PD 17/2019

Legal report in relation to the Proposal presented by the Department of the Vice-Presidency and the Department of Economy and Finance, to be included in the Draft Law on fiscal measures for 2020 (M-185.1)

The Proposal presented by the Department of Vice-presidency and Economy and Finance, to be included in the Preliminary draft law on fiscal measures for 2020 (M-185.1), is presented to the Catalan Data Protection Authority, for the study and issuance of the corresponding

The text of the Proposal is accompanied by a copy of the General Report and the Impact Assessment Report.

Having examined the Proposal, taking into account the current applicable regulations and having seen the report of the Legal Counsel, the following report is issued.

Legal foundations

I

(...)

II

The Proposal presented by the Department of the Vice-Presidency and of Economy and Finance refers to a proposal to modify Legislative Decree 3/2003, of November 4, which approves the revised text of the legislation on water of Catalonia, to be included in the Draft Law on fiscal measures for 2020 (hereinafter, the Proposal).

The Proposal that is reported consists of the addition of a new twenty-ninth Additional Provision, to the Consolidated Text of the legislation on water in Catalonia, approved by Legislative Decree 3/2003, of November 4 (in forward, DL 3/2003), with the following content:

> **"Additional provision twenty-ninth**
>
> **Processing of personal data contained in tax returns.**
>
> **1. The Catalan Water Agency collects and processes personal data within the framework of tax powers, without the consent of the person affected by the communication of this data being necessary for the purposes of establishing the existence of a tax relationship with the people who use water, as well as to facilitate the application and verification of the taxes it manages.**
>
> **2. In order to fulfill these purposes, the water supply entities that, as taxpayers must declare and enter or pass on the fee, must communicate to the ACA the necessary data, included in the technical prescriptions and in the models taxes that are approved by resolution of the Directorate of the ACA. They must too**

communicate the data that the ACA requires, despite not being included in the models, among others, those that are linked to the physical situation of the measuring devices or the activity that involves the use of water, including its geolocation through UTM coordinates or other means that allow its correct identification."

(...).

Having said that, according to the General Report that accompanies the Proposal, this aims to expand the scope of the personal information that must be provided to the ACA for the effective and correct management of the water fee, within the framework of that provided for in article 93 of Law 58/2003, of December 17, general taxation (LGT).

According to the General Report, the Proposal aims to be included "in a text with the rank of law that the ACA can request personal data that is required in the technical prescriptions and in the tax models that are approved by resolution of the management of the ACA, and this data declared by the supplying entities can be used to establish the existence of a tax relationship, as well as to facilitate the application of taxes, for statistical purposes, for the preparation of tax regulations ."

III

In accordance with Regulation (EU) 2016/679, of April 27, general data protection (RGPD), treatment means "any operation or set of operations carried out on personal data or sets of personal data, whether by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, suppression or destruction" (article 4.2)).

The RGPD establishes that all processing of personal data must be lawful (Article 5.1.a)) and, in this sense, establishes a system of legitimizing the processing of data that is based on the need for one of the legal bases to be met established in its article 6.

Article 6.1 of the RGPD establishes that there must be a basis that legitimizes the treatment, either the consent of the affected person (art. 6.1.a)), or any of the other circumstances provided for, such as, among others, that "the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment" (art. 6.1.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 controller" (art. 6.1.e)).

To this it should be added that, according to article 6.3 RGPD, the basis of the treatment indicated in article 6.1, letters c) and e), must be established by European Union Law (art. 6.3.a)) , or by the law of the Member States that applies to the data controller (art. 6.3.b)).

The referral to the legitimate basis established in accordance with the internal law of the member states referred to in article 6.3 of the RGPD requires, in the case of the Spanish State, that the development rule, to be a fundamental right, has the status of law (Article 53 EC), and as specified in Article 8 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD).

The Proposal presented in the report seems to have the vocation to be the "legal basis" that should legitimize the flow of information in relation to the effective and correct management of the water canon by the ACA.

At this point it should be noted that the RGPD itself establishes the requirements for this "legal basis", in the aforementioned article 6.3 in fine, according to which:

> **"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."**

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 finally).

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, of 1.10.2008, among others).

In other words, the measure established by law must respond to a legitimate purpose in a democratic society, must be proportionate and must also be "accessible" and "predictable", in the sense that the affected citizens can understand the scope of the limitation of the right.

It is in this context that it is necessary to examine, below, the text of the Proposal that is submitted to report

IV

According to the General Report, "the purpose of the proposed measure is that, in any case, the personal data collected and required by the ACA in the exercise of its tax functions are treated lawfully, loyally and transparently in relation with the interested party", which is why "it is considered appropriate that a rule with the rank of Law foresees what treatment will be given to tax data that is personal. And what tax data requirements with personal content, can the ACA carry out."

At the outset, it must be positively assessed that the Proposal envisages specifying in a standard (in this case, with the rank of law), the information flow that must occur in relation to the water canon, with the aim of carry out lawful, fair and transparent treatment (art. 5.1.a) RGPD), of the data of those affected.

However, having said that, it is appropriate to refer first to section 1 of the additional provision of the Proposal, according to which: "1. the Agència Catalana de l'Aigua collects and processes personal data within the framework of tax powers, without the consent of the person affected by the communication of this data being necessary for the purposes of establishing the existence of "a tax relationship with the people who use water, as well as to facilitate the application and verification of the taxes it manages."

This first section is formulated in very broad terms, which do not seem to refer solely to the tax that concerns us (the water canon), but refers in general terms to "the application and verification of the taxes managed by " the ACA.

According to article 7.1 of DL 3/2003, the ACA is the authority that exercises the competences of the Generalitat of Catalonia in matters of water and hydraulic works (art. 4 DL 3/2003), and article 8.2 of DL 3/2003 specifies the functions that correspond to the ACA as the Hydraulic Administration of the Generalitat of Catalonia, in the exercise of its tax functions, which cover different taxes.

This entity would also have tax functions with respect to the canon of use and occupation of the hydraulic public domain (art. 80 DL 3/2003), the regulation canon that applies to users who benefit directly from the regulation of reservoirs (art. 78 DL 3/2003), and also in relation to the different rates that may be provided for in the regulations. All these fees and charges are taxes managed by the ACA, among other financial resources at its disposal.

As has been said, it is clear from the Memoirs that accompany the Proposal that the objective of this is to clarify the information that the ACA can collect, specifically, from the supply companies, in relation to the management of the fee water (art. 13.a) DL 3/2013), without reference, in the available documentation, to obtaining information in relation to other taxes. Thus, the purpose of the proposal is to expand the personal information that must be provided to the ACA, "for the effective and correct management of the water fee, within the framework of what is foreseen in article 93 of the General Tax Law", without reference being made, in the said Reports or in the Proposal, to the fact that the planned information flow must refer to the management of other taxes that also correspond to the ACA.

We note that the Impact Assessment Report highlights that this Authority analyzed the data requirement of the ACA to the supply entities in relation specifically to the water rate, specifically, in Opinions 2/ 2018 and 21/2018, to which we refer.

In summary, the aforementioned Opinions analyzed from the perspective of data protection, the requirements that the ACA formulates to the supply entities for the management of the water fee, with the aim of obtaining information from subscribers, based on the provisions of article 93 of the LGT. Specifically, the ACA requested companies to communicate the subscriber's name and NIF; supply address; policy number; counter number; as well as the UTM coordinates.

The Impact Assessment Report highlights the need to "have an adequate legal framework to require the personal data of the subscribers (of the taxpayers of the water fee) with clear tax implications for the supplying entities, and to be able to process

always for fiscal purposes of this data without the need to require the consent of the affected persons and with individualized requirements."

For all this, the first section of the proposed additional provision should better specify its purpose.

In this case, the following wording is proposed for section 1 of the twenty-ninth additional provision that would be added to DL 3/2003:

"1. the Catalan Water Agency collects and processes personal data within the framework of tax powers in relation to the water rate, without the consent of the person affected by the communication of this data being necessary by the supply companies for the purposes of establishing the existence of a tax relationship with the people who use water, as well as to facilitate the application and verification of this tax."

v

Having said that, section 2 of the additional provision of the Proposal refers, specifically, to the flow of information between the supply companies and the ACA, with the following wording:

"2. In order to fulfill these purposes, the water supply entities that, as taxpayers must declare and enter or pass on the fee, must communicate to the ACA the necessary data, included in the technical prescriptions and in the tax models that are approved by resolution of the ACA Management. They must also communicate the data that the ACA requires, despite not being included in the models, among others, those that are linked to the physical situation of the measuring devices or the activity that involves the use of the "water, including its geolocation through UTM coordinates or other means that allow its correct identification."

Taking into account the considerations that have been made in this report, it is necessary to positively assess the will of the examined Proposal in the sense of making explicit, in this second section, that the supplying entities would be obliged to provide information to the ACA, in relation to the water canon.

In this sense, the Proposal specifies, on the one hand, the transferors obliged to provide the information (the supply entities), and on the other, those affected (for the purposes that interest, natural persons who are end users), which contributes to those affected knowing that data communication will occur.

Having said that, it is expected that the information will be specified later, through "technical prescriptions or tax models". The additional provision adds that, in addition to the information that can be foreseen in these instruments, the companies will have to provide data that would not be included in these models, among others, data on geolocation.

According to section 3.3 of the Impact Assessment Report: "the verification and effective collection of the tax is often required to have the data to confirm and calculate taxable bases declared or not, elements determining the tax (reducing coefficient on the rate of general levy...) geolocation point, and others."

Thus, for the purposes of concreteness and the certainty that the rule must give to those affected, it must be positively assessed that it has been made explicit in the additional provision that the ACA may demand fro

supply companies the communication of the necessary geolocation data (UTM coordinates).

For all this the following are done,

Conclusions

Having examined the Proposal presented by the Department of the Vice-Presidency and of the Economy and Finance, to be included in the Draft Law on fiscal measures for 2020 (M-185.1), it is considered adequate to the forecasts established in the regulations on data protection of a personal nature, as long as the considerations made in Legal Basis IV of this report are taken into account.

Barcelona, December 4, 2019