PD 13/2021

Report in relation to the Proposal presented by the Department of the Economy on the communication of information, to be included in the Draft Law on fiscal and financial measures for 2022 (M-336)

Background

The Proposal submitted by the Department of the Economy on the communication of information, to be included in the Draft Law on fiscal and financial measures for 2022 (M-336), is presented to the Catalan Data Protection Authority, for the study and issuance of the corresponding report.

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

Having examined the Proposal and the documentation that accompanies it, and having seen the report of the Legal Counsel, the following is reported.

Legal foundations

I

(...)

II

The Proposal presented by the Department of Economy to be included in the Draft Law on fiscal and financial measures for 2022 (hereinafter, the Proposal) aims to add a new additional provision to the first book of the Tax Code of Catalonia, approved by Law 17/2017, of August 1.

The Drafting Proposal for the additional provision submitted to report establishes the following:

> "Additional provision
> Supply of information between the bodies and entities that make up the Tax Administration of Catalonia
>
> 1. The Tax Agency of Catalonia and the bodies of the departments of the Government of the Generalitat and the entities of its public sector that, in accordance with the applicable legislation, exercise functions of management, liquidation and collection of taxes, must supply data or information to the organs and entities that make up the Tax Administration that are detailed and for the purposes that are spe

a) To the body competent in matters of taxes with the purpose of analyzing and designing the tax policy, drawing up the general tax regulations and of the own tax figures and of the ceded taxes, within the framework of the competences of the Generalitat.

b) To the Catalan Institute for the Evaluation of Public Policies when, with the purpose of preparing impact assessment studies of own taxes and, where appropriate, transferred taxes, it acts on behalf of the competent body in the field of taxes.

c) To the Institute of Fiscal Research and Tax Studies of Catalonia for the purpose of preparing research studies on public finance, tax law and management of tax systems in tax and tax matters.

2. The information and data to be supplied will be proportionate, necessary and essential for the fulfillment of the purposes mentioned in the previous section, and must undergo, whenever possible, prior processes of anonymization, encryption or encryption."

The text of the Proposal that is being examined foresees an authorization for the communication of data and information of a tax nature by the Catalan Tax Agency (hereinafter, the ATC) and the bodies and entities that have assigned functions of the application of taxes towards the body competent in matters of taxes of the Administration of the Generalitat, the Catalan Institute for the Evaluation of Public Policies (hereinafter, Ivàlua), when acting on behalf of this body, and the 'Institute for Fiscal Research and Tax Studies of Catalonia (hereafter IRFETC), so that they can effectively carry out the functions entrusted to them.

With regard to the need for the Proposal, in the accompanying General Report it is stated that the fourth additional provision of the second book of the Tax Code of Catalonia, approved by Law 17/2017, of August 1 , enables the communication of data and information from the ATC to the General Directorate of Taxes and Gaming, with the aim that this body can carry out a series of functions attributed to it. Next, it is agreed that, in order to increase the efficiency of the Catalan Tax Administration as a whole, it is necessary to expand the subjects obliged to supply information, as well as the recipient subjects.

III

In accordance with Recital 41 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 movement of this data (hereinafter, RGPD), "said legal basis or legislative measure must be clear and precise and its application predictable for its recipients, in accordance with the jurisprudence of the Court of Justice of the European Union (hereinafter, " Court of Justice") and the European Court of Human Rights." In this sense, for example, the SSTEDH of September 6, 1978 (Klas vs. Germany), August 2, 1984 (Malone vs. UK), July 30, 1998 (Valenzuela Contreras vs. Spain) 18 of February 2003 (Prado Bugallo vs. Spain) or STC 76/2019.

The Proposal makes, in section 1, a clear enough delimitation of its object with regard to the purpose of the intended treatment, the actors involved and the personal data that would be the subject of communication, in such a way that it specifies in which justified cases the 'ATC and the bodies of the departments of the Government of the Generalitat and the entities of its public s

competences in the area of application of taxes must supply data to other bodies and entities without the consent of the affected persons.

At the outset, it differentiates into three sections the flows of personal information that are enabled, specifying the recipients of the information, which contributes to the understanding, by the possible people affected, of the circumstances and under what conditions enables the public authorities to communicate their personal data.

Thus, section 1.a) of the Proposal refers to the communication of data to the competent body in matters of taxes of the Administration of the Generalitat, section 1.b) of the Proposal to the communication of data towards Ivàlua and section 1.c) of the Proposal for the communication of data towards the IRFETC.

These sections also specify the purpose to which each of the aforementioned communications obeys, which is linked to the exercise of the functions that are legally attributed to the recipients of the information.

Thus, in the case of the body competent in matters of taxes of the Administration of the Generalitat, it is specified that the communication of data has as its purpose the analysis and design of the tax policy, the elaboration of the general tax regulations and own tax figures and ceded taxes, within the framework of the powers of the Generalitat (section 1.a)).

In the case of Ivàlua, it is specified that the communication of data will take place when this entity acts on behalf of the competent body in the field of taxes in order to carry out impact assessment studies of own taxes and, where applicable, transferred (section 1.b)).

And as far as the IRFETC is concerned, it is specified that the purpose of the communication of data is the preparation of research studies in the field of public finance, tax law and management of tax systems in fiscal and tax matters (section 1. c)).

With regard to the data subject to communication, the Proposal provides (paragraph 1) that it is the data or information in the possession of the ATC, and the bodies of the departments of the Administration of the Generalitat and the entities of its sector public "that, in accordance with the applicable legislation, perform functions of management, settlement and collection of taxes", therefore, data with tax significance.

It would be convenient, in order to offer greater transparency about the intended treatment towards the affected persons (Article 5.1.a) RGPD), that it be specified in this way in the wording used. It should be borne in mind that both the ATC and the bodies and entities with powers in the area of tax enforcement process or can process a wider set of personal information not strictly linked to tax enforcement and that, therefore, it would remain outside the communication that is intended to be enabled.

Thus, it is suggested to modify the first paragraph of this section 1 in the following sense:

> "1. The Tax Agency of Catalonia and the bodies of the departments of the Government of the Generalitat and the entities of its public sector that, in accordance with the applicable legislation, exercise the functions of management, settlement and collection of taxes, have to supply relevant data or information to the bodies and entities that make up the Tax Administration that are detailed and for the purposes that are specified:"

IV

The RGPD provides that all processing of personal data (data relating to legal entities is therefore excluded) must be lawful (Article 5.1.a)) and, in this sense, establishes a system for legitimizing the processing of data that is based on the need for one of the legal bases established in its article 6.1 to apply.

In the field of public administrations and in a case like the one we are dealing with, the enabling legal basis provided for in letter e) of article 6.1 of the RGPD could apply, relating to those cases in which the intended 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 data controller.

In accordance with the provisions of these articles, the legal basis of the treatment indicated in this section must be established in the law of the member state that applies to the person in charge or in the law of the European Union which, in any case, must determine the purpose of the treatment. The referral to the legitimate basis established in accordance with the internal law of the member states requires, in the case of the Spanish State, in accordance with article 53 of the Spanish Constitution, that the rule of development, to be about a fundame

In this sense, article 8.2 of Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (hereafter LOPDGDD) establishes the legal scope of the enabling rule.

In accordance with the General Report that accompanies the Proposal, the body competent in matters of taxes of the Administration of the Generalitat, Ivàlua, when acting on behalf of this body, and the IRFETC require to have the data and information available to the ATC and the various bodies and entities that have assigned functions in the area of tax enforcement, in order to be able to carry out the respective functions that are legally assigned to them.

In accordance with article 71 of Decree 43/2019, of February 25, restructuring the Department of the Vice-Presidency and of Economy and Finance, in its wording given by Decree 68/2020, of July 14, corresponds in the General Directorate of Taxes and Gambling, among other functions, analyze and design the tax policy of the Generalitat of Catalonia (letter a)), propose and elaborate the general tax regulations for own tax figures and ceded taxes (letter b)), as well as preparing the economic and legal studies necessary for the fulfillment of these functions (letter e)).

For the exercise of these functions, the fourth additional provision of the second book of the Catalan Tax Code enables the communication of data, although only with respect to those held by the ATC. The legal basis of article 6.1.e) of the RGPD, to which reference has been made, would apply.

In accordance with the Statutes of the Consortium Catalan Institute for the Evaluation of Public Policies, Ivàlua's mission is to promote the evaluation of public policies among Catalan public administrations, non-profit entities that pursue purposes of public interest and among citizens in general (article 1), for which it has as main functions (article 4), among others, evaluating public policies on behalf of public administrations and non-profit entities (letter a)), generate knowledge and produce information and documentation that allow public administrations and non-profit entities in general to carry out analysis and evaluation of public policies (letter d)) and develop research projects on evaluation of public policies or participate in programs research of other organizations that have this same purpose (letter f).

In the specific case referred to in the Proposal (section 1.b)), Ivàlua would act on behalf of the Directorate General of Taxes and Gaming by preparing impact assessment studies of own and, where appropriate, transferred taxes. Therefore, in the case of Ivàlua, the legal basis for carrying out the treatment would be the same as in section a) as a result of the existence of a request for the treatment that would need to be formalized (Article 28 RGPD) carried out by the competent body in matters of taxes.

In accordance with article 321-3 of the Tax Code of Catalonia, IRFETC is responsible, among other functions, for generating, obtaining and disseminating scientific knowledge in the field of taxation (letter a)), developing and promote legal and economic research in the field of public finance and the management of tax systems (letter b)) and prepare or promote the publication of scientific or technical works related to taxation (letter c)).

The legal basis of article 6.1.e) of the RGPD, to which mention has been made, could protect the communication of data towards this entity, to the extent that a rule with the rank of law would apply that attributes to it a series of functions for the exercise of which it may be necessary to have this type of personal information.

However, it is not enough that there is a legal basis to be able to process personal data. The data treatments carried out by the public administration are also subject, and among others, to the principle of purpose limitation (Article 5.1.b) RGPD), according to which the data must be collected for specific, explicit and legitimate purposes, and must not be further processed in a manner incompatible with those purposes.

For this reason, in order to consider the communication of data referred to in this Proposal as lawful, it is necessary that the purpose of the treatment for which the data will be used is compatible with the purpose for which it was initially collected.

For these purposes, it should be borne in mind that the Proposal specifies that the data held by the ATC and the various bodies and entities that have assigned functions in the area of tax enforcement must be supplied:

- **To the body competent in matters of taxes "with the purpose of analyzing and designing the tax policy, drawing up the general tax regulations and of the own tax figures and of the ceded taxes, within the framework of the powers of the Generalitat" (section 1.a)).**

- **In Ivàlua, acting on behalf of the competent body in matters of taxes, "with the purpose of preparing impact assessment studies of own taxes and, where appropriate, transferred" (section 1.b)).**

- **To the IRFETC "with the purpose of preparing research studies in matters of public finance, tax law and management of fiscal systems in fiscal and tax matters" (section 1.c)).**

v

With regard to the first two cases (section 1.a) and section 1.b)), this is the transfer to the competent body in matters of taxes and Ivàlua, when acting on behalf of this, must take into account the Article 6.4 of the RGPD which provides the following:

> **"4. When the treatment for a purpose other than that for which the personal data was collected is not based on the consent of the interested party or on the Law of the Union or of the Member States that constitutes a necessary and proportionate measure in a democratic society to safeguard the indicated objectives**

in article 23, paragraph 1, the person responsible for the treatment, in order to determine whether the treatment with another purpose is compatible with the purpose for which the personal data was initially collected, will take into account, among other things:

a) any relationship between the purposes for which the personal data have been collected and the purposes of the subsequent treatment provided; b) the context in which the personal data have been collected, in particular with regard to the relationship between the interested parties and the controller; c) the nature of personal data, in particular when special categories of personal data are treated, in accordance with article 9, or personal data relating to criminal convictions and infractions, in accordance with article 10; d) the possible consequences for the interested parties of the planned subsequent treatment; e) the existence of adequate guarantees, which may include encryption or pseudonymization."

In accordance with this article of the RGPD, the processing of data for a different ulterior purpose will be considered lawful when the consent of the interested party is available or there is a rule with the rank of law that equalizes the processing to achieve the objectives of article 23.1 of the RGPD, and also in those cases in which it is considered that the subsequent treatment is compatible by application of the criteria listed in the same article.

From the point of view of the intended purpose of the treatment, the use of the data occurs in a context linked to the purpose for which it was collected and seems reasonable and may fall within the expectations that the affected persons may have with respect the processing of your personal data by the Tax Administration, that the data available to this administration and the various bodies and entities that make up it for the purpose of applying taxes may be used later, by the same Tax Administration, to analyze and evaluate its management and adopt, where appropriate, decisions on the existing tax policy and/or the regulation of taxes. The impact of this further treatment for the affected persons does not seem to necessarily entail negative consequences towards their person. And although the tax regulations grant a reserved character to data with tax significance, these would not be part of the data qualified as deserving of special protection by the RGPD. However, as provided in article 6.4.e) of the RGPD, it is necessary to provide adequate guarantees that ensure the right to data protection of the affected persons.

The Proposal being examined is intended to be the norm with the rank of law that provides legal certainty in the further processing of data of a tax nature by the various bodies and entities that make up the Tax Administration of Catalonia, for the purposes of carrying out the functions they are legally entrusted with for the purposes of investigation or research in the tax field.

In light of the doctrine established both by the Constitutional Court (Judgment 76/2019, of May 22) and by the Court of Justice of the European Union (STJUE 8-4-2012 Digital Rights Ireland), it is necessary that this rule brings together the foreseeability requirements for its recipients or concretization of the cases affected and also establishment of the necessary guarantees.

In the aforementioned STC 76/2019, the TC makes it clear that it must be the same law that establishes the guarantees, without them being able to refer to a later regulatory standard or to the decisions that may be taken subsequently by the person in charge of the treatment (FJ VI).

It is in this context that we will examine, in Legal Basis VII, the guarantees offered in the Proposal.

VI

With regard to the third case provided for in the Proposal (section 1.c)), that is the transfer of data to the IRFETC, it should be taken into account that the same article 5.1.b) of the RGPD provides that "in agreement with article 89, paragraph 1, the subsequent processing of personal data for archiving purposes in the public interest, scientific and historical research purposes or statistical purposes will not be considered incompatible with the initial purposes".

The RGPD does not define the term "scientific research", although recital 159 indicates that "the treatment of personal data for the purposes of scientific research must be interpreted, for the purposes of this Regulation, in a broad way, which includes, for example, the technological development and demonstration, fundamental research, applied research and research financed 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 create a European research space. (...)".

Taking into account the recipient of the information and the functions that the applicable regulations attribute to it, as well as the purposes described, it seems clear that in this case (section 1.c)) we would be dealing with data processing (the communication) that it could be understood that it would respond to scientific research purposes. Therefore, we would be faced with a compatible purpose.

However, the effectiveness of the authorization given by article 5.1.b) of the RGPD is conditional on the treatment for the purposes of scientific research being subject to adequate guarantees for the rights and freedoms of those affected, in accordance with the GDPR.

This is established in article 89.1 of the RGPD, to which it refers in the same article 5.1.b) of the RGPD, which provides the following:

> **"1. The treatment for archival purposes in the public interest, scientific or historical research purposes or statistical purposes will be subject to adequate guarantees, in accordance with this Regulation, for the rights and liberties of the interested parties. These guarantees will require that technical and organizational measures are available, in particular to guarantee respect for the principle of minimization of personal data. Such measures may include pseudonymization, provided that in that way said ends can be achieved. As long as those goals can be achieved through further processing that does not allow or no longer allows the identification of the interested parties, those goals will be achieved in that way."**

With respect to the assumptions provided for in letters a) and b) of section 1 of the Proposal, it cannot be ruled out that the studies and projections on the impact of tax policy, tax regulations or tax regulation or the modifications that can be introduced, which would motivate the communication of data, present elements that could lead to qualify it also as a purpose with scientific interest and, therefore, that it could be considered whether article 89 of the RGPD could result of application

In any case, with respect to the assignments that are based on the compatibility derived from their consideration as scientific research, the key element to take into account will also be, as we pointed out in the previous section, the guarantees that can be offered .

VII

The Proposal includes, in its section 2, a series of guarantees for the protection of the persons affected by the processing of their data that is intended to be carried out.

Specifically, it provides the following:

> **"2. The information and data to be supplied will be proportionate, necessary and essential for the fulfillment of the purposes mentioned in the previous section, and must be submitted, whenever possible, to prior processes of anonymisation, encryption or encryption. "**

In accordance with the doctrine established both by the CJEU and by the TC, and in accordance with the provisions of both article 6.4.e) and 89 of the RGPD mentioned above, it is necessary that the rule that legitimizes a certain data processing incorporates specific guarantees that contribute to being able to determine the proportionality of the measure.

In relation to the possibility of using data for research purposes, the guarantees required must in particular guarantee respect for the principle of data minimization (article 5.1.c) RGPD), which establishes that "personal data will be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed". Thus, in accordance with this principle, it is necessary to opt for that option which, while still allowing the intended purpose to be achieved, involves a lesser sacrifice of the right to data protection of the affected persons.

Taking into account this principle of data minimization, and given that the purpose of the communication that is intended to be enabled is not to analyze the tax situation of specific people but to prepare studies and projections on the impact of tax policy, tax regulations or the regulation of taxes and the management of fiscal systems in fiscal and tax matters, it may be excessive that the data be communicated in a generalized manner in such a way as to allow the identification of the affected persons. This should lead to the fact that in all cases where the purpose can be achieved without the identification of the affected persons, their right to the protection of personal data is not unjustifiably limited. In these cases the adequate protection of this right would require the anonymization of the information, that is the communication of the data in such a way that the affected persons cannot be identified or become identifiable directly or indirectly without disproportionate efforts (consideration 26 RGPD) .

The Proposal incorporates this principle of data minimization and expressly provides that the data to be supplied "must be subjected, whenever possible, to prior processes of anonymisation, encryption or encryption".

The wording used, by encompassing different figures, on the one hand, the anonymization of data, which constitutes a guarantee in the processing of data, and, on the other, the encryption or encryption of the information, which constitutes a measure to mitigate the risk in its treatment, generates some confusion, which is why, at the outset, it would be convenient to differentiate it in separate sections.

As can be seen from this section 2 of the Proposal, when anonymization is not possible, the data should be provided in such a way that the affected persons are identifiable by the recipient of the information.

However, in certain cases it may not be possible to apply the anonymization techniques because it may be necessary to temporarily monitor the evolution of a certain tax referred to the same taxable persons or respect different taxes referred to the same person, which

it may make it necessary to have some kind of identifier of the affected people in order to follow them. For these cases, in which anonymization would not allow to achieve the purpose pursued, it may be appropriate to resort to data pseudonymization techniques.

Article 4.5) of the RGPD defines pseudonymization as "the treatment of personal data in such a way that they can no longer be attributed to an interested party without using additional information, provided that said additional information is listed separately and is subject to technical measures and organizational measures intended to ensure that personal data are not attributed to an identified or identifiable natural person". In other words, the attribution of a code that cannot be deciphered or linked to specific people by third parties other than the original person responsible for the information.

In fact, the use of pseudonymisation of data is foreseen by the RGPD itself, specifically in article 89.1, transcribed in FJ III of this report, as one of the measures that can be used in the field of data processing for research purposes to offer adequate guarantees and comply with the aforementioned data minimization principle. In any case, please note that pseudonymised information will remain personal information.

In fact, this measure had already been foreseen in the fourth additional provision of the second book of the Catalan Tax Code, which enables the communication of data and information from the ATC to the General Directorate of Taxes and Gambling, for the same up to what is referred to in section 1.a) of this Proposal. This qualification, as we have seen, is now intended to be extended to other bodies and entities of the Tax Administration of Catalonia.

In the General Report that accompanies the Proposal, no mention is made of any case in which the application of pseudonymization techniques would not allow the intended purpose to be achieved.

For all that, it would be necessary to incorporate into the text of the Proposal a provision that includes the use of pseudonymisation when the purpose pursued with this technique can be achieved. For these purposes, the same wording of the fourth additional provision of book two of the Catalan Tax Code could be used.

On the other hand, the reference to encryption or encryption together with anonymization can lead to confusion.

Unlike the previous regulation, the RGPD does not establish a list of taxed security measures that must be applied in attention to the nature of the data, but rather sets up a security system that is based on determining, as a result of 'a prior analysis of the risks, which technical and organizational measures must be applied to guarantee security levels appropriate to the risk in each case.

As a result of this risk analysis, taking into account the concurrent circumstances, such as the volume of personal information being processed, the sensitivity of this information or others arising from the application of the criteria established in National Security Scheme (applicable in a case such as the one examined, in accordance with the first additional provision of the LOPDGDD), in certain phases of the treatment, as could be the case of communications or the storage of data on portable devices, the use of techniques to encrypt or encrypt personal information will be required, given the consequences that could arise for the affected persons deriving from a possible loss, illegal access or other unauthorized treatment .

But it would also be advisable that, as an additional guarantee, the encryption or encryption of the information in relation to other data processing operations is also foreseen, for

for example, in the storage of the information while it is being processed by the staff or, once the processing is finished, as long as the data is not destroyed.

Likewise, it would be advisable to provide that once the regulations have been drawn up, the study, analysis and design of the tax policy has been carried out, the information must be destroyed, unless it is anonymised.

For this reason, collecting all these observations, it is proposed to modify section 2 and add two new sections 3 and 4 in the following sense:

> **"2. The information and data to be supplied will be proportional, necessary and essential for the fulfillment of the purposes mentioned in the previous section.**
>
> **3. The communication of this information must be done anonymously, whenever possible or, if the purpose pursued requires it, pseudonymized, so that it does not allow the identification of the affected persons by third parties other than the transferor entity.**
>
> **4. Information encryption mechanisms must be applied during its communication and, whenever possible, in the rest of the processing operations.**
> **Once the study, the elaboration of the regulations or the analysis and design of the tax policy is finished, the personal information must be destroyed, unless it is anonymized.**

Conclusions

Having examined the Proposal presented by the Department of the Economy, to be included in the Draft Law on Fiscal and Financial Measures for 2022 (M-336), it is considered adequate to the forecasts established in the regulations on the protection of personal data, provided that the considerations made in this report are taken into account.

Barcelona, October 22, 2021