Opinion in relation to a query on an information request made by the State Tax Administration Agency regarding health cards issued to foreign holders that have been used during the years 2014, 2015 or 2016

A letter is submitted to the Catalan Data Protection Authority in which it requests that the Authority issue an opinion on the adequacy of the personal data protection regulations of an information request made by the State Agency of the Administration
Tax (hereafter, AEAT) regarding the health cards issued to foreign holders that have been used during the years 2014, 2015 or 2016.

A copy of the request made by the AEAT and of the report issued by the regional legal service of the AEAT of Catalonia on the intended communication is attached to the consultation letter.

Having analyzed the request and seen the report of the Legal Counsel, the following is ruled.

I

(...)

II

The inquiry states that they have received a request from the AEAT to obtain information on the use of health cards issued to foreign holders during the years 2014, 2015 or 2016.

Specifically, in accordance with the aforementioned request, a copy of which is attached, the AEAT requests:

> "Relation, by card and day, of health cards issued to foreign holders (for themselves or for beneficiaries), which have been used in any of the years 2014, 2015 or 2016, both with respect to health and pharmaceutical benefits. Said relationship will contain, at least, the following data for each individual health card and day of use (one data per card and day, regardless of the number of times it has been used in the same day):
>
> - NIF of the declaring Organism.
> - Company name of the declaring Organization.
> - Year to which the data refers (YYYY).
> - Date of use (YYYYMMDD).
> - Number of individual health card.
> - Holder's health card number (only in beneficiary data).
> - Social Security number.
> - Holder/Beneficiary's Spanish Identification Number (NIF, NIE, Passport).
> - Identification number abroad of the Holder/Beneficiary.
> - Surnames and Number of Holder/Beneficiary.
> - Ownership ("T" if Holder; "B" if Beneficiary).
> - In case of being a beneficiary, type of kinship or relationship with the insured.
> - Date of birth (YYYYMMDD).

- Nationality
- Domicile
- Telephone."

This request is related to a previous request - made in the same terms - regarding which, given the legal doubts it raised, the (...) requested the pronouncement of this Authority. In this regard, the Authority issued opinion CNS 50/2017 (available on the website http://apdcat.gencat.cat), which concluded that:

"The communication of the information on the use of health services and pharmaceutical benefits by identifiable foreign persons required in (...) by the Tax Agency based on the provisions of the LGT would only be possible if the tax significance of this information in relation to a person or a set of specific people. Based on the information provided with the consultation, this transcendence cannot be concluded."

In view of the considerations made in the aforementioned opinion, the (...) did not send the information requested by the AEAT, which has motivated a new request, although this time it is accompanied by a report issued by the regional legal service of the AEAT of Catalonia, for the purposes of justifying the tax relevance of the required information.

In addition to all this, the consultation raises the following questions:

a) If the data on the use of the health card should not be considered data relating to health, according to the criteria of the legal service of the AEAT.

b) If the information provided by the AEAT, in relation to the communication of information on the use of health services and pharmaceutical benefits by identifiable foreign persons required in (...), the tax significance of this information from the perspective of the data communication regime of the interested parties affected (all foreign persons who have received healthcare or pharmaceutical assistance during the three-year period).

These issues are examined in the following sections of this opinion.

III

In the consultation, the first question is whether the data relating to the use of the health card should be considered "data relating to health".

This, it must be said, is an issue that was already examined in opinion CNS 50/2017. Thus, in FJ III, it became clear that:

"(...), as provided in article 4.15) of Regulation (EU) 2016/679, of April 27, general data protection (RGPD), in force since May 25, 2016, and that will be applicable from May 25, 2018 (Article 99 RGPD), the data relating to health are:

"personal data relating to the physical or mental health of a natural person, **including the provision of health care services,** which reveal information about their state of health;"

In relation to the concept of personal information related to health, we note that, according to Recital 35 of the RGPD:

> **"Among the personal data relating to health must be included** all the data relating to the state of health of the interested party that give information about their past, present or future state of physical or mental health. It includes the information on the natural person collected on the occasion of his registration for health care purposes, or **on the occasion of the provision of such assistance,** in accordance with Directive 2011/24/EU of the European Parliament and of the Council (1); **any number, symbol or data assigned to a natural person that uniquely identifies him for health purposes;** (…)."

> Given these forecasts, the communication of the data relating to the date of access to a healthcare or pharmaceutical service, by a specific person, or even the number of the healthcare card, which gives information about the provision of assistance, would be a communication of personal health information of the natural persons affected (art. 3.e) LOPD), protected by the principles and guarantees of the data protection regulations (LOPD, RLOPD, as well as the Regulation (EU) 2016/679, of April 27, general data protection (...))."

The RGPD referred to in opinion CNS 50/2017 has been in full force since last May 25.

In view of the definition that this rule makes of data relating to health but, especially, to the considerations contemplated in recital 35, it is clear, for the purposes that concern, that, from the perspective of the right to data protection personal data, the information relating to the number assigned to the individual health card must be considered health data of the person who holds it. Taking into account, therefore, that this data, once the RGPD has become fully applicable, is health data, it does not seem that there should be any doubts in qualifying as health data any information associated with the use of this health card.

Therefore, from the perspective of the RGPD, the information relating to the fact that a person has been treated by the health system - which is evidenced by the use of their health card - (card number, date in what is used and number of times), whether or not it is linked to information about the specific healthcare or pharmaceutical benefit received, must be understood as data relating to your health (Article 4.15) RGPD).

IV

Having said that, the consultation considers whether in the present case the tax significance of the information required by the AEAT is proven from the perspective of the data communication regime of the affected interested parties (all foreign persons who have received health care or pharmaceutical during the three-year period).

Before examining this issue, it is considered appropriate, given that the RGPD is fully applicable, to mention the regime applicable to the treatment of data relating to health.

Article 9 of the RGPD establishes a general prohibition of the processing of personal data of various categories, among others, data relating to health (section 1). Section 2 of the same article provides that this general prohibition will not apply when one of the following circumstances occurs:

> "a) the interested party gives his **explicit consent** for the treatment of said personal data with one or more of the specified purposes, except when the Law of the Union or of the Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party;

(...)

g) the treatment is necessary **for reasons of an essential public interest, on the basis of the Law of the Union or of the Member States,** which must be proportional to the objective pursued, essentially respect the right to data protection and establish measures adequate and specific to protect the fundamental interests and rights of the interested party;

h) the treatment is necessary for the purposes of preventive or occupational medicine, evaluation of the worker's labor capacity, medical diagnosis, **provision of health** or social assistance or treatment, or management of health and social care systems and services, **on the basis of the Law of the Union or of them**
Member States or by virtue of a contract with a healthcare professional and without prejudice to the conditions and guarantees contemplated in section 3;

(...)".

In the case at hand, the intended treatment, that is the communication of certain information about the use of health cards by foreigners, does not respond to the purpose of providing medical treatment to the patient or to third parties (article 9.2.h)
RGPD), but for different purposes related to the inspection functions that the regulatory framework attributes to the AEAT.

This being so, it must be borne in mind that the RGPD itself (Article 9.2.g)) admits that the law of the Union or the law of the Member States, for reasons of essential public interest, may enable the processing of specially protected personal information, such as health data.

Despite the fact that recital 41 of the RGPD provides that "when the present Regulation makes reference to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament", it must be taken into account that the same recital establishes that this is "without prejudice to the requirements in accordance with the constitutional order of the Member State in question".

The referral to the legitimate basis established in accordance with the internal law of the States referred to in article 9.2 of the RGPD requires, in the case of the Spanish State, that the rule of development, to be a right fundamental, has the status of law, given the requirements derived from Article 53 CE, as the Constitutional Court has recalled, for example, in STC 292/2000 (FJ 14).

Agreeing that, according to the provisions of article 9.2 of the Draft Organic Law on the protection of personal data and guarantee of digital rights, published in the BOCG, Congress of Deputies. Serie A No. 13-6 of October 26, 2018, currently in the parliamentary processing phase:

"2. Data processing contemplated in letters g), h) ei) of article 9.2 of Regulation (EU) 2016/679 based on Spanish law must be covered by a law-enforcement law, which may establish additional requirements relating to its security and confidentiality. (…)"

Therefore, in the event of not having the explicit consent of those affected (article 9.2.a) RGPD), a communication of health-related data to the AEAT as proposed would only be possible if it found protection in a standard with of law for reasons of essential public interest (article 9.2.g) RGPD).

It should be noted, at this point, that the processing of certain personal data for the purpose of investigating possible situations of tax fraud, in order to guarantee the proper functioning of the Spanish tax system, could be considered to respond to reasons of essential public interest.

In the opinion CNS 50/2017, mentioned above, it was analysed, among other regulations with the rank of law, whether the provisions of Law 58/2003, of December 17, general taxation (hereinafter, LGT) would enable this data communication, particularly articles 93 and 94.

Article 93.1 of the LGT regulates the general duty of collaboration with the tax administration, in the following terms:

> "1. The natural or legal persons, public or private, as well as the entities mentioned in section 4 of article 35 of this law, will be obliged to provide the Tax Administration with all kinds of data, reports, antecedents and supporting documents with tax significance related to the compliance with your own tax obligations or deductions from your economic, professional or financial relationships with other people.
>
> In particular:
> (…)."

In accordance with paragraph 2 of this same article 93, these collaboration obligations "must be fulfilled in a general manner in the form and time periods that are determined by law, or through an individualized request from the tax administration that can be made in any moment after carrying out the operations related to the required data or background."

For its part, article 94 of the LGT establishes the duty of administrations, courts and tribunals and, in general, of institutions that exercise public functions to collaborate with the Tax Administration by providing it with information, in the following terms:

> "1. The authorities, whatever their nature, the holders of the organs of the State, of the autonomous communities and of the local entities; autonomous bodies and public business entities; chambers and corporations, schools and professional associations; social security mutuals; the other public entities, including Social Security managers and those who, in general, exercise public functions, will be obliged to provide the Tax Administration with any data, reports and antecedents with tax significance that it receives **by means of general dispositions or through requirements concrete,** and to lend, to her and her agents, support, assistance, assistance and protection for the exercise of her functions. (...)
>
> 5. The transfer of personal data to the Tax Administration in accordance with the provisions of the previous article, in the previous sections of this article or in another legal standard, will not require the consent of the affected party. In this area, the provisions of section 1 of article 21 of Organic Law 15/1999, of December 13, on the Protection of Personal Data shall not apply."

As is clear in the aforementioned opinion CNS 50/2017, it can be understood that these provisions of the LGT would enable the communication of data available in the (...) to the AEAT, provided that the requirements established in the LGT itself and its development regulations when requesting information, that is to say that the data requested

have tax significance and that the requirements in which the duty of collaboration is articulated are carried out respecting the regulations that regulate them.

On this last aspect, and following the consolidated doctrine of the Supreme Court on information requirements by the Tax Administration (for all, STS of November 28, 2013 (rec. 5692/2011), it is necessary that the requirement be individualized , be motivated and proportionate.

Having examined, in this sense, the content of the information request addressed by the AEAT - which is now reiterated in the same terms -, this Authority, as has been said, concluded that from the information provided it could not be determined the tax significance of the required information (FJ V).

Likewise, he made it clear that a communication of data such as the one proposed (specially protected information on all foreign persons who had been cared for by (...) during a period of three years (2014 to 2016)), in the absence of the relevant justification, would require having a provision of a general nature that expressly provided for this request for information, as required by the jurisprudence of the Supreme Court (among others, STS of November 13, 2014) (FJ VI).

For the purposes of correcting this lack of justification for the information requirement and of the accreditation of the tax significance of the information, the AEAT now accompanies the requirement with a report in which it is made clear, among other aspects, that the data relating to the date of use of the health card is necessary because it reveals information relating to fiscal residence, given that it presupposes physical presence in Spanish territory, and this residence is an essential element in the configuration of the taxable person in the Tax on the income of natural persons (IRPF) (FJ II).

He argues, in this regard, that residence in Spanish territory is a prerequisite for being the holder or beneficiary of health care. It is required, for this purpose, to have an authorization to reside in Spain and to have this authorization it is necessary to stay in Spain for a minimum of six months and one day in a period of one year. Therefore, he considers that the use of the card would mean that the foreigner is resident for 183 days and therefore liable to personal income tax (FJ III).

On the other hand, he argues that the tax significance does not refer exclusively to a specific tax, but to the global tax system, due to the transversal effect of the operations in several taxes, so the information requirements cannot be specified in one or several taxable persons. For this reason, it maintains that the requirement made in (...), despite referring to a generality of people (foreign holders or beneficiaries of health cards), is sufficiently specific, thus meeting the required individualization requirement (FJ III) .

Likewise, it states that it is of interest to know the identity of the card holder (if he is the holder or beneficiary) and the date or dates on which the card was used (during the period 2014-2016), but not what it was the health care received (unit, specialist doctor or disease treated) (FJ II).

In view of these manifestations, it is considered appropriate to make, below, a series of considerations in this regard.

v

Agree, at the outset, that it is questionable that the attached report sufficiently proves the tax significance and proportionality of the information requested.

From the statements made in this report, it can be inferred that the purpose of the request for information regarding the use of the individual health card is to investigate possible situations of tax fraud in the IRPF in relation to all those foreign persons who have resided in Catalonia for a certain period (2014, 2015 or 2016).

The AEAT maintains that the use of the individual health card by the foreign persons who hold it (or by the beneficiaries) would prove that they have habitual residence in Spanish territory for the purposes of personal income tax and that, therefore, they are liable to this tribute

However, it does not seem, from the point of view of data protection, that this is effective information to prove said habitual residence in all cases.

Thus, it must be taken into account that there may be foreign people who have their usual residence in Spain and who have been treated by the public health system as a result of being holders of a European health card.

It should also be borne in mind that there may be those with habitual residence in Spain but who, during the period specified in the request, have not used their individual health card, despite having one. Thus, a measure like the one proposed would have a special impact on those sectors of the foreign population that have used the public health care system to a greater extent, and less so for those people who have not needed to go there.

In any case, a proposed measure would also unnecessarily sacrifice the right to data protection of those people who, being foreigners and having used the health card, have already fulfilled all their tax obligations.

On the other hand, and for the purposes of taxes such as personal income tax, it also does not seem that residence is an effective information to determine in all cases that foreign persons are liable subjects of personal income tax, given that the taxable event of the tax it does not consist of the fact of residence alone, but depends on the perception of taxable income.

On the other hand, it should be borne in mind that for natural persons, the tax domicile does not always depend on the usual residence, but when it comes to natural persons who carry out economic activities, the usual residence of these persons will depend on the place where the administrative management and direction of the activities carried out is effectively centralized or, if this place cannot be established, the place where the greatest value of the fixed asset is located in which the economic activities are carried out (art. 48.2.a) LGT).

Therefore, only in relation to certain foreign persons could it be considered that the information requested on the use of the health card would have a certain tax significance, which in any case would be indirect, given that the public health care provided does not evidence of entry the performance of any taxable event.

The examined requirement is addressed to all foreign persons. Information relating to certain tax payers is not selected in a specific and very specific way, nor is more concrete or additional information provided about what are the operations or activities carried out by these people that could justify an inspection action by the Tax Administration to understand that they can be allegedly constitutive of tax fraud.

Given this, and given on the one hand the great impact that the disclosure of the fact of having received medical care, or, even more, of having received it with a certain

periodically or with a certain intensity during a period of time, and on the other hand that the tax significance of the requested information would be very weak (at least for many of the people from whom the information is requested) and in any indirect case, the proportionality of the requirement for this information does not appear to be sufficiently proven either, as can be seen from article 9.2.g) RGPD.

It cannot be understood that the alleged tax transcendence has sufficient entity to consider the proposed measure proportionate in the present case, this is a massive and indiscriminate compilation of information deserving of special protection relating to a multitude of people (not only those holders of the health card, but also of the beneficiaries, who may be minors or people with disabilities) for the mere fact, apparently, of being foreigners and having received sustained health care with public funds.

VI

But, beyond the doubts offered by the present requirement regarding the accreditation of the tax relevance and the proportionality of the information requested, it is also questionable that it can be considered to meet the requirement of individualization to which it does reference to article 93.2 of the LGT, as stated in the attached report.

The Supreme Court Judgment of October 20, 2014 (rec. 1414/2012), among others, is illustrative of what is meant by "individualized requirement":

> "The individualized requirements, as in general the actions of obtaining information, which are practiced by the Tax Inspectorate (...) must refer, like them, to data, reports, antecedents and supporting documents with tax significance. As their own name indicates ("individualized"), **they must be concrete and singular,** a condition that is predicated first of all on the requirement, but also on the objective scope of the information claimed (...).
>
> The joint game of both notes (subjective individualization and objective concretion) **allows us to reject the abstract, generic and indiscriminate requirements,** as we did in the sentence just quoted, because, otherwise, **they would blur until the dividing lines between the information disappear by capture and information by supply.** (…)"

Therefore, it is clear that it is prohibited to practice tax information requirements with a generic and indiscriminate nature. These must be individualized, bearing in mind, for this purpose, that "there is no rule in the LGT that restricts the concept of "individualized request" only to cases in which the same is done to find out data from a passive subject determined, but the individualization is referred, in addition to the content of the request (which can be more or less extensive, according to the information needs of the Administration), to the mode of operation and the uniqueness of the recipient" (STS of 15 of February 2003, rec. 1263/1998).

Having examined the content of the request in question, it must be reiterated that it covers an undetermined and quantitatively relevant number of natural persons.

It is requested "relation, per card and day, of health cards issued to foreign holders (for themselves or for beneficiaries), which have been used in any of the years 2014, 2015 or 2016, both regarding health and pharmaceutical benefits.
Said relationship will contain (...)". In other words, personal information about all foreign people who have been cared for by (...) during a certain period (from 2014 to 2016).

Information that, it must be remembered, deserves special protection (articles 4.15 and 9 RGPD).

It is, therefore, a request for information that would go beyond what consolidated jurisprudence understands to be an individualized information request, in the sense, as we have seen, that this can refer not only to a specific person but also to a set of people related to a specific investigation.

In the present case, a "set" of people with respect to whom there may be suspicion of possible tax fraud in the IRPF is not specified, but it includes all the people who are part of the same group school: that of foreign persons who are holders or beneficiaries of the public health system.

Although it can be admitted that the group affected (foreigners) presents a particular problem with regard to the control of their tax obligations and this could lead to the adoption of certain measures by the State Treasury, these actions should not lead to make all of them suspects of having failed to fulfill their tax obligations, unless it is recorded that they have not received medical assistance in the public health service.

An action such as the one alleged in the present case therefore would not seem to conform to the guidelines of objectivity that must govern any action to obtain information by capture or request.

In this sense, the recent Judgment of the Supreme Court of November 13, 2018 (STS 1611/2018) is illustrative, in which the requirements required by jurisprudence on the ways of obtaining information by the 'Tax administration.

In this ruling, the court recalls that the investigative administrative activity in tax matters requires two types of investigation (equally necessary): a first activity to ascertain possible individual non-compliance, which must be carried out when there are actually indications of respect, and a second prospecting activity, aimed at obtaining data that is relevant to check tax non-compliance that may have actually occurred.

Both activities, the court maintains, must follow objective guidelines in terms of their performance, in order to ensure "that the action of the Tax Administration duly observes the mandate of interdiction of arbitrariness proclaimed by article 9.3 of the Constitution."

These guidelines, the court remembers, differ according to the type of information sought to be obtained. Thus, dealing with information by supply, the obtaining "operates according to the previsions reglamentariamente established in cuanto a sus formas y plazos", while being information by capture (context in which we find ourselves), "its motivation singularized in order to express the circumstances and facts that justify it, as well as its subjective individualization and its objective concretization."

Adding, then, that the information by supply "is the natural medium for prospecting tasks", while the information by collection "is the ordinary way to verify the indications of possible non-compliance that have reached the tax administration."

For all that, as it was made clear in opinion CNS 50/2017, it would seem that a request for information like the one claimed in the present case requires a provision of

of a general nature (STS of February 7, 2014, or the already mentioned October 20, 2014, among others) that requires the supply of this information.

In any case, regarding the content of any general provision that may be approved for this purpose, agree that, by application of the principle of data minimization (Article 5.1.c) RGPD), which requires that all data processing that is carried out is limited to the minimum data necessary to achieve the intended purpose with this treatment, this provision should be limited to the provision of information about foreign persons to whom an individual health card has been issued and not information about their use.

All in all, it must be concluded that, from the data protection side, a collection of particularly protected information such as the one proposed, in which the tax relevance of the data is not sufficiently obvious, without the protection of a regulatory supply obligation, could not be considered proportional to the object pursued and that, therefore, the communication was enabled by article 9.2.g) of the RGPD, on the basis of article 94.1 of the 'LGT.

In accordance with the considerations made so far in relation to the query raised, the following are made,

Conclusions

The information relating to the number of the individual health card and its use, regardless of whether or not it is associated with the health benefit received constitutes information relating to health (article 4.15) and considering 35 RGPD).

In view of the terms in which the request for information on the use of the individual health card by foreigners during the years 2014, 2015 and 2016 is made, it does not appear that the communication of this data could be considered protected by article 9.2.g) of the RGPD, based on article 94 of the LGT.

Barcelona, November 20, 2018