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Autoritat Catalana de Protecció de Dades

Opinion in relation to the query made by a public transport company about the performance of alcohol and drug tests on its staff with driving duties or other tasks directly or indirectly related to traffic safety

A letter from the Data Protection Officer of a transport company is presented to the Catalan Data Protection Authority in which it is stated that they want to carry out alcohol and drug tests on staff who carry out driving tasks or tasks directly or indirectly related to traffic safety, and the following questions are raised:

1) Confirm whether the legal bases that legitimize the described treatment are the contractual relationship, the vital interests of the interested party or of other people and the fulfillment of a legal obligation of the person in charge.

2) Whether the treatment should be carried out by healthcare personnel, or whether it could be carried out by employees of the organization or third parties who are not healthcare personnel.

Having analyzed the consultation and given the current applicable regulations, and in accordance with the report of the Legal Advice I issue the following opinion.

I

(...)

II

The establishment of alcohol and drug tests on the entity's staff asking which functions are driving and/or are directly or indirectly related to traffic safety, to which this inquiry refers, constitutes a treatment of personal data that remains subject to personal data protection legislation.

Given the nature and procedures for collecting this data, it will often have to be considered that it is intimate information of the affected persons, and that it may end up revealing information about the health of the affected persons. In accordance with article 4.15) of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection Regulation (RGPD), it is understood by *"data relating to health: personal data relating to the physical or mental health of a natural person, including the provision of health care services, which reveal information about their state of health".*

The RGPD establishes that all processing of personal data must be lawful, fair and transparent
(article 5.1.a)).

Article 6.1 of the RGPD regulates the legal bases on which the processing of personal data can be based. In the context in which we find ourselves it is necessary to mention section b), which provides that the treatment will be lawful if *"it is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this of pre-contractual measures "* and, especially, a section c), which provides that the treatment will be lawful if *"it is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment".*

As can be seen from article 6.3 of the RGPD and expressly included in article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), the processing of data it can only be considered based on the legal basis of article 6.1.c) of the RGPD when this is established by a rule with the rank of law.

In addition, it must be borne in mind that, when the treatment affects special categories of data, as is the case with data relating to health, it is also necessary to count on one of the exceptions
established in article 9.2 of the RGPD, in order to be able to consider this data processing lawful

Article 9 of the RGPD provides the following:

> *"1. The processing of personal data that reveal ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation is prohibited, and the processing of genetic data, biometric data aimed at uniquely identifying a natural person, data relating to the health or data relating to the sexual life or sexual orientation of a natural person.*
>
> *2. Section 1 will not apply when one of the following circumstances occurs:*
>
> *(...)*
>
> *h) the treatment is necessary for the* ***purposes of preventive or occupational medicine*** *, evaluation of the labor capacity of the worker, medical diagnosis, provision of health or social assistance or treatment, or management of health and social care systems and services, on the basis of the Law of the Union or of the Member States or by virtue of a contract with a healthcare professional and without prejudice to the conditions and guarantees contemplated in section 3;*
>
> *(…)."*

At the same time, the seventeenth additional provision of the LOPDGDD provides the following:

> *"1. They are covered by letters g), h), i) and j) of article 9.2 of the Regulation (EU) 2016/679 the processing of health-related data and genetic data that are regulated by the following laws and their implementing provisions:*
>
> *(...)*
>
> *b) Law 31/1995, of November 8, on the Prevention of Occupational Risks.*

(...).”

Law 31/1995, of November 8, on the prevention of occupational risks (LPRL) establishes that *"workers have the right to effective protection in matters of safety and health at work",* recognition that, in turn, entails *" the existence of a correlative* ***duty of the employer to protect workers against labor risks*** *"* (article 14.1).

In compliance with this duty of protection, the LPRL provides that *"* ***the employer must guarantee the safety and health of the workers in his service in all aspects related to work. To this effect*** *, within the framework of his responsibilities, the employer will carry out the prevention of occupational risks by means of the integration of preventive activity in the company and* ***the adoption of whatever measures are necessary to protect the safety and health of the workers*** *, with the specialties that are included in the following articles in the field of occupational risk prevention plan, risk assessment, information, consultation and participation and training of workers, action in cases of emergency and serious and imminent risk,* ***monitoring of health*** *, and through the establishment of an organization and the necessary means in the terms established in chapter IV of this law"* (article 14.2).

In accordance with article 22 of the LPRL, relating to health surveillance:

"1. The employer will guarantee the workers in his service the periodic monitoring of their health status based on the risks inherent in the work.
This surveillance ***can only be carried out*** *when the worker gives his* ***consent*** *. This voluntary nature* ***will only be exempted*** *, after a report from the representatives of the workers, in the cases in which* ***the realization of the surveys is essential to*** *evaluate the effects of the working conditions on the health of the workers or to* ***verify whether the state of health of the worker can constitute a danger for him, for other workers or for other persons related to the company or when this is established in a legal provision in relation to the protection of specific risks and activities of special danger.***
In any case *, you must choose to carry out those examinations or* ***tests*** *that cause the least discomfort to the worker and* ***that are proportional to the risk*** *.*
2. The surveillance and health control measures of the workers will be carried out always respecting the right to privacy and the dignity of the person of the worker and the confidentiality of all information related to his state of health.
(…).”

Article 22.1 of the transcribed LPRL imposes on the employer the obligation to periodically monitor the state of health of the workers based on the risks inherent in the work they carry out, although this obligation of monitoring is conditioned on the consent that voluntarily lend the worker This means that, a priori, the employer must propose the medical examinations and the worker must accept or reject their practice.

Even so, these medical examinations are no longer voluntary for the staff, according to the same article 22.1, when they are "essential" in the following three cases:

- To assess the effects of working conditions on staff health.

- To verify whether the worker's state of health may constitute a danger, both for himself and for other people (other staff or other people who are related to the company).
- When so established by a legal provision in relation to the protection of specific risks and particularly dangerous activities.

Therefore, from the point of view of data protection, to the extent that any of these three cases occur, the processing of data relating to the health of the staff of the consulting entity that would entail the implementation of a prevention measure as proposed (the establishment of alcohol and drug tests for staff with driving duties or with duties linked to traffic safety) could find protection in the provisions of articles 6.1.c) and 9.2.h) of the 'RGPD, mentioned above, in relation to the examined provisions of the LPRL.

Point out, at this point, that in a case like the one we are dealing with it does not seem that the intended treatment can be based on the need to safeguard the vital interests of the entity's staff or of third physical persons, as pointed out in the consultation

Article 6.1.d) of the RGPD provides that the treatment will be lawful in cases where it is necessary to protect the vital interests of the affected person or of another person. In the case of special categories of data, article 9.2.c) of the RGPD adds, in addition, that for the use of this legal basis it will be necessary that the affected person is not physically or legally able to give their consent, which does not happen in the present case, given that the staff of the entity that would be affected by the treatment would be in a position to give their consent.

It should also be borne in mind that this exception would be focused on extraordinary situations from which, if the data controller does not carry out personal data processing, the vital interests of this person may certainly be affected. This circumstance would not occur in the present case either, given that we are in a preventive and not reactive context.

Therefore, it is examined below whether the intended treatment, as has been said, could find protection in the provisions of articles 6.1.c) and 9.2.h) of the RGPD, in relation to article 22.1 of the 'LPRL.

III

According to the information available, (...) is the common name of companies A and B, which manage the metro and bus network of (...).

It also includes companies C, which manages the Cable Car of (...); D, which manages tariff products and other transport services; and the Foundation (...), which looks after the historical heritage of the consulting entity and promotes the values of public transport through social and cultural activities.

At the beginning of the consultation letter companies A, B and C are mentioned. Therefore, it is understood that the adoption of the prevention measure relating to alcohol and drug controls would affect the driving staff and personnel directly or indirectly related to the traffic safety of these companies only.

With regard to company A, which manages the metro network, and for the purposes of the authorization for the treatment of data relating to health in the context examined, mention should be made of Law 4/2006, of March 31, railway

This Law, which regulates infrastructure and rail transport services within the current competence framework of the Generalitat (article 1), is applicable to rail transport services, regardless of whether, in accordance with their technical configuration or scope territorial, are called railways, metropolitan railways, trams or zip lines (article 2.2).

Article 67 of Law 4/2006, in regulating specific offenses and sanctions in the field of traffic and driving, provides the following:

"1. (...).
2. The consumption, before or during the working day, of alcoholic beverages that may produce blood alcohol levels higher than a rate of 0.2 grams per liter or breath alcohol levels higher than 0.10 milligrams per liter. The Government can modify these limits. Failure to comply with this prohibition is a very serious offence.
3. It is prohibited to consume any substance that may disturb or reduce the psychophysical faculties or the ability to drive during the working day in the performance of functions related to traffic or, directly or indirectly, traffic safety. Failure to comply with this prohibition is a very serious offence.
4. The ***traffic staff and the rest of the staff whose functions are related, directly or indirectly, to the safety of rail traffic are obliged, if required by the company, to undergo alcohol tests or any other test that can be done to detect if they have consumed the substances referred to in section 3*** *. Refusal to submit to these tests is a very serious offence.*
For these purposes, the railway companies can carry out, ***before the start or during the working day*** *of this staff, the appropriate actions of prevention, control and monitoring for the detection of levels of alcohol, narcotics, substances toxic or other substances, and must apply the corresponding disciplinary measures if the staff refuses to submit to the tests or in cases of positive detections.*
5. (...).
6. Driving personnel who, for medical reasons, take products that may alter the ability to drive must notify the company. Failure to report this is a serious offence.
(...)."

On this occasion, the establishment of blood alcohol and drug controls referred to in the query has a clear provision in a standard with the rank of law, thus giving rise to one of the cases regulated in article 22.1 of LPRL (third assumption).

Consequently, the processing of data relating to the health of the staff of company A, with driving functions and others related to the safety of rail traffic, within the framework of the health monitoring functions of this personnel that the company is responsible for guaranteeing, would be lawful on the basis of articles 6.1.c) and 9.2.h) of the RGPD, in relation to the examined provisions of the LPRL and Law 4/2006.

With regard to company B, which manages the bus network, and for the purposes of the authorization for the processing of data relating to health in the context examined, mention should be made of Royal Legislative Decree 6/2015, of 30 d October, by which the revised Text of the Law on traffic, circulation of motor vehicles and road safety is approved.

The additional third bis provision of this Law, introduced by Law 18/2021, of December 20, which modifies the revised Text of the Traffic, Motor Vehicle Movement and Road Safety Law, approved by Royal Decree legislative 6/2015, of October 30, regarding the permit and driving license for points, provides the following:

> *" **Additional provision third bis.** Control of consumption of substances that may disturb the performance of professional driving.*
>
> *The Government, by Royal Decree, within a period of twenty-four months from the entry into force of the Law, prior hearing of the National Road Transport Committee, will regulate the procedures for carrying out **initial, periodic or random controls, during the exercise of the professional activity, of alcohol, drugs of abuse and psychoactive substances and medicines, to the personnel holding the position of driver of a vehicle transporting passengers and goods by road** .*
> *In any case, the treatment of the samples and the results of the controls carried out must be guaranteed, and the action should be regulated in the event of tests with a positive result."*

This provision of RDL 6/2015 would seem to enable the company to carry out alcohol and drug tests on its bus driving staff and other staff with functions related to traffic safety, but it must be borne in mind that, in any case, it is conditional on the fact that the Government of the Spanish state regulates, by means of a royal decree, the assumptions and conditions under which this type of control must be carried out (regulation which, to date of issuing this opinion, has not occurred).

Nor does Law 12/1987, of 28 May, regulating the transport of passengers by road using motor vehicles, establish a provision in the sense of authorizing passenger transport companies to carry out alcohol tests and of drugs to its staff.

Therefore, in this case, it cannot be understood that the intended treatment could be based on the concurrence of a specific legal provision, which is referred to in article 22.1 of the LPRL (third assumption).

In view of this, the treatment of the data relating to the health of this staff, following the establishment of a preventive measure such as the one proposed with a mandatory character, should be based on one of the other two assumptions established in the article 22.1 of the LPRL. This could be the case that said preventive measure is considered essential to verify whether the worker's state of health may constitute a danger to himself, to the rest of the company's workers or to other people (such as now, the user persons).

The same consideration can be made regarding the staff of company C, which manages the Telefèric de (...), given that the sectoral regulations of application, such as Law 12/2002, of June 14, of cable transport, does not include any provisions on the carrying out of alcohol and drug tests on the driving staff present in the facilities.

In relation to the legitimacy to establish this type of controls on the basis of the assumption of article 22.1 of the aforementioned LPRL, warn of the need to bear in mind the doctrine emanating from the Constitutional Court in this regard.

In particular, it is necessary to mention, in this sense, the considerations of the TC in their sentence no. 196/2004, of November 15 (FJ VI):

> *"(...) we have to agree that mandatory medical examinations are only authorized by law when a series of notes meet, namely: proportionality to risk (due to the absence of alternative options with less impact on the core of the rights incised); the indispensability of the tests (to prove ad case the objective necessity of their performance in attention to the risk that is sought to be prevented, as well as the reasons that lead the employer to carry out the medical examination of a singularly considered worker), and the presence of a preponderant interest of the social group or the labor collective or a situation of objective need (described in the assumptions of the second paragraph of art. 22.1), notes that would justify together the disfiguration of the ordinary rule of freedom of decision of the trabajador.*
>
> *Consequently, the legal limits (the exceptions to the subject's free disposal of private areas, provided for in art. 22.1, second paragraph, LPRL) are linked either to the certainty of a risk or danger to the health of the workers or of third parties, or, in certain sectors, to the protection against specific risks and activities of special danger (because it is obvious that there are companies and activities sensitive to the risk and therefore workers especially affected by it - ATC 272/1998 , of December 3 (RTC 1998, 272 AUTO)).*
>
> *The obligation cannot be imposed, on the other hand, if only the health of the worker himself is at stake, without the addition of a certain objective risk or danger, because that person, according to what was said, is free to dispose of the vigilance of his health by submitting or not to the recognitions in attention to the circumstances and evaluations that it deems relevant to the decision."*

In view of the provisions of article 22.1 of the LPRL examined, the doctrine of the TC exposed and the functions that pertain to the personnel who would be affected by the proposed prevention measure, it cannot be ruled out that there may have been there are elements that justify the establishment of this type of alcohol and drug controls in the cases examined.

so, from the data protection aspect, the processing of the health data necessary for this purpose by companies B and C could be lawful on the basis of articles 6.1.c) and 9.2.h) of the RGPD.

However, it must be remembered, on the one hand, that article 22 of the LPRL refers in any case only to periodic controls; and, on the other hand, that the decision to implement - and, therefore, the need to justify - a preventive measure such as periodic blood alcohol and drug tests on said staff corresponds to the occupational risk prevention service of the company, after assessing the risk factors that may affect the workers.

Article 31 of the LPRL provides that prevention services correspond to *"preventive activities in order to guarantee the adequate protection of the security and health of workers, advising and assisting the employer, the workers and their representatives and specialized representative bodies"* (section 2).

In this sense, it establishes that prevention services must be able to provide the company with the advice and support it requires based on the types of risk that exist and in relation to (article 31.3):

"(...)
b) The evaluation of risk factors that may affect safety and health of the workers in the terms provided for in article 16 of this Law.
c) The planning of the preventive activity and the determination of the priorities in the adoption of preventive measures and the monitoring of their effectiveness.
(…)
f) Monitoring the health of workers in relation to the risks arising from work."

All this, without prejudice to the compliance, in the three cases examined, of the rest of the principles established in the data protection regulations, in particular, of the principles of transparency in relation to the affected staff (Article 5.1.a) RGPD) and of data confidentiality (Article 5.1.f) RGPD), among others.

In this last sense, note that the RGPD requires, in relation to the processing of data relating to health for the purposes of preventive or occupational medicine and assessment of the worker's work capacity (article 9.2.h)), that this treatment must be carried out *"by a professional subject to the obligation of professional secrecy, or under his responsibility, in accordance with the Law of the Union or of the Member States or with the rules established by the competent national organisms, or by any other person also subject to the obligation of secrecy in accordance with the Law of the Union or Member States or the rules established by the competent national organisms"* (article 9.3 RGPD).

At this point, note that the LPRL itself establishes the obligation to guarantee the confidentiality of all information related to the state of health of the worker (article 22.2), as well as that the measures to monitor and control the health of workers it must be carried out by health personnel with technical competence, training and accredited capacity (article 22.6).

Therefore, in view of these forecasts, in this case the intended treatment should be carried out by qualified health personnel.

conclusion

The treatment of health data of the driving staff or with functions related to the traffic safety of the railway transport services to detect, by the company, the consumption of alcohol or drugs, at the beginning or during the day labor, has qualification in articles 6.1.c) and 9.2.h) of the RGPD in relation to railway legislation.

In the case of the staff who perform these functions in the transport services of the bus network or the cable car, the data protection regulations do not prevent periodic controls of the consumption of the aforementioned substances, when established, in a justified manner, the occupational risk prevention service, insofar as it may constitute a risk for third parties.

This treatment must be carried out by health personnel with technical competence, training and accredited capacity.

Barcelona, July 22, 2022