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FOCUS

20 años de la Carta de derechos fundamentales de la UE. Su aplicación por los Tribunales Españoles

Il Focus contiene i testi rivisti di alcune delle relazioni tenute in occasione del Convegno internazionale organizzato presso l'Universidad Pompeu Fabru di Barcellona (28/29 settembre 2020)

RISKS FOR THE FUNDAMENTAL RIGHT TO THE PROTECTION OF PERSONAL DATA STEMMING FROM THE COVID-19 SANITARY CRISIS: A SPANISH PERSPECTIVE

Eva María Nieto Garrido*

1. Introduction

The sanitary crisis provoked by COVID-19 virus has tested the regulation of the fundamental right to the protection of personal data, as recognised by Article 8 of the Charter of fundamental rights of the European Union (hereinafter CFREU) and regulated by the General Data Protection Regulation (hereinafter GDPR). I hereby refer to the idea that has been spread which states that the demanding regulation of the fundamental right to the protection of personal data included in GDPR could be an obstacle for the implementation of virus spread-prevention and control measures. But the reality could not be more different, since as it will be explained hereinafter, the current regulation of said fundamental right allows health data processing, as long as the established guarantees for the protection of the essential contents of the fundamental right are met, which do not prohibit personal data processing. The aim of this paper is precisely to analyse if anti-COVID measures include the guarantees required by the current regulation of said fundamental right, according with the most recent constitutional case law (Judgment of the Spanish Constitutional Court STC 76/2019, dated 22 May).

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The fundamental right to the protection of personal data was recognised in the EU with its own identity and it was disassociated from the fundamental right to privacy, by the repealed Directive 95/46/EC. When the Directive was approved, the need to count on a common framework on data protection at EU level was appreciated, as contribution to a better functioning of the common market.

The implementation of such Directive in Spain was carried out by means of the approval of Spanish Law 15/1999, of 13 December, on Protection of Personal Data (*Ley Orgánica 15/1999, de 13 de diciembre, de protección de datos de carácter personal*). The constitutional case law deriving from the Spanish Constitutional Court Judgment STC 292/2000, of 30 November, which partially granted an action of unconstitutionality against said Law, recognised, for the first time, the fundamental right to the protection of personal data (Article 18.4 Spanish Constitution, hereinafter SC) as an autonomous right with respect to the fundamental right to privacy (Article 18.1 SC). And reference was made to the CFREU, which recognised the fundamental right to the protection of personal data (Article 8).[1]

CJEU case-law deriving from the compliance control of said Directive in relation with the implementation regulations of the Member States showed the limits of a regulation which, in the light of CFREU, had become obsolete. Advances in technology since 1995 led to a rich panoply of cases, which were all judged by CJEU by applying an outdated Directive in respect with reality.[2] In addition, Directive 95/46/EC was only applied to the first pillar or community pillar, by leaving apart the matters which did not fit therein. In short, during the years prior to the approval of Regulation (EU) 2016/679, of the European Parliament and of the Council, of 27 April 2016, on the protection of

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For example: J. GERARDS (ed.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law: a Comparative Analysis,* Cambridge, 2014.

[1] On data protection in Spain, as precedent to Law 15/1999, of 13 December, on personal data protection (*Ley Orgánica 15/1999, de 13 de diciembre, de protección de datos de carácter personal*), there was Law 5/1992, of 29 October (*Ley Orgánica 5/1992, de 29 de octubre*), and some of its precepts were judged by the Spanish Constitutional Court in Judgment STC 290/2000, of 30 November. On the fundamental right to the protection personal data, see also Judgment of the Spanish Constitutional Court STC 94/1998, of 4 May.

[2] As examples: 1) Judgment of CJEU of 13 May 2014, C-131/12, case Google Spain. The Court declared that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, according to Article 4.1, a) of the Directive 95/46/EC, "when the operator of a search engine (Google Inc.) sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State (par. 60 of said Judgment): 2) Judgment of 1 October 2015 of CJEU (C-230/14, case Weltimmo s.r.o). The Court of Justice declared the establishment of Weltimmo company in Hungary, location of its economic activity and personal data processing, despite it had its registered office in Slovakia, as it had a legal representative in Hungary and since its activity was mainly or entirely focused on the inhabitants of said Member State, as understood when it refers to properties located in said State with advertisements written in the language of such State: 3) Judgment of 6 October 2015 of CJEU (Grand Chamber), C-362/2014, case Maximillian Schrems. The Court of Justice declared, on the one hand, that the decision of the Irish supervisory authority of filing the case was not compliant with EU law and, on the other hand, it declared the Decision 2000/520 void, in which the Commission declared that US was a safe harbour on transfer and processing of personal data of EU citizens.

natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR), EU lacked a uniform legal framework on personal data protection.

Therefore, on the application of the legal basis of Article 16 TFEU, GDPR was adopted and it entered into force on 25 May 2018. Even though, it is a regulation which is directly applicable to Member States, provided that Article 81 SC establishes that only Laws regulate fundamental rights, among others, on 5 December 2018 the Spanish Law 3/2018, of 5 December, on Personal Data Protection and Guarantee of Digital Rights was enacted (*Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales)* (hereinafter, OLPDPGDR). A Law that copies most articles of GDPR.

Both regulations (GDPR and OLPDPGDR) allow health data processing only under exceptional circumstances, as at present, but this requires certain limits and guarantees, which are object of analysis in the present paper.

2. A brief reference to the limitation of fundamental and subjective rights

The limits of the exercise of fundamental rights can be established by the legislator but also can be established by case-law. As Professor Luis María Diez-Picazo recalled, «the regulations that declare fundamental rights usually have a legal principle structure», in other words, most cases are optimization mandates of a value or right recognised by law, which are characterised by their vagueness, so their extension is not properly delimited and «the limit of the reality field which they regulate is not clear»[3]. These defining features of fundamental rights determine that their interpretation is not simple and that case-law has a fundamental role therein as it «gradually fills the existing gaps in the open texture of the regulations of fundamental rights»[4]. In fact, the determination of what has to be optimised corresponds to judicial bodies and, should there be a conflict with another protected value or right recognised by law, it should establish the limit of said optimisation. In order to answer the last question, one applies the weighing technique of values or rights recognised by law, which is technically channelled by means of the application of the proportionality principle. It is a known fact that the proportionality principle has its origin in Germany and has achieved a very important dissemination level in the rest of Europe, thanks to the work of the European Court of Human Rights and, especially, of the EU Court of Justice[5]. The principle allows the control of the action of public authorities which bear on individuals' rights and interests. The action can only be deemed proportional, and thus valid, when the following three requirements are

[3] L.M. DIEZ-PICADO, *Sistemas de Derechos Fundamentales*, 3rd ed., Thomson-Civitas, 2008, pp. 46 to 48.
[4] *Ibidem*, p. 52.
[5] See M. GONZÁLEZ BEILFUSS, *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional*, Pamplona, 2003, among many others. In order to quote another example of weighing of conflicting interests and rights regarding data protection, see judgment of the Court of Justice of the EU of 24 November 2011, joined cases C-468 and C-469-10, ASNEF, FECEMD and Administración del Estado.

complied[6]: a) it should be appropriate to reach its goal b) the involvement is necessary if a less cumbersome alternative measure does not exist with respect to the interested party; and c) it has to be proportional strictly speaking, that is to say, it can not imply an excessive sacrifice of the right or interest on which public intervention is produced.

During the sanitary crisis provoked by COVID-19, we have attended to a limitation of some fundamental rights. The most evident limitation was on freedom of movement recognised by Article 17.1 SC, but there were also other threatened fundamental rights, such as the right to the protection of personal data. This was because the adopted measures taken by the public authorities in order to fight against the pandemic consider the processing of personal data of the infected people, of their relatives and contacts, with the purpose of preventing the transmission increase and, at that time, to eradicate the pandemic. This processing has to include certain guarantees which are not envisaged in the current regulations *a priori*. Reference is made to subsection 4.3 of the present paper.

The right to the protection of personal data, as fundamental right, limits the action of the legislator but, furthermore, any limitation of said right shall be established by law and respect its essential contents, by respecting the principle of proportionality. According to CFREU, "limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others" (Article 52.1 CFREU).

The limits imposed on the fundamental right to the protection of personal data in pandemic times can be necessary to protect the right to health, recognised as guiding principle of economic and social policy in Article 43 SC. That said, as exposed in the introduction of this paper, the generated dilemma which says that health protection requires the reduction of the guarantees of the fundamental right to personal data protection is false.

The fundamental right to the protection of personal data is not an obstacle, in any case, in relation with the effectiveness of prevention and control measures of the pandemic. As the rest of fundamental rights, it can be limited by law, provided it meets purposes of general interest, and that restriction requirements and scope are sufficiently specified in law and respect the principle of proportionality. Based on the application of the principle of proportionality, the aim is to weigh the limitations, which are necessary to prevent, and control COVID-19 transmission.[7] As stated by José Luis Piñar Mañas, privacy and safety are not excluding, but complementary[8].

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[6] L.M. DIEZ-PICADO, op., cit., p. 122.

[7] The need of a law which develops (Article 81.1 SC), limits or conditions the exercise of the fundamental rights (*ex.* Article (53.1 SC), is justified according to the constitutional doctrine because, on the one hand, it guarantees that the rights conferred by SC to citizens are not affected by public authorities' interference which are non-authorised by the citizens' representatives and, on the other hand, because as in our legal system the Judiciary members are subject to the law, we do not have a system bound to the precedent, the legal reservation "is the only effective way to guarantee the requirements of legal certainty in the area of fundamental rights and public freedoms". Judgment of the Spanish Constitutional Court STC 76/2019, of 22 May, FJ 5, d).

[8] J.L. PIÑAR MAÑAS, *La protección de datos durante la crisis del coronavirus*, available in the website of Consejo General de la Abogacía Española, latest news, opinion, 20 March 2020, p. 6. Retrieval date: 15

The fundamental right to general data protection, regulated by GDPR and OLPDPGDR, allows the processing of personal data relative to health in exceptional situations as the current one, without counting on the consent of the data subject. This was the view taken by the State Legal Service of the Spanish Data Protection Authority with its Report 0017/2020, since it declared that the regulation of the fundamental right reconciles and weighs the interests and rights at stake in situations as the current one.[9]

This is how it is recognised in recital 46 GDPR, but taking into account that the guarantees and principles that regulate personal data processing are fully in force (Article 5 GDPR).[10] In recital 46 GDPR are quoted legal bases, which legitimise personal data processing, as the compliance with a legal obligation (Article 6.1, c) GDPR), that the processing is necessary for the performance of a task carried out in the public interest (Article 6.1.e), or that it is necessary to protect the vital interests of the data subject or of another natural person (Article 6.1.d) of said GDPR. On this last legal base, the Report of the Spanish Data Protection Authority explains that can be vital interests of unidentified natural persons, which opens the door for "*processing of personal data aimed at protecting all those persons susceptible to being infected in the spread of an epidemic*"[11]. In principle, as they are data relative to health and thus included in the sensitive data category together with other data, they cannot be subject to processing, unless in exceptional circumstances enshrined in Article 9 (2) GDPR, and these are circumstances which currently occur with the pandemic, according to such Report. [12]

January 2021. See also an excellent work of the same author entitled *Transparencia y protección de datos en el estado de alarma y en la sociedad digital post Covid-19*, in *Covid-19 y Derecho Público (durante el estado de alarma y más allá),* D. BLANQUER CRIADO (Coord.), Tirant lo Blanch, 2020, pp. 135-184, especially pp. 149 to 179.

[9] Available at the website of the Spanish Data Protection Authority, SDPA (*Agencia Española de Protección de Datos*).

[10] Recital 46 GDPR also states the following: "*The processing of personal data should also be regarded to be lawful where it is necessary to protect an interest which is essential for the life of the data subject or that of another natural person. Processing of personal data based on the vital interest of another natural person should in principle take place only when the processing cannot be manifestly based on another legal basis. Some types of processing may serve both important grounds of public interest and the vital interests of the data subject as for instance when processing is necessary for humanitarian purposes, including for monitoring epidemics and their spread or in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters".*

[11] Report no. 0017/2020, State Legal Service, Spanish Data Protection Authority, p. 2. Available at www.aepd.es, Informes jurídicos 'Legal reports'. Retrieval date: 13 January 2021.

[12] The mentioned report explains the circumstances foresee in Article 9.2 GDPR: specifically in b), regulating the relations between employer and employee, "*processing is necessary for the fulfilment of the obligations and the exercise of the specific rights of the data controller (the employer) or the data subject in the field of Labour Law, specifically Law 31/1995, of November 8, on the Prevention of Occupational Risks, by virtue of section 14 and related of said law, there is duty for the employer to protect workers against occupational risks and guarantee the safety and health of all workers at their service in aspects related to work. For the same reason, Article 29 of Law 31/1995, of November 8, on the Prevention of Occupational Risks, which transposes Article 13 of the Council Directive (89/391/EEC), of 12 June 1989, on the application of measures to promote the improvement of safety and health of workers at work, also establishes obligations for the workers in the field of risk prevention. Thus, it is up to each worker to provide, according to their possibilities and by complying with the preventive measures that are adopted in each case, for their own safety and health at work and for those of other people who may be affected by his/her professional activity because of their acts and omissions at work, in accordance with their training*

3. Regulatory hyperinflation, legal gaps and confusion

Since the declaration of the state of alarm on 14 March 2020[13], we are astonishingly attending to a huge regulation production which has imposed restrictions on all social and economic areas and we have had some of our fundamental rights limited. The most significant is freedom of movement enshrined in Article 17.1 SC, and public freedoms, among them, free enterprise of Article 38 SC.[14][15]

The panoply of royal decree-laws, autonomous decree-laws and ministerial orders approved since 14 May 2019 has been commented widely and valuably. On the one hand, comments have shown the deficiency of our legal system in a sanitary crisis situation such as the present one[16] and, on the other hand, some paradigmatic examples of the confusion

and the employer's directions. This means that they must immediately inform their direct superior, and the worker in the area of occupational safety and health risks or, where appropriate, the occupational risks' prevention service, about any situation that, in their opinion, involves for reasonable reasons, a risk to the safety and health of workers; contribute to the fulfilment of the obligations established by the competent authority in order to protect the safety and health of workers and cooperate with the employer so that he can guarantee safe working conditions that do not entail risks for the worker safety and health. In the context of the current situation resulting from covid-19 pandemic, this means that the worker must inform the employer in case of suspected contact with the virus in order to safeguard, in addition to their own health, that of other workers in the workplace, so that appropriate measures can be taken. The employer must process such data in accordance with the RGDP, and the appropriate security measures and proactive responsibility that the processing demands and must be adopted (Article 32 RGDP). (II) In letter g) and letter i), which can be examined together, since both refer to a public interest, the first of which is described as 'essential' and the second of which refers to a public interest qualified "in the field of public health such as protection against serious cross-border threats to health" all based on the law of the Union or of the Member states that establish adequate and specific measures to protect the rights and liberties of the data subject, in particular professional secrecy; in letter h), when the processing is necessary to carry out a medical diagnosis, or evaluation of the worker's work capacity or any other type of health care or for the management of health care systems and social and health assistance services. A final closing circumstance that would allow the processing of health data could even be established in letter c), in the event that the circumstances provided in this section occur, which would apply when the processing is necessary to protect vital interests of the data subject or another natural person, in the event that the data subject is not physically or legally capable of giving their consent. (List of circumstances transcribed from said SDPA Report, pp. 3 and 4).

[13] The state of alarm was declared by Royal Decree 463/2020, of 14 March, in accordance with Law 4/1981, of 1 June, on states of alarm, exception and siege (*Real Decreto 463/2020, de 14 de marzo, de acuerdo con lo previsto en la Ley Orgánica 4/1981, de 1 de junio, de estados de alarma, excepción y sitio*). The Spanish Constitutional Court Decision ATC 7/2012, of 13 January, due to the air traffic controllers strike at the end of 2011, when the state of alarm was declared for the first time in Spain since SC 1978, recognised that the royal decrees foresee in Spanish Law 4/1981, of 1 June, are regulations with the power of law.

[14] See, V. ÁLVAREZ GARCÍA, F. ARIAS APARICIO, E. HERNÁNDEZ DIEZ, *Lecciones jurídicas para la lucha contra una epidemia*, Iustel, 2020, in which apart from presenting an excellent and brief analysis of the law of exception and the measures to be taken to fight against a sanitary crisis, it includes a chronology of the high amount of state regulations which have been approved in order to fight against the pandemic.

[15] See, F. VELASCO CABALLERO, *Libertades públicas durante el estado de alarma por la Covid-19*, in BLANQUER CRIADO (Coord.), *Covid-19 y Derecho Público (durante el estado de alarma y más allá)*, ~~Tirant lo Blanch~~, Valencia, 2020, pp. 79-134.

[16] C. CIERCO SIERA, *Derecho de la salud pública y Covid 19,* in BLANQUER CRIADO (Coord.), *Covid-19 y Derecho Público (durante el estado de alarma y más allá)*, cit., pp. 25-78; R. RIVERO ORTEGA, *Rastreadores y Radar Covid: obligaciones de colaborar y garantías*, in *Revista General de Derecho Administrativo*, 2020, 55, p. 6 *et seq.*

which has been generated by the proliferation of regulations within the context of the crisis. Some of the examples are mentioned below.

In the first place, the inexperience on the decision-making institutional structure and the lack of loyal cooperation among the different government levels of our Spanish territorial decentralised State. The crisis provoked by COVID-19 obliged to take preventive and control measures of the pandemic without the guide of a legal support, which clearly delimited the competences, powers, as well as duties and rights of the citizens, especially the former ones, which have had a secondary status for decades with respect to the rights of citizens, which are main topic in the last reform of some Statutes of Autonomy.[17]

Some time after, already in de-escalation times, while there was political incoordination and altercation between public authorities, executive powers from all territorial levels, there was the approval of Royal Decree-law 21/2020, of 9 June, on urgent prevention, containment and coordination measures to deal with the health crisis caused by COVID-19 (*Real Decreto-Ley 21/2020, de 9 de junio, de medidas urgentes de prevención, contención y coordinación para hacer frente a la crisis ocasionada por la Covid-19*), which was adopted based on the exclusive competence of the State on bases and general coordination of health matters (Article 149.1.16 SC) and it granted to the Interterritorial Board SNS the competence of "*designing and activating action plans and strategies in cases of health emergencies, by counting on the participation of all concerned administrations*" (Preamble, p. 14), and it also established new information duties in public health emergency situations as the current one.[18] See subsection 4.3 of the present paper where this Royal Decree-law will be analysed.

This first example is already a clear indication that, notwithstanding the large number of regulations which had been approved since the declaration of the state of alarm, there is the need of an *ad hoc* Act which, among others, regulates the State competence in order to rule under a state of alarm situation enshrined in Article 116 SC, as well as the coordination and cooperation relations with respect to the constitutional order on distribution of competences.

Secondly, the measures taken as a result of the declaration of the state of alarm by the Royal Decree 463/2020, of 14 May, on the regulations adopted due to the state of alarm, tried to design an express and specific system of penalties if the citizens failed to comply with said regulations and deriving obligations imposed for public health purposes, always with exceptions. And this is because such Royal Decree that declared the state of alarm did not establish a system of penalties which included a classification of offences and penalties in connection with the non-compliance with the measures of the state of alarm. As a consequence, the penalties which have been imposed under the regulations

[17] F. VELASCO CABALLERO, *Estado de alarma y distribución territorial del poder*, in *El Cronista del Estado Social y Democrático de Derecho*, no. 86-87, March-April, pp. 79-87. The author defends the state competence to rule in a state of alarm situation, which although it is not expressly foresee in Article 149.1 SC, it is set out in Article 116 SC as "*extraordinary, latent and very much of the competence* of the State", p. 82.

[18] Articles 5, 22 to 26, and second final provision.

of the state of alarm have been very much questioned by doctrine. Although they were presumably based on a regulation with status of law, in order to respect the principle of legality on sanctioning (Article 25.1 SC), as Law 14/2015, of 30 March, on the Protection of Public Safety, the circumstance in relation to the failure of compliance with the measures did not fit with the concept of disobedience to authority of art 36.6 of said Law.[19] This is why some court decisions declared the nullity of the imposed penalties due to illicit administrative circumstances.[20]

Thirdly, in order to mention one of the most striking chapters on legal confusion deriving from the measures taken to prevent and control the pandemic, in August 2020, the Department of Health of Galicia (*Consellería de Sanidade de Galicia*) published an Action Protocol on public health on the obligations of quarantine and imposition of penalties in case of failure.[21] Besides promoting the neighbours as "police" when establishing the duty of collaboration of citizens in order to report the non-compliance with the quarantine (Article 3 of the 'Order of 29 August of 2020, approving the Action Protocol of the Department of Health of Galicia', *Orden de 29 de agosto de 2020, que aprueba el Protocolo de actuación, de la Consellería de Sanidad de Galicia*), by calling a telephone number (+34 900 400 116). It also provided for a report by security and forces and corps, which is more logic from the perspective of the exercise of police functions, and by the sanitary professionals and the personnel of the inspection services of the Galician Health Service or Department of Health. In addition, it imposes on people who have been diagnosed with COVID-19 the duty to identify their close contacts and includes a system of penalties if there is no collaboration or non-compliance in relation with such duties. This is a system of penalties which includes the circumstances categorised as

[19] See, among others, C.A. AMOEDO SOUTO, *Vigilar y castigar el confinamiento forzoso. Problemas de la potestad sancionadora al servicio del estado de alarma sanitaria,* in *El Cronista del Estado Social y Democrático de Derecho*, no. 86-87, March-April 2020, pp. 66-77; also two studies of R. CANO CAMPOS, *Estado de alarma, sanciones administrativas y desobediencia a la autoridad,* available at https://seguridadpublicasite.wordpress.com/2020/05/08/estado-de-alarma-sanciones-administrativas-y-desobediencia-a-la-autoridad/ ; and another one of the same author, *¿Puede el Decreto de Alarma establecer su propio régimen sancionador?,* available at https://seguridadpublicasite.wordpress.com/2020/05/11/puede-el-decreto-de-alarma-establecer-su-propio-regimen-sancionador/. Also see, C. MARTÍN FERNÁNDEZ, *¿Es posible sancionar en virtud de la Ley de seguridad ciudadana a quiénes incumplen las limitaciones de circulación durante el estado de alarma?,* in the blog of public safety, available at www.seguridadpublicasite.wordpress.com.

[20] Among others, Judgment of the Court for Contentious Administrative Procedures no. 1 of Logroño of 27 October 2020 and the Judgment of the Court for Contentious Administrative Procedures no. 3 of Santander of 30 September 2020. See the comment of J.M. ALEGRE ÁVILA, *Anulación de sanciones administrativas impuestas por 'desobediencia a la autoridad' durante la vigencia de Estado de alarma,* available at the author's blog.

[21] Order of 29 August 2020, adopting the Action Protocol of the Department of Health of Galicia on public health in relation to isolations and quarantines for the prevention and fight against SARS-CoV-2 and on the instructions for sanction procedures in such cases, (*Orden de 29 de agosto de 2020 por la que se aprueba el Protocolo de actuación de la Consellería de Sanidad de Galicia en materia de salud pública en relación con aislamientos y cuarentenas para la prevención y el control de la infección por el SARS-CoV-2 y se dictan instrucciones para la tramitación de los procedimientos sancionadores en estos casos).* Diario Oficial de Galicia de 29 de agosto de 2020 'Official Gazette of Galicia, of 29 August 2020'.

offences and penalties and materialised in 'Law 8/2008, of 10 July, of Health in Galicia' (*Ley 8/2008, de 10 de julio, de salud de Galicia*).

In short, this is an Action Protocol with insufficient regulatory status, a general regulation, which limits fundamental rights as freedom of movement (Article 17 SC), and it also includes offences and penalties which are of dubious constitutionality, as they breach the principle of legality on sanctioning (Article 25.1 SC).

In the fourth place and finally, another paradigmatic example of the existing chaos in our legal system concerning the adopted measures to eradicate the pandemic is found at the Community of Madrid, which requested to the Court for Contentious Administrative Proceedings no. 2 of Madrid the ratification of Order 1008/2020, of 18 August (*Orden 1008/2020, de 18 de agosto*), which modified Order 668/2020, of 19 June 2020 (*Orden 668/2020, de 19 de junio de 2020*), by established preventive measures to face the sanitary crisis caused by COVID-19 (upon completion of the extension of the state of alarm established by Royal Decree 555/2020, of 5 June (*Real Decreto 555/2020, de 5 de junio*)), for the application of coordinated actions related to public health, in order to provide an answer to the situation which involved a particular risk deriving from the increase of positive cases due to COVID-19.

From my point of view, the ratification request of said Order of the Community of Madrid is based on an incorrect understanding of Article 8.6, second paragraph, of the Law regulating Administrative Dispute Jurisdiction (*Ley reguladora de la Jurisdicción Contencioso-Administrativa)*, which states that the Administrative Courts have competence on judicial ratification regarding urgent and necessary measures, relative to public health, which imply deprivation or restriction of freedom or of another fundamental right. Such Article refers to special measures which affect to specific persons, either individually or collectively, but it does NOT refer to the ratification of the exercise of regulatory power by the executive power. Nevertheless, the Community of Madrid requested the Judge of the Court for Contentious Administrative proceedings, which is a Judiciary body, the ratification of a general regulation which was approved in the exercise of its statutory authority.[22] This is another example of the confusion that is provoking the fight against the pandemic without a specific Act. In conclusion, it is possible to affirm that COVID-10 even leads to the stagger of the validity of the principle of separation of powers of our State of Law.[23]

[22] After writing this paper, legislator introduced a new provision in Article 10, which rules the competences of the Tribunales Superiores de Justicia, máximum judicial organs at autonomous communities. Provision 8, within Article 10, of Law regulating Administrative Dispute Jurisdiction, give competences to each Tribunal Superior de Justicia to ratify measures adopted by Autonomous Community Govern that may limit fundamental rights in order to fight against the pandemic. This legal modification has been appealed before Spanish Constitutional Court because it could be unconstitutional (cuestión de inconstitucionalidad nº 6283-2020, admitted by the Court 16th February of 2021).

[23] See the excellent comment of J.M. ALEGRE ÁVILA, on Interlocutory (*Auto*) 121/2020, of 20 August, of the Spanish Court for Contentious Administrative Proceedings no. 2 of Madrid, entitled *Restricciones/Limitaciones de derechos fundamentales por las Comunidades Autónomas en periodo de crisis vírica*, available in the author's blog.

In the regard of sanitary measures included in said Order of the Community of Madrid, they were general prevention measures addressed to the whole population, as safety distance, mandatory use of masks, limitations on tobacco and alcohol consumption, others expressly addressed to the hospitality and nightlife industry (restrictions and prohibitions) as well as other measures to regulate care homes of the Community of Madrid (exits, visits, PCR tests)

Interlocutory 121/2020, of 20 August (*Auto 121/2020, de 20 de agosto*) of the Court for Contentious Administrative Proceedings of Madrid no. 2 denied the ratification of said Order of the Community of Madrid as it was based and was covered by the ministerial order of the Ministry of Health of 14 August 2020 (*Orden del Ministerio de Sanidad de 14 de agosto de 2020*), approved in the exercise of the exclusive state competence of health general coordination. It was a ministerial order that was communicated to the Autonomous Communities but it was not published in the Official State Gazette (*BOE*) and thus the Judge declared its lack of effectiveness and absolute nullity. Consequently, the Order denied the requested ratification but it did not declare the nullity of the Order of the Community of Madrid, neither for the fact that such Ministerial Order that presumably provided cover was null, nor for its insufficient regulatory status to limit fundamental rights.

The mentioned respective Orders, ministerial and autonomous orders, state they are based not only on other general regulations, but also on regulations with the status of law. They quote the following state laws as sources which grant legal cover to their respective regulations: Law 3/1986, of 14 April, on Special Measures on Matters of Public Health (*Ley Orgánica 3/1986, de 14 de abril, de medidas especiales en materia de Salud Pública*), the articles of which empower the competent sanitary authorities to take measures related to examination, treatment, hospitalisation or control should there exist rational danger signs for the health (Article 2), and for the control of communicable diseases (Article 3), which makes possible to take measures to control the people who are sick or people who have been in contact with them. Furthermore, reference is made to Article 26 of General Health Act 14/1986 of 25 April, on General Health, (*Ley 14/1986, de 25 de abil, General de Sanidad*) which provides for the possibility for the relevant sanitary authorities to take preventive measures against imminent risks for health. There is also reference to Law 33/2011, of 4 October, on General Public Health (*Ley 33/2011, de 4 de octubre, General de salud pública*), whose articles regulate the adoption of measures by the sanitary authorities under cases which may cause a risk to public health (art 27.2 and Article 54), it imposes on citizens the duty of cooperation (Article8) in public health actions, even the duty of those who know facts that could jeopardize health by being obliged to notify it to sanitary authorities (Article 9). And finally, at state level, Order of 29 August of 2020, of the Department of Health of Galicia (*Orden de 29 de agosto de 2020 de la Consejería de Sanidad de Galicia*) mentions as well Royal Decree-law 21/2020, of 9 June, on Urgent Prevention, Containment and Coordination measures to deal with the health crisis caused by COVID-19 (*Real Decreto-Ley 21/2020, de 9 de junio, de medidas urgentes de prevención, contención y coordinación para hacer frente*

a la crisis sanitaria ocasionada por la COVID-19), which establishes the measures to consider at the end of the state of alarm declared in March 2020. What is more, the following autonomous laws, which presumably provide legal cover, have to be added: Law 8/2008, of 10 July, of Health in Galicia, (*Ley 8/2008, de 10 de julio, de salud de Galicia*), and Law 12/2001, of 21 December, of Sanitary Ordering of the Community of Madrid (*Ley 12/2001, de 21 de diciembre, de Ordenación Sanitaria de la Comunidad de Madrid*).

From my point of view, this wide range of quotations of various laws on which both ministerial and autonomous orders try to base highlights the lack of a specific Act. We need an Act which regulates the competence of the State to rule under state of alarm circumstances deriving from Article 116 SC, which clarifies that the aim is not to centralise again the autonomous competences, and that their exercise, as well as the exercise of local competences, are subject to the measures taken by the State Government during the state of alarm, but the constitutional order of distribution of competences due to the declaration of the state of alarm has not been modified, but inserted into the constitutional framework. An Act which also authorises the interference with citizens' fundamental rights and, moreover, which constitutes a guarantee of legal certainty for their limitation, in the sense of regulating under which circumstances and conditions would these interferences be legitimate, among them, the fundamental right to the protection of personal data.

4. Risks for the fundamental right to the protection of personal data in times of pandemic

The aim of this section is to analyse some specific measures taken in order to prevent the spread of coronavirus, specially, the application of tracking technology and the role of trackers which, by definition, process personal data related to health, as well as the problems arising from them.

Order SND/297/2020, of 27 March, (*Orden SND/297/2020, de 27 de marzo*), of the Ministry of Health, assigned to the Secretary of State for Digitisation and Artificial Intelligence the development of different actions in order to manage the sanitary crisis caused by COVID-19, based on Article 3 of Law 3/1986, of 14 April, on Special Measures on Matters of Public Health (which authorises authorities to take the appropriate measures to control sick people, as well as those who are or have been in contact with them), and Article 4 of Royal Decree 463/2020, of 14 March (*Real Decreto 463/2020, de 14 de marzo)*, which empowers the delegated competent authorities to pass interpretative instructions, orders, directives and provisions which may be deemed necessary in order to guarantee the provision of services, either ordinary or extraordinary, regarding the protection of people, assets and places.

App development, conversational assistance or a webpage are necessary on these legal bases and with the objective, according to the preamble of said ministerial order, on

the one hand, to "offer alternative channels of reliable information to citizens; to lighten the workload of the emergency services of the different public Administrations with competences on matters of health" and, on the other hand, "to count on real information on the movement of people prior to and during lockdown", in order to "understand the population's movements in order to see how health capacities in each province are dimensioned".

4.1. Radar COVID and tracing apps

In this context, the Order assigns the Secretary of State of Digitalisation and Artificial Intelligence, the urgent development of a computer application which: a) allows the user to carry out self-assessment based on the communicated medical symptoms in order to know if he or she is possibly infected, apart from providing the user with information on COVID-19 and practical advice; b) allows user's geolocation in order to verify if he or she is located in the declared Autonomous Community and c) the application "can include links to websites managed by third-parties in order to facilitate access to information and services available through Internet". (Art .1, paragraph 1, Order SND/297/2020, of 27 March).

The Ministry developed such Radar COVID app thanks to the collaboration of private companies and it can be downloaded since 14 July. See below the most highlighted features of said application:[24]

- Voluntary use.
- Based on a decentralised system: the user reports to be infected and those people who have been in close contact with him or her for the last 14 days (less than two metres and for more than fifteen minutes) receive a notification but it does not include any personal identification, as it is an anonymous notification.
- It works with Bluetooth, which is less invasive than GPS.
- It does not collect names, surnames, e-mails or telephone numbers.

Radar COVID, as other tracing apps, is an example of the automation of public functions in Spain on a voluntary basis, contrary to China, South Korea or Singapore. The app design was carried out in collaboration with Google and Apple and it can be downloaded from Android and iPhone mobile phones. The app notifies the exposure to the virus in relation with the contacts, according to the exposure to a positive case depending on the distance (less than two metres) and for more than fifteen minutes. Through this app, one can report if he or she has been tested positive and this is automatically communicated to those who have been in close contact with him or her, in order they can adopt the corresponding precautionary measures, such as contact limitation or request a PCR rest. The responsible of personal data processing is the Ministry of

[24] L. COTINO HUESO, *Inteligencia artificial, big data y aplicaciones contra la COVID-19: privacidad y protección de datos,* in *Revista De Internet, Derecho Y Política*, 2020, n. 31, pp. 8-10; D. TERRÓN SANTOS, J.L. DOMINGUEZ ÁLVAREZ, M.M. FERNANDO PABLO, *Los derechos fundamentales de la privacidad: derecho y necesidad en tiempo de crisis",* in *Revista General de Derecho Administrativo*, 2020, pp. 1-45.

Health and the Secretary of State for Digitalisation and Artificial Intelligence acts on the commission received from the former.

At the moment, it does not seem that Radar COVID app has had the expected success in relation to the objective for which it was designed. There are very few citizens who have installed the app in their corresponding mobile devices, without taking into account that it started to work in Spain very late (July 2020), also due to the social mistrust generated by these devices.

Some authors reckon its use should be mandatory and that it should be included as an obligation since we are living an exceptional situation, at least concerning certain groups, such as workers in education centres or care homes, among others.[25]

In any case, this application and other possible computer applications have to consider the principles related to data processing (Article 5 GDPR), specially: that personal data shall be processed lawfully, fairly and in a transparent manner; it shall be collected for specified purposes and not used for different purposes; adequate, relevant and limited to what is necessary in relation to the purposes for which it is processed («data minimisation»); accurate and, where necessary, kept up to date; with a storage time limitation; by ensuring their integrity and confidentiality, in the sense of the duty of storing the data according to the necessary security measures in order to avoid alterations; and, according to the principle of proactive responsibility, the fact of proving that data processing has been carried out according to the mentioned principles falls within the controller.

4.2. Trackers

Apart from Radar COVID app, there has been the creation of trackers. The control of infected people and their contacts through trackers, natural persons who have been hired by the sanitary authorities of each Autonomous Community, is a centralised control, unlike the control applied by Radar COVID, and it is more invasive regarding the right to the protection of personal data. In fact, this is a centralised control method of identity tracking. Once the medical services of the infected patient have transferred such data, they notify the patient's contacts, specifically those who have been in contact with them for the last 14 days, so they undergo a COVID-19 test. In contrast to what occurs with Radar COVID, there is no consent to data processing with respect to trackers, although it is not necessary, because the legal base of the processing is not the consent, but to protect the vital interests of the data subject or of other natural persons (letter d) of Article 6.1 GDPR (Recital 46); or also letter e) of said Article 6.1, for the performance of a task carried out in the public interest for sanitary purposes (Recital 46 GDPR). Furthermore, as it is health data, an exception would be applied and this would allow the data processing of the infected people and their contacts, enshrined in letter i) of Article 9.1 GDRP, as the processing would be necessary for "reasons of public interest in the area of public health'.

[25] R. RIVERO ORTEGA, *Rastreadores y Radar Covid…,* op., cit., pp. 27-31.

One of the problems arising from the tracker role is who is performing such functions, since if they are not carried out properly, they can have an impact on a fundamental right to personal data protection. In Spain, sanitary authorities understood as public servants are not used for these purposes; instead, there are simple collaborators of the Administration, even private companies, and they do not have the authority status in order to exercise such public powers. But this is only one of the many problems arising from its use in order to control the pandemic.

In relation with the tracker role, I would like to mention that the Community of Madrid gave rise to a great controversy, since it decided to count on volunteers from the Complutense University of Madrid in order to fulfil these functions, although it finally assigned this task to a private company. Other companies have resorted to the scarce number of sanitary professionals as always. Nevertheless, considering the nature of such assignments, overnight, it is clear that the people will not have such training, which is against experts' opinion, apart from the risk that such fact entails concerning the fundamental right to the protection of personal data.

The Consensus Document (*Documento de Consenso*), which was created by a group of experts in order to optimise the fight against the pandemic, indicated the necessity of increasing the number of trackers so they could be at least one tracker for every four thousand or five thousand inhabitants, who should also be hired independently with regard to primary health care (in order not to overload it) and receive specific training in order to perform the tracking functions. [26] Unless I am mistaken, none of these parameters has been fulfilled at present.

The aim is not to be against the performance of tracking functions by private companies, as the outsourcing of public or almost public functions is not new in our legal order. However, outsourcing cannot be carried out without guarantees, specially when they are functions that affect a fundamental right and thus there should be a law that regulates the purpose of the processing, the data storage time, which should be limited to the indispensable time in order to reach the proposed goal; the duty of confidentiality of trackers; their specific training, specially on personal data protection; collected data and information management; as well as the requirement to have their activity supervised by the corresponding public authority.

But considering how the tracker system is set up, in other words, there is no system, it is difficult that we, as citizens, rely on volunteers or even private companies who process personal data, unless, of course, they have been trained for personal data processing.

Finally, said Order provides for a development of a conversational assistant/chatbot to be used through instant messaging apps (WhatsApp) and which will provide official information to those who have questions or raise a query in relation with the sanitary crisis. As in the previous examples, the responsible of the data processing of those who

[26] Documento de Consenso: ¿Es posible optimizar la estrategia en la lucha contra el virus de la Covid-19 en España?, 'Consensus Document. Is it possible to optimise the strategy to fight against Covid-19 virus in Spain?' Available at www.semesmadrid.es, among others. Retrieval date: 10 January.

voluntarily resort to the conversational assistance will be the Ministry of Health and the institution in charge of said processing will be the Secretary of State for Digitalisation and Artificial Intelligence by means of the Subdirectorate General for Artificial Intelligence and Digital Enabling Technologies.

4.3 Are these adopted measures covered by legislation?

When analysing said precepts, one wonder whether such processing is covered by legislation or not. In this subsection, we are going to analyse Order SND/297/2020, of 27 March, of the Ministry of Health, and the Royal Decree-law 21/2020, of 9 June, which have been previously mentioned.

Once we have noted the legal bases which would legitimise such processing, we should question if data processing established by Order SND/297/2020, of 27 March, through Radar COVID app or other applications, which include geolocation of individuals, as well as their movement control, either through the same application or through trackers, among any other system that may be implemented, is covered by legislation by virtue of Article 53.1 SC, as interpreted by the constitutional doctrine.[27]

We should remember that we are referring to the fact of limiting a fundamental right due to the measures provided by a ministerial order. And that Law 3/2018, of 5 December, requires that a regulation with status of law authorises the processing of personal data when it is necessary due to reasons of public interest within the field of public health, "which can establish additional requirements in relation with its security and confidentiality" (*ex* Article 9.2).

From my perspective, it is not sufficient with the generic authorisation included in Article 3 of Law 3/1986, of 14 April, on Special Measures on Matters of Public Health. There are two reasons: 1. Since Article 3 authorises the public authority to adopt, in general, preventive actions and measures to control infected people and those who are or have been in contact with them, in order to control communicable diseases. 2. If the authorisation had been sufficient, Article 9.2 of Law 3/2018 would have no sense. When this Law on Special Measures on Matters of Public Health was approved, specifically in 1986, the fundamental right to the protection of personal data did not exist as an autonomous right, hence the current legislator has decided to require an *ad hoc* law in order to process personal data when it is necessary due to reasons of public interest within the field of public health (*ex.* Article 9.2 of Law 3/2018). An *ad hoc* law that, in addition, can establish additional requirements relative to security and confidentiality. Because security and confidentiality of personal data are principles which are compromised in

[27] Article 53.1 SC: "The rights and liberties recognised in Chapter Two of the present Title are binding for all public authorities. The exercise of such rights and liberties, which shall be protected in accordance with the provisions of Article 161, 1a), may be regulated only by law which shall, in any case, respect their essential content".

application to control the movement of citizens and their geolocation as well as within the task of trackers.

Royal Decree-law 21/2020, of 9 June, on urgent prevention, containment and coordination measures to help to address the health crisis caused by COVID-19, is justified due to the extraordinary and urgent need of maintaining the prevention and control measures of pandemic upon finalisation of the state of alarm declared in March 2014, among them, personal data processing in relation with health and traceability of contacts included in Order SND/297/2020, of 27 March.

The statement of reasons of Royal Decree-law declares that, although it is a Royal Decree-law, which due to its legal nature it does not normally regulate, among other matters, fundamental rights or public freedoms of Part 1 SC (*ex.* Article 86.1 SC), constitutional case law has explained that this limit cannot be object of extensive interpretation by devoiding of substance said source of law, "and thus what is constitutionally prohibited is the regulation of a general regime of said rights, duties and freedoms or going against the contents or essential elements of some of these rights (Spanish Constitutional Court Judgment STC 111/1983, of 2 December, FJ 8)". The quotation corresponds to the Spanish Constitutional Court Judgment STC 139/2016, of 31 July, FJ 6.

In Chapter V, under the title "Early detection, control of sources of infection and epidemiological surveillance", articles from 22 to 27, of the Royal Decree-Law 21/2020, of 9 June, establish, in the first place, that the coronavirus disease has to be declared mandatorily, for the purposes of the national network of epidemiological surveillance; in the second place, the obligation of providing information to the competent public health authority, either by private entities, or public entities, whose activity is related with the management of COVID-19 cases; in the third place, that health services of all autonomous communities, as well as Ceuta and Melilla, are subject to the duty of carrying out PCR tests or other diagnostic tests on those suspected of having COVID-19, and to provide information as soon as possible to the competent sanitary authority, which will inform the Ministry of Health; in the fourth place, there is the duty of communication of the tests carried out by laboratories through the information system established by each administration; in the fifth place, regarding essential information for the purposes of contact traceability, there is the duty of cooperation with the sanitary authority, affecting either public institutions or private organisations, "establishments, means of transport or any other place in which sanitary authorities identify the need of carrying out contact traceability"; and finally, in the sixth place, there is the regulation of personal data applicable to all kinds of personal data processing which may be deemed necessary in order to comply with the duties imposed by said regulation with status of law (Article 27).

I will focus on the analysis of Article 27 of Royal Decree-law, which regulates in paragraph 1 the guarantees to be adopted for personal data processing related to health, with express and generic reference to GDPR and to OLPDPGDR, and with specific reference to Article 14 GDPR, which regulates the information obligations to the data

subjects related to the data obtained without their consent. In paragraph 2, Article 27 states as purpose of the processing: "*the follow-up and epidemiological surveillance of COVID-19 in order to prevent and avoid very serious exceptional circumstances, on the grounds of reasons of essential public interest within the specific field of public health, and for the protection of vital interests of the affected persons and other natural persons*". And finally, paragraph 3 of Article 27 regulates the processing data controllers, which are the autonomous communities, Ceuta and Melilla cities and the Ministry of Health, in accordance with their respective competences. It falls within all of them to guarantee the application of these required security measures which result from the risk analysis, by taking into account they are sensitive data as they are health data. It should be added that the authorised processing of health data by Royal Decree-law 21/2020, of 9 June, will be in force in the whole national territory until the Government declares that the sanitary crisis has finished, (*ex.* Article 2, 3(1)). Therefore, such rule establishes a temporary limit for data processing related to health under this Royal Decree-law.

We should question if, from the constitutional point of view, said regulation is sufficient with regard to possible interferences with the fundamental right to the protection of personal data which can occur as consequence of anti-COVID measures, included in Royal Decree-law 21/2020, of 9 June, or adopted in its development. In fact, in the famous Judgment of the Spanish Constitutional Court STC 292/2000, FJ 10, the Court declared that the prediction and legitimacy of the desired purpose in a regulation with status of law were necessary but not sufficient requirements in order to substantiate the constitutional validity of the regulation of personal data processing, if it was not accompanied by the establishment of appropriate guarantees for the respect for the fundamental right to the protection of personal data, which is based on the respect for the essential contents of the fundamental right. In addition, the Spanish Constitutional Court Judgement STC 76/2019, of 22 May, FJ 5, letter (d) declared that the necessity of having appropriate guarantees is especially important when the processing affects special categories of data, sensitive data, relative to the political ideology in said Judgment, and, in this case, concerning health.

The function of said appropriate guarantees is to "*watch in order that data processing is carried out under conditions which unsure transparency, supervision and effective judicial protection, and they shall ensure that data is not collected in a disproportionate way and is not used for different purposes in relation to the purposes that would justify its collection. The nature and scope of the guarantees which can be required constitutionally speaking in each case will depend essentially on three factors: the type of data processing to be carried out; the data nature; and the probability and severity of risks of abuse or illicit use which, in turn, are linked to the type of processing and to the data category of the processed data. Therefore, a data collection for statistic purposes and a data collection for a specific purpose do not bring the same problems. Furthermore, there is not the same degree of interference if we compare collection and processing of anonymous data with collection and processing of personal data which is taken individually and not made anonymous; data processing of personal data which disclose*

ethnic or racial origin is not the same than political opinions, health, sex life or sexual orientation of a natural person or the processing of other types of data… The level and nature of the appropriate guarantees cannot be determined once and for all, they shall be reviewed and updated when necessary and, on the other hand, the principle of proportionality obliges to verify if the development of technology will lead to processing possibilities which may result less intrusive or potentially less dangerous for fundamental rights" (FJ 6 *in fine* Spanish Constitutional Court Judgment STC 76/2019).

The analysed Royal Decree-law 21/2020, of 9 July, has established what type of data would be processed, which were health data, which should be provided by the public and private entities to public authorities when contact traceability was deemed necessary; the processing purpose, which was the follow-up and epidemiological surveillance of COVID-19 in order to prevent and avoid serious exceptional situations; as well as the bases that legitimise the processing of health data since, in principle, its processing is forbidden, and in this case these are reasons of essential public interest within the specific field of public health, and for the protection of vital interests of the data subjects and other natural persons (Articles 6(1)(d) and (e), and 9(2) (c) and (g), GDPR).

But since health data is sensitive data, especially protected, as well as citizens' political opinions, the Court of Justice requires that a regulation with status of law establishes not only the purposes of the processing, but also the limitation of such processing by regulating in detail the restrictions to the fundamental right of data protection and the establishment of appropriate guarantees to protect the fundamental right of the data subjects. (Spanish Constitutional Court Judgement STC 76/2019, FJ 7, paragraph 1).

With regard to the last two requirements of the constitutional case law in order to consider the interference with the fundamental right by virtue of SC, the Royal Decree-law has insufficient regulation. On the one hand, if we analyse the processing limits, the restrictions concerning the fundamental right have not been regulated in detail, since in reality we found only the mentioned temporary limit, which will coincide with the moment when the Government declares that the current sanitary crisis has ended. On the other hand, regarding appropriate guarantees to be established by the regulation with status of law in order to protect the essential contents of the fundamental right despite the designed processing, the Royal Decree-law includes an express reference to the two main regulations which form the regulatory framework of the fundamental right. In fact, Article 27.1 of said Royal Decree-law states that personal data processing within the field of health shall be carried out according to GDPR and OLPDPGDR and, in particular, that the information obligations to the data subjects related to the data not obtained from them will be in line with Article 14 GDPR. This precept regulates the information that the data controller will facilitate to the data subject when the data (all types of data, not specifically health data) has not been provided by the data subject. In accordance with constitutional case law on the certainty requirements implied by any interference with a fundamental right, the ones that consist only of a generic reference to GDPR and OLPDPGDR are not appropriate guarantees, even if there is an express reference, or reference is made to

Article 14 GDPR, which does not establish appropriate guarantees for health data processing, but regulates the information duty of the data controllers on data which has not been obtained from data subjects.[28]

In conclusion, although Royal Decree-law 21/2020, of 9 June, seems to offer the necessary legal cover for data processing on grounds of the sanitary crisis measures, and in this aspect it enhances with no doubt what is provided in Order SND/297/2020, of 27 March, it lacks of enough regulation regarding the requirements that the constitutional case law requires for the interference with a fundamental right, so it affects the essential contents of the fundamental right to the protection of personal data, against Article 53.1 SC: "*to the extent that, on the one hand, the insufficient adaptation of the legal regulation…to the certainty requirements creates, to all those whom data collection could apply, a danger, in which precisely resides such breach and, on the other hand, …, the inexistence of "appropriate guarantees" or the "minimum to be required to Law" constitute by themselves interference with the fundamental right with similar severity in comparison to a direct interference concerning its core contents"* (Spanish Constitutional Court Judgment STC 76/2019, of 22 May, FJ 9).

5. Limitation of the principle of transparency for the supposed experts' protection of personal data

The fundamental right to the protection of personal data cannot only be injured by certain measures for pandemic purposes, it has also been used as excuse not to offer the information claimed by society in the exercise of the principle of transparency.

In May 2020, not only media, but also the opposition, particularly, prominent members of Partido Popular and Vox parties, insisted on knowing who were the experts who assessed the Government upon the adoption of measures of said Plan.

The President of the Government did not answer to this question and he did not even explain why he did not answer to it. There were no arguments, only silence, even if he was obliged to act with transparency in the management of public matters pursuant to Article 26 of Law 9/2013, of 9 December, on Transparency, Access to Public Information and Good Governance (hereinafter, LTAPIGG). He could have tried to substantiate his silence by virtue of Article 11 of Law on Public Health which, when it obliges to publish the experts' names, it would refer to individuals who are not public servants, but people who are external to the public administration ("who collaborate"). Irrespective of the interpretation that may correspond to this precept, he could have alleged Article 14 LTAPIGG, which enumerates causes that allows to limit the access to information of public action, but he did not. It is also true that these causes do not fit well within the limitation of the right of access to the experts' names, as it is difficult to admit that this has an impact on national security, defence, external relations or public safety, among

[28] See FJ 8 of Judgment of the Spanish Constitutional Court STC 76/2019, of 22 May.

others. Furthermore, the relation of causes is *numerus clausus* and thus nothing else should be added, otherwise the purpose of LTAPIGG could be systematically breached.

Those who requested to know the experts' identity did so according to the principle of transparency in political action, which is developed in LTAPIGG. However, they did not justify why they wanted to know the experts' name and this is a crucial element that the political opposition did not explain.

It is true that the experts' name, as it identifies them, is personal data (Article 4.1 GDPR), and that, when access to information in public management affects personal data, but not sensitive data by virtue of Article 9 GDPR, Article 15.3 of LTAPIGG establishes some weighing criteria between access to information of public management and the fundamental right to personal data protection of the data subjects, which has to be taken into account in order to authorise the requested access.

Among the criteria expressly listed by paragraph 3 of Article 15 LTAPIGG, it is applicable to the case of the experts of the de-escalation "*b) The justification by the applicants of their request in the exercise of a right […]"*. This criterion comes from the EU Court of Justice case-law, where we find another example applicable to the matter of the experts' name.

In fact, the Judgment of the Court of Justice of the European Union, of 29 June 2010 (case C-28/08 P, European Commission v Bavarian Lager Co. Ltd.) dismissed the appeal, set aside the Judgment of the Court of First Instance of 8 November 2007 and confirmed the decision of the European Commission not to give access to the names of the experts who provided assessment, since the beer company did not justify the necessity of transmission of said personal data. There are other subsequent judgments which insist on the necessity of justifying why access to names is necessary as, for example, Judgment CJEU of 23 November 2011, case Dennekamp v European Parliament I, in which the General Court dismissed the application for annulment of Mr Dennekamp, against the refusal of the European Parliament to grant the applicant access to certain documents relating to the affiliation of Eurodeputies to the additional pension scheme, since he did not justify the necessity of such access.

Therefore, the lack of justification in to access to the experts' names of the de-escalation constitutes a serious obstacle in order that their request is accepted. However, it can be understood implicitly that in the request of Partido Popular and Vox, the function to control the Government under Article 23.1 SC would be the reason that would justify the access to experts' names. In addition, in order to save this access requirement, the request could also be justified by referring to the need of controlling the experts' impartiality, in the sense that they should be professionals with no economic and political links with members of the Spanish Government.

Furthermore, in case-law of the EU Court of Justice, experts' quality that the same Government assigned to its advisers, is used as weighing criterion between the right of access to information in public or political management and the fundamental right to the protection of personal data.

In case C-615/13 P, ClientEarth and PAN Europe v European Food Safety Authority (EFSA) and European Commission, the CJEU judgment of 16 July 2015 accepted the appeal, set aside the Judgment of the General Court and studied the action for annulment. The Judgment accepted the request to access to the experts' names that gave advice to the European authorities because, on the one hand, ClientEarth and PAN Europe justified the request access to names in order to verify their impartiality; on the other hand, because EFSA's argument stating that the disclosure of the experts' name could undermine their privacy or integrity (although for this purpose it invoked individual attacks addressed against experts whose collaboration had been requested) was rejected by the EU Court of Justice since it was a general consideration, and it was not supported by any other form or fact for this specific case, and should that be admitted it could be invoked in all cases by throwing overboard the right of access. In addition, as they are precisely experts, the Court considered that the disclosure of names would, by itself, have made it possible for the suspicions of partiality in question to be dispelled or would have provided to experts who might be concerned with the opportunity to dispute, if necessary by available legal remedies, the merits of those allegations of partiality.

In conclusion, based on the EU Court of Justice case-law, one can deduce that when the necessity of access to experts' names with a legitimate purpose is justified, it is not possible to refuse the access on the fact that it will affect experts' privacy, since this is a generic formula which has to be settled on real damages depending on the case.

In the case of the experts' names of the de-escalation, the silence of the President of the Government does not fit with how the management of public matters should be in a democratic society and of Rule of Law, as well as it does not fit the refusal of access to reports which determinates the next step of the de-escalation Plan in each territory.

6. Conclusions

The main conclusion is that the Spanish legal system is unfitted to guarantee the protection of fundamental rights in times of pandemic. Regarding the fundamental right to the protection of personal data, OLPDPGDR requires a regulation with status of law which authorises personal data processing, when it is deemed necessary due to reasons of public interest within the field of public health. A law "which can establish additional requirements in relation with security and confidentiality" (*ex* Article 9.2).

As explained previously, from my point of view, the generic authorisation under Article 3 of Law 3/1986, of 14 April, on Special Measures on Matters of Public Health is not enough and this is due to two reasons: 1. Article 3 authorises the public authority to adopt, in general, preventive actions and measures to control sick people and those who are or have been in contact with them, for the purposes of controlling communicable diseases. 2. If the authorisation had been enough, Article 9.2 OLPDPGDR would have no sense. At the time of the passage of Law 3/1986, of 14 April, on Special Measures on Matters of Public Health, the fundamental right to the protection of personal data did not

exist as an autonomous right, hence the current legislator has decided to require an *ad hoc* law to process personal data, when it is necessary due to reasons of public interest within the field of public health *ex* Article 9.2 OLPDPGDR. An *ad hoc* law which also can establish additional requirements relative to security and confidentiality. Since security and confidentiality of personal data are principles which are compromised in applications that control citizens' movement and their geolocation, as well as in the work of trackers.

We need an Act which regulates the competence of the State to rule under state of alarm circumstances by virtue of Article 116 SC, which clarifies that the purpose is not to recentralise the autonomous competences, but their exercise, as well as local competences shall be subject to the measures adopted by the Government of Spain during the state of alarm. But the constitutional order of distribution of competences due to the declaration of the state of alarm is not altered, but inserted into the constitutional framework. An Act that also authorises the interference with citizens' fundamental rights, among them, the fundamental right to the protection of personal data, and also constitutes a guarantee of legal certainty for their limitation, in the sense of regulating under which circumstances and conditions would this interference be legitimate.

The regulation of the fundamental right to the protection of personal data in CFREU (Article 8) and its development by GDPR, as well as OLPDPGDR together with case-law, are crucial tools, but not sufficient, to protect the citizens from the confusions caused by some public authorities.

RESUMEN: El estudio aborda los riesgos que algunas de las medidas de la crisis sanitaria implican para el derecho fundamental a la protección de datos de carácter personal, bien por la insuficiencia regulatoria de las normas o bien por la insuficiencia de su rango normativo. Con carácter previo se describe el contexto jurídico en el que se desarrolla la crisis, caracterizado por la aprobación de numerosas normas y un clima de confusión en su aplicación. Finaliza el trabajo con una ejemplo de la limitación del principio de transparencia por la supuesta prevalencia del derecho fundamental de protección de datos de personales.

PALABRAS CLAVE: derecho fundamental – protección de datos – riesgos – medidas de la crisis sanitaria.

ABSTRACT: The paper analyses the risks posed to the fundamental right of personal data protection by some of the measures adopted in Spain in response to the Covid-19 sanitary crisis due to lack of regulation, or lack of a specific Act. Before delving into the analysis, the paper focuses on the legal framework adopted to face the crisis provoked by Covid-19, the high number of laws and regulations that it comprises and the confusion that ensued. Eventually, it shows an example of how personal data protection regulation is used as a fake limit to the principle of transparency

KEYWORDS: fundamental right – data protection – risks – sanitary crisis' measures.