

Legal report in relation to the draft law amending Law 16/2017, of August 1, on climate change, regarding the tax on carbon dioxide emissions from mechanical traction vehicles

Background

The Draft Bill amending Law 16/2017, of August 1, on climate change, with regard to the tax on carbon dioxide emissions, is presented to the Catalan Data Protection Authority carbon of mechanical traction vehicles, so that the Authority issues its opinion on the matter.

The draft consists of a single article that includes twelve sections, an additional provision, a repeal, and a final one. It is accompanied by the General Report and the report on the treatment of tax and personal data in the management of the tax on carbon dioxide emissions of mechanical traction vehicles drawn up by the data protection delegate of the 'Catalan Tax Agency.

Having examined the Preliminary Project and the documentation that accompanies it, taking into account the current applicable regulations, and in accordance with the report of the Legal Counsel, I issue the following report.

Legal foundations

I

(...)

II

The Preliminary Project being examined aims to amend Law 16/2017, of August 1, on climate change, which regulates the tax on carbon dioxide emissions from vehicles mechanical traction

As can be seen from the statement of reasons "Under the protection of the competences of the Generalitat of Catalonia in matters of the environment and the creation of own taxes, recognized in articles 144 and 202 of the Statute of Autonomy of Catalonia, respectively, the Parliament of Catalonia created the tax on carbon dioxide emissions from mechanical traction vehicles in Law 5/2017, of March 28, on fiscal, administrative, financial and public sector measures and creation and regulation of taxes on large commercial establishments, on stays in tourist establishments, on radiotoxic elements, on packaged sugary drinks and on carbon dioxide emissions. Subsequently, the regulation of this tax is incorporated into Law 16/2017, of August 1, on climate change."

Specifically, with regard to the articles 40 to 50 regulating this tax, it is pointed out that the Judgment of the Constitutional Court of June 20, 2019 has validated these precepts, which were the subject of an appeal of unconstitutionality by the president of the State Government.

It is stated that the effective implementation of the tax has made clear certain deficiencies in the current regulation that make legislative modification necessary, such as the regulation of an alternative quantification of carbon dioxide emissions for vehicles whose technical data sheet does not include this information, as well as the tax management procedure through the register system, among others.

In this context, those provisions of the Preliminary Draft are examined below that have a particular impact on the fundamental right to the protection of personal data, the perspective from which this report is issued.

III

As can be seen from article 41.1, the purpose of the tax is to tax carbon dioxide emissions from vehicles suitable for driving on public roads included in the categories described in the same precept. For this purpose, section 2 considers that the vehicles referred to in section 1 registered in the corresponding public registers are suitable for driving on public roads, as long as they have not been definitively or temporarily deregistered due to theft, and vehicles equipped with temporary permits."

According to article 42 of the proposed text, they are liable for the tax, among others "a) Natural persons who own the vehicle and have their tax domicile in Catalonia."

According to the provisions of article 47.1, the management of the tax will be done through a register that will be drawn up and approved by the Tax Agency of Catalonia based on the data it has.

The processing of the data of the natural persons who own the vehicles subject to the tax by the Catalan Tax Agency, provided for in this draft, must comply with the provisions of the RGPD and Organic Law 3 /2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD).

Article 5.1.a) of the RGPD establishes that all processing of personal data must be lawful, fair and transparent in relation to the interested party (principle of lawfulness, loyalty and transparency).

In accordance with article 6.1 of the RGPD, in order to carry out a treatment, it is necessary to have a legal basis that legitimizes this treatment, either the consent of the affected person, or any of the other circumstances, such as "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (letter c) or that "the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for treatment " (letter e).

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

For these purposes, the legal basis that would enable the ATC, - body in charge, among other functions, of "Managing, liquidating, inspecting and collecting taxes, when their application corresponds to the Generalitat" (article 211-2 Law 17/2017, of August 1, of the Tax Code of Catalonia and of the approval of books one, two and three, relating to the Tax Administration of the Generalitat) - for the treatment of data holders of the vehicles subject to the tax is derived from the provisions contained in the law that regulates it. Therefore, the treatment can be protected in article 6.1.e) of the RGPD.

Point out that the RGPD itself establishes the requirements for this "legal basis". In this sense, the aforementioned article 6.3 in fine provides:

"The purpose of the treatment must be determined in said legal basis or, in relation to the treatment referred to in section 1, letter e), it will be necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers given to the person in charge of the treatment. Said legal basis may contain specific provisions to adapt the application of the rules of this Regulation, among others: the general conditions that govern the legality of the treatment by the person in charge; the types of data object of treatment; the interested parties affected; the entities to which personal data can be communicated and the purposes of such communication; the limitation of the purpose; the periods of data conservation, as well as the operations and procedures of treatment, including the measures to guarantee legal and equitable treatment, as well as those relating to other specific situations of treatment in accordance with chapter IX. The Law of the Union or of the Member States will fulfill an objective of public interest and will be proportional to the legitimate aim pursued."

And in any case, this "legal basis" "must be clear and precise and its application predictable for its recipients, in accordance with the jurisprudence of the Court of Justice of the European Union (...) and the European Court of Human Rights" (consideration 41 in fine).

The European Court of Human Rights (hereafter ECtHR) has repeatedly stated that any limitation to the exercise of a fundamental right must pass the so-called "limits test". That is to say, it must be provided for in a law, it must be necessary in a democratic society to achieve a legitimate purpose and it must be proportionate in relation to the purpose that is intended to be achieved in each case (SSTEDH Amann v. Switzerland, of 16.02.2000; Rotaru v. Romania, from 4.05.2000; Cutlet c. Romania, from 3.06.2003; Liberty and others c. United Kingdom, from 1.10.2008, among others.

IV

Article 47 which regulates the register provides in section 1: "The tax is managed through the register and is drawn up and approved by the Tax Agency of Catalonia based on the data it has, in accordance with what is established in the following sections. (...).

Section 3 details the data that will be included for each taxable person in the register, including the name and surname of the person who owns the vehicle, and the vehicle's identification data.

Section 8 provides that "the registration, modification or removal from the tax register can also occur as a result of a verification procedure initiated by the management bodies Tax Office of the Catalan Tax Agency based on the data available to the Administration, or from an investigation by the tax inspection of the Generalitat de Catalunya."

While it is true that paragraph 2 of article 42 considers for the purposes of this tax that the owners of the vehicles will be the persons identified with this condition in the corresponding public records, it is not clear in the articulation where s obtain the data to set up the register of vehicles subject to the tax.

According to the general report that accompanies the proposal to amend the Law "the preparation of the register starts from the need of the ATC to have the complete data of the fleet of vehicles subject to taxation, which are contained in the Register of Vehicles, managed by the DGT, through a collaboration agreement between the two administrations with which the bimonthly delivery of the data necessary for the preparation of the tax register is agreed."

The use of data from the Vehicle Registry for this purpose is compatible and proportionate with the use for the purposes of applying this tax (art. 6.4 RGPD).

Regarding this, remember that these communications can only be considered appropriate to the data protection regulations to the extent that they are limited to the personal data required for the management of the tax.

Having said that, if the data on the owners of the vehicles for the preparation of the register are obtained from the Vehicle Registry, when reference is made to the register in article 47.1, it should be clarified in the articulated text that the register s 'elaborates from the data contained in this register.

In this sense, the following wording is proposed for paragraph 1 of article 47:

"The tax is managed through a register and is drawn up and approved by the Catalan Tax Agency, based on the data obtained from the Vehicle Registry of the General Directorate of Transit, in accordance with what is established in the sections next. (...).

In any case, it should be noted that there are certain data referred to in article 47.3 that will not be obtained from this Register, as would be the case with the data relating to direct debit and no. of account It should also be reflected in this article.

Beyond this, from the point of view of the right to the protection of personal data, it is necessary to ensure that the processing of the data obtained from the Vehicle Registry, apart from having sufficient legitimacy, is adequate, among others, to the principles of purpose limitation (Article 5.1.b) RGPD) and data minimization (Article 5.1.c) RGPD).

According to these principles, the personal data that is collected must be adequate, relevant and limited to what is necessary to achieve the purposes that justify its treatment (minimization of data (art. 5.1.c RGPD)) and, on the other hand , must be collected for specific, explicit and legitimate purposes, their subsequent treatment being incompatible with these purposes (limitation of purpose (art. 5.1.b RGPD)).

The Law lists the types of data that the register will collect on the owners of the vehicles (subjects liable for the tax), which is positively valued, and given the detail of information that is incorporated, it can be considered that corresponds to the principle of minimization, although it should be noted that the contact details of the liable subjects would possibly be missing.

On the other hand, from the point of view of the principle of purpose, the report of the data protection delegate of the ATC (hereinafter, DPD) adds that an agreement has been signed with the Director General Traffic under the protection of article 95 of the General Tax Law, according to which:

1. The data, reports or antecedents obtained by the Tax Administration in

performance of their functions are reserved and may only be used for the effective application of the taxes or resources whose management is entrusted to them and for the imposition of the sanctions that apply, without being transferred or communicated to third parties, unless the assignment has por objeto: (...) b) The collaboration with other tax administrations for the purposes of the fulfillment of fiscal obligations within the scope of their competences.”. These forecasts would fit the purpose principle.

IV

Article 47.4 provides for the publication on the electronic headquarters of the ATC of the provisional register, which has, for each of the interested persons, the character of a liquidation proposal and which is exposed to the public from 1 to 15 May of the calendar year following accrual. This public exhibition must be subject to prior announcement by means of an edict published in the DOG. The same public exhibition is planned for the definitive register

From the general report and the report of the DPD, it follows that access to the data contained in the provisional or definitive register can only be done by the respective holders. Taking this into account, it would be advisable to clarify that the public exhibition will be held so that interested parties can consult their remuneration data.

In this sense, the following wording is proposed for sections 4 and 5 of article 47:

4. Prior to the definitive drawing up of the register, the head of the Central Office of Tax Management of the Catalan Tax Agency draws up a provisional register, which has, for each of the interested persons, the character of liquidation proposal.

The provisional register is exposed to the public, for consultation through a system that allows the digital identification of the persons affected, from May 1 to 15 of the calendar year following the accrual year, through its publication in the electronic headquarters of the Catalan Tax Agency. This public exhibition must be subject to prior announcement by means of an edict published in the Official Gazette of the Generalitat of Catalonia."

5. The definitive register is approved by the head of the Central Office of Tax Management and is exposed to the public from September 1 to 15 of the calendar year following the accrual year, through its publication at the headquarters electronic of the Catalan Tax Agency for consultation through a system that allows the digital identification of the people affected. This public exhibition must be subject to prior announcement by means of an edict published in the Official Journal of the Generalitat of Catalonia, which must include the following information (...)."

v

Beyond the provisions that may be contained in the Law, and in relation to the implementation of the management system and access to the taxpayers' tax data contained in the register, it is appropriate to consider the need for, among other actions in matters of security, adopt appropriate mechanisms that allow the correct identification and authentication of users

of this management platform, for the purposes of guaranteeing, as required by the RGPD, that no unauthorized treatments will occur (Article 5.1.f)).

It is therefore necessary to carry out a risk analysis prior to putting the planned platform into operation, in order to establish the appropriate technical and organizational security measures to safeguard the right to data protection of the recipients of the benefit (holder and members of the family unit).

The report of the DPD of the ATC points out that an access system has been designed in which only the tax data can be accessed, by entering the No. NIF number and vehicle registration number.

Warning that although the combination of both data allows identification, the truth is that it is data that can easily be known by third parties. In this sense, it is considered that the replacement of no. registration number frame (if ATC has them) or another key not known by third parties, or the use of a system based on an electronic certificate would be a more appropriate security measure.

Point out, regarding the establishment of organizational measures, that a comprehensive security model also requires the adoption and implementation of training measures for the personnel who must process personal data.

Also agreeing that, in the case of public administrations, the application of security measures will be marked by the criteria established in the National Security Scheme, approved by Royal Decree 3/2010, of January 8, which, currently, is being reviewed.

In this regard, Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereafter LOPDGDD), provides that:

"First additional provision. Security measures in the public sector.

1. The National Security Scheme will include the measures that must be implemented in case of personal data processing, to avoid its loss, alteration or unauthorized access, adapting the criteria for determining the risk in the data processing to the established in article 32 of Regulation (EU) 2016/679.

2. The responsible persons listed in article 77.1 of this organic law must apply to the processing of personal data the security measures that correspond to those provided for in the National Security Scheme, as well as promote a degree of implementation of equivalent measures in the companies or foundations linked to them subject to private law.

In cases where a third party provides a service under a concession, management assignment or contract, the security measures will correspond to those of the public administration of origin and will be adjusted to the National Security Scheme."

Point out that, among those responsible for the processing included in article 77.1 of the LOPDGDD, to which this DA1a expressly refers, we find the administrations of the autonomous communities, as well as their public bodies and public law entities, among others. Therefore, it must be borne in mind that, in the present case, the application of the security measures established in the National Security Scheme will be mandatory.

Conclusions

Examined the draft law amending Law 16/2017, of August 1, on climate change, regarding the tax on carbon dioxide emissions from mechanical traction vehicles, it would not be contrary to the forecasts established in the personal data protection regulations if the considerations made in this report are taken into account.

Barcelona, 2 September 2019

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