

CNS 57/2021

**Opinion in relation to the query formulated by an association of collegiates regarding compliance with the data protection regulations of the use of the COVID certificate in different areas in Catalonia and the requirement of the DNI by the establishments**

**A consultation is presented to the Catalan Data Protection Authority by the president of an association of collegiates in which he requests that this Authority pronounce itself in relation to compliance with the data protection regulations of "the use of COVID certificate in restaurants, gyms, Catalan residences, etc. (endorsed by the TSJC), with the data protection regulations and also (ii) the requirement of the user's ID, by restaurants, gyms and residences as a verification measure."**

**The query attaches a link to a news item which echoes the statements of the Minister of Health in relation to the desire to regulate the obligation of establishments to request the DNI to identify the person who presents the COVID certificate.**

**Having analyzed the request, which is not accompanied by further information, in view of the current applicable regulations and in accordance with the report of the Legal Counsel, the following is ruled:**

**I**

**(...)**

**II**

**The president of the association addresses a query with the aim of knowing the criteria of this Authority regarding the conformity of "the use of the COVID certificate in restaurants, gyms, Catalan residences, etc. (endorsed by the TSJC), with the data protection regulations and also (ii) the requirement of the user's ID, by restaurants, gyms and residences as a verification measure."**

**The first question raised, given the moment in which the consultation is made, seems to refer to the provisions of point 8 of Resolution SLT/3652/2021, of December 7, which establishes the measures in the matter of public health for the containment of the epidemic outbreak of the COVID-19 pandemic in the territory of Catalonia (henceforth, Resolution SLT/3652/2021). In particular, point 8 of this resolution provides for the following:**

**"-8 Use of the COVID certificate**

**1. Access to the premises, establishments, equipment or spaces enabled for the areas of activity provided for in section 2 of this section is conditioned on the presentation of a certificate by the users, issued by a service public health, in digital or paper format, that proves any of the following circumstances:**

**a) That the holder has been administered the complete vaccination schedule against COVID-19 of one of the authorized vaccines (vaccination certificate).**

**b) That the holder has a negative diagnostic test in relation to COVID-19 carried out in the last 72 hours in the case of RT-PCR tests and in the last 48 hours in the case of antigen tests ( diagnostic test certificate).**

**c) That the holder has recovered from COVID-19 in the last six months following a positive result obtained through a diagnostic test considered valid by the competent authority (certificate of recovery).**

**Persons under the age of 13 who do not have age-related access to these premises, establishments, equipment or spaces are exempt from this condition in accordance with the applicable sectoral regulations.**

**For these purposes, the owners or persons responsible for the premises, establishment, equipment or space must establish the access control system that allows the verification of any of the provided certificates presented by the people who wish to access them as users, without keeping the data contained therein and without using it for any purpose other than the aforementioned access control.**

**At the entrance to the premises, establishments, equipment or spaces, a poster must be placed in a visible area, where, in accordance with the model published on the website of the Department of Health, users are informed of the measures provided for in this section, on their nature necessary for access to the premises, as well as on the non-conservation of accredited personal data.**

**2. The presentation of vaccination, diagnostic test or recovery certificates is required in the terms established in section 1 of this section, in order to access, as users, premises, establishments, equipment or qualified spaces for the following areas of activity:**

**a) Concerts, music festivals of all genres and other cultural events that take place with the right audience and the possibility of dancing in cultural facilities or other specially equipped spaces.**

**b) Rooms and gymnasiums where physical and/or sports activities are practiced, as also in the High Performance Center of Sant Cugat.**

**c) Premises and catering establishments, including banquet halls. Excluded from this provision are the catering services of work centers intended for working people, the catering services integrated in health, socio-health and social centers and services to provide service exclusively to the people who perform labor services there and to the people that are included, the school canteens, the catering services integrated in centers**

university facilities to provide service exclusively to people who work there and to students and social canteen services, for people who use the service.

d) Premises and establishments with a license or that have submitted prior notification such as nightclubs, dance halls, party halls with shows, music bars, karaoke bars, youth clubs, special regime musical activity establishments and public establishments with reservations Annex.

e) Concert halls, theater cafés, concert cafés and musical restaurants.

f) Musical recreational activities of an extraordinary nature that, regardless of the type of license or authorization that protects them, can be carried out on the occasion of major festivals, fairs and other popular festivals in parks and amusement fairs and, in generally, in any space enabled for this purpose.

The access requirement consisting in the presentation of any of the certificates provided for in heading 1 of this section in the previously mentioned premises, establishments and activities is established for closed spaces, which includes interior spaces and exterior spaces that are covered and surrounded laterally by more than two walls, walls or facings. Premises and establishments that only have outdoor spaces and terraces are exempt from this control, or those that have skills, exclusively, for the exercise of the authorized activity, spaces and terraces. Likewise, the presentation of the aforementioned documentation will not be required when the service is provided in spaces and terraces located outdoors. For the purposes of applying the exemption, outdoor spaces and terraces may be covered and surrounded laterally by a maximum of two walls, walls or facings.

3. The regime of visits to users of residential care centers for the elderly and people with disabilities is subject to the access requirement consisting in the presentation of vaccination, diagnostic test or recovery certificates in terms established in heading 1 of this section, or, alternatively, the center performing a rapid antigen test (TAR) on the visiting person with a negative result. This provision can be excepted in cases of urgency or justified need and, in any case, to preserve the right to minimal accompaniment and care at the end of life, although during the visit the conditions of prevention and safety to deal with COVID-19.”

On the other hand, with regard to the second question raised, it refers to a news item published by a means of communication in which statements by the Minister of Health are echoed, and which include the provision of establishing the 'mandatory for establishments, where it is mandatory for users to present the COVID certificate, to also request the DNI in order to verify the identity of the person who presents it.

### III

From the point of view of European Union law on data protection, the Regulation (EU) 2016/679 of the Parliament and of the Council, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free movement of such data and which repeals the Directive 95/46/EC (General Data Protection Regulation

henceforth RGPD, provides that all processing of personal data must be lawful, loyal and transparent in relation to the interested party (article 5.1.a) and, in this sense, establishes a system for legitimizing the processing of data that is based on the need for one of the legal bases established in its article 6.1, such as when the treatment "is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (letter c), or "for the fulfillment of a mission carried out in public interest or in the exercise of public powers conferred on the person responsible for the treatment" (letter e), it being necessary to have a rule with the rank of law in this respect, in accordance with what is provided for in article 6.3 of the 'RGPD and article 8 of Organic Law 3/2018, on protection of personal data and guarantee of digital rights (from now on, LOPDGDD).

At the same time, taking into consideration that the COVID-19 certificate includes health data relating to the person holding it (art. 4.15) of the RGPD), in accordance with the list of categories of data provided for in the annex to the Regulation 2021/953, regarding the treatment of these data, article 9.2 of the RGPD provides that they may be treated, among other exceptions, when "it is necessary for reasons of an essential public interest" (section g) or "it is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health" (section i). Article 9.2 of the LOPDGDD requires that the treatment is covered by a rule with the rank of law, which may establish additional requirements relating to security and confidentiality.

Having said that, and for the purposes of the regulatory provisions required by both articles 6.1.c) i) and articles 9.2.g) ii) of the RGPD, we must refer to the provisions of Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, diagnostic test and recovery certificates (EU digital COVID certificate) in order to facilitate free movement during the COVID-19 pandemic.

Article 1 of Regulation 2021/953 provides for the following:

"The present Regulation establishes a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, diagnostic and recovery certificates (EU digital COVID certificate), in order to facilitate the exercise, by their holders, of your right to free circulation during the COVID-19 pandemic. [...]"

It establishes the legal basis for the processing of the personal data necessary to issue such certificates and for the processing of the information necessary to verify and confirm the authenticity and validity of said certificates in full compliance with Regulation (EU) 2016/679".

On the other hand, article 10 of this regulation establishes that "For the purposes of this Regulation, the personal data contained in the certificates issued in accordance with this Regulation will be processed solely for the purpose of accessing the information included in the certificate and verify it, in order to facilitate the exercise of the right to free movement within the Union during the COVID-19 pandemic. [...]"

However, recital 48 of the same Regulation 2021/953 also refers to the possibility that the law of the member states may establish the use of this data for other purposes provided that certain conditions are met:

**"[...] Member States may process personal data for other purposes if the legal basis for their treatment with other purposes, including corresponding retention periods, is established in national law, which must comply with Union law in matters of data protection and the principles of effectiveness, necessity and proportionality, and must include specific provisions that clearly determine the scope and scope of the treatment, the specific purpose in question, the categories of entities that can verify the certificate, as well as the relevant safeguards to avoid discrimination and abuse, taking into account the risks to the rights and liberties of those interested.**

**When the certificate is used for non-medical purposes, the personal data accessed during the verification process must not be kept, according to the provisions of this Regulation."**

Thus, Regulation 2021/953 enables the processing of personal data contained in the COVID-19 certificate with the aim of facilitating free movement within the European Union during the COVID-19 pandemic.

Beyond this, any other use of the certificate must be established in national law and comply with European Union data protection law and the principles of effectiveness, necessity and proportionality, and must include specific provisions that clearly determine the scope of application, the scope of treatment, the specific purpose, the categories of entities that can verify the certificate, as well as the relevant safeguards to avoid discrimination and abuse, taking into account consider the risks and freedoms for people.

#### IV

In relation to the first question raised in the consultation, regarding the display of the COVID-19 certificate in certain premises, establishments, equipment, etc. (henceforth, establishments), in the terms provided for in point 8 of Resolution SLT/3652/2021, reference must be made to article 3 of Organic Law 3/1986, of April 14, on special measures in matters of public health, which provides for the following:

**"In order to control communicable diseases, the health authority, in addition to carrying out general preventive actions, may adopt the appropriate measures to control the sick, the people who are or have been in contact with them and the environment immediate environment, as well as those considered necessary in the event of risk of a transmissible nature."**

This provision is set out in similar terms to Law 18/2009, of October 22, on public health (LSP) which aims to organize actions, benefits and services in the field of public health in the 'territorial area of Catalonia that establishes Law 15/1990 of July 9, on the health management of Catalonia, to guarantee the monitoring of public health, the promotion of individual and collective health, the prevention of disease and health protection (Article 1).

Specifically, article 55 of the LSP, provides the following:

"1. The health authority, through the competent bodies, can intervene in public and private activities to protect the health of the population and prevent disease. To this end, it can: [...] j) Adopt measures of medical recognition, treatment, hospitalization or control if there are rational indications of the existence of danger to the health of people due to a specific circumstance of 'a person or a group of people or by the conditions in which an activity is carried out. Measures can also be adopted for the control of people who are or have been in contact with the sick or the carriers. These measures must be adopted within the framework of Organic Law 3/1986, of April 14, on special measures in the field of public health, and State Law 29/1998, of July 13, regulating administrative contentious jurisdiction, and the legal provisions that modify or repeal them. k) In pandemic or epidemic situations declared by the competent authorities, the competent health authorities may adopt measures to limit activity, the movement of people and the provision of services in certain territorial areas provided for in annex 3, d in accordance with the provisions of article 55 bis.

2. The measures referred to in paragraph 1 must be adopted respecting the rights that the Constitution recognizes for citizens, especially the right to personal privacy, in accordance with what is established in the data protection regulations of personal nature and with the procedures that these regulations and the other applicable regulations have established, and having the mandatory authorizations."

For its part, Law 33/2011, of October 4, general public health (LGSP) establishes that "without prejudice to the measures provided for in Organic Law 3/1986, of April 14, on Special Measures in Matters of Public Health, with an exceptional character and when so required by reasons of extraordinary gravity or urgency, the General Administration of the State and those of the autonomous communities and cities of Ceuta and Melilla, within the scope of their respective competences, may adopt any number of measures are necessary to ensure compliance with the law" (article 54.1).

In accordance with these precepts, from the point of view of the processing of personal data, it is the responsibility of the competent public health authorities of the various public administrations to safeguard the essential interests in the field of public health and, to that end, the adoption of the necessary measures provided for in these laws to, in the face of a public health emergency, protect the health of the population and prevent its contagion.

On the other hand, it is necessary to take into account the provisions of article 10.8 of Law 29/1998, of July 13, regulating the contentious-administrative jurisdiction (LJCA) which attributes to the Contentious-Administrative Chambers of the Superior Courts of Justice "the judicial authorization or ratification of measures adopted in accordance with health legislation that the health authorities of a different scope than the state consider urgent and necessary for public health and involve the limitation or restriction of fundamental rights when their recipients are not individually identified" .

Precisely under the auspices of the aforementioned health and public health legislation, the Department of Health has foreseen in point 8 of Resolution SLT/3652/2021 the use of the COVID-19 certificate with

purposes other than those provided for in article 1 of Regulation 2021/953, which has been endorsed by the TSJC.

This resolution foresees the scope of application, the scope of treatment, the specific purpose, the categories of entities that can verify the certificate, as well as the relevant safeguards to avoid discrimination and abuse (control limited to certain activities where it is proportionate given the circumstances, duty of information at the entrance of the premises, temporary limitation of the measure, limitation of control to the personnel who control access to the activities or establishments, impossibility of allocating the data to another purpose, impossibility for the establishments to keep the data and prior judicial authorization).

In this sense, the Third Section of the Contentious-Administrative Chamber of the Superior Court of Justice of Catalonia has issued an Interlocutory of December 9, 2021 (judicial authorization procedure for COVID-19 measures number 530/2021), in which on the basis of sanitary and public health regulations, as well as the criteria established by the Third Chamber of the Supreme Court in relation to the authorization or judicial ratification of urgent and necessary measures for public health, to highlight in particular the sentence number 1112/2021, of 14 September (appeal 59/2021), agrees the authorization of the measures interested by the Generalitat of Catalonia included in point 8 of Resolution SLT/3652/2021.

Taking this into account, and with regard to the first question raised in the consultation, that is to say, in relation to the adequacy of the measure provided for in point 8 of said Resolution to the data protection regulations, it is referred to the considerations made by the Superior Court of Justice of Catalonia in the fourth legal basis of the aforementioned Auto from which, from the perspective of data protection regulations, and alluding to the same reasoning of the high court in judgment number 1112/2021, provides that the measure relating to the mere display of the COVID-19 certificate at the time of access to the premises (or establishment), without the data being able to be collected, nor creating a file as well as doing computer processing on it, does not limit the fundamental right to the protection of personal data.

It should be noted that, after receiving the consultation, and before issuing this opinion, the Department of Health has published new resolutions based on which public health measures have been established for the containment of the epidemic outbreak of the COVID-19 pandemic in the territory of Catalonia, including the measure relating to the use of the COVID certificate in terms similar to point 8 of Resolution SLT/3652/2021 (resolutions SLT/3787/2021, of December 23 and SLT/8/2022, of January 4, also authorized by the Third Section of the Contentious-Administrative Chamber of the Superior Court of Justice of Catalonia).

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With regard to the second issue raised in the consultation, that is to say, the criterion of this Authority in relation to the requirement of the DNI of the users by the establishments as a measure to verify the identity of those exhibiting the COVID-19, it means that at the time the consultation was formulated for the issuance of this opinion, this measure was not expressly provided for in any regulatory provision. However, we would be facing a treatment closely linked to the treatment analyzed in the previous legal basis. Showing the COVID certificate as a requirement to access an establishment or activity only makes sense if you can

raise as an individualized measure and it can be verified that the person exhibiting the certificate is really the person holding the certificate. However, in accordance with the principles of purpose and minimization, what will need to be determined is whether the verification of identity through the display of the front of the ID is compatible and proportionate.

From the outset it must be considered compatible, because if the purpose of the National Identity Document is a document that is issued mainly for police and administrative purposes (article 9 et seq. of Organic Law 1/1992, of 21 of February, on citizen security and art 9.1 of Law 39/2015, of 1 October, on the common administrative procedure of public administrations), it must be taken into account that in this case it is the same administration that has imposed on the establishments the obligation to carry out a control task as a measure of collaboration with the public health authorities in controlling the epidemic. And certainly in this case, as already happens in other areas or activities, it does not seem that the exhibition of this document to access these for the purposes of verifying identity when compliance with the obligations established by the legal system requires it, exceeds the privacy expectations that the affected people may have, nor should it cause them any discrimination (once the legality of the access control measure has been endorsed in the terms already described).

With regard to proportionality, 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.

It must be said that this measure favorably passes the proportionality test in accordance with the reasoning set out below.

At the outset, from the point of view of the suitability of the measure, it is clear that the display of the DNI, or another identification document such as the passport, together with the COVID 19 certificate allows establishments where it is mandatory presentation check that the person who has the COVID-19 certificate is the owner of it. In this sense, remember that in accordance with article 9.1 of Organic Law 1/1992, of February 21, on citizen security, the national identity document "will, by itself, have sufficient value for the accreditation of the identity of people". In the same sense, article 1.2 of Royal Decree 1553/2005, of December 23, which regulates the issuance of the national identity document and its electronic signature certificates, establishes that the national identity document "it has sufficient value, on its own, to prove the identity and personal data of its holder that are recorded in it".

The measure may also be considered necessary. In this sense, the serious health situation at the time when this opinion was written and the health situation alleged by the Department of Health and endorsed by the TSJC show the need to check the vaccination status, diagnostic test or recovery of the people affected, and this cannot be done reliably without verifying the identity of the person exhibiting the certificate.



Finally, the measure can also be considered justified from the point of view of proportionality analysis in the strict sense, if the costs and benefits of the measure are analyzed, from the point of view of people's rights, in relation to the possible alternatives.

The intrusion that entails accessing the information contained in the DNI, or another equivalent identification document, at the time of the display of the COVID-19 certificate is not significant, insofar as the establishments would mainly access identification data (names and surnames and date of birth) which are already included in the COVID-19 certificate and which may be necessary to verify your identity.

Regarding the photo of the holder, this information is essential to verify that the person exhibiting the COVID-19 certificate is the actual holder of it.

However, it is true that the display of the ID, even if it is limited to the front, may lead to access to other data than that contained in the COVID-19 certificate, such as the no. of ID, sex, nationality or the date of validity of the document. Although this other information is not necessary to verify the identity of the holder of the COVID-19 certificate, it cannot be considered to be significantly intrusive either, due to the context in which this information would be accessed and the fact that, in accordance with what has been exposed, establishments cannot keep it or use it for any purpose other than access control.

It is different in the case of the back of the ID. Access to the information contained therein is not justified for the intended purpose.

In any case, even though it is true that the display of the DNI can lead to a certain degree of intrusion in the right to the protection of personal data, it does not seem that there are other alternatives, which allow to achieve the objective pursued (verify the identity of the holder of the COVID certificate) with an equivalent level of reliability and that are less intrusive for the affected persons.

## Conclusions

The requirement of the COVID certificate in the terms set out and which have been authorized by the Superior Court of Justice of Catalonia, cannot be considered contrary to the regulations on the protection of personal data. Likewise, when this certificate is required, the requirement to display the front of the ID for the purposes of verifying identity is compatible and provided in accordance with the personal data protection regulations

Barcelona, January 18, 2022