against the dissemination of fake news and provides for the monitoring of these measures through the communication of an annual declaration from the operators. As the Superior Council of Audiovisual is responsible for supervising the systems put in place by the platforms and supporting the operators, it informed them by its press release of the 27<sup>th</sup> of February 2020 of the development of a questionnaire facilitating the preparation of annual declarations. This questionnaire was sent to the platforms<sup>8</sup>. The goal was to ensure the presence of a visible and accessible reporting system using transparent processing methods and opening up remedies for the authors of the reported content. It also aimed to control the mechanisms for fighting against accounts that massively spread fake news. All the questionnaires were returned to the Superior Council of Audiovisual. They served for the evaluation of the effectiveness of the measures taken by the platforms. The Superior Council of Audiovisual put also in place hearings from the platforms about the specific systems they adopted during the health crisis. It was specifically the case for Facebook, Twitter, Snapchat, Wikipedia and Google, the major platform used for searching information and communication during the lockdown.

The IAA and IPA also assumed a role of interpellation and support for public authorities. For example, in the opinion n° 20-03 from the 27<sup>th</sup> of April 2020<sup>9</sup>, the Defender of Rights reaffirmed its role for guaranteeing rights and freedoms. It was underlined notably the importance of the adaptation by the public authorities of the mechanisms for checking certificates and verbalization for people who were materially unable to present a derogatory travel certificate. It was therefore recommended that the police favor pedagogy and help these populations in vulnerable situations. In addition, in the all-digital era, it was launching a major

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<sup>8</sup> The questionnaire is available on: <https://www.arcom.fr/sites/default/files/2022-05/Questionnaire%20aux%20opérateurs%20de%20plateformes%20en%20ligne%20soumis%20au%20titre%20II%20de%20la%20loi%20du%2022%20décembre%202018%20relative%20à%20la%20lutte%20contre%20la%20manipulation%20de%20l%27.pdf>.

<sup>9</sup> See: [https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=19735](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=19735).

reflection on the dematerialization of authorizations, because they were excluding millions of people from access to many public services.

Also, a major attention was paid to the manner the end of the lockdown had to be organized. When the question of the possibility to decide the continuation of the lockdown for a certain number of persons was discussed, the Defender of Rights recalled that such decision should provide for very strict conditions and a limited duration. The solitary lockdown had to be considered as a measure of constraint, like the forced hospitalization. Therefore, it could be decided by respecting upon certain conditions: the spread of the disease had to be dangerous for public health and the lockdown had to represent the *ultima ratio* to prevent the spread of Covid-19. The authorities would have to demonstrate that less severe measures were considered, but these ones were insufficient to protect public health. As always, the measure had to be necessary in the current circumstances and respect the principle of proportionality. If this condition was met, the measure should last only the time strictly necessary to pursue the objective of healing the patient and the end of the period of contamination.

Like the Defender of Rights, the General Supervisor of Places of Deprivation of Liberty intervened on several levels in the context of the health crisis. The methods of interventions and the deployment of the institution's powers during the crisis were listed in the report on "The fundamental rights of persons deprived of their liberty put to the test of the health crisis" from the 2<sup>nd</sup> of July 2020<sup>10</sup>. In this report have been formulated a certain number of criticisms and recommendations, both for the management of the crisis itself and for the manner political authorities were preparing future steps. Three axes clearly appeared: the case of detained persons in prisons, the case of detained persons in the so called "Administrative detention centers" and the case of persons in psychiatric care establishments.

In the case of the detained persons in prisons, two letters were sent to the Minister of Justice, respectively on the 17<sup>th</sup> of March 2020 and on the 5<sup>th</sup> of May 2020. In the first, which was sent a day after the announcement of the general lockdown, the Minister's attention has been drawn to a phenomenon far from be recent, but which has taken on a particular magnitude precisely because of the said measures. In fact, the problem of prison overcrowding, at a time when scientific recommendations clearly established the need to implement physical distancing measures, was taking an extremely serious turn. In addition, the suspension of the rights of family visits and meetings with lawyers has worsened the already very precarious conditions of detention.

The second letter, which was sent at the end of the lockdown, completed the first one, by deploying a longer-term vision: the prison population has decreased during lockdown. The General Supervisor of Places of Deprivation of Liberty pleaded for this trend to be continued, in accordance with national and international (and particularly European) law, by using and developing, like our European neighbors, other methods of sanction and by reforming part of criminal proceedings, for example.

For the detained persons in administrative detention centers, two letters were sent to the Minister of Home Affairs. The first one, from the 17<sup>th</sup> of March 2020, partly reproduced the one addressed to the Minister of Justice, developing the argument of the reduction of international flights, which mechanically implied an almost total impossibility of

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<sup>10</sup> See: [https://www.cglpl.fr/wp-content/uploads/2020/07/CGLPL\\_Rapport-COVID.pdf](https://www.cglpl.fr/wp-content/uploads/2020/07/CGLPL_Rapport-COVID.pdf).

implementation of removal measures. In this situation the General Supervisor of Places of Deprivation of Liberty called for the closure of the administrative detention centers. A recommendation which was not followed. In a second letter from the 20<sup>th</sup> of April 2020, was denounced the catastrophic health situation in certain administrative centers that was incompatible with fundamental rights and freedoms. The request for the closure of these centers was reiterated “with firmness”, but it remained without response.

In addition, on the 27<sup>th</sup> of March 2020, the General Supervisor of Places of Deprivation of Liberty sent to the Minister of Solidarity and Health a letter about the particular situation of psychiatric care establishments, drawing his attention both to the problems traditionally encountered by the hospital sector from the start of the crisis (lack of means, lack of supplies, etc.) but also on the particular case of patients treated, who were risking to suffer particularly from the lockdown situation, which was incompatible with the specific care involved in the treatment of these diseases. All these measures were taken in order to insure a more effective protection of the rights and freedoms in the state of health emergency.

## **II – The protection of rights and freedoms in the state of health emergency**

The health crisis has aggravated the vulnerability of certain people, in particular children, people deprived of their freedoms or users of the health system. The IAA and IPA have focused on protecting these people while identifying specific vulnerabilities related to the Covid-19 pandemic (A). They also continued to work for the fight against discrimination and access to rights and public services despite the lockdown measures (B) and paid much attention to the protection of personal data, an important subject in times of pandemic (C).

### ***A – Protection of people in vulnerable situations***

During the first lockdown, the Defender of Rights received 127 referrals questioning the rights of children in connection with the health crisis. In a press release from the 20<sup>th</sup> of March 2020, the institution called for collective responsibility, encouraging the reporting to emergency numbers of any worrying situation concerning a child. The proposal was followed by the creation of the Childhood and Covid-19 platform to support professionals and parents but also to inform children about their rights.

The second question was the return to school. The Defender of Rights focused on the exclusion in certain educational establishments of the children whom parents were exercising a medical profession. The decision to put them in separate groups from other pupils has been criticized. As responsible for combating discrimination and promoting equality, the Defender of Rights declared that there could be no difference in treatment within the education system.

The crisis has also put some single-parent families in difficulty due to the refusal of children to enter supermarkets. The Defender of Rights recalled his mission of “monitoring compliance with the International Convention on the Rights of the Child in France, according to which children have the right to be protected against all forms of violence”. In order to fight against discrimination, the Defender of Rights specified that “it was illegal to prohibit

the entry of a store to people accompanied by a child or to require that they leave the child at checkouts or in the custody of a security guard”. Following this alert, the Secretary of State for Gender Equality and the Fight against Discrimination set up a complaint mechanism on a dedicated email address.

The health crisis due to the spread of Covid-19 and lockdown have led to a deterioration in living conditions and access to rights, particularly for precarious populations, as social inequalities have increased. The Defender of Rights presented recommendations to prevent people from finding themselves in a situation of economic vulnerability, whether this concerned means of communication, food, housing, or work. For example, in the communication from the 7<sup>th</sup> of April 2020, the Defender of Rights issued recommendations to prevent lockdown from causing isolated citizens in a precarious economic situation and communication difficulties due to lower-cost telephone subscriptions (€2) have become insufficient to cover needs amplified by isolation. He thus recommends that these “telephone subscriptions (...), taken out by the most precarious households, [be] extended to an unlimited duration throughout the period of the lockdown in order to allow them to reach the health services as well as their relatives”. The Defender of rights asked the Minister of Economy and Finance to intervene by negotiating with the various telephone operators.

Concerning the protection of sick persons, a major role was played by the High Authority for Health. In general, a large part of the documents the institution produced in the context of the pandemic concerned the care and follow-up of patients with Covid-19. Some documents concerned patients without Covid-19 and healthcare professionals. Chronic diseases have been the subject of the greatest number of publications because of the risks the patients were running. In terms of mental health, the High Authority for Health has adopted rapid responses aimed to ensuring the continuity of care during the lockdown period and the post-lockdown periods. The management and monitoring of pregnancies have also been areas of publication by the High Authority for Health. The latter responded favorably to the extension of the period for recourse to voluntary termination of pregnancy.

### ***B – The fight against discrimination and for access to rights***

On the 22<sup>nd</sup> of June 2020, the Defender of Rights published the report “Discrimination and origins: the urgency to act” which contained more than 80 pages<sup>11</sup>. This report highlighted the problem of the amplification of discrimination and racism during the health crisis. The report was presented in three parts:

- the observation of the amplification of the phenomenon;
- the analysis of the responses provided for by the public authorities, which were deemed insufficient;
- the proposals for actions to raise public awareness and fight effectively against this phenomenon.

The problem of discrimination was also raised by the Superior Council of Audiovisual. In its report published in June 2020, the under-representation of women in the media during the Covid-19 pandemic was noted. Parity has almost been achieved for

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<sup>11</sup> See : <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rap-origine-num-15.06.20.pdf>.



journalists, but major imbalances have been noted for experts. Only 20% of women spoke about expertise issues. Another area in which strong discrimination was noted was that of the restriction of asylum seekers. The Defender of Rights pointed out the problem of the closure of asylum application registration services in the prefectures. The French Office for Immigration and Integration has stopped the multilingual telephone platform. Asylum seekers have therefore been deprived of the material reception conditions (accommodation, support and daily living allowance) to which they are legally entitled if the application is registered.

In the decision n° 2020-100 of the 28<sup>th</sup> of April 2020<sup>12</sup>, relating to the closure of one-stop shops for asylum seekers in Île-de-France, the Defender of Rights ruled that their closure was a violation of the right to asylum and inhuman or degrading treatment. Such restrictions were disproportionate and undermined the principle of continuity of public service. They “were not based on any text related to the state of health emergency and were not justified by a material impossibility of pursuing the public service”. In a decision pronounced on the 30<sup>th</sup> of April 2020, the Council of State (*Conseil d’État*) confirmed the position of the Defender of Rights and ordered the reopening of the measures to which asylum seekers are entitled.

### ***C – Protection of personal data***

In managing the health crisis linked to Covid-19 pandemic, the French Government has relied on new technologies to try to reduce the transmission of the virus. The National Commission for Computing and Liberties ruled on the guarantees provided for by various automated devices face to the risks they were posing both to the right to privacy and to the protection of personal data. Two processes were specifically analyzed. In the case of thermal camera devices, the National Commission for Computing and Freedoms published a bulletin on the 17<sup>th</sup> of June 2020<sup>13</sup>, warning against the video devices of so-called “intelligent thermal cameras” which were deployed as part of the procedure of the lockdown ending. If the process was seen as legitimate given the context, the National Commission for Computing and Freedoms expressed some reservation because of its massive use by both public and private entities. These cameras, used to prevent any suspicious case by evaluating a person’s body temperature, were collecting a large amount of biometric or health data. Because of the absence of specific normative text, the process of such information was, in principle, prohibited. The Commission has concluded that these actions had to respect at least the principles of the General Data Protection Regulation. In the Commission’s opinion, the people’s consent could not be considered free since any refusal by the individual would be accompanied by a ban on access to certain private or public premises.

The National Commission for Computing and Freedoms also paid particular attention to the “StopCovid” mobile application<sup>14</sup>. The purpose of this application was to alert people who have been in contact with an individual who was tested positive for Covid-19. On the 26<sup>th</sup> of April 2020, a first opinion on the overall assessment of a mobile application project

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<sup>12</sup> See : [https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=19733](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=19733).

<sup>13</sup> « La CNIL appelle à la vigilance sur l’utilisation des caméras dites „intelligente” et des caméras thermiques » : <https://www.cnil.fr/fr/la-cnil-appelle-la-vigilance-sur-lutilisation-des-cameras-dites-intelligentes-et-des-cameras>.

<sup>14</sup> « Application StopCovid : les contrôles de la CNIL » : <https://www.vie-publique.fr/en-bref/275466-application-stopcovid-les-contrôles-de-la-cnil>.

within the current legal framework was published<sup>15</sup>. The second notice was published on the 25<sup>th</sup> of May 2020 following the referral to the Ministry of Solidarity and Health on the draft decree implementing the “StopCovid” application<sup>16</sup>. The National Commission for Computing and Freedoms accepted the use of this technology, but it recalled that the process remained subject to the regime of the General Regulations on Data Protection of 1978. Indeed, the preservation of the history of an individual’s contacts and elements of his state of health has been assimilated by the institution to the processing of personal data. The implementation of the system therefore had to be justified, necessary and proportionate. The Commission also stated that the maintenance over time of such an application should be conditional on a constant reassessment of its effectiveness through updated studies.

The Ministry of Solidarity and Health followed the recommendations made by the Commission in its opinions. In particular, it was provided for the voluntary nature of the use of the “StopCovid” device, without any consequences or sanctions in case of refusal to use the application. In addition, proportionality has been reinforced by a period of commissioning limited to 6 months from the end of the state of health emergency. On the 4<sup>th</sup> of June 2020, the President of the National Commission for Computing and Freedoms announced the start of several controls on the mobile applications “Contact Covid”, “SI-DEP” and “StopCovid”. Following these controls, the decision n° MED-2020-015 of the 15<sup>th</sup> of July 2020 was made public<sup>17</sup>. The conclusions in this decision were quite severe. The applications evaluated were notably declared non-compliant with the General Data Protection Regulation. Similarly, a violation of the Data Protection Act was found in the collection of information carried out by Google via its “ReCaptcha” system which was not mentioned to the users and for which their consent was not requested. The President of the Commission gave to the Ministry of Solidarity and Health a period of one month to bring the application into compliance with regulatory and legislative standards before the opening of a sanction procedure.

This quick analysis shows that the French IAA and IPA have done a very important job in terms of information, awareness, and even sanctions. They managed to adapt their activity to the new circumstances, while continuing their previous work. They have thus demonstrated a great capacity for adaptation and have asserted themselves in their role as counter-powers. Thanks to their work, they participated in better informing Parliament and therefore enrich the parliamentary debate which is necessary in a democracy. From this point of view, they also plaid an important role in guaranteeing the balance of powers during the period of the state of emergency, when the executive power is much stronger, situation which inevitably leads to a degradation of democracy. All the reports made by European and international institutions noted such a degradation during the Covid crisis. The situation could have been worse in the absence of the work carried out by these authorities.

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<sup>15</sup> See:

[https://www.cnil.fr/sites/cnil/files/atoms/files/deliberation\\_du\\_24\\_avril\\_2020\\_portant\\_avis\\_sur\\_un\\_projet\\_dappllication\\_mobile\\_stopcovid.pdf](https://www.cnil.fr/sites/cnil/files/atoms/files/deliberation_du_24_avril_2020_portant_avis_sur_un_projet_dappllication_mobile_stopcovid.pdf).

<sup>16</sup> See: <https://www.cnil.fr/sites/cnil/files/atoms/files/deliberation-2020-056-25-mai-2020-avis-projet-decret-application-stopcovid.pdf>.

<sup>17</sup> Available on: <https://www.legifrance.gouv.fr/cnil/id/CNILTEXT000042125452/>.