

Ref.: PD 9/2020

Legal report in relation to the draft law amending Law 22/2005, of December 29, on audiovisual communication in Catalonia.

Background

The draft law amending Law 22/2005, of December 29, on audiovisual communication in Catalonia, is presented to the Catalan Data Protection Authority.

The Draft Law consists of Statement of reasons, eighty-six articles, and one provision end

Having analyzed the Preliminary Project, which is not accompanied by the Report corresponding to the Preliminary Project or other documentation, taking into account the current applicable regulations, and in accordance with the report of the Legal Counsel, it is reported that Next:

Legal Foundations

I

(...)

II

As can be seen from the Statement of Reasons, the Preliminary Project that is submitted to report has as its object the modification of Law 22/2005, of 29 December, on the audiovisual communication of Catalonia, mainly following the modification of the Directive 2010/13/UE, of March 10, 2010, by Directive (EU) 2018/1808, of November 14, 2018 ("New Audiovisual Directive").

With regard to the regulatory framework in which the Preliminary Project is framed, in addition to the aforementioned Directives, reference must be made to Law 7/2010, of March 31, general on audiovisual communication, which regulates *"the audiovisual communication of state coverage and establishes the basic rules in audiovisual matters without prejudice to the powers reserved to the autonomous communities and to local bodies in their respective fields."* (art. 1 Law 7/2010).

We note, as a relevant element in the matter at hand, that the Comisión Nacional de los Mercados y la Competencia (CNMC) has issued the Public Consultation on the application of audiovisual regulation to communication service providers

audiovisual that are supported on video exchange platforms (File INF/DTSA/082/20, which can be consulted on the website <https://www.cnmc.es/ca/node/383046>), which is open in the at the time of issuing this report, which analyzes various issues relating to these services, with particular attention to the incidence of their use by minors, in relation to the provisions of State Law 7/2010, and the new Audiovisual Directive, cited.

As indicated in the Statement of Reasons of the Preliminary Project: *"Article 189.3 of the Statute of Autonomy of Catalonia provides that, in the event that the European Union establishes legislation that replaces the basic regulations of the State, the Generalitat can adopt development legislation based on European standards, and Constitutional Court Judgment 31/2010 has considered that this precept is in accordance with the Spanish Constitution of 1978, insofar as it does not affect basic state competence.*

Article 146 of the Statute of Autonomy of Catalonia attributes to the Generalitat the exclusive competence over the organization of the provision of the public audiovisual communication service of the Generalitat and of the public communication services at the local level and, and shared competence in social media."

It is also necessary to take into account Law 2/2000, of May 4, of the Audiovisual Council of Catalonia (hereinafter, CAC), given that some of the provisions of the Preliminary Project affect the CAC's control functions in relation to with the field of audiovisual communication in Catalonia (arts. 1 and 2 Law 2/2000).

III

From the perspective of the protection of personal data, it is necessary to start from the basis that the processing of personal data (art. 4, sections 1 and 2 RGPD) by providers of communication services and providers of exchange platforms videos, among others, referred to in the Preliminary Project (cited art. 2), as well as by the control authorities in the field of audiovisual communication, in particular, the CAC, is subject to the principles and guarantees of the data protection regulations (RGPD and Organic Law 3/2018, of December 5, Protection of personal data and guarantee of digital rights (LOPDGDD)).

In this sense, we highlight the provisions of recital 153 of the RGPD, in relation to the application of personal data protection regulations in the audiovisual field.

The Preliminary Draft regulates different areas in which it would be advisable to take into account, in particular, the perspective of the protection of personal data, to which we refer below.

- Freedom of audiovisual communication

Article 3 of the Draft, which modifies article 3 of Law 22/2005, provides the following.

"1. The provision of audiovisual communication services and video exchange platforms by citizens is free within the framework of the legitimate exercise of the fundamental rights of freedom of expression and information, in accordance with the limits and conditions established by the Constitution, the Statute of Autonomy, European regulations, this law and the other laws that are applicable.

2. In particular, the provision of audiovisual communication and video exchange services must comply with the provisions of the legislation on the effective equality of women and men, rights and opportunities in childhood and childhood adolescence, accessibility, and lesbian, gay, bisexual, transgender and intersex rights and to eradicate homophobia, biphobia and transphobia."

The provision of audiovisual communication and video exchange services by the providers of these services must take into account in particular the applicable regulations for the protection of personal data (RGPD and LOPDGDD).

It could be advisable to give greater visibility to the perspective of the protection of personal data, in particular, in what refers to the obtaining and processing of personal data, to the information that must be provided to those affected, with special attention to minors age and, therefore, include a reference to this regulation in the areas regulated in the Preliminary Project.

Specifically, a paragraph could be added to section 2 of article 3 of Law 22/2005, with the following content:

2. In particular, the provision of audiovisual communication and video exchange services must comply with the provisions of the legislation on the effective equality of women and men, protection of personal data, rights and opportunities in childhood and adolescence, accessibility, and rights of lesbians, gays, bisexuals, transgenders and intersex and to eradicate homophobia, biphobia and transphobia."

- Article 5 of the Draft

Article 5 of the Preliminary Project modifies article 4 of Law 22/2005, which is drafted as follows:

"Article 4

Free choice

"1. All citizens have the right to receive truthful information and to freely choose the audiovisual communication and video platform exchange services they want to receive without private providers and public authorities being able to replace their decisions.

2. The providers of audiovisual communication services and video exchange platform services must make available to the receivers of the service, in an easy, direct and permanent way, at least the following information: a)

Your name and address.

b) Data that allows you to quickly contact them and establish direct and effective communication with them, including their email address or website.

c) The information on the ownership structure of the medium, which must include the identification of the natural or legal persons who have direct or indirect control or exercise a significant influence on the content of the services provided. This identification must contain exclusively the data that is necessary and provided for the information of the users and must respect the right to personal and family privacy and other fundamental rights of the affected persons.

(...)."

Article 4.2.c) of Law 22/2005, in the wording proposed by the Preliminary Project, provides for an informative flow of data on physical persons, and makes it clear that these must be exclusively those that are necessary and provided for the user information. From the perspective of the protection of personal data, specifically, the principle of minimization (art. 5.1.c) RGPD), this mention is positively valued, although it would be advisable that the reference made to the right to personal privacy and family is made to the right to the protection of personal data, given that identifying data or media ownership does not seem to be considered part of the right to privacy, while they are part of personal data that needs to be protected.

Therefore, the following wording is proposed for article 4.2.c) of Law 22/2005:

"c) Information on the ownership structure of the medium, which must include the identification of the natural or legal persons who have direct or indirect control or exercise significant influence over the content of the services provided. This one

identification must contain exclusively the data that is necessary and provided for the information of the users and must respect the right to the protection of personal data and other fundamental rights of the persons affected."

IV

- Processing of personal data of minors and protection measures

One of the axes of the Preliminary Project, in line with the provisions of the new Audiovisual Directive, is the protection of the rights of minors in their interaction with the digital environment, with the aim of preventing them from accessing content that could harm the physical, mental or moral development of children and adolescents.

According to recital 21 of Directive 2018/2018: "*Reglamento (EU) 2016/679 of the European Parliament and of the Council recognizes that children deserve specific protection in the treatment of their personal data. The establishment of child protection mechanisms by communication service providers **inevitably leads to the processing of personal data of minors**. Since these mechanisms aim to protect children, the personal data of minors processed within the framework of the technical measures for the protection of minors **should not be used for commercial purposes** .*

In this sense, Directive 2018/1808 incorporates a new article 6 bis in Directive 2010/13, with the following content:

"1. The member states will adopt the appropriate measures to ensure that audiovisual communication services offered by communication service providers subject to their jurisdiction that may harm the physical, mental or moral development of minors are only accessible in a way that guarantees that, normally, said minors will not see or hear them. These measures may include the choice of broadcast time, age verification instruments or other technical measures. They must be proportionate to the potential damage to the program. The most harmful content, such as gratuitous violence and pornography, will be subject to the strictest measures.

2. The personal data of minors collected or otherwise generated by communication service providers in accordance with paragraph 1 may not be processed for commercial purposes, such as direct marketing, profiling or personalized advertising based on behavior ."

On the other hand, article 128 ter, paragraph 3, of Directive 2018/1808 establishes the following:

"The personal data of minors collected or otherwise generated by providers of video exchange platforms in accordance with the third paragraph, letters f) and h), may not be treated for commercial purposes, such as, for example, direct marketing, processing of profiles or personalized advertising based on behavior."

According to recital 38 of the RGPD: "*Children deserve specific protection of their personal data, since they may be less aware of the risks, consequences, guarantees and rights concerning the treatment of personal data.*

This specific protection must apply in particular to the use of children's personal data for marketing purposes or the development of personality or user profiles, and to the collection of personal data relating to children when services offered directly to a child are used. (...)."

In accordance with this, it is necessary to positively assess that the Preliminary Project incorporates, in article 7, which modifies article 9.3 of Law 22/2005, the prohibition established by Directive 2018/1808 to treat the data of minors for for these purposes (commercial, direct marketing, profiling -art. 4.4 RGPD-, or personalized advertising), both with regard to the data obtained by communication service providers and those obtained by data exchange platform providers videos

- Provision of the consent of minors

It is particularly relevant to take into account the regime for obtaining consent established by the data protection regulations in relation to minors.

Article 8 of the RGPD establishes the conditions applicable to the consent of minors in relation to information society services, in the following terms:

"1. When article 6, section 1, letter a) is applied, in relation to the direct offer to children of services of the information society, the treatment of the personal data of a child will be considered lawful when he is at least 16 years old. If the child is under 16 years of age, such treatment will only be considered lawful if consent is given or authorized by the holder of parental authority or guardianship over the child, and only to the extent that it is given or authorized. The Member States may establish by law a lower age for such purposes, provided that this is not lower than 13 years.

2. The person responsible for the treatment will make reasonable efforts to verify in such cases that the consent was given or authorized by the holder of parental authority or guardianship over the child, taking into account the technology available."

Regarding the burden of verification that article 8.2 of the RGPD requires of those responsible for data processing (art. 4.7 RGPD), in this case, the service providers and platforms referred to in the Preliminary Project, As explained the European Data Protection Committee (CEPD) in the document "Guidelines 05/2020 on consent under Regulation 2016/679": "If the user states that he/she is below the age of digital consent then the controller can accept this statement without further checks, but will need to go on to obtain parental authorization and verify that the person providing that consent is a holder of parental responsibility." (recital 134).

Article 7 of the LOPDGDD establishes that:

"1. The treatment of the personal data of a minor can only be based on his consent when he is over fourteen years old.

The cases in which the law requires the assistance of the holders of parental authority or guardianship for the celebration of the legal act or business in whose context consent for the treatment is obtained are excepted.

2. The treatment of the data of minors under fourteen years of age, based on consent, will only be lawful if the holder of parental authority or guardianship is included, with the scope determined by the holders of parental authority or guardianship."

When audiovisual communication service providers and video exchange platform providers collect data from minors based on consent, they must respect the regulatory provisions and, where appropriate, obtain the consent of the minors' parents or guardians, and apply the corresponding measures, if applicable, to verify the age of minors.

For all of the above, given that the data protection regulations establish the regime for obtaining the consent of minors to process their data, it is considered advisable that the Preliminary Project incorporate a specific mention of this regime.

Thus, article 7 of the Draft, which modifies article 9 of Law 22/2005, could incorporate a new paragraph in section 2 of article 9, with the following wording:

"The obtaining and subsequent processing of personal data of minors must be subject to the regime provided for in the regulations for the protection of personal data. When audiovisual communication service providers and video exchange platform providers collect data from minors on the basis of consent, they must obtain the consent of the parents or guardians of minors under the age of fourteen, and must be able to prove the establishment of the corresponding age verification measures."

v

- Activities of the Audiovisual Council of Catalonia

According to the Statement of Reasons, the purpose of the Draft Law is, among others, to modify the current system of inspection and sanction of audiovisual activities without a qualifying title, through the adoption of various mechanisms, which "are basically aimed at combating the provision of audiovisual communication services without a qualifying title, with measures aimed at strengthening the liability regime in order to sanction the true intellectual authors responsible for the provision of audiovisual communication services without a qualifying title, the regulation of the obligation of collaboration of natural and legal persons related to illegal activity, collaboration with other administrations in application of the principles of mutual cooperation, collaboration and assistance, as well as the prohibition of commercial communications in stations without a qualifying title."

Article 47 of the Draft adds a new article 89 quater to Law 22/2005, with the following wording:

*"Article 89 quater
Measures to counteract the dissemination of content that incites violence or hatred*

(...).

3. Without prejudice to the provisions of the regulations on the protection of personal data, the Audiovisual Council of Catalonia may make public the actions of the Council that support the existence of content that incites violence or hatred, the responses of the service providers of video sharing platforms and, if applicable, the judicial resolution that falls."

At the outset, the express mention made in the data protection regulations in relation to the dissemination of information relating to the actions of the CAC is positively valued. Indeed, if the dissemination of these actions may affect personal data, it will be necessary to take into account whether, based on the principles of the RGPD, this dissemination can occur, and under what circumstances.

Now, having said that, it is worth pointing out that the Preliminary Draft includes certain forecasts in relation to the flows of personal data that could occur within the framework of the CAC's control and inspection powers, which are not clear enough, taking into account the principles and guarantees of data protection regulations.

- **Article 63 of the Draft** amends sections 2 and 3 of article 127 of Law 22/2005, as follows:

"2. Corresponds to the Administration of the Generalitat, ex officio or at the instance of the Audiovisual Council of Catalonia, the exercise of inspection and control activities for the provision of audiovisual communication services, including cases of provision of audiovisual services without having obtained the license or without having complied with the duty of prior communication referred to in article 37.2.

The data obtained as a result of carrying out these inspection and control activities must be sent to the Audiovisual Council of Catalonia, so that it can exercise the sanctioning powers established by this title, without prejudice to the sanctioning powers which correspond to the competent departments of the Administration of the Generalitat.

3. The Audiovisual Council of Catalonia and the Administration of the Generalitat must provide each other with the information that is required on the inspection, control and penalty activities that they carry out within the framework of their respective powers, including merely identifying and contact information, without the need for the consent of the affected person."

We remind you that, according to paragraph 1 of article 127 of Law 22/2005 (which is not modified by the Draft), the CAC is responsible for the inspection and control of the activities of audiovisual communication service providers, in relation to the fulfillment of the obligations that correspond to them in accordance with the provisions of this law and those that are applicable.

From the perspective of data protection, it is necessary to start from the basis that the personal data to which the CAC or the Administration of the Generalitat can have access in their respective areas of competence, can only be the subject of communication between the two if it exists an appropriate legal basis (eg art. 6.1 RGPD).

That article 127.3 of Law 22/2005, in the wording given by the Draft, refers to the communication of (merely) identifying or contact data, generates confusion, given that if the communication is linked to an inspection, the identifying data will necessarily be linked to the content of the inspection.

On the other hand, the generic mention of "Administration of the Generalitat", made in article 127.3, is also not adequate, since the CAC must not communicate personal data, within the framework of its inspection powers, to any body of the Administration of the Generalitat.

The reference to those bodies or competent bodies that exercise the power of inspection and control of the provision of audiovisual communication services should be specified. We note that in article 64 of the Draft, which modifies article 128.2 of Law 22/2005, a specific mention is made of "the body of the Administration of the Generalitat competent in matters of audiovisual communication", which would seem more appropriate.

Therefore, the following wording is proposed for article 127, paragraph 3 of Law 22/2005:

"3. The Audiovisual Council of Catalonia and the body of the Generalitat Administration competent in matters of audiovisual communication must provide each other with the information that is required on the inspection, control and sanctioning activities they carry out within the framework of the respective competences including, where appropriate, identifying and contact data of natural persons related to the inspection, without the need for the consent of the affected person."

- **Article 66 of the Draft**, adds a new article 128 ter, to Law 22/2005, with the following wording:

"Article 128 ter

Collaboration with other administrations

1. The competent public administrations in matters of urban planning, environment, public health and telecommunications that, in their procedures for granting licenses and authorizations for works and activities necessary for the provision of audiovisual communication services, ascertain that the service provider is not in possession of a license or has not fulfilled the duty of prior communication, they must inform the body of the Administration of the Generalitat competent in the provision of audiovisual communication services.

2. In application of the principles of cooperation, collaboration and reciprocal assistance, and for the best performance of the functions that correspond to the various administrations, when a public administration receives from the competent authorities in audiovisual matters information about the breach of the audiovisual regulations must adopt in its area of competence the necessary resolutions to guarantee compliance with the audiovisual regulations.

3. Collaboration mechanisms must be established between the various administrations with the objective that the information from the inspection of audiovisual communication services on possible non-compliance with the regulations in the matters provided for in section 1 is put to disposal of the competent authority to adopt the appropriate measures, and if necessary, restore legality."

Directive 2010/13, as amended by Directive 2018/1808, gives special importance to the protection of health in the context of advertising and makes it clear that States must ensure that audiovisual communication services do not constitute a risk to public health or the environment (see art. 3.2 and art. 9.1.c) iii) and iv) of Directive 2010/13, in the wording given by Directive 2018/1808).

At the outset, note that from the point of view of the purpose principle (art. 5.1.b) RGPD) it does not seem clear that the competent public administrations in matters of urban planning, the environment, public health and telecommunications that must grant any license or authorization must inform the competent body in matters of audiovisual communication that they have ascertained lack of license for the provision of audiovisual services. Rather, the granting of the sectoral license (urban planning, environment, public health or telecommunications) should be conditioned on having the license for the provision of audiovisual services beforehand if the activity requires, because if the audiovisual communication activities have not started, the fact of applying for a works license, for example, does not imply that the audiovisual communication regulations have been violated.

Beyond this, the sectoral regulations (urban planning, environment, etc.) should provide for the need to certify that the activity license is available beforehand. served that the Preliminary Project Report is not available at the time of issuing this report, it must be noted that it is not clear what the "procedures for granting licenses and authorizations for works and activities for the provision of audiovisual communication services" are would justify this control of the audiovisual communication license by these other bodies.

The Statement of Reasons for the Draft makes a reference to "collaboration with other administrations in application of the principles of cooperation, collaboration and reciprocal assistance", which also does not help to clarify what the role of these other administrations is administrations (urban planning, environment or public health), in said procedures and, consequently, which information flows of personal data might be necessary.

Article 92.1 of Law 22/2005 refers to illegal advertising or teleshopping, among others, "*Those that promote bad food practices or any other behavior harmful to human health or safety or to the environmental protection*" (section c) art. 92.1). However, beyond this mention, Law 22/2005 also does not clarify what these information flows could be.

Nor is the provision of section 2 at all clear, given that it is not clear what the functions are that would correspond to the different administrations in audiovisual matters, nor in which cases the competent authorities in audiovisual matters must communicate to other bodies of these other administrations the resolutions on non-compliance, nor the measures to be adopted by the receiving authority.

Likewise, section 3 of the same article establishes a communication of information between "the various administrations", without further specification, of inspection actions in various areas that would be useful to clarify, but which in any case could present problems from the point of view of the purpose principle (art. 5.1.b) RGPD), which prevents the data from being collected for a purpose incompatible with that for which it was collected.

It should be borne in mind that the provisions of article 128.ter may generate an information flow between various bodies of the administration and the body of the Administration of the Generalitat competent in matters of the provision of audiovisual communication services, which could include personal data (for example, of people related to the provision of audiovisual communication services that encourage behaviors harmful to health, in the terms of the 2018 Directive). Therefore, the aforementioned article 128.ter must specify what these procedures are, and what information flows can occur, always in accordance with the principle of purpose and proportionality.

In accordance with the considerations made in this report, the following are made,

Conclusions

Having examined the draft law amending Law 22/2005, of December 29, on the audiovisual communication of Catalonia, it is considered adequate to the provisions established in the regulations on the protection of personal data, if the considerations are taken into account made in this report.

Barcelona, November 6, 2020