COVID-19 STATE OF ALERT: WHAT ARE THE IMPLICATIONS FOR DATA PROTECTION AND PRIVACY?

16 March of 2020

On March 11, 2020, the World Health Organization (WHO) declared through its Director General, Tedros Adhanom Ghebreyesus, the spread of the Covid-19 Coronavirus as a pandemic due to the high number of people infected and deaths caused by the SARS-CoV-2 virus to date.

As far as Spain is concerned, last Friday, March 13, 2020, that is, two days after the declaration of Covid-19 as a pandemic, Spain's Prime Minister declared a state of emergency in view of the current health crisis that the country is experiencing, which to date includes more than 200,210 infected and 21,282 dead.

The declaration of the state of emergency meant the approval on March 14, 2020 of the Royal Decree 464/2020 of March 14, which proclaimed the state of alarm for the management of the health crisis situation caused by Covid-19 (hereinafter, the "Royal Decree"). The entry into force of the Royal Decree has meant, by application of its article 10, the suspension, as a measure of containment of the pandemic, of the opening to the public of a large part of the premises and commercial establishments of our society, which is expected to have a highly significant impact on the Spanish economy.

In addition, the entry into force of the Royal Decree has meant, on the one hand, the limitation of the freedom of movement of persons (Article 7), and, on the other hand, has reinforced the duty of collaboration with the competent delegated authorities (Article 5) by granting the agents of the authority the power to verify that no practices suspended by the previous Articles 7 and 10 are being carried out.

Well, despite the fact that the Royal Decree lacks specifications on the subject of protection of personal data, the legislative framework that said provision has implemented on Spain is susceptible of containing various implications on said subject that deserve to be analyzed together with the position of the Spanish Data Protection Agency (hereinafter, "AEPD").

On 12 March 2020, the legal office of the AEPD, in view of the classification of Covid-19 as a pandemic, issued a legal report assessing the applicability of the data protection regulations in view of the imminent health crisis (hereinafter, the "Report"). Likewise, and following the line of other control authorities such as the Italian and French data protection agencies, the AEPD also issued a FAQ guide that aimed to resolve the main issues with regard to the processing of personal data in the Covid-19 scenario.

In particular, from the documents mentioned above, the following conclusions can be drawn with regard to the Royal Decree as far as the framework for the protection of personal data is concerned:

1. Applicability of data protection regulations to the current situation.

With regard to the applicability of the data protection regulations to the current scenario that has been implemented by the Royal Decree, the AEPD reminds that the data protection regulations, whose objective is to safeguard the fundamental right to privacy contained in article 18.4 of the Constitution, are applicable in their entirety to the present situation. This is due to the fact that there are no reasons nor adopted measures that could allow the determination of the suspension of fundamental rights in this sense.

Therefore, the processing of personal data carried out by natural or legal entities within the scope of said regulations must continue to be carried out in accordance with the guarantees provided for therein and, in particular, in strict compliance with the principles of lawfulness, fairness and transparency, purpose limitation, accuracy and minimization of data.

2. Legitimate basis available to the data controllers to legitimize the processing of personal data in the current situation.

The AEPD, in turn, indicates in its Report to those data controllers the employer's duty to protect and ensure the safety and health of their employees in application of Article 14 of Law 31/1995, of 8 November, on the prevention of occupational hazards (hereinafter, "LPRL"). In this regard, the AEPD states that compliance with legal obligations is a valid basis for legitimization in accordance with Article 6.1.c) of Regulation (EU) 2016/679 (hereinafter, "GDPR"), and that the consent of the data subject is not required with regard to the processing of his or her personal data in order to guarantee compliance with the LPRL.

However, the AEPD also acknowledges the existence of alternative grounds for legitimization that would also allow the processing of personal data of data subjects without requiring their express consent. In particular, the AEPD, referring to Recital 46 of the GDPR, indicates that the grounds for legitimacy referred to in Articles 6.1.d) (Protection of vital interests of the data subject or other natural persons) and 6.1.e) (Mission carried out in the public interest) may be used for the processing of personal data for the purpose

of controlling both epidemics and their programming.

As regards the grounds for legitimacy summarized in Articles 6(1)(c) and 6(1)(e) of the GDPR, the Agency states, in application of Article 6(3) of the GDPR, that the basis for processing must be established by Union law or the law of the Member States, for example, by means of the regulations on the prevention of occupational hazards.

However, and concerning the legitimate basis of Article 6.1.d) GDPR, the AEPD confirms that the justification of vital interests does not require the above obligation, and can be used for such purposes without the need to be established by Union law or the law of the Member States. In addition, it should be pointed out that this basis for legitimization may be used not only to protect the vital interests of the interested party, but also those of third parties. Additionally, measures applicable to a natural person may be used on this basis to consolidate and guarantee the protection of other natural persons.

3. Main implications of the processing of personal data concerning health and other categories of sensitive data

In accordance with Article 9 of the GDPR, the processing of data concerning health data constitutes a special category of personal data. Article 9.1 GDPR states that the processing of any data constituting said "special category" is expressly prohibited unless one of the exceptions set out in Article 9.2 GDPR applies. Therefore, in order to justify the processing of health data, the Data Controller will need (i) a valid legitimate basis according to article 6 GDPR; and (ii) the application of one of the exceptions summarized in article 9.2 GDPR.

In its Report, the AEPD points out the possibility of applying to the current situation one of the following exceptions to the general rule of prohibition in Article 9.1 GDPR:

i. The need to process the data for the fulfilment of obligations in the field of employment law, social security and social care (Article 9.2.b GDPR);

ii. The need of processing the data for the protection of vital interests of the data subject or of another natural person in case the data subject is not able to give his/her consent (Article 9.2.c GDPR);

iii. Processing is necessary for reasons of essential public interest on the basis of the law of the Union or of the Member States which must be proportional and provide for appropriate measures to protect fundamental interests and rights (Article 9.2.g GDPR);

iv. The need to process the data for the purposes of preventive or occupational medicine or medical diagnosis (Article 9.2.h GDPR); or

v. Need to process the data for public interest reasons in the field of public health, such as protection against serious transborder threats to health (Article 9.2.i GDPR).

However, the existence of the above exceptions does not imply that all companies and/or organizations can make use of the above exceptions to legitimize the processing of personal health data. In particular, the AEPD refers to the general regulations on public health, composed mainly of the Organic Law 3/1986 on Special Measures in the field of Public

Health, as well as the General Law 33/2011 on Public Health, to indicate that it is the health authority that, in the event of an epidemic, shall adopt the appropriate and corresponding measures for the protection of the interests of natural persons. In this way, the AEPD emphasizes that it shall be the health authorities who shall adopt decisions in application of the interests of natural persons. The data controllers shall follow such instructions even in cases which these directions may involve the processing of special categories of data.

On the other hand, and with regard to the legitimacy indicated in article 9.2.b) GDPR, it will be the employers, as subjects obliged by the regulations on prevention of occupational risks, who, applying at all times of the provisions of this legislation, will be able to establish the necessary guarantees to comply with their duty to safeguard the health and safety of their employees, including preventing the contagion of Covid-19 in the workplace.

4. Other relevant issues: Application of Additional Provision 3 of the Royal Decree to the activities of the AEPD

The Royal Decree also contains a third additional provision announcing the suspension of terms and interruption of deadlines for the processing of procedures by public sector entities. These proceedings will resume at the time when the Royal Decree (or any extensions thereof) ceases to be in force.

In view of the foregoing, the procedures before the AEPD would be covered by this interruption, being suspended for such purposes until the effective loss of validity of the Royal Decree.

Without prejudice to the above, section 3 of the third Additional Provision grants the competent body the power to agree, by means of a reasoned resolution, on the measures of organization and instruction strictly necessary to avoid serious damages to the rights and interests of the interested party in the suspended proceedings in two specific cases: (i) if the interested party agrees; or (ii) if the interested party agrees that the time limit should not be suspended. In this regard, the interpretation of the AEPD of this power must be awaited, and the adoption of such measures may be contemplated, among others, in cases of violations of security and/or exercise of rights of data subjects that are significantly harmful to the rights and freedoms of the data subject.

5. Conclusions: Joint application of the rules of the Royal Decree and the AEPD's position.

Having set out the AEPD's position on this matter, and in view of Articles 5 and 7 of the Royal Decree, the following implications should be taken into account:

i. Regardless of the declaration of the state of emergency on 13 March 2020, the personal data protection regulations will continue to apply;

ii. Likewise, the regulations also provide for alternative legitimate basis to consent, such as the fulfilment of a mission in the public interest or the protection of the vital interests of the data subject or other natural persons. In particular, the AEPD has shown that the legitimization of processing based on these bases of legitimization is possible in states of health emergency such as the present one;

iii. Similarly, the data protection regulations also provide for compliance

with legal obligations as a legitimate basis (Article 6.1.c of the Data Protection Act). To this end, the inspection powers that the Royal Decree grants to the competent authorities by virtue of article 5.2 and the possible processing of personal data that originates through access to personal data by said competent authority would find due justification in this precept. Therefore, the consent of natural persons shall not be required for the performance of the functions provided for in the regulations by the competent authorities;

iv. Similarly, the request to the interested party for authorization to prove that he or she is circulating for employment-related purposes is not expressly included in the Royal Decree, and could therefore provide for a data processing that is not covered by Article 6.1.c) GDPR. However, there are currently several autonomous institutions that have resorted to this obligation in reference to the provisions of the Royal Decree, so it is possible that in the coming days the monitoring of travel in this sense may be added as a legal provision, and for this purpose the processing of data may be covered by this precept. In any case, there are other alternative legitimate basis by which the processing of personal data in this sense could be justified, such as, for example, the consent of the employee and even the protection of the vital interests of the interested party (in allowing him to move without major inconvenience on the part of the competent authorities) as well as of third parties (in guaranteeing that the authorized person in question travels for a matter duly contemplated in the Royal Decree);

v. The processing of special categories of data, such as health data, will in turn require a second legitimate basis in order to override the general prohibition preventing the processing of such categories of sensitive data;

vi. Furthermore, as regards the processing of personal health data in the context of the employer-employee relationship, the data protection regulations and the LPRL allow the employer to process the personal data of its employees that are necessary to ensure their health and thus prevent contagion within the company and/or workplace.

vii. The above would also apply to the possibility that, in the course of ensuring the health and safety of employees, the employer may process personal data of visitors with whom it has no employment relationship. In this sense, however, the AEPD recommends applying the principle of proportionality, limiting in any case the amount of personal information that will be collected about the visitor and avoiding in any case all information that is not related to the illness in question.

viii. Without prejudice to the above, and in any case, regardless of whether the categories of data subjects are employees or visitors, data controllers must apply the guarantees provided for in the regulations, as well as the proportionality of the processing to be carried out, and must in any case follow the recommendations established by the health authorities, in particular with regard to the processing of special categories of data;

ix. The third additional provision of the Royal Decree entails the suspension and interruption of deadlines for the entire public sector, including for such purposes the procedures before the AEPD. Without prejudice to the above, section 2 of said provision contemplates the possibility of

arranging, by means of a reasoned resolution, on the measures of organization and instruction necessary to avoid serious damage to the rights of the data subjects involved in these proceedings. To this end, it will be the AEPD who, in the course of the coming weeks that are so vital for the Spanish State, will let it be known which specific matters will be agreed upon by means of a resolution and which measures of organization and instruction will be dictated to avoid such damages.

ONTIER

Department: New Technology and Intellectual Property
Contacts:
Joaquín Muñoz – Jmunoz@ontier.net
Álvaro Vidal – Avidal@ontier.net