

PD 8/2021

**Report on the Draft Decree-Law regulating the use of the covid certificate digital of the European Union for access to carry out certain activities within the framework of the prevention and containment measures established in Catalonia to deal with the health crisis.**

**Background**

On July 16, the Catalan Data Protection Authority is asked to issue a report on a Draft Decree-Law regulating the use of the European Union's digital covid certificate for access to the realization of certain activities within the framework of the prevention and containment measures established in Catalonia to deal with the health crisis.

(...)

Having analyzed the Project, which is not accompanied by any other documentation, taking into account the current applicable regulations, and in accordance with the report of the Legal Adviser, I issue, as a matter of urgency, the following report:

**Legal Foundations**

I

(...)

II

The verification of certain circumstances contained in the European Union's Covid digital certificate entails, even if the data is not collected, a treatment of personal data specifically related to people's health, which is subject to the

Obviously, a measure like the one proposed in the project can affect not only the right to the protection of personal data but also other rights. But given the instrumental nature of the right to data protection for the protection of other rights (STC 292/2000), it is appropriate to analyze the justification of the limitation of the right to data protection derived from the verification of aspects relating to the health of the people affected, as a condition to be able to access certain activities.

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 regulation of the treatment of health data for public health purposes can be found under letter i) 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 of the RGPD states that "When the present Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament, without to the detriment of 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 being 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.

On this issue it should be noted that the Project regulates the use of information contained in the EU digital COVID certificate regulated by Regulation (EU) 2021/953 of the European Parliament and of the Council of June 14, 2021 relating to a framework for dispatch, verification and acceptance of interoperable COVID-19 vaccination, diagnostic test and recovery certificates to facilitate free movement during the COVID-19 pandemic.

In this regard, 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 to 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 Statement of Reasons 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:

"The Member States may process personal data for other purposes if the legal basis for its treatment with other purposes, including the corresponding retention periods, is established in national law, which must comply with Union law on the protection of data 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."

It will therefore be necessary for this project to clearly determine:

- The scope of application
- The scope of the treatment
- The specific purpose
- The categories of entities that can verify the certificate
- The relevant safeguards to avoid discrimination and abuse, taking into account the risks to people's rights and freedoms.

On the other hand, the use of the information contained in the EU digital COVID certificate under the terms of the Project 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

At the outset, the measure contained in the Project must be considered endowed with predictability, given that in general terms it allows to deduce both the purpose, the subjects involved and the categories of data treated, although the wording could be subject to improvement in effects of greater clarity. In this sense, and in order to give the rule greater clarity and precision, the following observations can be made:

- a) Article 1 refers to "the conditions set out in Article 2", and Article 2 is headed "Conditions of use of the EU digital COVID certificate", and its first paragraph also includes a reference to "the conditions of use of the certificate".

In reality, Article 2 does not regulate the conditions of use of the certificate, but it regulates the circumstances that can be accredited through the EU Digital covid Certificate. The conditions of use of the certificate are regulated in article 4.

For this reason, it is proposed to modify the wording of articles 1 and 2 in the following sense:

"Article 1. Object

The purpose of this Decree Law is to enable the use of the EU digital COVID certificate, for access to the activities referred to in article 3, under the conditions established in article 4, when established by the authorities competent within the framework of the PROCICAT Action Plan for emergencies associated with emerging communicable diseases with a high risk potential, through the resolutions adopted in accordance with the procedure provided for in Article 55 bis of Law 18/2009 , of October 22, of public health.

The use of the EU digital COVID certificate is without prejudice to other supporting documents of diagnostic tests that are determined to be valid by the competent authorities.

Article 2. Accreditable circumstances with the EU digital COVID certificate

For the purposes of this Decree-Law, the use of the EU digital COVID certificate allows the following circumstances to be accredited:

- 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 recovered from COVID-19 after a positive result obtained through a diagnostic test considered valid by the competent authority (certificate of recovery).
- c) (...) That a diagnostic test (ART or PCR) has been carried out in relation to COVID 19 with a negative result, within the validity period established by the competent authority (diagnostic test certificate).

b) Regarding article 4 of the Project, it is suggested that the title "Conditions of accessibility" be changed to "Conditions of access", given that what is regulated in this article are not conditions of accessibility (in the meaning of Law 13/2014, of October 30, on accessibility) but access conditions.

On the other hand, it is also suggested to delete the expression "of them" in the second paragraph of this article, since it is redundant.

If the observations that have been made are taken into account, the project can be considered foreseeable and would specify all the aspects referred to in Recital 48 that we referred to above:

- Scope of application: activities established by the competent authorities within the framework of the PROCICAT Plan, in which the circumstances described in this article occur.
- The scope of the treatment: aspects related to article 2 of the Project
- The specific purpose: to prevent the spread of COVID-19 among the attendees to these activities.
- The categories of entities that can verify the certificate: persons designated for access control by the person in charge of the activity.

v

Regarding the relevant guarantees or safeguards to prevent discrimination and abuse, taking into account the risks to the rights and freedoms of individuals, the project also provides guarantees. The measures provided for in the project must be evaluated positively, as long as the observations that have been made are taken into account.

At the outset, and with regard to the risk of discrimination, it must be taken into account, apart from the fact that vaccination has not been established as mandatory, that despite the fact that a considerable percentage of the population has already been able to follow the complete vaccination schedule, there is still no free availability of vaccines, so there could be a risk of discrimination against those citizens who have not yet been able to get vaccinated.

On the other hand, the Draft Law Decree does not specify the activities or sectors of activity affected, but rather refers to what is established in the framework of the Action Plan of the Prosecutor, at each moment.

In this analysis, a decisive element will be the types of activities with respect to which, within the framework of the Procicat's Action Plan, this measure is to be implemented. In this sense, the justification made in the report or in the report justifying the measures foreseen for each sector at each moment will play a very important role. The risk will be greater to the extent that it concerns activities that significantly affect fundamental rights, such as freedom of movement, the possibility of working or activities that can be considered indispensable for daily life.

Beyond that, the regulation contained in the project would not absolutely affect all the activities in respect of which this measure can be established, but only when they involve a high level of social interaction, without which it can be guaranteed at all times the minimum interpersonal safety distance as well as the continued use of masks.

Thirdly, the project does not exclude the possibility of using other means to prove the concurrence of any of these circumstances (second paragraph of article 1). This is particularly relevant at a time when access to diagnostic tests (in terms of cost and availability) has been greatly improved.

Fourthly, access is limited to a check of the data presented, and it is expressly provided that the data contained therein cannot be retained, nor used for other purposes.

In this sense, the project is in line with article 10.1 of Regulation 2021/953 which states that "personal data accessed in accordance with this section will not be stored." And, along these same lines, with recital 48 of the Statement of Reasons for Regulation 2021/953, which establishes that "When the certificate is used for non-medical purposes, the personal data accessed during the verification must not be kept, according to the provisions of this Regulation."

Fifth, access is limited to the people designated for access control by the person in charge of the activity.

Finally, the temporary limitation of the validity of the Decree Law is foreseen.

## VI

Taking into account all the elements that have just been set out, the measure must also be considered proportionate.

At first it can be considered suitable. In other words, it allows to achieve the intended result of preventing the spread of COVID-19 among the people attending these activities.

The measure may also be considered necessary. In this sense, the serious health situation at the time when this Decree-Law is to be approved can justify the need for the measure. In any case, the justification for the need for the measure must be documented not only in the report that must accompany the draft law decree, but also at the time when the competent authorities within the framework of the Procicat Plan, establish its application with respect to some activity or sector of activity. In any case, the processed data and the treatment that is planned to be done, are adapted to the principle of minimization.

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 proposed measure involves revealing information about the state of health of the affected people who want to attend these activities, specifically about their immunity to the SARS-CoV-2 coronavirus. This entails the disclosure of information that, if it is already sensitive in general, is even more so in a context like the current one. However, it should be borne in mind that the disclosure would only be made to the people in charge of controlling access to the affected activities, without data being collected, and only with respect to those people who choose to attend these activities. In addition, as already explained, the affected people have other ways to prove that they are in one of the situations that would allow access to these activities.

On the other hand, the assessment of the benefits and harms of the measure, and especially the risk of discrimination, must be put in relation to the specific types of activities to which the measure applies, given that the nature of the activity determines the risk of discrimination. The more relevant the activity when it comes to being able to exercise fundamental rights and freedoms or for a

develop essential aspects of people's daily lives, the greater the risk and severity of eventual discrimination. For this reason, and beyond the considerations already contained in the Statement of Reasons for the Project, the detailed justification becomes essential that, from the point of view of the public health situation and the circumstances affecting each of the activities, contain the report of the Draft Law Decree and the Report or the reports that accompany the eventual resolutions that establish the application of this measure to the different activities under the provisions of article 3 of the Project.

In any case, with the information available, and taking into account the effects not only for the right to data protection, but also for other rights and freedoms, both of those attending and of the people promoting the activities affected, the proposed measure may be less restrictive than other measures such as the total closure of the activity.

Taking into account the guarantees that have already been referred to in the preceding legal basis, and to the extent that the provisions of this Decree-Law apply to sectors of activity where it has been established that there may be a high level of spread of the SARS-CoV-2 coronavirus, in which the conditions referred to in article 3 cannot be guaranteed, the establishment of the possibility of using the EU digital certificate to certify any of the circumstances that they contain is a less intrusive alternative for people's rights than the total limitation of these activities, or that limiting access only to people who can prove these circumstances by other means.

Without prejudice to the fact that the concurrence of the circumstances that justify the proportionality of applying this measure to a certain activity will have to be evaluated at the time when the application of this measure to each activity or sector of activity is agreed, with the information available at the time of issuing this report, it does not appear that there are less intrusive alternatives that are equally effective.

## **Conclusions**

The Draft Decree-Law regulating the use of the EU digital covid certificate for access to the performance of certain activities within the framework of the prevention and containment measures established in Catalonia to deal with the crisis health, complies with the regulations for the protection of personal data, without prejudice to the observations made in this report for the improvement of the text.

Barcelona, July 19, 2021