



Paris, 6 May 2020

POLITICAL OPINION

on monitoring respect for the rule of law in the context of the Covid-19 pandemic

Having regard to the European Convention on Human Rights,

Having regard to the Convention of the Council of Europe for the protection of individuals with regard to automatic processing of personal data, known as “Convention 108+”,

Having regard to the Charter of Fundamental Rights of the European Union,

Having regard to Articles 2 and 3 of the Treaty on European Union,

Having regard to Articles 16 and 168 of the Treaty on the Functioning of the European Union,

Having regard to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications),

Having regard to 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 Data Protection Regulation),

Having regard to the Joint Statement of 30 March 2020 by Alessandra Pierucci, Chair of the Committee of Convention 108, and Jean-Philippe Walter, Data Protection Commissioner of the Council of Europe, on the right to data protection in the context of the COVID-19 pandemic,

Having regard to the Statement of 31 March 2020 by Ursula von der Leyen, President of the European Commission, on emergency measures by Member States,

Having regard to the Statement of 2 April 2020 by 19 European States on the rule of law,

Having regard to the information document from the Secretary General of the Council of Europe of 7 April 2020 entitled “Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis – A toolkit for Member States”, SG/Inf (2020)11,

Having regard to Recommendation (EU) 2020/518 of the Commission of 8 April 2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data,

Having regard to the report by the European Union Agency for Fundamental Rights of 8 April 2020 entitled “Coronavirus Epidemic in the EU: Fundamental Rights Implications”,

Having regard to Recommendation CM/Rec(2020)1 of the Committee of Ministers of the Council of Europe of 8 April 2020 to Member States on the human rights impacts of algorithmic systems,

Having regard to the Statement of 14 April 2020 by the Committee on Bioethics of the Council of Europe on human rights considerations relevant to the COVID-19 pandemic,

Having regard to the Communication of the Commission of 15 April 2020 entitled “A European roadmap to lifting Coronavirus containment measures”, AC/20/679,

Having regard to the Communication from the Commission of 16 April 2020 entitled “Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection”, C (2020) 2523,

Having regard to the Joint Statement of 16 April 2020 by the Presidents of the Parliamentary Assembly of the Council of Europe, the North Atlantic Treaty Organization Parliamentary Assembly, and

the Parliamentary Assembly of the Organization for Security and Co-operation in Europe on the Role of Parliaments in a Time of Pandemic,

Having regard to the European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences,

Having regard to the roadmap for recovery presented on 21 April 2020 by Charles Michel, President of the European Council,

Having regard to the guidelines of the European Data Protection Board of 21 April 2020 on the processing of data concerning health for the purpose of scientific research in the context of the COVID-19 outbreak,

Having regard to the guidelines of the European Data Protection Board of 21 April 2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak,

Having regard to the Joint Statement of 28 April 2020 by Alessandra Pierucci, Chair of the Committee of Convention 108, and Jean-Philippe Walter, Data Protection Commissioner of the Council of Europe, on digital contact tracing,

The European Affairs Committee of the Senate,

Acknowledges the need for Member States to take emergency measures to combat the Covid-19 pandemic; is convinced that the application of democratic principles will contribute to consolidating the trust in the authorities that is essential to fight effectively against this epidemic, and that respect for fundamental rights therefore cannot be considered an obstacle to eradicating it; therefore asserts that public health considerations and respect for fundamental freedoms must go hand in hand;

Notes that the Charter of Fundamental Rights of the European Union continues to apply during the pandemic and therefore considers that any measure derogating from the obligations set out in the European Convention on Human Rights must be compliant with the provisions of Article 15 of that Convention;

Considers therefore that the reconciliation of public health imperatives with respect for fundamental rights requires measures that are explicitly justified by the current health crisis, strictly proportionate to the demands of the situation, limited in time and

subject to regular scrutiny; and that the penalties for failing to comply with such measures must obey the same principles;

Asks that the emergency measures should take account of the situation of vulnerable persons, such as the homeless, dependent elderly persons, disabled persons, detainees, migrants and asylum-seekers, victims of domestic abuse or isolated persons;

Considers increased efforts to be necessary during the Covid-19 pandemic to fight against homophobia and xenophobia, as well as against hate speech targeting certain groups or communities in the spread of the pandemic;

Insists that the emergency measures should be subject to parliamentary oversight in compliance with the principle of the separation of powers and with the provisions of the Constitution;

Reiterates the fundamental importance of judicial control over the emergency measures, and of maintaining effective access to justice for citizens;

Considers that the national authorities should refrain from making modifications to electoral law during the pandemic; insists on the need for elections to comply with the standards defined in such matters, in particular with those of the Venice Commission of the Council of Europe and of the Office for Democratic Institutions and Human Rights of the OSCE; in this respect, lauds the commitment of its Polish counterpart;

Considers that information constitutes a particularly important right in a time of pandemic; demands that citizens be informed of the fundamental rights that continue to apply during the pandemic; notes that misinformation is detrimental to the proper functioning of democracy and that fake information about the Covid-19 pandemic constitutes a major danger for public health; considers, therefore, that all citizens must have access to accurate information throughout the health crisis, including in various foreign languages; asks that social media platforms should take the necessary measures to put an end to misinformation and hate speech relating to Covid-19;

Considers that the implementation of digital contact tracing applications within the framework of the fight against the Covid-19 pandemic in Europe can only be considered as part of a broader sanitary strategy for the purpose of lifting confinement, and that such applications constitute a tool for empowerment and decision-making support for citizens, and not for stigmatisation, enforcement or discrimination;

Considers that the data protection standards established by Convention 108+ are fully compatible in themselves with the relevant fundamental rights and public interests, in particular in public health matters;

Calls for an objective and transparent evaluation, on a scientific basis, of the potential advantages for public health of the use of contact tracing applications, and for the systematic publication of impact studies before they are rolled out;

Supports, if they should be deemed to be efficient, the development of tracing applications that collect, on a temporary basis only, the personal data that is strictly necessary for and proportionate to the legitimate purpose pursued, incorporating data protection by design and by default, and states that they should be used on a strictly voluntary basis under the exclusive control of the health authorities;

Recommends the publication of the source codes and constant human supervision of the algorithms;

Considers that uncoordinated development of such applications by the Member States is likely to restrict their efficiency at Union level and delay the lifting of measures restricting freedom of movement in the Union, lessen public confidence in the relevance of such applications, and thus reduce their social acceptability; supports, therefore, the coordinated implementation of interoperable applications within the European Union and cross-border cooperation in order to facilitate movement;

Welcomes the Commission's initiative to provide Member States with a "toolkit" to enable the development of national contract tracing applications that comply with the high standards of personal data protection defined by the European regulations, notably regarding health; calls upon the Commission to step up its coordination efforts with a view to developing applications that do not rely on the technical solutions developed by non-European private actors, whether those solutions are national or pan-European, in order to guarantee compliance with these high standards;

Calls for particular vigilance regarding transfers to third countries of any personal data, and in particular of health data that might be collected by these tracing applications or by any other applications rolled out to combat the Covid-19 pandemic, including when that transfer is made for scientific research purposes;

Lauds the work of the non-governmental organisations, of the European Union Fundamental Rights Agency and of the competent

bodies of the Council of Europe in conducting monitoring of respect for the rule of law during the Covid-19 pandemic; calls on this occasion for the European Union and the Council of Europe to reinforce their cooperation in favour of democracy, human rights and the rule of law, while avoiding any duplication of their activities;

Calls on the Commission to present a review of respect for the rule of law in Member States during the Covid-19 pandemic, accompanied by recommendations, within the framework of the new rule-of-law monitoring mechanism.