

**Report on a proposal for an article to be included in a decree-law, on the obligation to provide information and communicate data for the implementation of the Vaccination Strategy against Covid-19 in Catalonia**

**Background**

A letter from the Secretary General of the Department of Health is submitted to the Catalan Data Protection Authority requesting that the Authority issue a report on a proposed article to be included in a decree law, on the obligation to 'information and data communication for the implementation of the Vaccination Strategy against Covid-19 in Catalonia.

Specifically, the wording of the proposal contains an article and an additional provision, with the wording Next:

*"Obligation of information and communication of data for the execution of the Vaccination Strategy against Covid-19 in Catalonia*

*1. The Vaccination Strategy against Covid-19 in Catalonia, prepared in accordance with the forecasts approved by the Interterritorial Council of the National Health System and with the criteria established by the Vaccination Strategy of the European Union, aims to contribute to the prevention and control of the pandemic.*

*In a context in which universal access to vaccination against Covid-19 cannot be guaranteed, the Vaccination Strategy against Covid-19 in Catalonia, set up as a document subject to continuous review and updating based on the evidence scientific knowledge, the availability of vaccines and the epidemiological situation, identifies the different population groups subject to vaccination at any given time and it is up to the Department of Health to guarantee access, on a voluntary basis, to vaccination for all people who make up these population groups.*

*For these purposes, the Department of Health must have, organized according to the population groups defined in the aforementioned Strategy, the personal data necessary to identify the members of the groups to be vaccinated and be able to contact them to inform - information on access to this benefit and the vaccination procedure established in each case.*

*At the request of the Department of Health, it is up to the departments of the Government of the Generalitat competent by reason of the field of activity to which each vaccination group belongs to compile the data mentioned in the previous paragraph. The receiving departments will make the data communicated corresponding to each group available to the Department of Health.*

*2. For the purposes of what has been provided for in the previous section, the obligation is established to provide the Department of Health, through the corresponding department, with the data necessary to*

*to the identification and contact of the members of each vaccination group, who are required by it, in the format determined in order to guarantee the protection of the data provided, and diligently.*

*All public administrations and the entities dependent on them, as well as any natural or legal person, of a public or private nature, located or carrying out their activity in Catalonia, are obliged to provide the data referred to.*

*3. The data made available to the Department of Health will be integrated into the "Covid data Web" treatment, owned by the Department of Health, in order to exercise its powers in the field of epidemiological surveillance and control of public health attributed to you as a health authority."*

*"Additional provision*

*The obligation of information and communication of data established in article (X) of this Decree Law will be in force as long as the request for data by the Department of Health is necessary for the achievement of the objectives of the Strategy of vaccination against Covid-19 in Catalonia."*

Analyzed the Project, which is accompanied by a copy of the document "*Actualización 3- Estrategia de vacunación frente a COVID 19 en España*" and the supporting report for the purposes of article 38.3 of Law 13/2008, of 5 of November, of the Presidency of the Generalitat and of the Government, taking into account the current applicable regulations, and in accordance with the report of the Legal Advice, 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 treatment of health data for the purposes of healthcare and health public 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 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 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) *"According to article 52, section 1, of the Charter, any limitation of the exercise of the rights and freedoms recognized by it 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 to protect 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, since in general terms it allows to deduce both the purpose, the subjects involved and the categories of data treated, although the wording would be susceptible of improvement for the purposes of greater clarity.

With regard to the purpose, it is clear that the purpose of the forecast is to exercise the powers attributed to you by the Department of Health as a health authority in terms of epidemiological surveillance and public health control, more specifically, to identify and put - get in touch with people who are part of the different vaccination groups established in accordance with the vaccination strategy, to inform them about access to this benefit and the vaccination operation.

As for the people affected, it is also clear that it refers to any natural person who may be included in any of these groups.

When the subjects involved in the data communications that are foreseen, it is also defined that the final recipient of the information is the Department of Health and that the information can come directly from other Departments of the Government of the Generalitat or from other natural persons or public or private entities that have the required information regarding the established groups and that would provide it to the Department of Health through the competent department depending on the activity in question. These forecasts are contained

in the last paragraph of section 1 and in the first and second paragraphs of section 2.

For these purposes, it is suggested, for greater clarity, to move the last paragraph of section 1 and merge it with section 2, in accordance with the wording that will be proposed later.

Regarding processed data, the text could be more accurate. In accordance with section 2 of the proposal, the data that must be communicated are the data necessary for the identification and contact of the members of each vaccination group. However, it should be borne in mind that to the extent that this communication will be linked to age, to certain conditions relating to work activity or to the fact of suffering from certain diseases - circumstances all of which are linked to the established risk groups - it would be convenient that the treatment of these other data was expressly provided for in section 2 of the proposal.

For this reason, it is proposed to delete the last paragraph of section 1 and give the following wording a section 2:

*"2. For the purposes of the provisions of the previous section, the obligation of public administrations and the entities that depend on them, as well as any natural or legal person, of a public or private nature, located or carrying out their activity, is established in Catalonia, to provide the Department of Health with the identification, contact, age, professional or health data necessary for the identification and contact of the members of each vaccination group, which are required by this Department, in the format determined to guarantee the protection of the data provided, and diligently. The communication must be made through the departments of the Administration of the Generalitat competent by reason of the field of activity to which each vaccination group belongs. The receiving departments must make the communicated data available to the Department of Health."*

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 third paragraph of section 1 of the proposal, it is indicated, with regard to the purpose of the measure, that the Department of Health must dispose, organized according to the population groups defined in the Strategy, of those personal data necessary to identify the members of the groups to be vaccinated and to be able to contact them to inform them about access to this benefit and the vaccination operation established in each case.

Certainly, the document "*Estrategia de vacunación frente a COVID 19 en España*", approved by the Public Health Commission of the Interterritorial Council of the National Health System on December 2, 2020, and revised so far on three occasions, the first on December 18, 2020, the second on January 21, 2021 and the third on February 9, 2021 (which is attached to the report request), provides that, given the lack of sufficient availability of vaccines and the epidemiological situation, it is necessary to establish different population groups and establish the order of priority to vaccinate them. It is up to the Department of Health to prioritize this.

It is clear that a measure like the one proposed can allow the competent bodies in the field of health surveillance to identify the people who are part of the different vaccination groups and contact them for the purposes of informing them and manage the process for the purposes of apply the aforementioned strategy.

The measure may also be considered necessary. In this sense, it is essential to be able to apply the prioritization of the different vaccination groups to know certain circumstances that justify the inclusion of a person in one or another group. Likewise, once the people who are part of it have been identified and assigned to a certain group, it must be possible to get in touch with them to administer the vaccine. It should be noted in this regard that if the health administration already has other files where some of the data referred to in the proposal may be recorded, the set of people susceptible to vaccination may be wider than that of the people whose data are recorded in the Department's information systems. And in addition, there are certain data, especially those of a professional nature, that are not recorded in the Department's systems.

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

At the outset, despite the breadth with which the obligation to communicate certain data is formulated, it must be said that the provision is not formulated in broader or more intrusive terms than the general provisions on recognition measures, treatment, hospitalization and control that on this matter can already be derived, for example, from Organic Law 3/1986 on special measures in the field of public health (arts. 2 and 3) or article 55.1.j) of the Law 18/2009, of October 22, on public health.

It must also be taken into account that the data that is planned to be collected are the ones that are indispensable to achieve the intended purpose. In principle, the data necessary to identify people belonging to the majority of priority groups will not require the processing of special categories of data. And although in some cases they could require it (for example for the identification of people who may be part of prioritized groups due to the pathologies they suffer from and who are not treated in the public health system but in private centres), the communication of this data may also be covered by the already mentioned article 9.2.i) of the RGPD.

On the other hand, it does not seem that there are less intrusive alternatives that are equally effective. In this sense, the time factor is also relevant, given that other alternatives, such as having the person providing the data be the affected persons themselves, would predictably end up entailing a delay in the process, which would be detrimental not only to the affected person, but of the population as a whole and, ultimately, of the effectiveness of the vaccination strategy.

It should also be borne in mind that the information and data communication obligation established in the proposal will only be in force as long as the request for data by the Department of Health is necessary to achieve the objectives of the Vaccination Strategy against Covid-19 in Catalonia (additional provision of the proposal), and that the proposal also provides that the Department of Health must adopt a format for communication that guarantees the protection of the data communicated (section 2 of the proposal).

It can therefore be concluded that the measure is proportionate.

## VI

Without prejudice to what has just been explained, it is also appropriate to make an observation regarding section 3 of the proposal, according to which *"The data made available to the Department of Health will be integrated into the treatment "Web data Covid", of which the Department of Health is the holder, with the purpose of exercising the competences attributed to you as a health authority in matters of epidemiological surveillance and public health control.*

If the treatment "Web data covid" is also mentioned in other provisions recently approved by the Department of Health for the purpose of collecting information necessary for the diagnosis, prevention and fight against the spread of Covid-19 (for example the Article 2 of Decree 48/2020 provides for the data of residential social services staff, and Decree-Law 6/2021 provides for the data of staff in penitentiary centers and youth justice education), it should be noted that in the case at hand, Decree-law 48/2020 created the vaccination register of Catalonia where the data relating to the identification of the recipients of vaccines; data relating to its administration, as well as those other data established by the health authorities.

This being so, and that the data that would be collected through the obligation of communication provided for in the article subject to report are collected with the purpose of *"identifying the members of the groups to be vaccinated and being able to contact them for inform them about the access to this service and the vaccination operation established"*, it would seem that, regardless of the fact that this data may also be included in other treatments, it is in the vaccination record where the information collected should be incorporated, since it is a treatment specifically created for the purpose of managing vaccination processes.

In any case, both the "Web covid data" treatment and the "Catalan vaccination register" treatment must be included in the Department of Health's treatment activity register.

## Conclusions

The proposed article examined on the obligation of information and communication of data for the implementation of the Vaccination Strategy against Covid-19 in Catalonia, complies with the personal data protection regulations, without prejudice of the observations made in this report for the improvement of the text.

Barcelona, February 15, 2021