

PD 12/2020

Urgent note on the Proposal for an article to be introduced in a Decree-Law for the communication of data from educational centers to the Department of Health

1. The Department of Education sends this Authority a proposal for an article to be included in a Decree-Law, for the communication of data from educational centers to the Department of Health, so that an assessment can be made.

Specifically, the wording of the proposed article is as follows:

"Article (X)

1. With the aim of complying with and guaranteeing the effectiveness of the set of prevention and health protection measures in the educational centers of the educational system of Catalonia to deal with the COVID-19 pandemic, the Department is authorized of Education to communicate to the Department of Health identification and contact data of students, educational administration staff and external staff of companies providing services to educational centers, necessary to carry out the activities related to the management of the current health emergency.

2. The data made available to the Department of Health are included in the "Covid19 Health-School Census" treatment, which is owned by the Department of Health, in order to exercise the powers that it has in the field of epidemiological surveillance and control of public health that has been attributed as a health authority.

3. The personal data to be communicated will make it possible to locate the person, or in the case of minor students, their parents or legal guardians, which educational center they belong to, and which group of stable cohabitation they belong to, as the case may be. The data will be made available automatically, whenever possible.

4. Likewise, the Department of Health, within the framework of the functions attributed to it in the pandemic situation referred to, will communicate to the head of the school through the established information systems, the health data corresponding to the results of diagnostic tests of COVID-19 so that the relevant measures can be adopted in accordance with established protocols. The person in charge of the school must maintain the duty of secrecy and confidentiality regarding the information to which they have access, even after the end of the health emergency situation.

5. The processing of personal data referred to in the previous paragraphs is carried out in accordance with sections g, hii of article 9 section 2, of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 d 'April 2016, article 57 of Law 18/2009, of 22 October, on public health, as well as the rest of the rules and principles regarding the protection of personal data.

"Additional provision first

The forecasts contained in article (X) of this Decree-Law are in force as long as the health measures for intervention and control of the pandemic that are agreed to manage the health crisis situation due to COVID-19 remain in force.

2. In accordance with article 6 of the RGPD, in order to be able to carry out a treatment of personal data, one of the legal bases of article 6.1 must be met. Among the legal bases provided for, in the case we are dealing with would be the one provided for in letter h), referring to those cases in which the treatment is necessary for "for the fulfillment of a mission carried out in the public interest or in the exercise of powers public given to the person in charge of the treatment;". On the other hand, the processing of health data for the purposes of healthcare and public health or for the prevention of occupational risks could be authorized by letters h) ii) of article 9.2 RGPD.

In accordance with the provisions of these articles, the legal basis must be established in the law of the member state that applies to the person in charge or the law of the European Union which, in any case, must determine the purpose of the treatment. With regard to the quality of this rule, it must fulfill an objective of public interest and must be proportional to the aim pursued (art. 6.3 if).

Regarding the range of internal law, Recital 41 itself states that "When this Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, without prejudice to the compliance requirements of the constitutional order of the Member State in question."

It should be taken into account in this respect that, in Spanish law, the rule that establishes the treatment must be a rule with the rank of law, as it follows from Article 53 EC to the extent that it entails the limitation of a right fundamental, and as constitutional jurisprudence has come to recognize (SSTC 292/2000 and 76/2019, among others), of the Court of Justice of the European Union (STJUE 08.04.2014, Digital Rights Ireland, among others) and the European Court of Human Rights (STEDH 07.06.2012, Cetro Europa 7 and Di Stefano vs. Italy, among others). In this sense, article 8.2 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD) establishes that "The treatment of personal data can only be considered based on the fulfillment of a mission carried out in the pu

of public powers conferred on the person in charge, in the terms provided for in article 6.1 e) of Regulation (EU) 2016/679, when it derives from a competence attributed by a rule with the force of law.”. Article 9 LOPDGDD is pronounced in similar terms regarding the processing of data from special categories of data, such as health data.

The Decree-Law constitutes a norm with the rank of law, and if it affects a fundamental right, such as the right to the protection of personal data, the analyzed regulation does not entail the essential regulation or the direct development of the fundamental right (question already done by the RGPD and Organic Law 3/2018), so it would not go against Article 64 EAC. Therefore, a Law Decree is a rule suitable to enable a certain processing of personal data.

3. Without prejudice to what has just been explained, the rule that is approved must also take into account the rest of the principles established by the personal data protection regulations, specifically the principle of data minimization, in by virtue of which the data processed must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (art. 5.1.c) RGPD and art. 9 of Convention 108 of the Council of Europe, for the protection of individuals with regard to the automated processing of personal data).

According to Recital 41 of the RGPD, "said legal basis or legislative measure must be clear and precise and its application foreseeable for its recipients, in accordance with the jurisprudence of the Court of Justice of the European Union (hereinafter, "Court of Justice") and the European Court of Human Rights."

The introduction of the authorization to carry out the intended communication constitutes a limitation of the fundamental right to data protection that may be justified. But it will only be so to the extent that it is proportionate (art. 6.3 RGPD). As recognized by the STJUE 08.04.2014 (Digital Rights Ireland case, among others) "According to article 52, section 1, of the Charter, any limitation on the exercise of the rights and freedoms recognized by it must be established by the law, respect its essential content and, within the respect of the principle of proportionality, limitations may only be introduced to said rights and freedoms when they are necessary and effectively respond to objectives of general interest recognized by the Union or the need to protect the rights and liberties from others.". In the same sense, SSTC 292/2000 or 76/2019, among others.

In accordance with repeated jurisprudence (STC 66/1995 serves for all) the analysis of compliance with the principle of proportionality of a certain measure requires what is known as the "test of proportionality". This involves a threefold analysis:

- a) The suitability of the measure, that is to say, if the measure is suitable to achieve the result intended
- b) The need for the measure, that is to say, if there are other less intrusive measures or more moderate to achieve the intended result.
- c) The analysis of proportionality in the strict sense, that is to say, if the measure derives more benefits for the general interest than damages on the other legal assets or values in conflict.

Therefore, the treatment provided for by the rule must be an appropriate, necessary and proportionate measure in the strict sense.

4. Taking into account what has been stated, it must be positively assessed that in section 1 of the proposal it is expressly indicated that the data will be limited to the data "necessary to carry out the activities related to the management of the current health emergency.". It is also necessary to assess as appropriate the review that, once a person infected or suspected of being infected has been identified, the collaboration of educational centers may be required to locate this person or the groups of people who may have been there in contact

However, from the second indent of the first point of section 3, it can be inferred that the intended communication would not be limited to the data just described, but would cover the identification and contact data of all the students, of the staff of the educational center and of all the external staff of companies providing services to the educational centers, regardless of whether or not they have had any type of contact with an infected person. In other words, it would affect hundreds of thousands of students, and staff from educational centers or external people. And most of these affected people are minors. In fact, what follows from this paragraph is that the shipment would be made massively and regardless of whether or not any situation of contagion has been detected, so that it is the Department of Health itself that determines which center education they belong to, and which stable coexistence group they belong to.

The justification that accompanies the proposed article refers only to the need to maintain the opening of educational centers in the current situation and to the protocols drawn up to be able to do so safely, but does not offer a justification for the need to this massive transmission of information, beyond stating that "In order to allow the effectiveness of the measures to contain the pandemic, it is necessary for the Department of Health to have the census of students, teachers and external staff that provides services in the educational centers of Catalonia, distributed by groups, with the basic contact details."

The truth is that, with the information available and in the light of the principle of proportionality, the measure does not seem to be considered suitable, nor necessary, nor justified from the point of view of proportionality in the strict sense.

At the outset it cannot be considered suitable (that is, it does not allow the intended result to be achieved) given that although it is true that these data could allow the Department of Health to identify the school and perhaps in some cases also the group stable to which a student is assigned, do not allow us to know precisely which are the teachers and administrative staff who have been in contact with the student or, much less, who are the external staff who have been in contact with them. In addition, with regard to students who may have been in contact, in order to have accurate information, an aspect that is required by the principle of accuracy of data (art. 5.1.d) RGPD), it should be taken into account not only the student's stable group of affiliation, but other circumstances specific to the dynamics of the educational center (parties groups, extracurricular activities, resignations and substitutions of teachers, ch

On the other hand, it is expected that the Department of Education will transmit this information, but the Department of Education does not have information on the staff of all centers (in principle it would affect both public and private centers) or the external companies nor, probably, on the composition of stable groups.

Nor can it be considered necessary, because while it is clearly necessary to identify the contacts of a person infected or suspected of being infected and to be able to locate them, the Department of Health has other less intrusive ways for the right to data protection:

Thus, in the event that it is the school that informs the Department of Health of the existence of a contagion or a risk situation, it may be the center itself that communicates the identification and location data not only of the infected person, but also the identification and the data that allow the location of the people who have been in contact with them in the school environment.

In the event that it is the Department of Health itself that detects contagion or the risk of contagion (for example when carrying out a detection test) the affected person (or their legal representatives if they are under 14) can indicate the school he attends. And from here the Department of Health can in any case contact the educational center (or, if applicable, the Department of Education) to communicate the identification and location data of the members of the group and the rest of people who may have been in contact. This, that is to say, the fact that the person who makes the identification is the educational center itself after the fact, would allow a more precise identification, not only of the students who have been in contact there, but also of the staff of the center and external staff who can having been in contact with them and would avoid having to communicate en masse the identification and location data

including those of many students or workers who have nothing to do with any episode of contagion.

On the other hand, although it is true that this possibility requires the collaboration of educational centers and that in certain circumstances it can be difficult to obtain, it is no less true that the Administration has means, even coercive, to make this obligation of the centers effective and that, on the other hand, this collaboration would also be necessary in the mechanism provided for in the proposal, given that, as we have explained, it does not seem that the Department of Education has much of the information that is foreseen in the proposal.

Finally, the measure is also not justified from the point of view of the analysis of proportionality in the strict sense. That is, on the one hand the option of the proposal involves a high level of intrusion in terms of the right to data protection, not only because of the very high number of people who may be affected by this measure (in principle the entire population between the ages of 3 and 16 and also those studying outside these age ranges), but also due to the fact that it will often be data from minors who may be in very different situations that may require special protection (it should be borne in mind that the communication of the information would include the center attended or location data that may generate, for example, risks from the point of view of the safety of the minors themselves or their relatives that relate to it).

It is also necessary to take into account the risks derived from the breach of the principle of accuracy, given that as has been explained, the identification that can be made directly by the Department of Health with the information sent *ex ante* cannot take into account the real circumstances and updated in which the school activity has been developed.

On the other hand, from the point of view of the benefits that the measure may bring, the justification of the measure does not set out additional benefits to those that could be obtained if the transmission of the data were carried out only with respect to groups or specific people affected by a contagion situation.

For this reason, and given that the justification that accompanies the proposal does not provide any concrete justification for the need for the Department of Health to massively dispose of the data of all these groups, it is proposed to delete the paragraph: "to which educational center do they belong, and to which stable coexistence group do they belong, in their case." of section 3 of the proposal. This would leave open the possibility that the Department could require the data that is necessary for the location of affected people, when necessary.

Or even the obligation could be foreseen that when educational centers are aware of a situation of contagion in the school environment, they must send *ex officio*, that is to say, without prior request from the Department of Health, the information necessary to identify and locate people from these groups who have been in contact with an infected person or suspected of being infected.

5. Finally and with regard to section 5, it should be noted that the communication of data from educational centers to the Department of Health could be protected by article 6.1.e) RGPD, and with regard to the categories special data (e.g. health data) in the case provided for in letter i) of article 9.2 RGPD (reasons of public interest in the field of public health) or the case in letter h) of the same article (necessary treatment for the purposes of preventive or occupational medicine), with regard to the data of the workers of the educational centers. However, the specific flow of information that is foreseen in the projected rule, from educational centers to the Department of Health, does not seem to involve the communication of health data from the Department of Education to the Department of Health, because which the reference to letters g) h) ii) of article 9.2 RGPD that is made in the last paragraph may be redundant and generate confusion.

Barcelona, November 6, 2020