Ref.: CNS 19/2018

Opinion in relation to an inquiry into the advisability of publishing a draft Departmental File Creation Order that is currently being processed

A letter from a Department of the Administration of the Generalitat is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue an opinion to assess the advisability of publishing a draft Order for the creation of Department files that are currently being processed.

In particular, he explains that the Department is processing a Draft order in relation to which this Authority has already issued two reports. The Project is currently awaiting a report from the Legal Advisory Committee. Given that Regulation (EU) 2016/679, of the European Parliament and of the Council of April 27, 2016, general data protection (hereinafter, RGPD), does not provide for the need to formally create publicly owned files, the Department raises the convenience of the formal publication (we understand that it also refers to the approval) of these files through the aforementioned Order.

Having analyzed the query, which is not accompanied by any other documentation, and in accordance with the report of the Legal Adviser, I issue the following opinion:

I

(...)

II

Article 20.1 of Organic Law 15/1999, of December 13, on the protection of personal data (LOPD), establishes that "the creation, modification or deletion of public administration files can only be done by medium of general disposition published in the "Official Bulletin of the State" or corresponding official newspaper."

In accordance with the third final provision of Law 32/2010, of October 1, of the Catalan Data Protection Authority, in the area of the Administration of the Generalitat the creation, modification and the deletion of the files must be done by means of an Order from the corresponding Councillor.

On the other hand, from article 26 of the same LOPD and article 11 of Law 32/2010 it follows the need to notify the files created by the departments of the Administration of the Generalitat to the Data Protection Registry of Catalonia .

All these obligations, that of creating the file, publishing the provision of creation and notifying the Data Protection Registry, must be carried out prior to the start of the treatment.

Despite what has just been stated, as the Department points out in its consultation, the RGPD, in full application from next May 25, 2018 (art. 99.2), does not establish the need for the publicly owned files must be formally approved through a general provision.

Although in some articles the RGPD continues to refer to the concept of file (for example, in art. 2.1 or in art. 4.6 which gives its definition), the RGPD dispenses with the concept of file in the time to regulate the obligations of the data controller. Thus, the RGPD foresees the existence of a register of processing activities that each person in charge and person in charge must keep (art. 30), but this register, called a register of processing activities, is not based on of the file concept but based on the purpose or purposes pursued with the treatment.

It should be borne in mind that the RGPD, despite being a rule of direct application (does not require transposition) and that enjoys supremacy with respect to the internal legal system, does not formally repeal the LOPD, but only shifts the applicability of the internal rules that oppose it. For this reason, the doubt may arise as to whether the provisions of the LOPD, and specifically its provisions relating to the need for formal creation of public ownership files through a general provision that must publish in the corresponding official gazette (art. 20 LOPD) and the need for its notification in the corresponding data protection register (art. 26) remain enforceable or not.

III

One of the purposes pursued by the RGPD has been the elimination of unjustified obstacles to the free circulation of data in the different countries of the European Union. In this regard, Recitals 9 and 10 of the RGPD state the following:

> "(9) (...) The differences in the level of protection of the rights and freedoms of physical persons, in particular the right to the protection of personal data, with regard to the treatment of said data in Member States may prevent the free circulation of personal data in the Union. These differences can, therefore, constitute an obstacle to the exercise of economic activities at the level of the Union, distort competition and prevent the authorities from fulfilling the functions incumbent upon them by virtue of Union Law. This difference in the levels of protection is due to the existence of divergences in the execution and application of Directive 95/46/CE.
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> (10) To guarantee a uniform and high level of protection of natural persons and to eliminate obstacles to the circulation of personal data within the Union, the level of protection of the rights and freedoms of natural persons as regards treatment of said data must be equivalent in all Member States. It must be guaranteed throughout the Union that the application of the rules for the protection of the rights and fundamental freedoms of natural persons in relation to the processing of personal data is consistent and homogeneous.(...)"

In this same sense, the Communication from the European Commission to the Parliament and the Council "Greater protection, new opportunities: Commission guidelines on the direct application of the General Data Protection Regulation from 25 May 2018" (24.1.2018 COM(2018) 43 final), considers that:

> "The Regulation provides the opportunity to simplify the legal environment and, consequently, to have fewer national rules and greater clarity for operators.
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> When adapting their national legislation, Member States must bear in mind that any national measure that may hinder the direct applicability of the Regulation and endanger its simultaneous and uniform application throughout the EU is contrary to the Treaties."

Specifically, and referring to the disappearance of the obligation to notify the files in the data protection register that the data protection authorities have so far carried out, an obligation closely linked to the formal creation of the files, the Impact Assessment drawn up on January 25, 2012 by the Commission in the process of drawing up the proposed Regulation, stated the following:

> "According to the Article 29 Working Party's advisory paper on notification, a public register kept by a data protection authority is no longer the best and most appropriate way for individuals to understand what a organization with their personal data and who to contact when things go wrong.
>
> (...)
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> A basic register for all data controllers would simplify procedures and allow certain data protection authorities to continue to be funded by a fee-based system. However, if the registration system were a general requirement and did not allow exceptions to the same level as the current notification rules, they would impose additional, albeit reduced, administrative burdens on data controllers in Member States that have made extensive use of the 'current possibility of exemptions and exceptions (eg Sweden, Germany). On the other hand, maintaining this type of margin would again open up the possibility of divergence in the member states, contrary to the main political objective pursued (that is, simplification and reduction of undue administrative burden).
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> However, it would fall short of the expectations of the vast majority of economic actors for whom this represents an (unnecessary) administrative burden, which does not provide real added value for the data holder. In fact, the data protection authorities themselves have recognized that the current register, available in their offices from notifications received: "is no longer the best and most appropriate way for people to understand what an organization does with their personal details and who to contact when things go wrong.

> If this system amounts to 50% of the current costs of notifications to data protection authorities (including the additional burden in those Member States that largely provide for the exemption of current notifications), then it can be assumed that its global cost would amount to approximately 65 million euros each year in the EU."

The introduction at national level of formal obligations not foreseen in the RGPD, such as the establishment of formal requirements for the creation of files or their notification would go against the aforementioned objectives.

Along these lines, the draft of the new Organic Law on the protection of personal data that is currently being processed in the Congress of Deputies (BOCG 13-1, 24.11.2017), provides for the repeal of Organic Law 15/1999, in everything that opposes what is established by the RGPD, and does not include among its provisions, any reference to the need for approval of publicly owned files through a general provision.

In accordance with all this, it can be concluded that from next May 25, 2018, the provisions of the LOPD would cease to be applicable in relation to the need to create files of public ownership through a provision of a general nature published in the corresponding official newspaper and the obligation to notify them in the corresponding data protection register.

Equally, the provisions of article 11 of Law 32/2010, relating to the obligation to notify files to the Data Protection Register of the Catalan Data Protection Authority and the provision final third of the same law which, in the area of the Administration of the Generalitat, provides that the creation, modification and deletion of files must be done by means of an Order of the corresponding Minister. The concordant provisions contained in the Regulations for the deployment of the LOPD (RLOPD), approved by Royal Decree 1720/2007, of December 21, would also cease to apply.

IV

What has been described so far refers to the regime that will be applicable from 25 May 2018, the date on which the full applicability of the RGPD will occur (art. 99.2 RGPD). Until that date, it should be borne in mind that both Organic Law 15/1999, as well as the aforementioned Law 32/2010 and the RLOPD remain fully applicable.

This without prejudice to the fact that, by application of the principle of retroactivity of the most favorable sanctioning rule (art. 26.2 of Law 40/2015, of October 1, on the legal regime of the public sector), a possible infringement of this obligation could end up not being punishable.

In any case, it should also be added that, regardless of the fact that the files are not required to be created through a general disposition, both the files that are currently already created and those contained in the disposition project that is being processed can constitute the basis from which the register of processing activities provided for in article 30 of the RGPD is maintained, which, in the case of those responsible for the processing, must contain information on:

"a) The name and contact details of the person in charge. If applicable, also of the co-responsible person, the representative of the responsible person and the data protection delegate. b) The purposes of the treatment. c) A description of the categories of interested parties and the categories of personal data. d) The categories of recipients to whom the personal data have been or will be communicated, including recipients in third countries or international organizations. e) If applicable, transfers of personal data to a third country or an international organization, including the identification of this third country or international organization. In the case of the transfers mentioned in article 49, section 1, paragraph two, in addition, the documentation of adequate guarantees. f) If possible, the deadlines for deleting the different categories of data. g) If possible, a general description of the technical and organizational security measures."

To this it must be added that article 31.2 of the project of the new Organic Data Protection Law to which we have previously referred also foresees that the legal basis of the treatment is incorporated. If this provision ends up being approved, this must also be taken into account, as well as the need for it to be accessible by electronic means.

Therefore, as of May 25, 2018, all processing activities carried out or intended to be carried out by the bodies that depend on them must have been included in the register of processing activities created by the Department.

In accordance with the considerations made in these legal foundations in relation to the query raised in relation to the advisability of publishing a project Order for the creation of files from the Department that is currently being processed, the following are made,

Conclusions

As of May 25, 2018, the creation of publicly owned files is not required by means of a general provision, but it is sufficient to include the treatment in the record of treatment activities that must be kept by each person in charge and in charge of the treatment, which must contain the detailed information in article 30 RGPD and, where applicable, that established by the future Organic Data Protection Law that is currently being processed.

Barcelona, April 11, 2018