

Ref.: PD 14/2020

**Report on the Proposal of an article to be introduced in a Decree-Law for the communication of data from the staff of residential centers to the Department of Health.**

**The Department of Health asks this Authority to issue, as a matter of urgency, a report on a proposal for an article and an additional provision to be included in a Decree-Law, for the communication of data on professionals who work in residential centers or those that collaborate with them, in the Department of Health.**

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

**"Article (X)**

**1. To ensure the protection of people residing in residential social services, residential homes and homes with support for the elderly, for people with physical or intellectual disabilities or problems arising from mental illness that are part of the Catalan system of social services, and to guarantee the effectiveness of the set of prevention and health protection measures in highly vulnerable environments, the titular entities and the managing entities of the aforementioned social services must make available to the Department of Health the identifying and necessary contact of the own and external staff who work or collaborate there, to manage and monitor the diagnostic tests for COVID-19 through the information systems created for the purpose.**

**2. The data made available to the Department of Health, in accordance with the provisions of section 1, are integrated into the "Covid data web" treatment, owned by the Department of Health, with the purpose to exercise the powers attributed to you as a health authority in the field of epidemiological surveillance and public health control.**

**3. Likewise, the Department of Health, within the framework of the functions attributed to it, will communicate to the person in charge of the residential device through the established information systems, the health data corresponding to the results of diagnostic tests for COVID-19 in order to that the relevant measures can be adopted in accordance with the established protocols. The person in charge of the residential facility must maintain the duty of secrecy and confidentiality regarding the information to which they have access, even after the health emergency has ended."**

**"Additional provision first**

**The forecasts contained in article (X) of this Decree-Law are in force as long as the PROCICAT Action Plan remains active for emergencies associated with emerging communicable diseases with high potential risk."**

**Having analyzed the proposal, which is accompanied by a justification of the measure, taking into account the current applicable regulations, and in accordance with the report of the Legal Adviser, I issue the following report:**

## Legal Foundations

I

(...)

II

In accordance with article 6 of the RGPD, in order to carry out personal data processing, 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 e), 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 scope of the internal law rule, Recital 41 RGPD establishes that "When this Regulation makes reference 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 Union

European (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 public interest or in the exercise 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 involve 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, as recognized

in STC 139/2016, a Decree-Law is a rule suitable to enable a certain processing of personal data.

### III

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, under 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." In this sense, for example, the SSTEDH of September 6, 1978 (Klas vs. Germany), August 2, 1984 (Malone vs. UK), July 30, 1998 (Valenzuela Contreras vs. Spain), 18 February 2003 (Prado Bugallo vs.

Spain) or STC 76/2019.

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 of April 8, 2014 (Digital Rights Ireland case, among others) must be established by 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 for protection of the rights and freedoms of 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 intended result.
- b) The need for the measure, that is to say, if there are other less intrusive or more moderate measures 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.

#### IV

From the outset, the proposed measure must be considered predictable. The group affected is clearly defined (own and external staff who work or collaborate with residential social services, residential homes and homes with support for the elderly, people with physical or intellectual disabilities or problems derived from mental illness that are part of the Catalan system of social services), such as the entities that would participate in the communication of data (holding entities and managing entities of the aforementioned social services, on the one hand; and Department of Health on the other other).

Section 1 also clearly defines the information that is intended to be accessed (identifying and contact data necessary to manage and monitor the diagnostic tests for COVID-19).

However, the wording of the third section may offer some doubt as to the group affected. It would be good, therefore, that in this third section, in line with what is explained in the justification of the measure, it should be indicated that it refers to the personnel indicated in the first section.

On the other hand, this third section refers to the "responsible for the residential device". The use of this expression can be confusing since it seems to allude to the existence of a specific residential device. Unless the creation of a "residential device" has previously been planned, it may be advisable to refer to the "responsible for the residence".

That is why it is proposed to introduce the following modification:

"3. Likewise, the Department of Health, within the framework of the functions attributed to it, will communicate to the person in charge of the residential device through the established information systems, the health data of the staff referred to in the first paragraph corresponding to the results of diagnostic tests for COVID-19 so that the relevant measures can be adopted in accordance with the established protocols. The person in charge of the residence 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.

#### V

Beyond this the measure must also be considered proportionate.

At first it can be considered suitable. In other words, it allows the intended result to be achieved. In the justification of the measure, it is indicated that the objective of the measure is to detect outbreaks and monitor the correct frequency of carrying out screenings among workers and collaborators, as well as being able to link the staff to the residential center where they provide services for be able to manage and monitor the diagnostic tests for COVID-19 to detect people carrying the virus and be able to break the chains of transmission.

It is clear that a measure such as the one proposed will allow the competent bodies in matters of health surveillance to be able to control whether the staff of these establishments or who collaborate there have

subjected to diagnostic tests and also allows you to link it with an establishment so that, in the event that it turns out to be a carrier of the virus, the chain of transmission can be controlled.

The measure may also be considered necessary. As stated in the justification of the measure, this staff is essential in the care of the residents and given their continuous interaction it is necessary to be able to control the effect of the virus on this group in order to break the chain of transmission where the people who live there are particularly vulnerable. In this sense, the justification indicates that it is considered necessary to carry out periodic diagnostic tests for these professionals. Therefore, in the absence of more effective alternative measures, it is an essential element in the virus control strategy in the field of residences, which is precisely one of the areas in a situation of greater vulnerability.

Finally, the measure can also be considered justified from the point of view of the analysis of proportionality in the strict sense.

Although the measure certainly entails a limitation of the right to data protection of the affected workers, given that data may be communicated, not only identifying and professional data but also health data, it must be taken into account take into account the high-risk situation existing in this residential context, not only for the workers themselves but, especially, for the people they have to take care of (remember in this regard not only the high number of people affected in these centers but also , especially the high mortality associated with Covid-19 among the groups resident in these establishments).

On the other hand, as has been explained, the proposal offers other guarantees: the data will only be transmitted between the residences and the Department of Health; the measure is planned to be temporary (it would only be in force as long as the PROCICAT Action Plan remains activated for emergencies associated with emerging communicable diseases with high risk potential); and finally the duty of secrecy and confidentiality regarding the information to which the residential manager has access, even after the end of the health emergency situation, is reca

## Conclusions

The proposed article examined, to be introduced in a Decree-Law, on the communication of personal data of residential centers while the PROCICAT Action Plan remains activated for emergencies associated with emerging communicable diseases with high potential risk, would be appropriate to the personal data protection regulations. However, it is recommended to modify the third section of the proposed article, in accordance with what is set out in legal basis IV of this

Barcelona, November 29, 2020