

Report in relation to the Proposal presented by the Department of Social Rights on the exchange of information between social services and health services, to be included in the Draft Law on fiscal and financial measures for 2022 (M-184)

The Proposal presented by the Department of Social Rights on the exchange of information between social services and health services is submitted to the Catalan Data Protection Authority, to be included in the Draft Law on fiscal and financial measures for to 2022 (M-184), for the study and issuance of the corresponding report.

The text of the Proposal is accompanied by a copy of the General Report and the Impact Assessment Report.

On September 29, 2021, a meeting will be held with the Department of Social Rights and the Department of Health, in order to clarify some issues related to this Proposal.

Having examined the Project and the documentation that accompanies it, and having seen the report of the Legal Counsel, the following is reported.

Legal foundations

I

(...)

II

The Proposal presented by the Department of Social Rights to be included in the Draft Law on fiscal and financial measures for 2022 (hereinafter, the Proposal) aims to add a new additional provision, the fortnight, to Law 12/2007, of October 11, of social services.

The Drafting Proposal for the additional provision submitted to report establishes the following:

"Article xx: a new additional provision is added, the fortnight, to Law 12/2007, of 11 October, on social services, with the following text:

1. In order to guarantee the effective comprehensive care of the people served by the Network of Social Services of Public Care and the health services of the public system, the communication of data between the aforementioned services is enabled, without the consent of the interested persons, in the terms provided for in the following section:

a. The social services are enabled to communicate to the health services the data of the people served by both systems, of an identifying nature, of contact, as well as

those related to the social services provided, whenever they may have an impact on your health and in order to guarantee a comprehensive and integrated care process. They can access the information, the health professional profiles involved in the diagnosis or treatment of the interested party, duly accredited.

b. The health services are enabled to communicate to the social services the data of the people served by both systems, of an identification and contact nature, as well as those data from their clinical history that may affect their personal autonomy - whether by dependency or disability situation - to detect and intervene in situations of social risk that may require the activation of social benefits and that require health information to be effective, and in order to guarantee a care process comprehensive and integrated. They can access the information, the professional profiles of the social services involved in the monitoring and evaluation of the citizen, duly accredited.

2. The entities responsible for the communications must apply the technical and organizational measures appropriate to the sensitive nature of the information, in order to guarantee the confidentiality, integrity, traceability, availability and authenticity of the information, as well as the exercise of rights and duty to inform

The professionals of the social and health services must maintain the duty of secrecy regarding the information to which they have access, even once their association with the entity for which they provide services has ended.

The text of the Proposal that is being examined foresees an authorization for the communication of certain data between the care services and the social services, with the aim of guaranteeing an integrated and focused care for the people who are cared for by both serv

With regard to the need for the Proposal, the accompanying General Report states that a large number of people in complex health and social situations require the health and social services system to intervene concurrently and together in the assessment of its state. In this sense, the need to improve the coordination of the care process and shared decision-making between professionals and organizations in the fields of health and social care is exposed, and, therefore, to promote that the professionals involved they have the minimum information necessary for decision-making to help carry out a multidimensional and comprehensive assessment, a diagnosis of the situation and the preparation of a unique care plan, in order to avoid duplication.

III

Regulation (EU) 2016/679, of the Parliament and of the Council, of 27 April 2016, relating to the protection of natural persons with regard to the processing of personal data and the free movement of such data (hereinafter , RGPD) provides that all processing of personal data must be lawful (article 5.1.a)) and, in this sense, establishes a system of legitimization of data processing that is based on the need for one of the legal bases to be met established in its article 6.1.

In the field of public administrations and in a case like the one we are dealing with, the enabling legal basis provided for in letter e) of article 6.1 of the RGPD could apply, relating to those cases in which the intended treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the dat

On the other hand, the processing of health data for the purposes of health and social assistance could be authorized by article 9.2.h) of the RGPD, on the basis of the law of the Union or of the member states, provided that carried out by professionals subject to the obligation of professional secrecy (article 9.3 RGPD).

In accordance with the provisions of these articles, the legal basis of the treatment indicated in these sections must be established in the law of the member state that applies to the person in charge or in the law of the European Union which, in any case, must determine the purpose of the treatment. The referral to the legitimate basis established in accordance with the internal law of the member states requires, in the case of the Spanish State, in accordance with Spanish law, that the development rule, as it is a fundamental right, has the status of law.

In this sense, article 8.2 of Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (hereafter LOPDGDD) establishes the legal scope of the enabling rule. Article 9 of the LOPDGDD is pronounced in similar terms regarding the processing of data from special categories of data, such as health data.

Both the current health regulations and the social services regulations allow in certain cases the exchange of certain personal information between these services when it is necessary for adequate attention to the people affected. This Authority has made this clear on several occasions (for example, in opinions CNS 37/2015, CNS 13/2020 or CNS 19/2021, among which are available on the website <https://apdcat.gesat.cat/en/visiti>) where social services' access to clinical history data, as well as health services' access to information in the possession of social services, is provided for in the aforementioned regulations, can clearly be improved.

The Proposal presented in the report aims to be the "legal basis" that must legitimize the fluid and efficient communication of data between social services and health services in order to guarantee comprehensive care for people.

However, as established in article 6.3 in fine of the RGPD, this new rule, apart from fulfilling a public interest objective, must be proportional to the intended legitimate purpose. This implies, in the light of the doctrine established both by the Constitutional Court (Judgment 76/2019, of May 22) and by the Court of Justice of the European Union (STJUE 8-4-2012 Digital Rights Ireland), that the rule meets the requirements of foreseeability for its addressees or of concretization of the cases affected and also of establishing the necessary guarantees.

The aforementioned STC 76/2019 is particularly illustrative in this regard, which declared the unconstitutionality of Article 58.1 of the LOREG precisely because this article provided for the treatment of special categories of data (in that case ideological data) without clearly establishing neither the assumptions nor the conditions under which the treatment could take place, and without providing adequate guarantees.

In this sense, the TC makes it clear that it must be the law itself that establishes the guarantees, without referring to a later regulatory standard or to the decisions that may be made subsequently by the data controller (FJ VI):

"(...)

c) The need to have adequate guarantees is especially important when the treatment affects special categories of data, also called 12 sensitive data, because the use of these latter is likely to compromise more directly the dignity, the freedom and the free development of the personality.

(...)

Adequate guarantees must ensure that data processing is carried out under conditions that ensure transparency, supervision and effective judicial protection, and must ensure that data are not collected disproportionately and are not used for purposes other than those they justified their obtaining. The nature and scope of the guarantees that are constitutionally enforceable in each case will depend on three factors essentially: the type of data processing that is intended to be carried out; the nature of the data; and the probability and severity of the risks of abuse and illicit use which, in turn, are linked to the type of treatment and the category of data in question. Thus, data collection with statistical purposes does not pose the same problems as data collection with a specific purpose. Nor does the collection and processing of anonymous data involve the same degree of interference as the collection and processing of personal data that are taken individually and are not anonymized, as is the treatment of personal data that reveal ethnic or racial origin, political opinions, health, sex life or sexual orientation of a natural person, than the treatment of other types of data.

The level and nature of the adequate guarantees cannot be determined once and for all, because, on the one hand, they must be revised and updated when necessary and, on the other hand, the principle of proportionality requires verifying whether, with the development of technology, treatment possibilities appear that are less intrusive or potentially less dangerous for fundamental rights. d) In conclusion, political opinions are sensitive personal data whose need for protection is, to that extent, greater than that of other personal data.

Adequate and specific protection against treatment constitutes, in short, a constitutional requirement, without prejudice to the fact that, as we have seen, it also represents a requirement derived from European Union law. Therefore, the legislator is constitutionally obliged to adapt the protection it provides to said personal data, where appropriate, imposing greater requirements so that they can be the object of treatment and providing specific guarantees in their treatment, in addition to those that may be common or general.”

It is in this context that it is necessary to examine, below, the text of the Proposal that is submitted to report

IV

The Proposal makes, in section 1, a clear enough delimitation of its object with regard to the purpose of the intended treatment, the actors involved, the personal data that would be the subject of communication and the affected persons, in such a way that it specifies in in which justified cases social services and health services may exchange certain personal data without the consent of the affected persons.

At the outset, it differentiates in two sections the flows of personal information that are enabled, which contributes to the understanding, by the possible people affected, of what circumstances and under what conditions public powers are enabled (social services and health) for the communication of your personal data.

Thus, section 1.a) of the Proposal refers to the communication of data from social services to health services and section 1.b) of the Proposal to the communication of data from health services to social services

Both sections specify the people affected by this communication: the people "served by both systems".

Certainly, not all people cared for by the health system should be cared for by social services, nor should health services be able to access, without the consent of the people affected, social services data of people they should not attend. Therefore, it is correct and in line with the principle of data minimization (Article 5.1.c) RGPD) to limit the communication of data to the people served by both systems (social services and health) in those cases where is necessary for the adequate care of these people.

However, it should be noted that both health care and social care, and therefore also a comprehensive and integrated care by both systems, in certain cases it seems that may entail the processing of personal data of family members or other third parties linked to the person served. If this is the case, it would be advisable to expressly foresee this and refer to the "data related to the people served by both systems".

The aforementioned sections of the Proposal also specify the personal data subject to communication and to which the workers of each service (health and social services) will be able to access, as well as the purpose to which this communication is intended.

Thus, in the case of health services, it is specified that the social services will communicate the data "of an identifying nature, contact, as well as those related to the social services provided, whenever they may have an impact on your health and for that to guarantee a comprehensive and integrated care process" for the people served by both services (section 1.a)).

Point out that the reference to the data "related to the social services provided", even though the communication is subsequently linked to those data "that may have an impact on the health" of the people served, could be imprecise from the point of view of the principle of data minimization (Article 5.1.c) RGPD), taking into account the breadth of the volume of information processed by social services and the breadth of the concept of health data. It would be convenient to link the attachment to health with the care that health services mu

In the case of social services, it is specified that the health services will communicate the data "of an identifying nature, contact, as well as those data from your clinical history that may affect your personal autonomy - whether due to the situation of dependency or disability-, to detect and intervene in situations of social risk that may require the activation of social benefits and that require health information to be effective, and in order to guarantee a comprehensive and integrated care process " of the people served by both services (section 1.b)).

The wording used in this case specifies with greater clarity the information of the clinical history subject to communication, as well as the need for this information by social services, adjusting to a greater extent to the principles of purpose and minimization of data, already mentioned.

In any case, note that to the extent that the regulation included in the proposal provides for a system of direct consultation of the information, in order to guarantee that only the necessary information in the terms indicated will require having a system of categorization of the

information that allows the professional to guarantee access only to those data of the health or social information system that, depending on the case, they require at any given time to carry out their functions.

The Proposal also establishes which people, from each of the services involved in data communication, will be able to access personal information. Reference is made, on the one hand, to the "professional health profiles involved in the diagnosis or treatment of the person concerned" (section 1.a)) and, on the other hand, to the "professional profiles of the social services involved in the monitoring and the evaluation of the citizen" (section 1.b)), in both cases, "duly accredited".

Now, beyond guaranteeing that the professionals with access to the information system are part of a certain user profile and that they are duly accredited, from the point of view of the principle of integrity and confidentiality (article 5.1.f) RGPD) it is necessary to ensure, and therefore adopt the appropriate measures for that purpose, that each professional of the profiles mentioned has access only to those personal data that he needs at any given time for the exercise of his functions and in relation only to those people who have

Remember that, from the point of view of the right to data protection, there would be no essential obstacle to a provision such as the one examined which foresees the interoperability between the information system of the shared clinical history and the information systems of the provider entities of the Social Services Network of Public Care, provided that the exchange of information between systems is necessary for adequate care of the people affected. However, this should not lead in practice to indiscriminate access to the information contained in said information systems, but only in those cases where this is justified and respects the people in which it is necessary. Enabling access based on profiles is an indispensable minimum measure for any information system of these characteristics. But beyond that, taking into account the breadth of professionals included in each of the possible profiles and the breadth of the group of people whose data will be processed, it is necessary to establish additional measures to ensure that only the professionals involved they will access the appropriate information. In this sense, it would be very useful if in the field of social services, as in the field of health, the reference professional or professionals are available, without prejudice to the qualification of other professionals who may also have to intervene for reasons of urgency. Otherwise, it would not be consistent for the health centers to be restricting the access of the organization's health professionals only to the clinical history of the patients they are assigned to attend to, except in other cases that must be justified in each case, and that, instead, it is open to all social services profession

For this reason, collecting all these observations, it is proposed to modify these forecasts in the following sense:

"a. The social services are enabled to communicate to the health services the data related to the people served by both systems, of an identifying nature, of contact, as well as those related to those social services received that may have an impact on their health and are necessary to guarantee a comprehensive and integrated care process (...)". Health professionals involved in the diagnosis or treatment of the interested party, duly accredited, can access the information.

b. The health services are enabled to communicate to the social services the data related to the people served by both systems, of an identification and contact nature, as well as those data from their clinical history that may affect their personal autonomy - already whether due to dependency or disability, to detect and intervene in situations of social risk that may require

the activation of social benefits that require health information to be effective, and in order to guarantee a comprehensive and integrated care process. Social service professionals involved in the monitoring and evaluation of the citizen, duly accredited, can access the information.

v

The Proposal also includes, in its section 2, a series of guarantees for the protection of the persons affected by the processing of their data that is intended to be carried out.

Specifically, it provides that:

"2. The entities responsible for the communications must apply the technical and organizational measures appropriate to the sensitive nature of the information, in order to guarantee the confidentiality, integrity, traceability, availability and authenticity of the information, as well as the exercise of rights and duties to inform the interested parties.

The professionals of the social and health services must maintain the duty of secrecy regarding the information to which they have access, even once their association with the entity for which they provide services has ended.

In accordance with the doctrine established both by the CJEU and by the TC, which has been mentioned above, it is necessary to require the legislator that the rule that legitimizes a certain data treatment, especially when it affects special categories of data, incorporate specific guarantees that contribute to being able to determine the proportionality of the measure.

For this reason, it would be appropriate to incorporate in this section 2 an indent to indicate that the responsible entities will not only apply the appropriate technical and organizational measures to, in view of possible risks, guarantee the confidentiality, integrity, traceability, availability and authenticity of the information, the exercise of rights and the duty of information, but they will also periodically verify the operation, effectiveness and degree of compliance of these measures

Apart from this, it would be necessary to define in the legal text what it means in this case to guarantee the traceability of the information.

In this sense, and bearing in mind that we are faced with the exchange of data between the different services and centers that make up the Public Care Social Services Network and the different services and health centers of the public health system, in order to guarantee the possibilities of an effective control of the legitimacy of the actions and inquiries carried out from other organizations that provide a service of a very diverse nature, it should be collected in the Proposal that traceability will make it possible to record the identity and category health or social care professional who accesses the information system, the date and time when the access occurs, the action taken (consultation, download, communication, etc.), the data affected and the reason for the access

Also, in view of the complexity of the information system resulting from the effective application of the forecasts established in the Proposal and the repercussions that may arise for the possible affected persons, it would be justified, from the perspective of data protection, the establishment of another additional guarantee.

Thus, it is necessary to take into account the special sensitivity of the personal information subject to treatment, which covers, remember, not only special categories of data (as is the case with all the

information that may be contained in the patient's medical history), but also other information in the possession of social services that may affect various aspects, in some intimate cases, of people's lives (it could even allow obtaining a profile), so it is equally deserving of a special reservation or confidentiality. It is also necessary to take into account the high number of professionals, both health and social, who will be able to have access to said information, in view of the various centers and services that make up the public health system and the Public Care Social Services Network .

These circumstances only highlight the increase in risks that this entails and the difficulties that the entities responsible for data communication could have in verifying that the information system is being used properly and that, therefore, the access to the information contained therein is justified. For this reason, it is particularly important in these cases to offer greater transparency towards the people affected.

In this sense, the establishment of a system that allows the people served by both services to know who, when, what and why has accessed their data from the information system (in short, to know the traceability of your data) would allow those in charge to achieve this goal of generating a greater degree of trust in the people affected.

It should be noted that the Working Group created under Article 29 of Directive 95/46/EC in the Working Document on the processing of personal data relating to health in electronic medical records (HME) , adopted on February 15, 2007, already envisaged, as good practice, the establishment of systems that allow the citizen to know who and when he has accessed the medical history, with the aim of generating a greater degree of trust in the patients themselves. This measure was foreseen in the implementation process of the electronic clinical history. With all the more reason, a measure of this type would be convenient when what we are talking about is to enable access to the clinical history of a new group for purposes that are not properly the health care of the patient, even though is related to it.

Having said that, the current second paragraph of section 2 of the Proposal, relating to the duty of secrecy of professionals with access to the information system, should become a new section, section 3 of the Proposal.

For these reasons, it is proposed to modify the first paragraph and add a second paragraph and a third paragraph to section 2, and move the current second paragraph of section 2 to a new section 3, with the following text:

"2. The entities responsible for communications must apply technical and organizational measures appropriate to the sensitive nature of the information, in order to guarantee and periodically verify the confidentiality, integrity, traceability, availability and authenticity of the information, as well as the exercise of rights and duty to inform interested parties."

Traceability must allow the control of access to the information system by the profiles of authorized users, the identity and professional category of the user, the date and time when the access was made, the action taken, the data affected and the reason for the access."

The responsible entities must facilitate consultation by the affected persons of the information on the traceability of their data."

3. Social and health services professionals must maintain the duty of secrecy regarding the information to which they have access, even after their relationship with the entity for which they provide services has ended.”

In the event that there are justified technical or organizational reasons that prevent the adoption of a measure of these characteristics with immediacy by the responsible entities, a new transitional provision could be incorporated into Law 12/2007, of 11 October, of social services, in which an adaptation period is established:

"Additional provision

The entities responsible, in the field of health and social services, for the communications provided for in the fifteenth additional provision of this Law, must establish within the term of mechanisms that allow the affected persons to consult the traceability of the consultations and actions carried out."

Conclusions

Having examined the Proposal presented by the Department of Social Rights, to be included in the Draft Law on Fiscal and Financial Measures for 2022 (M-184), it is considered adequate to the provisions established in the regulations on personal data protection, provided that the considerations made in this report are taken into account.

Barcelona, October 7, 2021