CNS 4/2020

Opinion in relation to the consultation of the data protection representative of a public university on the deletion of the data of minors used in the framework of a research project

A letter from the data protection representative of a public university (hereafter, the DPD) is presented to the Catalan Data Protection Authority in which he asks whether, following the errors detected in the execution of a project research, the university must ex officio delete the set of personal data used to carry out the project. It also raises whether the Association of Mothers and Fathers of Students (henceforth, the AMPA) of one of the educational centers participating in the project is legitimate to request the deletion of the

Having analyzed the request and seen the report of the Legal Counsel, the following is ruled.

I

(...)

II

The DPD states in its consultation that, following the news published in the digital press about the collection of ideological data from minors in educational centers owned by the Department of Education as part of a research project carried out by teaching staff and researcher of the university, said university initiated a series of actions to detect possible errors in the treatment of this data, in order, if necessary, to adopt the appropriate measures to adequately protect the rights and freedoms of the minors affected .

He maintains that, as a result of these actions, important errors have been detected such as, among others, a non-existent basic training policy on data protection for University researchers; a lack of effective supervision by the university of the project before starting its execution; providing students with incomplete information about the processing of their data: failure to implement adequate security measures; or the lack of a risk analysis and impact assessment of the intended treatment term

This, he points out, has led to the approval by the university of a new Action Protocol detailing the appropriate guidelines for future action in the project, in order to guarantee the correct treatment of minors' data and compliance of the data protection regulations.

The DPD also states in its consultation that the Department of Education has requested the university to delete all the personal information processed in carrying out the aforementioned research project regarding a certain participating educational center, given that would have requested the AMPA of this center.

In light of this request, as well as the errors detected by the university itself, the DPD poses two questions to this Authority:

1) Whether the university must ex officio delete the personal data of minors processed for the realization of the research project and, if so, what should be the scope of this action. In this regard, it proposes three possible scenarios:

- The deletion of all processed personal data.
- The deletion only of data relating to minors under the age of 14 who have been able to treat each other.
- The deletion of only those data that are considered essential after weighing up the protection of the minor's rights and the impact of the deletion of their data on the results of the research project.

2) If the AMPA can request the deletion of the data in the terms set out above, or it would correspond to each person affected or, where appropriate, to the holders of parental authority, to request said deletion.

In order to provide an adequate answer to the questions raised, which we refer to in the following sections of this opinion, it is considered necessary to examine beforehand the lawfulness of the data processing carried out by the university's team of researchers.

Clarifying, in this respect, that this opinion is not intended to determine eventual responsibilities for the facts described in the consultation, but only to set out the applicable legal regime and the appropriate legal considerations in relation to the problem raised, but without analyzing the specific circumstances, nor the authorship, nor the qualification of the facts described and therefore without prejudging the outcome of any investigations, given that it is carried out based only on the information provided by the university in its consultation.

The determination of the responsibilities derived from the events described will be determined, if applicable, through the corresponding sanctioning procedure, which will have to be processed in accordance with the established procedure and respecting all the guarantees legally required for the people involved.

Regarding this, please note, as indicated in the consultation, that this Authority has already opened ex officio a preliminary information phase (no. IP 309/2019), in order to know the circumstances of the specific case and the convenience or not to initiate the sanctioning procedure. Also agreeing that sixteen complaints have been submitted to this Authority regarding the aforemen

III

The research project carried out by the university's research staff ("Acculturation and linguistic acculturation of the descendants of migrants. Challenges and potential for language learning and linguistic and socio-educational inclusion") aims, according to DPD statements , “afavorir la incorporació, en condicions d'igualtat, en la societat espanyola en general, i en la catalana en particular, dels descendents de persones immigrades”.

With the Project, he maintains, it is intended to "analyze the particular case of the descendants of Romanians and Moroccans who are in the last stage of Compulsory Secondary Education", specifically, "their acculturation and linguistic acculturation guidelines, and the interrelation that is established with linguistic performance and the degree of linguistic and socio-educational inclusion".

He points out that for the study of these issues, the "segmented assimilation theory" or "acculturation theory" is followed, in which "both self-identifications and linguistic issues are key indicators to grasp the degree of social and educational inclusion of the descendants of migrants".

Therefore, following this research method, the team of researchers addressed to the participating educational centers two survey models (one for students of foreign origin and the other for the rest of the students) that they include, in both cases, "questions that may reveal the ideology or the ethnic or racial origin of the students". Es tracta, en concret, de "preguntes d'identificació personal amb la cultura i llengua catalanes i espanyoles, o fins i tot amb el "moviment independentista"; preguntes sobre "sentir-se" català o espanyol; or if it is "more important to learn English or French than Catalan"; or if "Castilian is a beautiful language", among many others." He adds, right after, that at the end of the surveys he asks "about the specific religion that is professed and the degree of religious practice, if applicable." In addition, it appears that the group of researchers asked the tutor responsible for the surveyed students to carry out a "small assessment of each one of them".

He points out that the data obtained from these surveys and from the evaluation of the teachers are entered into a computer program that allows the researchers to extract final results of a statistical type and in an anonymized way. It seems that, based on these results, the group of researchers intended to carry out a series of interviews with "those people (native, Romanian or Moroccan) whose surveys reveal results of special scientific significance". in addition to other activities, such as discussion groups with student groups and interviews with teaching staff. These interviews and other activities would not have been carried out, however, following the suspension of the research project.

We would therefore be faced with the treatment of special categories of personal data relating to minors, this is data that, by their nature, are particularly sensitive in relation to fundamental rights and freedoms, so they deserve special protection, and, at the same time, I respect a group that, by application of the legal principle of the best interests of the minor, also deserve special protection.

In addition, it must be taken into account that this treatment of specially protected data would have been carried out in such a way that the minors affected are fully identifiable, given that, according to DPD statements, the students stated in the aforementioned surveys (specifically, on the first page) their first and last name.

Article 4.1 of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereafter, RGPD), defines personal data as "all information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person."

It must, therefore, be taken into account that the processing of the data of the students surveyed for purposes related to the research project described is subject to the legislation on the protection of personal data.

IV

The RGPD establishes that all processing of personal data must be lawful, fair and transparent (Article 5.1.a)).

Article 6.1 of the RGPD regulates the legal bases on which the processing of personal data can be based, in the following terms:

"1. The treatment will only be lawful if at least one of the following conditions is met:

a) the interested party gives his consent for the treatment of his personal data for one or several specific purposes; b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures; c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment; d) the treatment is necessary to protect the vital interests of the interested party or another natural person; e) 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 the treatment; f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child.

The provisions in letter f) of the first paragraph shall not apply to the processing carried out by public authorities in the exercise of their functions."

Point out, at this point, that these legal bases do not maintain any relationship of priority or precedence. Therefore, it must be taken into consideration that the processing of personal data must have, to be lawful, a legal basis, which can be the consent of the persons affected or any other of the legal bases indicated in this article 6.1 of the 'RGPD.

This is clear from Recital 40 of the RGPD establishing that "for the treatment to be lawful, personal data must be processed with the consent of the interested party or on some other legitimate basis established in accordance with law, either in the present Regulation or by virtue of another law of the Union or of the Member States to which the present Regulation refers, including the need to fulfill the legal obligation applicable to the person responsible for treatment or the need to execute a contract in which the interested party is a party or in order to take measures at the request of the interested party prior to the conclusion of a contract."

Make it clear that the choice of the legal basis on which to base a certain data treatment must always be carried out before starting the treatment, taking into account the purpose to which it will respond. This follows from the obligation to inform the affected person about, among other aspects, the legal basis used by the data controller at the time of data collection (Article 13.1.c) RGPD).

In the present case, there is no information clause that the group of researchers would have provided to the students at the time of handing them the surveys. Despite this, taking into account that in the consultation it is pointed out that "students sign an informed consent", it seems that the processing of these students' data would have been articulated on the basis of the consent of those affected.

v

It must be taken into consideration that consent can only be an adequate legal basis if it meets the characteristics established in article 4.11) of the RGPD, that is to say, the consent of the affected person must be informed, free, specific and it must be granted through a manifestation that shows the will of the affected person to consent or through a clear affirmative action. In addition, when the treatment affects special categories of data, as happens in the present case, the consent must be explicit (Article 9.2.a) RGPD).

It is worth remembering, at this point, that it is up to the person in charge, when he intends to base the processing of data on the basis of consent, to evaluate whether this consent will bring togethe

the requirements to consider it valid. Otherwise, the consent cannot be considered a valid legal basis, so the data processing will become illegal.

It should also be taken into consideration that, when the data processing refers to minors, as is the case in the present case, it can only be based on their consent when these persons are over 14 years of age. This, except in the cases in which the law requires the assistance of the holders of parental or guardianship to carry out the legal act or business in the context of which consent for the treatment is requested (article 7.1 LOPDGDD).

In the event that these persons are under 14 years of age, the processing of data based on their consent will only be lawful if the consent of the holder of parental or guardianship is also included, with the scope determined by him (Article 7.2 LOPDGDD) .

The DPD itself acknowledges in its consultation that some of the students affected were not 14 years old at the time they carried out the surveys and that authorization was not required from the respective parents or legal guardians of the students.

In this case, it is clear that the person in charge must proceed ex officio to delete the personal data they have of these students under 14 years of age, as it is an illegal data processing, in accordance with the mentioned article 7.2 of the LOPDGDD.

Regarding the rest of the students affected, it should be noted that, in view of the statements made by the DPD in the consultation, it is questionable that the consent given by minors over 14 years of age for the processing of their data in connection with the execution of the present research project can be considered a valid consent.

Remember that it is in any case the responsibility of the person in charge of the treatment to demonstrate that they have the valid consent of the affected person (article 7.1 RGPD), when this is the legal basis used.

As has been said, the consent of the affected person must be informed, under the terms of the RGPD. It must be taken into account that the requirement of transparency constitutes one of the fundamental principles in data processing, closely related to the principles of loyalty and lawfulness of processing (Article 5.1.a) RGPD). Providing information to those affected, before obtaining their consent, is essential so that they can understand what they are really cons

Article 13 of the RGPD determines the information that the data controller must provide to the data subject when the data is obtained from him.

In order to facilitate this compliance, the LOPDGDD (article 11) has provided for the possibility of giving the affected person this information by layers or levels. This method consists in presenting "basic" information (summary information) at a first level, so that you can have a general knowledge of the treatment, indicating an electronic address or other means where it can be accessed easily and immediately to the rest of the information, and, at a second level, offer the rest of the additional information (detailed information).

When opting for this route, said "basic" information must include the identity of the person in charge of the treatment, the purpose of the treatment and the possibility of exercising the habeas data rights established in articles 15 to 22 of the RGPD, as well such as, where appropriate, the fact that the data will be used for profiling (article 11.2 LOPDGDD).

In accordance with Recital 42 of the RGPD, in order to consider that the consent is informed, it is necessary to communicate to the affected "at least the identity of the person responsible for the treatment and the purposes of the treatment to which the data are intended personal".

This does not mean, however, that, taking into account the circumstances and the context in which a certain treatment is carried out, it is not necessary to give more information to the affected person so that he really understands the data treatment that will take place and the consent can be considered valid. In this regard, the Article 29 Working Group pronounces itself in its document "Guidelines on consent within the meaning of Regulation (EU) 2016/679" (section 3.3.1), a criterion shared by this Authority.

In a case such as the one under consideration, taking into account the nature of the personal information that was intended to be processed (special categories), the public to whom the information was addressed (minors) and the manner in which it was intended carry out the processing of the data (identifying the data subjects), it seems clear that it was necessary to give the data subjects more detailed information about the processing of their data.

In the consultation it is pointed out that the information contained in writing and which, it is understood, would have been given to those affected, does not include all the content required by the data protection regulations. Also that the group of researchers contacted the different participating educational centers to "offer them the possibility of expanding the information in writing and even, if the centers considered it appropriate, to provide them with an informative letter specifically addressed to the parents of the students in the centers" and that "only three agreed to make use of the additional information offered by the group".

Warn, regarding this action, that the obligation to inform those affected and to demonstrate compliance falls on the person responsible for the treatment, so it was not up to the educational centers to decide whether they wanted to have this additional information to facilitate to those affected.

In any case, it must be borne in mind that, in consideration of the group affected, the information had to be provided in clear and simple language, in such a way that those affected could easily identify who is responsible, the intended purpose and understand what is it that they were authorizing.

It is pointed out in the consultation that, beyond the "informed consent" contained in the surveys, additional explanations have been given in the classrooms for the correct understanding of the content and purpose of these, and that, in this sense, reference was expressly made to "the voluntary, anonymous and confidential nature of the responses."

It does not seem, however, that the intended objective of transparency, despite said explanations, had been achieved in the present case in a satisfactory manner.

It has also been warned that the consent of the affected person, to be considered valid, must be free, understanding, in this sense, that the affected person must have a capacity for real choice and control.

The RGPD provides, as a general rule, that if the affected person is not really free to choose, feels obliged to give his consent or suffers negative consequences if he does not give it, this consent cannot be considered valid (consideration 42). Nor can it be considered valid if there is an obvious imbalance between the person affected and the person responsible (recital 43).

In any case, when assessing whether consent has been given freely, it is necessary to take into account the context in which it is requested. Any inappropriate influence or pressure exerted on the interested party (which can manifest itself in very different ways) that prevents him from freely exercising his will would invalidate the consent granted.

In the consultation, it is pointed out that the students' participation in the project "is voluntary" and that, in those cases in which the students refused to participate, "the teaching staff

they assigned alternative academic tasks, while classmates answered the survey".

Despite this, it cannot be ignored that the student surveys were carried out in the corresponding educational center (mainly, during the hours that each center allocates to tutoring) and always in the presence of the responsible teaching staff.

Taking into account the dynamics of the school environment and, especially, that the teacher-student relationship, although it could not be described as hierarchical in the strict sense, nor does it seem that it can be considered a relationship between equals, it can hardly be sustained that, in a case like the one examined, we are facing a consent freely granted by the students. It does not seem reasonable to think that the presence of the teachers in the classroom at the time of granting said consent, bearing in mind that they are minors, did not exert any type of influence on the students' decision regarding the their participation in the research project and that in a certain way they did not feel obliged to answer said surveys, which, remember, referred to extremely sensitive issues.

In addition to all this, it is necessary to bear in mind the provisions established in the LOPDGDD regarding consent as a legal basis for the treatment of special categories of data.

Article 9.1 of the LOPDGDD provides that:

> **"1. Pursuant to article 9.2.a) of Regulation (EU) 2016/679, in order to avoid discriminatory situations, the consent of the data subject alone will not be sufficient to lift the ban on the processing of data whose main purpose is to identify their ideology, trade union affiliation , religion, sexual orientation, beliefs or racial or ethnic origin.**
>
> **The provisions of the previous paragraph will not prevent the processing of said data under the remaining assumptions contemplated in article 9.2 of Regulation (EU) 2016/679, when applicable."**

In the present case, there is no evidence, from the information provided to make this opinion, that, as a result of the data processing carried out by the university's group of researchers, discriminatory situations have taken place towards the students participating in the project

But, even so, in attention to the personal information processed and the best interests of the minor enshrined in article 2 of the Organic Law 1/1996, of January 15, on the legal protection of the minor, of partial modification of the Code Civil and of the Law of Civil Procedure, which must preside over all actions related to minors, the consent of those affected in a case such as the one examined could not be considered sufficient to lift the prohibition of dealing with special categories of data established in article 9.1 of the RGPD.

For all of this, it can be concluded that we would be facing an invalid consent, under the terms of the RGPD, and, consequently, that the data processing carried out by the university's group of researchers regarding students over 14 years old in the framework of the research project was also conducted unlawfully.

Article 5.2 of the RGPD provides that "the person responsible for the treatment will be responsible for compliance with the provisions in section 1 and capable of demonstrating it ("proactive responsibility")."

By virtue of this principle of proactive responsibility, which requires the person in charge of the treatment to have a conscious, diligent and proactive attitude in relation to all the processing of personal data carried out, it is not possible to guarantee (or demonstrate) that the treatment of minors' data for scientific research purposes complies with data protection regulations,

in case of not having a valid legal basis (invalid consent), among other issues (some pointed out in the same consultation), it would be necessary for the university's group of researchers to proceed ex officio with the deletion of all data personal data of minors employed in carrying out said surveys as part of the research project.

VI

At this point, it is appropriate to make some considerations in relation to the possible existence of another legal basis that could legitimize the data processing carried out, as indicated in the consultation.

At the outset, it should be remembered that the determination of the legal basis on which to base a certain data processing must always be carried out in advance of the start of the processing operations, given that it is necessary to inform those affected by this basis at the time of collection of your data (Article 13.1.c) RGPD).

It should be borne in mind that the choice of this legal basis will determine the regime applicable to the treatment in question, therefore, if the person in charge decides to base the treatment on consent, he must be prepared to respect this option. Thus, for example, you must bear in mind that, in the event that the affected person withdraws his consent, he will have to stop processing his data or that, in the event of subsequent problems with the validity of the consent granted by him, he will not be able retrospectively resort to another legal basis in order to justify the treatment in question.

On the other hand, it must be borne in mind that informing those affected that the processing of their data is based on consent when, in reality, another legal basis of which they are not aware is used, would constitute an unfair action towards those affected .

In the present case, as we have seen, the data processing would have been articulated on the basis of the consent of those affected and thus, due to the information available, those affected would have been informed. It would not be possible, therefore, to go, once problems have been detected in the validity of the consent granted by the surveyed students, to another legal basis to justify this treatment, as is intended in this case, in view of the manifestations made by the DPD in the query

But, even in the event that the affected parties had been informed of another legal basis as the basis for data processing, it should be noted that we could not consider the intended data processing enabled in the present case either.

As we have seen, in order to consider the processing of personal data lawful, it is necessary that one of the legal bases established in article 6.1 of the GDPR, which does not necessarily have to be the consent of those affected (section a)).

For a case like the one proposed, in which the data processing is carried out by research staff of a public university, the legal basis of article 6.1.e) of the RGPD is of interest, according to which the processing will be lawful if "it 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 the treatment".

Article 6.3 of the RGPD establishes that the basis of the treatment indicated in this article 6.1.e) must be established by the Law of the European Union or by the law of the Member States that applies to the person responsible for the treatment.

The reference to the legitimate basis established in accordance with the internal law of the Member States referred to in this article requires that the rule of development, when dealing with the protection

of personal data of a fundamental right, has the status of law (Article 53 CE), as Article 8 of the LOPDGDD, already cited, has come to recognize.

In this sense, it should be borne in mind that Organic Law 6/2001, of December 21, on Universities (hereinafter, LOU), considers research and investigation activity as an essential function of universities (and, in terms similar, Law 1/2003, of 19 February, on universities in Catalonia). Specifically, article 39.1 of the LOU provides that:

> **"Scientific research is the essential foundation of teaching and a primary tool for social development through the transfer of its results to society. As such, it constitutes an essential function of the university, which derives from its key role in the generation of knowledge and its ability to stimulate and generate critical thinking, key to any scientific process."**

So, to the extent that it was a public interest mission attributed to a public university, the legal basis of article 6.1.e) of the RGPD could legitimize the processing of data by its research staff entity when this treatment responds to scientific research purposes.

Alternatively, that is to say, for those cases in which the legal basis of article 6.1.e) of the RGPD did not apply, it would be possible, in view of the provisions of the LOU and, as we shall see, of Law 14/2011, of June 1, on Science, Technology and Innovation, base this type of treatment for the purposes of scientific research on the legal basis of article 6.1.f) of the RGPD, relating to the "satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child."

The application of this legal basis will, in any case, require a prior weighting of conflicting interests.

Regarding this, recital 47 of the RGPD points out that "the legitimate interest of a person responsible for the treatment, including that of a person responsible to whom personal data can be communicated, or of a third party, can constitute a legal basis for the treatment, always that the interests or rights and freedoms of the interested party do not prevail, taking into account the reasonable expectations of the interested parties based on their relationship with the person in charge. (…). In any case, the existence of a legitimate interest would require a meticulous evaluation, including whether an interested party can reasonably foresee, at the time and in the context of the collection of personal data, that the treatment for that purpose may occur. (...

It should be noted that the term "scientific research" is not defined in the RGPD. Recital 159 only states that "the processing of personal data for the purposes of scientific research must be interpreted, for the purposes of this Regulation, in a broad way that includes, for example, the development and demonstration of technologies , fundamental research, applied research and research funded by the private sector. In addition, it must take into account the objective of the Union established in Article 179, paragraph 1, of the TFEU, to constitute a European research area. The purposes of scientific research must also include studies carried out in the public interest in the field of public health. (...)."

Given this, for the determination of the scientific purpose of a certain research project, it will be necessary to attend to the internal legislation of the states that is applicable in each case. In the case at hand, in particular, the provisions of Law 14/2011, of June 1, on Science, Technology and Innovation, and their respective development provisions, as well as the autonomous regulations in this matter

In accordance with this Law 14/2011, the State Plan for Scientific and Technical Research and Innovation is configured as the main programming instrument that the Spanish science and technology system has for the development and achievement of the objectives of the "Spanish Strategy for Science and Technology and Innovation" (Article 6), and includes state aid for R+D+I.

The current 2017-2020 State Plan, like the one corresponding to the 2013-2016 period, is made up of four state programs that correspond to the general objectives established in the aforementioned "Spanish Strategy for Science and Technology and Innovation", which are: 1) state program to promote talent and its employability in R+D+I; (2) state program to promote knowledge and strengthen the system; (3) state program for business leadership in R&D&I; and (4) the state R+D+I program oriented to the challenges of society.

These state programs, in turn, are developed in sub-programmes in attention to the thematic specificity and nature of the actions planned in each of them. It is interesting to point out that, within the state program of R+D+I oriented to the challenges of society (4), the investigation of the social, economic and social impact of migratory flows is included ("reto en cambios e innovaciones sociales "), which covers, among other priorities, the investigation of migratory movements; of inequality, exclusion and poverty; of the impact and evolution of cultural, social and territorial identities in the processes of social and institutional change and transformation; and of individual characteristics, social values and collective dynamics ("cambio sociales y su impacto").

Given this, to the extent that we are faced with a research project aimed at achieving one of the objectives established in this State Plan and, therefore, in the programs and sub-programmes in which it is deployed, and its execution the carried out by one of the agents of the Spanish science and technology system (as could be the case of a university through its research staff), in accordance, in any case, with the requirements of planning, originality, objectivity, verification, rigorous sampling and the use of data collection instruments that respond to validity and reliability criteria, which establishes the scientific methodology, the treatment of personal data that are necessary for the realization of said project could be understood to respond for scientific research purposes.

From here, it must be borne in mind that, given that the investigation in question affects special categories of data, it is not only necessary to have a legal basis that legitimizes the treatment - such as the one established in article 6.1. e) of the RGPD-, but it is also necessary to have one of the qualifications established in article 9.2 of the RGPD.

In this sense, ruling out the application of the exception established in article 9.2.a) of the RGPD relating to the explicit consent of those affected for the reasons set out in the previous legal basis, reference can only be made in the present case with the exception of article 9.2.j)

This provision of the RGPD provides that:

> **"2. Section 1 (prohibition of processing special categories of data) will not apply when one of the following circumstances occurs: (...) j) the treatment is necessary for archival purposes in public interest, scientific or historical research purposes or statistical purposes, in accordance with article 89, paragraph 1, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, respect the right to data protection and establish adequate measures and specific to protect the fundamental interests and rights of the interested party."**

This provision of article 9.2.j) of the RGPD would enable the processing of special categories of data for the realization of the research project in question, provided that it is done on the basis of a rule with the rank of law that regulate adequate guarantees for the rights and freedoms of those affected.

In other words, the enabling effectiveness of the case provided for in article 9.2.j) of the RGPD is conditional on what the Law of the Union or the law of the Member States, which in our case must be a norm to the extent of the law, establish these guarantees.

At this point, it is appropriate to mention Sentence 76/2019, of May 22, of the Constitutional Court.

In this judgment it is pointed out that "all state interference in the field of fundamental rights and public liberties must respond to a constitutionally legitimate purpose or aim at the protection or safeguarding of a constitutionally relevant asset, because "if this Court has declared that the Constitution does not prevent the State from protecting rights or legal goods at the expense of the sacrifice of others equally recognized and, therefore, that the legislator can impose limitations on the content of fundamental rights or their exercise, we have also specified that, in such cases , those limitations must be justified in the protection of other rights or constitutional goods(...) and, in addition, they must be proportionate to the end pursued with them (...)" (FJ V).

Next, it recalls that this state interference in the field of fundamental rights and public freedoms requires a rule with the rank of law and specifies the indispensable requirements that this rule must meet as a guarantee of legal security (FJ V) :

> **"(...) is specified in the requirements of predictability and certainty of restrictive measures in the field of fundamental rights. In STC 292/2000, FJ 15, we point out that, even if they have a constitutional foundation, the limitations of the fundamental right established by law "can violate the Constitution if they suffer from a lack of certainty and predictability in the limits they impose and their manner of application", because "the lack of precision of the law in the material presuppositions of the limitation of a fundamental right is liable to generate an indeterminacy about the cases to which such restriction is applied"; "when this result occurs, beyond any reasonable interpretation, the law no longer fulfills its function of guaranteeing the fundamental right that it restricts, as it simply leaves the will of the person who has to apply it to operate instead". In the same sentence and legal foundation we also need the type of violation that entails the lack of certainty and predictability in the limits itself: "it would not only injure the principle of legal security (art. 9.3 EC), conceived as certainty about the applicable order and reasonably founded expectation of the person about what the action of the power applying the law should be (STC 104/2000, FJ 7, por todas), but at the same time said law would be injuring the essential content of the fundamental right thus restricted, given that the way in which its limits have been set make it unrecognizable and, in practice, make its exercise impossible (SSTC 11/1981, FJ 15; 142/1993, of April 22, FJ 4, and 341/1993, of 18 of November, FJ 7)".**

It also points out that, in addition to fulfilling these requirements (legal provision and legitimacy of the purpose pursued), it is necessary that the rule establishes adequate guarantees and specifies the nature and scope of this requirement (FJ VI) in the following terms:

> **"(...)**
> **c) The need to have adequate guarantees is especially important when the treatment affects special categories of data, also called data**

sensitive, since the use of the latter is liable to compromise more directly the dignity, freedom and free development of the personality. (...)

Adequate guarantees must ensure that data processing is carried out under conditions that ensure transparency, supervision and effective judicial protection, and must ensure that data are not collected disproportionately and are not used for purposes other than those they justified their obtaining. The nature and scope of the guarantees that are constitutionally enforceable in each case will depend on three factors essentially: the type of data processing that is intended to be carried out; the nature of the data; and the probability and severity of the risks of abuse and illicit use which, in turn, are linked to the type of treatment and the category of data in question. Thus, data collection with statistical purposes does not pose the same problems as data collection with a specific purpose. Nor does the collection and processing of anonymous data involve the same degree of interference as the collection and processing of personal data that are taken individually and are not anonymized, as is the treatment of personal data that reveal ethnic or racial origin , political opinions, health, sex life or sexual orientation of a natural person, than the treatment of other types of data.

The level and nature of the adequate guarantees cannot be determined once and for all, because, on the one hand, they must be revised and updated when necessary and, on the other hand, the principle of proportionality requires verifying whether, with the development of technology, treatment possibilities appear that are less intrusive or potentially less dangerous for fundamental rights. d) In conclusion, political opinions are sensitive personal data whose need for protection is, to that extent, greater than that of other personal data. Adequate and specific protection against treatment constitutes, in short, a constitutional requirement, without prejudice to the fact that, as we have seen, it also represents a requirement derived from European Union law. Therefore, the legislator is constitutionally obliged to adapt the protection it provides to said personal data, where appropriate, imposing greater requirements so that they can be the object of treatment and providing specific guarantees in their treatment, in addition to those that may be common or general."

It should be noted that neither the LOU nor, especially, Law 14/2011, applicable to the present case as it is in principle a treatment of data for the purposes of scientific research, contemplate clear and precise rules that regulate the scope of the interference in the rights and freedoms of those affected, nor any provision relating to the establishment of adequate guarantees for the protection of these rights and freedoms in the terms indicated by the TC.

Consequently, it cannot be concluded that the authorization conferred by article 9.2.j) of the RGPD to treat particular categories of data for the purposes of scientific research could be applicable in the present case.

VII

The consultation also considers whether it is necessary to proceed with the deletion of the data requested by the AMPA of one of the educational centers participating in the research project.

The associations of mothers and fathers of students (AMPA) are legally recognized non-profit associations, which bring together, voluntarily, parents of the educational center (Decree 202/1987, of 19 May, which regulates the associations of parents and students).

The AMPAs carry out their functions in accordance with the powers attributed to them according to article 3 of Decree 202/1987 (among others, providing support and assistance to the members of

the association and, in general, to the parents and guardians, to the teachers and students of the center and to its governing and participation bodies, in everything that refers to the education of their children and, in general, to all students enrolled in the center; promote the participation of the students' parents in the management of the center; assist the students' parents in the exercise of their right to intervene in the control and management of the center when it is supported with public funds; promote the representation and participation of students' parents in the School Councils of public and chartered schools and other collegiate bodies), as well as those others assigned by their respective Statutes within the framework of educational regulations.

Starting from the basis that, as has been seen, in the present case we would be faced with an illicit treatment of special categories of minors' data, it does not seem that the data protection regulations prevent admitting the possibility that the 'AMPA of one of the participating educational centers, upon becoming aware of this treatment regarding students of its center, may request the person responsible for the deletion of this unlawfully processed data, especially considering that the person responsible himself would be obliged to delete them ex officio, in accordance with the principle of proactive responsibility (article 5.2 RGPD).

A different question is whether the AMPA could request said deletion in exercise of the right of deletion recognized by article 17 of the RGPD, according to which:

> **"1. The interested party will have the right to obtain without undue delay the deletion of the personal data concerning him from the controller, who will be obliged to delete the personal data without undue delay when any of the following circumstances occur: (...) d) the data personal data have been treated illegally. (...)".**

It should be borne in mind that the rights inherent in informative self-determination recognized in articles 15 to 22 of the RGPD have a very personal nature, so they can only be exercised by the interested person, owner of the information (article 4.1 RGPD).

Article 12 of the LOPDGDD specifies that:

> **"1. The rights recognized in articles 15 to 22 of Regulation (EU) 2016/679 may be exercised directly or through a legal or voluntary representative. (...)**
>
> **6. In any case, the holders of parental authority may exercise the rights of access, rectification, cancellation, opposition or any other that may correspond to them in the context of this organic law in the name and representation of children under the age of fourteen. (...).”**

In accordance with article 12.6 of the LOPDGDD, holders of parental authority, or guardians, can exercise the right to informational self-determination on behalf of children under the age of 14.

As for those over the age of 14, these rights can be exercised by the students themselves or by their legal representatives (article 12.1 LOPDGDD), who could also be the holders of parental authority, as this Authority has done on previous occasions (among others, in the opinions CNS 33/2017, CNS 58/2017 or CNS 10/2018, available on the website https://apdcat.gencat.cat), in accordance with the provisions of Book Two of the Civil Code of Catalonia, which attributes to them the legal representation of minors (articles 236-1 and 236-18 CCC).

In view of the functions carried out by the AMPA, it does not seem that they can be recognized as having the capacity to exercise the rights to informative self-determination on behalf of the students affected by the processing of their data in the framework of the research project or, if applicable, of the holders of parental authority or guardians of these students.

Therefore, any exercise of the right to deletion of Article 17 of the RGPD, in relation to the aforementioned project, should be carried out by the holders of parental authority of the student under the age of 14 or, in case of minors over this age, by themselves or by their legal representatives.

That being the case, the person responsible, without undue delay, should delete the personal data that affect these minors, having been treated unlawfully (Article 17.1.d) RGPD).

In accordance with the considerations made so far in relation to the query raised, the following are made,

Conclusions

The lack of consent validly granted by the affected persons in the case examined means that the data controller must ex officio delete the set of personal data processed for the purpose of carrying out a survey within the framework of a project research

The exercise of the right of deletion, under the terms of article 17 of the RGPD, corresponds to the affected persons, directly or through a legal representative, but nothing prevents the AMPA of one of the educational centers participating in the research project can contact the person in charge requesting the deletion of data processed unlawfully in relation to the students of their centre.

Barcelona, February 25, 2020