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Autoritat Catalana de Protecció de Dades

Report in relation to the draft Law of Democratic Memory of Catalonia

Background

The draft Law of Democratic Memory of Catalonia is presented to the Catalan Data Protection Authority.

The draft law is structured in ten titles with eighty-two articles, thirteen additional provisions, a transitional provision, a repealing provision and five final provisions.

Having analyzed the preliminary draft, which is accompanied by the general report of the provision and taking into account the applicable current regulations in the field of data protection in accordance with the report of the Legal Counsel, I issue the following report.

Legal Foundations

I

(...)

II

In accordance with the provisions of article 1.1 of the draft, the object of the rule is:

"a) Create, consolidate and expand the instruments and resources to develop and regulate public policies for the recovery, preservation and dissemination of the democratic memory of Catalonia.

b) Recognizing and reparing the people, both physical and legal, and the groups that suffered violence and repression, in its many forms, in the period that includes the Civil War and the Franco dictatorship until the constitution of the first democratically elected government in Catalonia since the end of the Civil War.
c) Recognize the commitment of individuals, both natural and legal, groups and organizations of a political, trade union, civic and cultural nature that fought for freedoms and democracy in the period that includes the Second Republic, the War Civil, the Franco dictatorship and the transition to democracy.
d) Eradicate the Franco symbology and all forms of glorification of Francoism.
e) Satisfy the right of citizens to know the truth of the events that took place during the Civil War and the Franco dictatorship until the constitution of the first democratically elected government in Catalonia since the end of the Civil War and the circumstances in

that, during this period, people disappeared and human rights violations were committed."

Article 3 attributes to the Department of the Administration of the Generalitat competent in matters of democratic memory the powers for the ex officio investigation of the facts that occurred during the period of time referred to in the draft legislation in order to contribute to know the truth *"about the development of the war conflict and the participation of the people who, directly or indirectly, took part in it; on exile, deportation and forced displacement during the aforementioned period; and about the circumstances in which, during said period, the confiscation of property, forced labor, professional cleansing, deprivation of liberty and other forms of persecution and repression suffered by the population took place; acts of violence, trials without guarantees, executions, disappearances of people and other violations of human rights, as well as on the specific role and experience of women during the mentioned period".* Likewise, this article foresees that victims and indirect victims (in accordance with the definition in the preliminary project) can request an investigation of the events that occurred to the competent department in matters of democratic memory.

In turn, article 4 of the draft foresees the participation of other administrations and entities that, through an agreement or agreement, can exchange information on the investigations subject to the rule and article 5 the collaboration of third parties people who can provide relevant information for the purposes of the bill.

The information obtained as a result of these actions, either ex officio or at the request of the victims and indirect victims, whether it comes from the collaboration of other administrations or third parties, is incorporated into the Census of Victims of the Civil War and the Franco dictatorship, in the Census of people who disappeared during the Civil War and the Franco dictatorship, and in other treatments carried out by the Department of the Generalitat Administration competent in matters of democratic memory.

The application of the regulation contained in the draft law entails the processing of a large volume of personal data, understood as any information about an identified or identifiable natural person - any person whose identity can be determined directly or indirectly, in particular through an identifier such as a name, an identification number, location data, an online identifier or one or more elements specific to the physical, physiological, genetic, psychological, economic, cultural or social identity of the person- (article 4.1 RGPD).

The draft establishes as one of its objects the recognition and reparation of natural and legal persons (article 1.1.b). In this regard, it should be remembered that legal entities are excluded from the scope of protection of the data protection regulations, as specified by the RGPD itself, by establishing that *"This Regulation does not regulate the treatment of personal data* relating to legal entities *and in particular to companies established as legal entities, including the number and form of the legal entity and its contact details." (Recital* 14). Therefore, from the perspective of the right to data protection, there must be no impediment to the processing of information about legal entities, entities or associations, except for the data corresponding to natural persons who hold the legal representation of 'these legal entities, whose treatment will be subject to data protection regulations.

With regard to physical persons, the draft provides for the preparation of a census of victims of the Civil War and the Franco dictatorship (article 16), it establishes the criteria to determine the persons who can be considered as *"victims " (article* 15), sets up the Census of people who disappeared during the Civil War and the Franco dictatorship (article 25), and regulates the treatment and identification of recovered remains (article 30).

These treatments will affect both living people and missing or dead people. This issue is relevant given that, as Recital 27 of the RGPD indicates, this rule does not apply to the protection of personal data of deceased persons, although it states that "(..) *los Estados miembros son competentes para establish rules relating to the treatment of their personal data.".*

In development of this provision, article 2.2.b) of the LOPDGDD excludes from its scope the processing of the data of deceased persons, without prejudice to what is established in article 3. In this precept recognizes the people related to the deceased person for family or de facto reasons and also the heirs the possibility to request access, rectification and deletion of the data of deceased persons, unless a law prevents it or if the deceased person had expressly prohibited it while alive.

With regard to missing persons, it must be taken into account that the legal concept of a missing person is not the same as that of a dead person.

In Spanish civil law, the consideration of the missing person as dead requires the previous judicial declaration of death or death. Articles 193 and 194 of the Civil Code regulate the cases in which the declaration of death proceeds. Thus, for example, in the case of people who disappeared during the Civil War and the Franco dictatorship, it seems clear that the first assumption of article 193 is met, which provides that the declaration of death or death shall be made ten years after the latest news about the absentee or since his disappearance. However, to consider them dead, a previous judicial declaration of death would be necessary. Consequently, the data of missing persons in relation to which there is no judicial declaration of death or death are data of natural persons, and consequently subject to the protection of the regulations on the protection of personal data.

III

The RGPD provides that all processing of personal data must be lawful, loyal and transparent in relation to the interested party (Article 5.1.a)) and, in this sense, establishes a system of legitimizing the processing of data which is based on the need for one of the legal bases established in its article 6.1 to apply. Specifically, with regard to the treatments carried out by public administrations, paragraphs c) and e) of article 6.1 of the RGPD are particularly relevant, which respectively state that the treatment will be lawful if *"it is necessary for the fulfillment of an obligation law applicable to the person responsible for the treatment", and "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".*

As can be seen from article 6.3 of the RGPD and expressly included in article 8 (LOPDGDD), data processing can only be considered based on the legal bases of article 6.1.c) and e) of the 'RGPD when so established by a rule with the rank of law.

The draft law being analyzed could be an enabling rule for the processing of data necessary for the management of actions related to democratic memory. However, the RGPD prohibits in its article 9.1 the processing of special categories of data: *"The processing of personal data that reveals ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation remains prohibited , and the processing of genetic data, biometric data aimed at uniquely identifying a natural person, data relating to health or data relating to the sexual life or sexual orientation of a natural person",* except if, in addition to a legal basis provided for in article 6.1 is also given some of the exceptions established in article 9.2 of the RGPD.

In most cases, the registration itself in one of the censuses provided for by law, whether in the census of victims of the civil war and the Franco dictatorship, in the census of disappeared persons or in the bank of memory, allows obtain a certain profile of the people who are registered to the extent that they are victims of repression suffered which may be as a result of political opinions or religious convictions, a specific trade union affiliation, sexual orientation or origin ethnic or racial of these people. Therefore, regardless of whether the specific data on the reason for the repression suffered are recorded in more or less detail in these censuses, in general the treatment of this data entails the treatment of special categories of data.

But, in addition, the draft law also foresees the treatment of another typology of special categories of data, such as genetic data, which are treated with the aim of being able to identify missing persons.

In order to lift the prohibition of Article 9.1 of the RGPD to treat these types of data, it is necessary that one of the exceptions provided for in Article 9.2 be given, among which, for the purposes of this report, the following must be taken into consideration:

"a) the interested party gives his explicit consent for the treatment of said personal data with one or more of the specified purposes, except when the Law of the Union or of the Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party;
(...)
g) "the treatment is necessary for reasons of an essential public interest, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish appropriate and specific measures to protect the interests and fundamental rights of the interested party;
(...)

j) "the treatment is necessary for archival purposes in the 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 it must be proportionate to the objective pursued, essentially respect the right to data protection and establish appropriate and specific measures to protect the fundamental interests and rights of the interested party."

In the case we are dealing with, the draft law makes express reference to letters g) ij) of article 9.1 RGPD.

However, the processing of the genetic data of relatives of missing and dead persons in order to carry out the identification process of the remains that are located and exhumed, must necessarily be based on the explicit consent of those .

The exception provided for in letter g) (essential public interest) requires, as provided for in article 9.2 of the LOPDGDD that these treatments *"must be covered by a rule with the level of law, which may establish additional requirements relating to security and confidentiality."*

This regulation must contain *"adequate and specific measures to protect the fundamental interests and rights of the interested party;" (article* 9.2.g) through adequate guarantees (Consideration 56 RGPD).

In this sense, the Sentence of the Constitutional Court 76/2019 has established:

> *"The treatment of the special categories of personal data is one of the areas in which the General Data Protection Regulation has expressly recognized the Member States "room for maneuver" when "specifying their rules", as as it qualifies in recital 10. This margin of legislative configuration extends both to the determination of the enabling causes for the treatment of specially protected personal data - that is, to the identification of the purposes of essential public interest and the appreciation of proportionality of the treatment to the end pursued, essentially respecting the right to data protection - such as the establishment of "adequate and specific measures to protect the fundamental interests and rights of the interested party" [article 9.2.g) RGPD]. The regulation contains, therefore, a specific obligation of the Member States to establish such guarantees, in the event that they enable the processing of specially protected personal data." (FJ4)*

And in Legal Basis 5, it adds:

> *"This double function of the reserve of law translates into a double requirement: on the one hand, the necessary intervention of the law to enable the interference; and, on the other hand, that legal norm "must meet all those indispensable characteristics as a guarantee of legal security", that is, "must express each and every one of the budgets and conditions of the intervention" (STC 49/1999 , FJ 4). In other words, "not only does it exclude powers of attorney in favor of regulatory norms [...], but it also implies other requirements regarding the content of the Law that establishes such limits"*
> (STC 292/2000, FJ 15)." (FJ5d)

And, in terms of adequate safeguards, Legal Basis 6 states the following:

> *"6. In view of the potential intrusive effects on the affected fundamental right resulting from the processing of personal data, the jurisprudence of this Court requires the legislator to, in addition to complying with the aforementioned requirements, also establish adequate guarantees of a technical, organizational and procedural, that prevent risks of varying probability and severity and mitigate their effects, because only in this way can we ensure respect for the essential content of the fundamental right itself. (...) (FJ6)*

c) The need to have adequate guarantees is especially important when the treatment affects special categories of data, also called sensitive data, because the use of these latter is likely 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." (FJ6)

In summary, constitutional doctrine establishes that the rule limiting the fundamental right to data protection that involves the processing of special categories of data must contain a precise regulation of three essential elements:

1) It must determine by itself the purpose of the processing of the data (and for this purpose a generic mention of this purpose is not sufficient but must specify the essential public interest that grounds the processing of special categories of data).

2) It must regulate in detail the restrictions of the fundamental right (clear rules on the scope and content of the data processing it authorizes).

3) It must establish adequate guarantees to protect the rights of interested parties, which guarantee transparency, supervision and effective judicial protection, that they are not collected disproportionately and are not used for purposes other than those that justified the its obtaining

In this context, it is necessary to analyze whether the bill complies with the legal provisions that regulate the processing of personal data and with the aforementioned constitutional doctrine.

IV

At the outset, the draft law is accompanied by a general report that carries out a detailed analysis of the implications that the regulation established in the draft law has on the right to the protection of personal data.

In the report it is stated that the data treatments regulated in the preliminary project have as a legal basis paragraphs c) and e) of article 6.1. of the RGPD and the consent of the interested parties is generally discarded as a legal basis for these treatments.

This report identifies the precepts of the preliminary project that expressly establish the possibility of carrying out specific data treatments for certain purposes in order to comply with the overall objectives of the rule. Specifically, articles 3 *(Right to the truth),* 4 *(Collaboration with administrations and entities),* 5 *(Collaboration of third parties), 6 (Commission of democratic memory), 8 (Right of access)* are identified *to the documents),* 9 *(Democratic Memory Bank),* 10 *(Promotion of the right to justice),* 11 *(Communication of evidence of the commission of criminal offences),* 13 *(Legal reparation for the victims of the Franco dictatorship),* 16 *(Census of victims of the Civil War and the Franco dictatorship),* 19 *(Publicity of the names of the victims),* 25 *(Census of persons who disappeared during the Civil War and the Franco dictatorship),* 30 *(Treatment and identification of the recovered remains),* second additional provision *(Access to information relating to clearance files of public employees and other professionals)* and finally the third additional provision *(Protection of personal data included in the Census of Civil War victims and the Franco dictatorship, in the Census of people desap arising during the Civil War and the Franco dictatorship, to the Bank of Memory and to the other processing of personal data carried out in application of this law).*

It is worth noting that other precepts of the draft law also enable the processing of personal data, thus articles 21 *(reparation of people who have suffered unjust loss of their patrimony)* article 22 *(reparation of people who have suffered forced labor)* article 23 *(location and identification of children taken from their families),* article 24 *(search, location, recovery and identification of missing persons during the Civil War and the Franco dictatorship),* article 27 *(actions to locate, recover and identify missing persons),* article 54 *(withdrawal of distinctions, appointments, titles and institutional honors),* article 58 *(deprivation of aid and public subsidies),* as well as all of Title X relating to the sanctioning regime.

As indicated in the same report, the third additional provision of the draft law *"is intended to regulate the aspects related to the processing of personal data that are necessary to execute the Law and that, due to regulatory technical issues, are not they could include in the article of the rule. The aforementioned additional provision complies with what was established in the Constitutional Court Judgment 76/2019, of May 22, which contains doctrine on the characteristics and content that must be contained in regulations that regulate aspects with an impact on the right to data protection."*

Although the efforts to clarify both the purpose and the terms in which the data are to be processed, as well as the applicable guarantees, are positively valued, the content of the different sections into which the additional provision relating to the different data treatments is divided goes beyond what would be required in application of the aforementioned ruling STC 76/2019 which, as explained, requires the identification of the purpose of the treatment, the

data to be treated, the conditions of treatment including information flows,
as well as the specific guarantees to be applied. In addition, if it is necessary to introduce any limitation to the rights, this should also be foreseen, in accordance with the provisions of article 23 RGPD.

In fact, its content seems to coincide to a large extent with the information that must be collected by the Register of Processing Activities referred to in article 30 of the RGPD and 31 of the LOPDGDD and in some cases it reproduces forecasts of the 'RGPD or the LOPDGDD that it would not be strictly necessary to reiterate. It would be sufficient for the standard to accurately include the three elements mentioned relating to the purposes, the conditions of treatment, the appropriate guarantees relating to the treatment of special categories of data. In addition, as is already done, of the limitations to the exercise of rights in accordance with article 23 of the RGPD.

In this sense, for example, if we take as reference section 2 of the third Additional Provision (but this would be extrapolated to the other sections of the additional provision), they may be superfluous and reiterative with respect to what is already established by the current regulations, the following sections (paragraphs that may be redundant due to repetition are reproduced verbatim):

"Transparency: given the provenance of the data obtained, the obligations of information to interested persons for the purposes of article 13 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, they will adjust to the fact that the information is known by the interested person, when it has been provided by him.

When the information has not been obtained from the interested persons, they must be informed under the terms of article 14 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, unless the communication of this information is impossible or involves a disproportionate effort, to refer to treatments for scientific or historical research purposes, or for statistical purposes. In these cases, appropriate measures must be taken to make it public.

(...)

The data controller must guarantee the application of the corresponding security measures, in compliance with Royal Decree 3/2010, of January 8, which regulates the National Security Scheme in the field of electronic administration .

(...)

In accordance with article 2.1.b) of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights, personal data are not subject to the regulations on the protection of personal data corresponding to dead people.

The exercise of rights for natural persons, both victims and family members, subject to the regulations on the protection of personal data is guaranteed in accordance with the general regulations on the protection of personal data.

Guarantees to avoid illicit or abusive transfers or access: the data controller establishes organizational and technical measures that guarantee the safe storage of physical documents. Also, the data controller establishes organizational and technical measures to prevent illicit or abusive access and illicit transfers, by means of codes that allow access to the Census only to authorized personnel, and limited to the information strictly necessary for the development of the functions that have been attributed to them. Means are in place to prevent access to unauthorized third parties or illegal transfers."

In any case, and for the purposes of improving the system of the Law, it would be good if in the respective articles of the articulated text that regulate the different treatments that are then detailed in the third additional provision, a reference should be made to the corresponding section of the third additional provision.

V

It is also generally necessary to highlight the desirability of carrying out a Data Protection Impact Assessment in the context of the approval procedure for this draft law in application of what is established in article 35.10 of the RGPD. It is considered that the processing of the data that will be carried out, both with regard to the census of victims of the civil war regulated in article 16, and the processing of genetic data regulated in article 30, are included in the indicative list of the type of treatments that require an impact assessment related to data protection published by the APDCAT.

In the case of the census of victims there is a large-scale processing of special categories of data (as has been explained being included in this census may lead to the disclosure of special categories of data relating to political opinions, religious convictions or philosophical, trade union affiliation or data relating to sexual orientation) that can have an impact on a very high number of living natural persons and therefore, protected by data protection regulations, given that the concept of victim also includes, in accordance with article 15, indirect victims including, among others, relatives up to the fourth degree of direct victims.

In this case, to determine that it is a large-scale treatment, the number of people affected in absolute terms (broad concept of victim) must be taken into account, the permanence over time of this treatment activity (it is provides for the documentation to be permanently preserved) and its geographical extension (the entire territory of Catalonia).

On the other hand, the treatment provided for in article 30 entails the treatment of genetic data (article 4.13 RGPD). In accordance with the guideline list published by the APDCAT, it is considered advisable to carry out the data protection impact assessment of the treatments that involve the use of genetic data for any purpose.

VI

The following considerations must be made regarding the exercise of the rights recognized by the RGPD to interested persons and the regulation contained in the draft law:

As explained, the data protection regulations do not apply to dead people. However, article 3.1 of the LOPDGDD establishes an authorization so that people linked to the deceased person can exercise the right of access to the data of the deceased person before the data controller and, in their case its deletion. Next, the same article provides for the possibility of limiting this exercise of rights when a law expressly provides for it.

The regulation contained in the exercise of rights section of the third additional provision seems to want to constitute the rule that expressly includes the limitation of the exercise by the persons linked to the deceased persons of the right to delete the personal data of the deceased persons recorded in the different censuses and data processing (Census of victims of the Civil War and the Franco dictatorship, processing of personal data relating to combatants and the processing of personal data relating to the Bank of Memory).

In fact, the wording of this paragraph of paragraph 2 of the third additional provision does not limit the right of deletion, but seems to exclude it. It does not seem that this is justified, from the perspective of Article 23 RGPD, which does not see the possibility of excluding the right but only of limiting it.

Taking this into account, the following wording is proposed:

> *"Exercise of rights: people related to the dead victims can request access, rectification and deletion of their family members' personal data in accordance with article 3.1 of Organic Law 3/2018, of 5 of December, on the protection of personal data and the guarantee of digital rights. The right of deletion will not apply with respect to those data whose deletion may affect the right of victims and citizens in general to verify the facts and public knowledge of the reasons and circumstances in which violations were committed of human rights or serious violations of international norms on human rights during the period that includes the Civil War and the Franco dictatorship until the constitution of the first democratically elected government in Catalonia since the end of the Civil War and, in case of disappearance, about the fate of the victim and the clarification of his whereabouts."*

These considerations would also extend to section 4 of the additional provision third and in section 3, regarding missing persons who have been declared dead.

VII

It is also necessary to refer to the regime of access to public information (article 8 of the Draft).

Article 8 of the draft, in its section 1, regulates the right of access to documents through a referral to what is established by Law 19/2014, of December 30, on transparency, access to public information and good governance (hereafter LTC) and Law 10/2001. In addition to article 8, articles 16.4 (Census of victims of the Civil War and the Franco dictatorship) and 25.3 (Census of persons who disappeared during the Civil War and the Franco dictatorship) are also referred to, which expressly provide that the data of these censuses are public in the terms established by the LTC and Law 10/2001 of archives.

At the outset, it should be pointed out that the reference to Law 10/2001 should be deleted, given that the regime for access to public information is currently regulated in Catalonia by the LTC. The reference to Law 10/2001 seems to be understood as made in article 36 of this Law, according to which:

> *"1. In a general way, the legally established exclusions regarding the consultation of public documents cease to have effect thirty years after the production of the document, unless specific legislation provides otherwise. If these are documents that contain personal data that may affect the security, honor, privacy or image of people, as a general rule, and unless specific legislation provides otherwise, they may be subject to public consultation with the consent of those affected or when twenty-five years have passed before their death or, if the date is not known, fifty years before the production of the document."*

The first part of this section, which provides that consultation exclusions will disappear after thirty years in general, is in open contradiction not only with the LTC but, especially with the RGPD.

In accordance with the regulations of the LTC the limits to the right of access are only temporary if so established by the law that regulates them (art. 22.2 LTC). So there would be no automatic blanket repeal at age 30. On the other hand, and focusing on the right to data protection, the rules that regulate the limit are the RGPD and the LOPDGDD. According to these rules, the right to data protection does not disappear until the death of the person. Therefore, the reference to Law 10/2001 only introduces an element of confusion and the reference to the LTC would be sufficient.

In the LTC, the passage of time is one of the elements that must be taken into account when weighing up the public interest in access and the right to data protection (art. 24.2.a) LTC) but does not make the limit disappear automatically after 30 years.

For this reason, it is proposed to delete the references in articles 8.1 and 8.2, 16.4 and 25.3 in Law 10/2001.

On the other hand, the references in articles 16.4 and 25.3 of the Draft to that the data are *"public in the terms established by Law 19/2014"* introduces an element of confusion. It is obvious that the data from these censuses constitute public information within the meaning of article 2.b) of the LTC. But beyond that, the wording of these sections could generate the confusion of leading to understand that it is information of general public access.
For this reason, and given that article 8 already refers to the right of access, it is proposed to delete articles 16.4 and 25.3 or, where appropriate, replace them with a reference to article 8.

Thirdly, section 2 of article 8 establishes the following:

> *"2.Any person can fully consult the information existing in documents that prove their status as a victim in accordance with this law and that are subject to Law 19/2014, of December 29. For these purposes, you can access the personal data of third parties that appear in said documents, without subjecting to the deadlines established in article 36 of Law 10/2001, of July 13."*

At the outset it must be said that in this case we would not be faced with an exercise of the right of access to public information provided for in the LTC but with the right of access to one's own information recognized by the article 15 of the GDPR. To the extent that it is information linked to your status as a victim (and this may also include information from third parties linked to the events that gave rise to your status as a victim, or other people who have contributed to the clarification of the facts), it would be personal information of the victim himself. On the other hand, it does not seem justified to access data from other third parties that may appear in documents that are not related to their status as a victim.
To give an example, access to the identity of the people who participated in the victim's persecution would be justified, but access to the data of other victims (for example, other babies abducted from the their parents).

Therefore, the following wording is proposed:

> *"2. Any person can consult the information existing in documents that prove their status as a victim in accordance with this law, including, where appropriate, the data contained in them of third parties who have participated in the events suffered by the victim or that have contributed to the clarification of the facts."*

On the other hand, and for the purposes of improving the system of the law, it would be advisable to include in this article also the regulation contained in the second additional provision of the draft, regarding access to public information relating to certain public employees, professionals and employees of certain entities.

VIII

Regarding active publicity, it is necessary to mention the provisions of article 19 of the project on the publicity of the names of the victims.

This article covers the cases in which the Generalitat must publish the names and surnames of the victims.

At the outset, and to improve the system of the law, the publication of the names and surnames of the victims referred to in article 13.1 of the draft law is missing among the cases provided for in this article, in which the provisions of the first final provision of Law 11/2017, of 4 July on legal reparation for the victims of the Franco regime, are reproduced.

Secondly, the assumption provided for in letter d) is formulated in an excessively open manner. Far from providing legal certainty, this letter d) can generate interpretive problems that should be avoided. That is why it is recommended to specify the assumptions to which it refers or, if this is not possible, to eliminate it.

To the extent that it is an authorization, the wording should specify in which cases the Generalitat can publicize this information, for what purposes and the way in which this information will be publicized. Likewise, it would be convenient to identify the

mechanisms that allow opposition to the publication of this information if there are other legitimate interests of third parties that may oppose this publication.

On the other hand, as good as the public interest in the clarification and reparation of the facts referred to in the draft law is undeniable, it cannot be ruled out that in certain cases, especially in the case of facts that happened during the minor, the public exposure of certain facts may revictimize her or expose aspects of her personal or intimate life that she wishes to exclude from public knowledge. It should be borne in mind that despite the fact that only the name and surname will be published, their identity will be associated with certain facts that may be particularly painful for the victims. That is why it would be good to introduce in this article an express reference to the right of opposition provided for in article 21 of the RGPD.

That is why it is proposed to introduce a section 2 in this article, with the following wording:

"2. What is provided for in paragraph 1 of this article can be limited in the event that the victim exercises the right of opposition provided for in the regulations for the protection of personal data."

IX

Beyond these general considerations, especially those made in Legal Basis IV on the reiterative and superfluous nature of certain paragraphs, the different sections of the third additional provision of the draft are analyzed below.

a) Legality of the treatment

Sections 2, 3, 4, 6 and 7 when defining the legal basis of the treatment contain some element that can generate confusion, given that they refer jointly to the existence of a mission in the public interest (art. 6.1.e RGPD), the existence of an essential public interest (art. 9.2.g) and the existence of scientific and historical research purposes, and for statistical purposes, and for archival purposes in the public interest (art. 9.2. j)".

At the outset, neither the scientific research purpose (as opposed to the historical one), nor the statistical purpose seems to be applicable in this case. That is why the reference to these two aspects should be deleted.

Secondly, the legal basis of section 2 (and also sections 4 and 6) contains a third paragraph relating to the possibility of publishing the data of public authorities and officials.

At the outset it must be said that systematically it would be more appropriate to regulate this publication in the articulated text. For example, it could be regulated in article 19 (the title of the article would have to be adjusted) in order to unify the regulation of the planned publications.

Beyond that, the wording of this section can be confusing, given that it is not clear whether the clause *"that are of public interest"* refers to functions or published data. For this reason, the following wording is proposed (which, if applicable, should be incorporated into article 19 as a section 3):

"3. In the case of historical investigations, data on dead victims can be published or in other cases where it is of public interest. They can also

publish, when it is of public interest, the personal data of authorities and public officials related to the exercise of their duties."

Regarding section 5 of the third additional provision (sanctioning procedures), it seems that the most appropriate legal basis would be the exercise of public powers (art. 6.1.e) RGPD

b) Data collected

Regarding the Census of victims of the Civil War and the Franco dictatorship, the Census of missing persons, the processing of personal data relating to combatants and the processing of personal data relating to the Bank of Memory regulated in article 9, there is a lack of a clear indication of the types of special categories of data that may be the subject of treatment, that is to say, if they are about ethnic or racial origin, political opinions, religious or philosophical convictions, trade union affiliation, etc.

c) Transfer of data

Article 4 regulates collaboration with public administrations and entities.

At the outset, the article should differentiate between the collection of information by the department of the Generalitat competent in matters of democratic memory, and where appropriate, the possibility that it can be obtained from the entities with which agreements or conventions are reached for the purposes referred to in the article, and its incorporation in the different censuses that regulate the draft (which in the case that contains personal data of living persons will have as its legal basis article 9.1.g) and 9.1.f) RGPD), of the possible transfers of information that the administration of the Generalitat may make to the entities with which it signs agreements or agreements

For these purposes, it would be good to include an article that expressly provides for the authorization to collect all the information necessary to carry out the investigations, without prejudice to what will be said later regarding the DNA samples.

This article should include the forecasts that currently appear relative to the Source of the data that appears in different sections of the third additional provision and also the current article 4.3 of the preliminary draft, although with respect to this section some additional observation must be made.

With respect to the sections relating to the sources of the data, it is suggested to include, expressly, a reference to the data that can be obtained from family members and people related to the victims or the events they suffered (currently only section 6 refers to family members).

With respect to section 3 of article 4 of the preliminary project, in accordance with the principle of data minimization, the word *"necessary" should be added.* Thus, the wording would be as follows:

"In accordance with what was established in Law 40/2015, of October 1, on the legal regime of the public sector, public administrations must provide the department of the Generalitat Administration competent in matters of democratic memory the data relating to the victims and indirect victims, to the other people referred to in section 1 ia

the persons who may have the status of interested parties in the procedure that the aforementioned department requests, who are necessary in order to carry out the actions that are the object of this law"

Beyond this, if apart from the direct information on the victims or related persons, it is also intended to carry out reverse searches based on the information contained in the register or in the Register of Inhabitants or other databases from of which the relationship with the victim or missing person can be determined, it would be clearer if the article expressly included this authorization, so that it is the administration that has these databases that carries out the reverse search and returns them the result to the competent administration in matters of historical memory.

Regarding the transfer of data by the competent administration in matters of democratic memory, in the third additional provision, in the regulation of the different censuses and treatments, it is foreseen: *public administrations in the exercise of their powers, when necessary for process and solve their procedures, the data are communicated to other entities and, in accordance with the principle of data minimization".*

This ability to communicate data is too generic and would require a specification of both the recipient entities, the data that can be communicated and the security and confidentiality requirements that must be demanded of the potential recipient of the data .

Actually, taking into account that there is already an article 4 in the draft dedicated to collaboration with administrations and entities, these forecasts should be recast and clarified.

Article 4.1 establishes:

"The Administration of the Generalitat must establish protocols, agreements or collaboration agreements with universities, research centers, administrations and entities, including those of other states and international organizations, that carry out actions in the field of democratic memory, with the aim of exchanging information to find out the truth of the events that happened during the Civil War and the Franco dictatorship until the constitution of the first democratically elected government in Catalonia since the end of the Civil War and of the circumstances in which, during this period, people disappeared and human rights violations were committed; to obtain information about the people who, directly or indirectly, took part in the war conflict, the victims and their fate and, where appropriate, locate, recover and identify their remains; to obtain information about exiled persons and other persons considered victims under this law; to obtain information to locate indirect victims and relatives of the persons mentioned and to achieve the other objectives of this law. The information obtained must be incorporated, if applicable, in the Census of victims of the Civil War and the Franco dictatorship, in the Census of persons who disappeared during the Civil War and the Franco dictatorship and in other treatments carried out by the department of the Administration of the Generalitat competent in matters of democratic memory".

In accordance with the data protection regulations, it must be the same law that establishes the data communications that must be carried out. In the event that the communication is to another administration or international body with powers over the same

subject matter of the draft law, and that the data are necessary for the exercise of the respective functions, it would be a clearly compatible purpose.

Communication for historical research purposes may also be compatible (art. 5.1.b) RGPD) although in this case, if it affects special categories of data it will be necessary for the law to expressly provide for it and to also provide for the necessary guarantees (art. 9.2.j) RGPD).

Beyond this assumption, in accordance with article 6.4 RGPD communication for other purposes would require that it be the law that provides for the communication for the achievement of one of the objectives included in article 23.1 RGPD.

It should also be made clear that in this transfer of information the genetic data available to the Generalitat administration collected in the genetic data banks referred to in article 30 of the draft are excluded.

In the case of the memory bank, it is added that the data are also communicated to researchers and the public in accordance with the provisions of Law 19/2014, of December 29, on transparency, access to public information and good governance and Law 10/2001, of July 13, on archives and document management, a provision that does not exist with regard to the other censuses and data processing in this section and that generates confusion, since, in final, the general regime provided for in article 8 of the draft law is included.

In addition to these considerations, in the case of the processing of personal data relating to the sanctioning procedures for violation of the Law of Democratic Memory, data communications to other entities and public administrations must be limited to those necessary to make effective the provisions of article 56 of the draft law. In this sense, it is recommended to modify section 5 of the third additional provision to specify that the personal data relating to the sanctioning procedures for violation of the democratic memory law can only be communicated to the competent administrations to apply the bonuses or grant the subsidies referred to in article 56 of the draft for the purposes of applying these provisions.

d) Conservation

In sections 2, 3, 4 and 6, in the paragraphs that regulate the conservation and security of data, it says *compliance with the regulations on archives and document management*". It should be given the purpose of the treatment, the data are for permanent conservation, of borne in mind that although with respect to the identification data of the victims and those linked to the repression suffered, their permanent conservation may be justified, the data that have been collected for the purpose of the research, (such as the samples of relatives' DNA) or the data relating to relatives and other interested persons, it does not seem justified that in general they should be kept permanently.

e) Source and accuracy of the data

Without prejudice to what has already been pointed out regarding the sources of the data, it would be convenient to separate the reference to the sources from the reference to the principle of accuracy.

Regarding this second question, a guarantee of accuracy is offered *"by the source of origin",* but it does not seem clear the basis of this guarantee or what its implications would be. The references to *"a historiographical verification procedure"* are also not very concrete .

f) Processing of personal data relating to combatants

Section 4 of the third Additional Provision provides for the processing of personal data relating to combatants.

On the other hand, beyond the references in articles 15.2.c) and 15.4.a) to combatants who were victims, there is no article in the Law that specifically regulates this issue, with respect to combatants who were not victims or combatants who participated in any of the events referred to in article 15.

It should be borne in mind that, given the nature and scope of the war conflict, collecting this type of information affects a very high number of people and could offer - although not always accurately - information on special categories of linked data to ideology For this reason, the public interest should be expressly justified
essential that would justify this treatment.

X

With regard to the processing of genetic data regulated in article 30 (paragraph 7 of the third additional provision), it should be made clear that the processing of the biological samples of relatives of missing persons to compile their DNA profiles is a treatment of special categories of data that must be based on consent
expressed by these people (Article 9.2.a) RGPD).

At the outset, it should be noted that the reference to *"a banking system"* is unclear. If the purpose is unique it does not seem clear why Article 30 refers to a system of banks and not to a bank of DNA samples. It would be necessary to clarify this issue, determine exactly whether there is one or several banks and also clarify their responsibility.

On this issue, section 7 of the second additional provision identifies the department responsible for democratic memory and the department responsible for health as responsible for the treatment. On the other hand, throughout the project no other reference appears to the fact that any function is attributed to the Department of Health regarding the system of genetic data banks. This issue should be clarified. Given the functions attributed to the competent department in matters of democratic memory, it seems clear that it is this Department that must be responsible. This without prejudice to the fact that the same law may provide for the intervention of the Department of Health in some phase of the treatment necessary to identify the remains or the collection and comparison of the samples (in the event that the law does not provide for it, it would be necessary to establish through a processing contract, art. 28 RGPD).

On the other hand, although article 30.1 already makes reference to people who *"want to be part of it",* the mention is confusing, given that it seems to refer to missing persons, when in reality it should refer to people's family members

disappeared Apart from this, remember that for the collection of biological samples from relatives of missing persons, their consent must be obtained, so it would be advisable to collect it in a clearer way in this article.

Also in this sense, in section 7 of the third Additional Provision, the subsection that regulates the lawfulness of the treatment of genetic data regulated in article 30 should be modified in order to add that the legal basis of the treatment of the genetic data of relatives of missing persons is their explicit consent.

In addition, it should be added, clearly, that the data can only be used for research and the genetic identification of the human remains of missing persons in the period established by the draft law, and that only they will be kept for the period necessary for their identification.

On this issue of conservation, section 7 of the third Additional Provision indicates that they will be preserved *"as long as the identity of the person to whom they correspond is unknown or can be used to identify other victims."* This forecast, if it refers to the DNA of living people, is imprecise because taking into account that the data must have been collected with the consent of the people affected, it must be a specific consent, so that can be used to identify a specific person or persons. This would be in contradiction with the possibility of using them to identify *"other victims".* In the event that this provision refers to the DNA of dead persons, then some provision would be missing regarding the preservation of the DNA of living donors. This is why it should be indicated that the DNA of the donors will only be kept for the period necessary for the identification of the people for whom it has been provided.

Finally, in line with what has already been indicated, article 4 should incorporate the provision that the genetic data of family members of missing persons cannot be transferred to other public administrations without their consent.

XI

Other considerations relating to the joint.

- Article 15. Definition of victims

The first two sections of this article contain the definitions of victims for the purposes of the draft law, in the first section it is said that *"all those people who suffered damage in the territory of Catalonia..."* are considered victims section 2 states that: *"citizens of Catalonia are considered victims..."* affected by other cases that happened outside of Catalonia. Given the importance of the definition of victim in relation to the application of the draft law and the processing of personal data

of these people considered as victims, and that both sections are cumulative, it would be appropriate to add the word *"Also..."* at the beginning of article 4.2.

- Article 9 and section 6 of the third Additional Provision: Memory Bank democratic

The regulation contained in article 9 and the third additional Provision relating to the Bank of democratic memory is quite confusing. The concept of Bank suggests the idea of a previously delimited set of information under the responsibility of an administration. However, both from article 9 of the draft, and from section 6 of the third additional provision, it is not clear which are the databases or documentary funds that make it up (for example, it is not clear if the censuses regulated by the preliminary project are part of it), bearing in mind that they can be drawn up by different administrations or even private entities.

In section 6 of the third additional provision, it is indicated that the person responsible for the processing of personal data relating to the Memory Bank is the department of the Generalitat Administration competent in matters of democratic memory and the Democratic Memorial.

At the outset, the fact that there are two persons responsible would lead us to the figure of joint responsibility for the treatment (art. 26 RGPD), which, if so, should be included clearly in the project, with the implications that this will entail later , not only because of the need to establish the agreement referred to in article 26 but when it comes to jointly fulfilling the obligations entailed by the responsibility for the treatment.

Beyond that, this forecast does little with the fact that it is indicated that the Memory Bank includes archives and documentary funds prepared and documented by other administrations. Rather, it would seem that the Data Bank, if this figure is to be maintained, should not be set up as an autonomous treatment, but that each of the administrations or private entities responsible for some database or documentary fund that integri would be responsible for its database or documentary fund. If so, paragraph 6 of the third additional provision should be deleted.

- References to the National Security Scheme

Finally, it should be remembered that the references in the draft law to the regulatory norm of the National Security Scheme must be reviewed in order to refer to the new Royal Decree 311/2022, of May 3, by which regulates the National Security Scheme, which includes the updates referred to in the first additional provision of the LOPDGDD regarding security measures in case of processing personal data.

Conclusions

Having examined the draft Law of Democratic Memory of Catalonia, it is considered adequate to the provisions established in the regulations on the protection of personal data, as long as the considerations made in this report are taken into account.

Barcelona, May 23, 2022