

**Report on a Proposal for an article to be incorporated into a Draft Decree-Law on measures of an organizational nature in the health and penitentiary and juvenile justice fields, to deal with the health crisis caused by COVID-19**

**Background**

A letter from the Secretary General of the Department of Health is submitted to the Catalan Data Protection Authority in which it is urgently requested that the Authority issue a report on a Proposal for an article and an additional provision to be incorporated in a Draft Decree-Law on measures of an organizational nature in the health and penitentiary and juvenile justice fields, to deal with the health crisis caused by COVID-19.

Specifically, the wording of the proposal is as follows:

*"Article (X)*

*Communication of identification and contact data of the staff of the penitentiary centers and the educational centers of juvenile justice in Catalonia*

*1. To ensure the protection of people in prisons and juvenile justice educational centers in Catalonia, and to guarantee the effectiveness of the set of prevention and health protection measures in highly vulnerable environments, the Department of Justice must make available to the Department of Health the necessary identification and contact data of its own and external staff who work or collaborate there, to manage and monitor the diagnostic tests for COVID-19 through the information systems created to the effect.*

*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 matters of epidemiological surveillance and public health control.*

*3. Also, the Department of Health, within the framework of the functions attributed to it, will communicate to the person in charge of the penitentiary center or the educational center of juvenile justice through the established information systems, the health data of the staff to whom refers to the first section 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 penitentiary center or the educational center of juvenile justice must maintain the duty of secrecy and confidentiality regarding the information to which they have access, even once the health emergency has ended."*

*"Additional provision*

*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 Project, 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 follows from Article 53 CE, to the extent that it entails the limitation of a fundamental right, 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 only*

*may 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 norm with the rank 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 Law Decree 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 made 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 suitable rule 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 measure contained in the proposed article must be considered predictable. It clearly defines both the group affected (own or external personnel who work or collaborate in the penitentiary centers and the educational centers of juvenile justice in Catalonia), as well as the entities that would participate in the communication of data (the Department of Justice, on the one hand; and the Department of Health on the other).

Section 1 also clearly defines the information that the Department of Justice intends to communicate to the Department of Health (identification and contact data necessary to manage and monitor the diagnostic tests for COVID-19), as well such as the information that the Department of Health must communicate to centers (results of diagnostic tests for COVID-19).

#### V

Beyond that, 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 the possible carriers of the virus, and if applicable the existence of outbreaks, and to take the appropriate measures to prevent and treat the infection, in order to break chains of transmission and apply containment measures for cases and close contacts as quickly as possible and in the most accurate way possible, as well as being able to link staff to the center where they provide services to be able to manage and monitor diagnostic tests of 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 the field of health surveillance to be able to control whether the staff of these centers or who collaborates with them have undergone the diagnostic tests and also allows it to be linked with an establishment to the effect that, in case of being a carrier of the virus or suspected of being one, the chain of transmission can be controlled.

The measure may also be considered necessary. As stated in the justification of the measure, the professionals who work in a penitentiary center or in a juvenile justice educational center are a key element of care for people deprived of their liberty, since due to the

living conditions of the incarcerated population and of minors and young inmates, workers must interact with them constantly. In this sense, the justification indicates that it is considered necessary to monitor the performance of periodic diagnostic tests for these professionals indicated by public health. Therefore, and in the absence of more effective alternative measures, it is an essential element in the virus control strategy in the area of these centers.

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

Although both the articulation and the justification indicate that only identifying and contact data will be transmitted, the reality is that professional data will also be transmitted (at least the link of the working person with the center or with an external service provider company) and also health data (results of diagnostic tests).

In any case, the measure must be considered proportionate taking into account the situation of high risk of community transmission existing in this context, not only by the workers themselves but also of internal people.

On the other hand, as explained, the proposal offers other guarantees: the data will only be transmitted between the Department of Justice 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 penitentiary center or the educational center of juvenile justice has access, even after the end of the health emergency situation, is recalled.

## **Conclusions**

The proposed article examined, to be introduced in a Decree-Law on measures of an organizational nature in the field of health and penitentiary and juvenile justice, to deal with the health crisis caused by COVID-19, is appropriate to the personal data protection regulations.

Barcelona, February 8, 2021