PD 18/2019

Report in relation to the public consultation prior to the preparation of the draft law on the procedure for the preparation of rules of the Government of the Generalitat

Background

The Administration of the Generalitat has launched a public consultation prior to the reform of the procedure for drawing up rules of the Government of the Generalitat, in accordance with article 133 of Law 39/2015, of 1 October, of the common administrative procedure of public administrations.

It is intended to regulate in a draft law, in a unified way, the procedure for drawing up regulations and legislative initiatives, in order to update them to the changes introduced to the state regulations of the common administrative procedure and of the bases of the legal regime of public administrations, as well as transparency regulations.

At the same time, it is intended to revise the current procedure to simplify it and make it more adaptable to electronic processing. In the design of this procedure, the elements relating to the improvement of regulatory quality will be strengthened, the assessment of regulatory impact will be strengthened and the various participation mechanisms (prior public consultation, audience and public information) will be regulated and their exceptions

Finally, the need to foresee more flexible specific procedures: emergency procedure, procedure for consolidation of rules and procedures to facilitate the approval of regulatory experiments or pilot projects.

For the purposes of being able to express an opinion or make a statement about this public consultation, through the Participa Portal (https://participa.gencat.cat) it is made available to citizens and the most representative organizations potentially affected for the future standard the following documentation:

- **Preliminary report on the draft law on the drafting procedure of rules.**
- **Dossier on the main novelties in relation to the preparation procedure of rules.**
- **Infographic on the procedure for drawing up rules.**

Having examined the aforementioned documentation, taking into account the current applicable regulations, and in accordance with the report of the Legal Counsel, I issue the following legal considerations.

I. On the regulatory impact assessment

Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia, introduced, as a central tool of the regulatory improvement policy that facilitates evidence-based decision-making, regulatory impact assessment.

In this sense, article 64.3 regulates the content of the impact assessment report that must accompany the draft regulatory provisions and establishes the minimum content.

This evaluation report on the impact of the proposed measure, in accordance with Law 13/2008, of November 5, of the presidency of the Generalitat of Catalonia and the government, must also accompany the draft laws (article 36.3, in its wording given by the third final provision of Law 26/2010) and the legislative decree projects (article 37.2) drawn up by the Government.

The Administration of the Generalitat raises the need to improve the effectiveness of this mechanism, with the aim of achieving that the necessity of the rules is assessed before starting their processing, being, therefore, necessary that the report includes an analysis and comparison of possible alternatives and is not limited solely to justifying an option already adopt

The Authority shares this opinion and, from the side of the right to data protection, it is proposed that the future regulation of the procedure for drawing up regulations and legislative initiatives incorporate the obligation to carry out in certain cases that have a major impact on the right to data protection, as part of this assessment, a data protection impact assessment.

This measure is expressly provided for in article 35 of Regulation (EU) 2016/679 of the Parliament and of the Council, of April 27, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of this data and which repeals Directive 95/46/CE (hereinafter, RGPD) for certain cases that involve a "high risk to the rights and freedoms of natural persons".

It consists of carrying out an assessment of the impact that this measure may have on the privacy of the people affected, analyzing its legality, necessity and proportionality, foreseeable risks and measures to mitigate them, while at the same time it requires an analysis of the different alternatives available to achieve the objective pursued, so that one can opt for the one that offers more guarantees for people's rights.

It must be taken into account that the RGPD foresees the impact assessment as an instrument, of a mandatory nature, to be carried out by the person responsible for the treatment before starting activities that entail a processing of personal data that entails a high risk This means that if a certain law provides for certain high-risk treatments, each person responsible for the treatment should carry out this impact assessment on their own.

However, it should be noted that, in order to facilitate compliance with this obligation, article 35.10 of the RGPD provides that if a privacy impact assessment is carried out in the procedure for approving the rule then it will not be necessary for each person in charge of the treatment to carry it out when they want to start the data processing activity that derives from it. Hence the importance that it is foreseen as part of the procedure for drawing up rules that entail a high risk for people's rights and freedoms.

Pes can steal more information on this issue in the Practical Guide on impact assessment related to data protection, available on the website of this Authority.

II. On mandatory reports and the efficiency of the preparation procedure rules

The Administration of the Generalitat questions, in terms of efficiency, part of the mandatory reports of the current processing of the procedure for drawing up the rules. He maintains, in this sense, the need to check if they still fulfill the purpose for which they were intended.

Focusing on the area of personal data protection, Law 32/2010, of October 1, of the Catalan Data Protection Authority, provides that it is up to this Authority to issue a report, with a mandatory nature , on the provisions affecting the protection of personal data (article 5.1.m)).

Article 8.2.f) of this Law states that it is the function of the director of the Authority to issue a report, with a mandatory nature, of the draft laws, of the drafts of regulatory provisions that the Government prepares by virtue of a delegation legislative and draft regulations or provisions of a general nature that affect the protection of personal data.

The RGPD affects the need for this report from the control authority in the adoption of any legislative or regulatory measure that provides for the processing of personal data.

Thus, article 36.4 of the RGPD states that "Member States will guarantee that the control authority is consulted during the preparation of any proposed legislative measure to be adopted by a national Parliament, or of a regulatory measure based on said legislative measure, which refers to the treatment."

The intended purpose of the "consultation" with the control authority in this area is none other than to guarantee the conformity of the treatment provided for in the legislative or regulatory measure that is intended to be adopted in the RGPD and, in our case, also in the Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights, and, in particular, to mitigate the risk involved in the processing of the perso

As we have seen, the obligation to request this report is already foreseen not only in Law 32/2010, but also in the RGPD. However, for systematic purposes and clarity for the recipients of the rule, it would be good if the future regulation of the procedure for drawing up regulations and legislative initiatives incorporates a provision that contemplates that in the drawing up process of any proposal for a legislative measure to be adopted by the Parliament of Catalonia or a regulatory measure based on this legislative measure, which affects the protection of personal data, it is necessary to submit said proposal to a report by the Catalan Data Protection Authority .

III. On the improvement of participation processes in the elaboration of the rules

Citizen participation in the rule-making procedure has traditionally been based on hearing and public information procedures, which presuppose participation in an advanced phase of rule-making (articles 67 and 68 Law 26/2010, in relation to the regulatory provisions, and article 36.4 Law 13/2008, in relation to the legislative initiative).

Law 19/2014, of December 29, on transparency, access to public information and good governance (LTC), has introduced an optional procedure for citizen participation in the drafting of rules (article 69) from the beginning of the processing of its preparation procedure. It has also provided for the participation of interest groups (Article 47).

At the same time, Law 39/2015 has provided for a new public consultation procedure prior to the elaboration of future rules with the rank of law and regulatory provisions (article 133).

The Administration of the Generalitat considers it necessary to adequately articulate the various participatory procedures in the future regulation of the procedure for drawing up regulations and legislative initiatives, in order to ensure their effectiveness, openness and intensity that in each case it corresponds. To this end, the aim is to influence the use of electronic media and ensure that citizens' contributions are more transparent and consultable.

With regard, specifically, to the objective of making citizens' contributions more transparent, it is necessary to recall the considerations made by this Authority in the PD 13/2019 report on the draft Decree approving the Regulation of partial development of Law 19/2014, specifically, in FJ VIII, which is partially reproduced below:

> **"Article 16 on publicity of the regulatory procedures currently being developed, provides in section 2 that for the purposes of letter d) of article 10.1 of Law 19/2014, of December 29, it has to publish, among others, "the text or document of the contributions received" in the phases of prior consultation (letter a) and participatory citizen consultation (letter c), as well as the "allegations made" in phase d audience and public information (letter d).**
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> **Section 3 adds that "The procedures relating to citizen participation, referred to in letters a), c) and d) of the first section of this article, must be accessible from the Portal de la Transparència de Catalunya. The information relating to the intervention or participation in the rule-making procedure of people who, in accordance with the applicable regulations, have the status of an interest group, if applicable, must be published in order to be able to know the identity of the interest group, the date of their participation, contact or influence, and a description of the terms or contents of their contributions and contributions to the text of the standard and the corresponding assessment."**
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> **Point out that beyond the disclosure of the identity of natural persons who are considered interest groups for the purposes of article 47 of the LTC, and other applicable regulations, the disclosure of the rest of the information personnel that may appear in the contributions or allegations presented (whether referring to the citizens or holders of rights and legitimate interests who present them or referring to other people who may be identified in the documents), does not seem to be justified. The disclosure of said information may affect to a greater or lesser degree the privacy of these people (depending on the detail of information they can provide) and may even go against the very purpose of the hearing or public consultation process , given that the degree of participation will predictably be greater if the prospects for privacy (non-identification of who has made the allegations) are greater. In reality, the LTC article only refers to "the relationship and assessment of documents originating" in public information and participation processes. What may be relevant in this case is knowing the content of the contributions or allegations made, but this interest can also be satisfied without the need to sacrifice the privacy of the people who participate, and therefore their disclosure could be contrary to the principle of minimization.**

In order to clarify this point, it is proposed to add a second paragraph to section 3 with the following wording:

"Without prejudice to the identification of the interest groups, the publication of this information must be done prior to the anonymization of the information on natural persons."

(...).”

From the aspect of data protection, make clear the need, in the articulation of this citizen participation, to respect the right to the protection of personal data of the participants, in particular, to comply with the principles of transparency in relation to the affected (Article 5.1.a) RGPD), data minimization (Article 5.1.c) RGPD) and data integrity and confidentiality (Article 5.1.f) RGPD).

For this reason, it is proposed that the future regulation of the procedure for drawing up regulations and legislative initiatives:

a) Incorporate the right to the protection of personal data as a general principle in which to base citizen participation in this area of action.

b) Provide that the publication of the contributions received by citizens through any of the means of participation that we have referred to must not lead to the dissemination of personal data of the participants, beyond the identification of interest groups, except that the consent of the author is counted with regard to the disclosure of his identity. That is to say, that the author should be able to decide if he wants his identity to be made public, but in the absence of a statement in one sense or another, the criterion to be applied by default should be non-publication (art. 25.2 RGPD).

IV. On the right to propose regulatory initiatives

Law 1/2006, of 16 February, on the popular legislative initiative, regulates the possibility that, as an instrument of citizen participation, a promotion committee may present a legislative project on behalf of the signatories of the initiative.

Article 70 of the LTC, for its part, recognizes the right to present to the Public Administration proposals for normative initiatives of a regulatory nature.

From the side of data protection, it is necessary to influence the respect for the right to the protection of the data of legitimate persons in order to promote this type of initiative throughout its processing.

In this sense, the proposal contained in the previous section regarding the future regulation of the procedure for drawing up regulations and legislative initiatives of the Government should also be extended to this aspect, incorporating the right to data protection as a principle general on which the regulatory initiative for citizens must be based.

Beyond this, it should be noted that there are three aspects that should be particularly emphasized:

a) Transparency for the people affected: in other words, the people who sign an initiative of this type must be able to know clearly, before signing it, what will be the treatment of their personal data.

b) The data collected must be only the minimum and indispensable for the purpose pursued. c) The limitation of access to the identity of people who have supported an initiative to those people who need access to it for the exercise of their functions during parliamentary processing.

d) Provision for the destruction of this data once the processing has been completed.

Barcelona, December 20, 2019