Machine Translated by Google

apdcat
Autoritat Catalana de Protecció de Dades

Report in relation to the Draft Decree for the deployment of the sanctioning procedure in the field of equal treatment and non-discrimination and accessory sanctions

Background

The Draft Decree for the deployment of the sanctioning procedure in the field of equal treatment and non-discrimination and accessory sanctions is presented to the Catalan Data Protection Authority, so that the Authority can issue its opinion.

The Draft Decree consists of an explanatory part, four titles, thirty-seven articles, six additional provisions, two transitional provisions and three final provisions.

Having examined the Project and seen the report of the Legal Counsel, the following is reported.

Legal Foundations

I

(...)

II

The purpose of the Draft Decree that is submitted to report is to regulate the procedure that must be used to sanction the infractions regulated in Law 19/2020, of December 30, on equal treatment and non-discrimination, as well as the conditions application of the accessory sanctions regulated in article 47 of the same rule (article 1.1).

The same Project establishes that this procedure must also be used to sanction the infractions regulated in Law 11/2014, of October 10, to guarantee the rights of lesbians, gays, bisexuals, transgenders and intersexuals and to eradicate the homophobia, biphobia and transphobia (article 1.2), as well as those infractions regulated by any sectoral law, the purpose of which is to regulate matters of equal treatment and non-discrimination, provided that its articles so establish (article 1.3).

The Draft Decree is structured in four titles:

- Title I regulates a series of general issues.
- Title II regulates the processing of the sanctioning procedure.
- Title III regulates the completion of the sanctioning procedure.
- Title IV regulates accessory sanctions.

Machine Translated

Machine Translated by Google

It is clear that the application of the provisions contemplated in this Project will involve the processing of information of certain natural persons (offenders, whistle-blowers, victims, etc.), which must comply with the provisions of the Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD) and Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD).

Please note that this report is issued exclusively with regard to the assessment of the impact that the Draft Decree may have from the point of view of the protection of personal data, for which reason those aspects are mentioned below of the Project that are considered relevant in view of the provisions of the aforementioned data protection regulations.

III

Article 10 of the Project is dedicated to the "denunciation" of facts that may lead to the start of the sanctioning procedure that regulates the same Project.

Section 2 of this article states that *"the report can never be anonymous, the identity of the person or people who expose the facts must be stated, whether they are victims or not. It is the responsibility of the competent bodies to **protect** the personal data of the reporting person".*

Point out that the wording of this last paragraph is not clear enough and could lead to misunderstandings.

It should be noted that the protection conferred by the data protection regulations covers all personal information, in the terms of article 4.1) of the RGPD, which may be available to the competent body for the processing of the sanctioning procedure in matter of equal treatment and non-discrimination, to which this Project refers.

That is to say, this body is responsible for guaranteeing that the data, not only of the reporting persons, but also of the infringing persons, of possible witnesses, of the victims in case they have not reported the facts themselves, of the employees who intervene in the procedure in regard to the functions assigned to them or any other person who may be affected, they are treated in accordance with the principles and guarantees of the data protection regulations, such as, with the protection that is required. It is therefore recommended that the wording of this article be adapted to take this into account.

It seems that with this reference to the protection of only the data of the reporting person, it is intended to provide that the identity of this person must not be revealed to the persons interested in the sanctioning procedure, in particular, to the person reported or alleged infringer .

On this issue, it should be noted that this Authority has been considering (among others, in reports IAI 54/2018, IAI 34/202, IAI 9/2021 or IAI 21/2021, which can be consulted on the Authority's website) that the identity of the reporting person is information that can be known by the reported person on the basis of Article 15 of the RGPD.

Machine Translated by Google

This article of the RGPD recognizes the right of access to one's personal information in the following terms:

"1. The interested party will have the right to obtain from the person in charge of the treatment confirmation of whether or not personal data concerning you are being processed and, in such case, right of access to personal data and the following information:
a) the purposes of the treatment;
b) the categories of personal data in question;
c) the recipients or the categories of recipients to whom they will or will be communicated communicated personal data, in particular recipients in third parties u international organizations;
d) if possible, the expected retention period for personal data or, if not if possible, the criteria used to determine this period;
e) the existence of the right to request from the person responsible the rectification or suppression of personal data or the limitation of the processing of personal data related to interested, or to oppose said treatment;
f) the right to present a claim before a control authority;
g) when the personal data has not been obtained from the interested party, any person available information about its origin;
h) the existence of automated decisions, including the creation of profiles, referred to in article 22, sections 1 and 4, and, at least in such cases, information significant about applied logic, as well as the importance and consequences provisions of said treatment for the interested party.
2. (…)
3. The person responsible for the treatment will provide a copy of the personal data subject to treatment. The person in charge may charge a reasonable fee based on administrative costs for any other copy requested by the interested party. When the interested party presents the request by electronic means, unless he is requesting it that is provided otherwise, the information will be provided in an electronic format common use
4. The right to obtain a copy mentioned in section 3 will not negatively affect the rights and freedoms of others."

In accordance with this article 15 of the RGPD, the person denounced or infringer has the right to know the information about him that is being treated by the competent body and that is provided or generated in the course of the sanctioning procedure, and also has right to know the origin of this information (section 1.g). When, as in this case, the information originates in the denunciation of the facts, this right would also include knowing the identity of the person who provides the information about him, as well as the information referring to the facts, conduct or attitudes that this person attributes to him, as denounced.

Point out, at this point, that the right of access to one's own personal information regulated by the RGPD is a very personal right and constitutes one of the essential faculties that make up the fundamental right to the protection of personal data (article 18.4 CE), so the limitations to this right of access - such as limiting the right to know the origin of the information (not to reveal the identity of the reporting person) - must always be as minimal as possible.

Machine Translated

Machine Translated by Google

In this sense, it should be borne in mind that the only cases in which the same data protection regulation modulates the right of access are included in article 23 of the RGPD, which provides the following:

> *"1. The Law of the Union or of the Member States that applies to the person responsible or the person in charge of the treatment may limit, through legislative measures, the scope of the obligations and the rights established in articles 12 to 22 and article 34, as well as in article 5 to the extent that its provisions correspond to the rights and obligations contemplated in articles 12 to 22, when such limitation essentially respects fundamental rights and freedoms and is a necessary and proportionate measure in a society democratic to safeguard:*
>
> *a) the security of the State;*
> *b) the defense;*
> *c) public security;*
> *d) the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal sanctions, including protection against threats to the public security and its prevention;*
> *e) other important objectives of general public interest of the Union or of a State member, in particular an important economic or financial interest of the Union or of a Member State, including in the fiscal, budgetary and monetary areas, the public health and social security;*
> *f) the protection of judicial independence and judicial procedures;*
> *g) the prevention, investigation, detection and prosecution of infractions of deontological norms in the regulated professions;*
> *h) a function of supervision, inspection or related regulation, including occasionally, with the exercise of public authority in the cases contemplated in the letters a) ae) yg);*
> *i) the protection of the interested party or the rights and freedoms of others;*
> *j) the execution of civil demands.*
> *(...)".*

In accordance with this article 23 of the RGPD, a provision in the sense that article 10.2 of the Project could be aiming at (non-disclosure of the identity of the reporting person), which entails a limitation to the right of access of the affected person at the origin of their information held by the responsible administration, should be established in a rule with the rank of law.

An example, in this sense, is Law 14/2010, of May 27, on rights and opportunities in childhood and adolescence, which, in regulating the communication or reporting of facts that reveal the existence of a situation of risk for a minor, expressly provides that the identity of the person carrying out this communication must be confidential (article 100.2).

To point out that in the case we are dealing with there is no provision in the specific legislation in the matter of equal treatment and non-discrimination examined that establishes in general the confidentiality of the identity of the reporting person. Thus, neither Law 19/2020 nor Law 11/2014, already cited, contemplate this possibility, nor do other sectoral regulations such as now Law 17/2015, of July 21, on the effective equality of women and men, or Law 13/2014, of October 30, on accessibility.

Nor does the current state legislation on equal treatment and non-discrimination (Chapter III of Title II of *Law 62/2003, of December 30, on fiscal, administrative and*

Machine Translated by Google

social order; Organic Law 3/2007, of March 22, for the effective equality of women and men; Royal Legislative Decree 1/2013, of November 29, approving the Revised Text of the General Law on the Rights of Persons with Disabilities and Social Inclusion), nor the Comprehensive Equality Bill of treatment and non-discrimination, of recent parliamentary processing.

At this point, it is necessary to take into account the possibility that the people who have provided the information, that is to say, who are the "source" of the information (the reporting person), may exercise their right of opposition it makes it possible for third parties to know your identity.

In this sense, article 21 of the RGPD provides the following:

> *"1. The interested party will have the right to object at any time, for any reason related to your particular situation, to which personal data that concern you are subject to a treatment based on the provisions of article 6, section 1, letters e) of), including the creation of profiles on the basis of said provisions.*
> *The person in charge of the treatment will stop processing the personal data, unless it proves compelling legitimate reasons for the treatment that prevail over the interests, rights and liberties of the interested party, or for the formulation, exercise or defense of claims.*
> *(...)."*

With regard to this precept, it must be taken into account that the right of access and, in particular, the right to know the origin of the information could also be limited in the event that the reporting person objects to the communication of the your data attesting to the existence of specific personal circumstances that show that revealing your identity could cause real harm to your rights or interests.

In a case like the one being examined, this could be the case when it comes to protecting the victim or people around him who have acted as whistleblowers and who may be at risk as a result of this fact (predictability that they may be subject to reprisals for filing a complaint). In any case, the mechanism for exercising the right of opposition provided for in article 21 and article 12 of the GDPR should be applied.

In view of this, although the Draft Decree cannot incorporate a provision that limits the exercise of the right of access to one's own personal information as referred to in Article 10.2, there would be no inconvenience in recognizing the need to guarantee the confidentiality of the identity of the reporting person who exercises his right of opposition when there is a personal and extraordinary circumstance in his person that requires special protection.

For all this, it is suggested to modify the wording of **article 10.2** of the Project in the sense Next:

> *"10.2 The report can never be anonymous, the identity of the person or people who report the facts must be stated, whether they are victims or not. The competent bodies must guarantee the confidentiality of the identity of the reporting person, even with respect to the interested parties, when the reporting person exercises the right of opposition provided for in the regulations on the protection of personal data and there are personal circumstances that justify."*

Machine Translated by Google

Related to this, taking into account that **article 11.3** of the Project establishes that the administration must make available to citizens *"standard forms"* for complaints, it is recommended that these forms include sufficiently clear information so that the reporting persons are aware that the data may be known by the persons who have the status of interested parties in the sanctioning procedure, as well as the possibility of opposing this communication when duly justified personal circumstances arise.

IV

Article 14 of the Draft Decree mentions mediation as an instrument for resolving the conflict between the parties, the victim and the offending person or persons.

Section 3 of this article regulates the principles that must be guaranteed by the mediation procedure in this area of action, including confidentiality, in the following sense:

> *"c) Confidentiality: The people involved in the mediation procedure cannot reveal any information they know during the mediation procedure."*

Point out that the data protection regulations impose on anyone who intervenes in the processing of personal data the duty to keep it secret, an obligation that remains even after the end of the relationship they maintain with the data controller (article 5 LOPDGDD). For this reason, it could be convenient to include a section in this regard in this same section. To this end, the following wording is suggested:

> *"c) Confidentiality: The people who take part in the mediation procedure cannot reveal any information that they know during the mediation procedure, even after their relationship with the entity for which they provide services has ended."*

v

Title IV of the Draft Decree regulates the accessory sanctions that can be imposed by the competent body in lieu of a legal or serious sanction, subject to the consent of the infringing person.

Article 35.1 of the Project provides that the monitoring of the execution of the accessory sanction is carried out by the person designated by the competent body to sanction, *"whose identity must also be stated in the sanctioning resolution" .*

Article 37.5 of the Project provides that the sanctioning resolution must include, among other aspects, *"the identification and contact details of the person designated by the competent body as responsible for monitoring the execution of the accessory penalty"* (letter a)).

Point out that, in application of the principle of data minimization (Article 5.1.c) RGPD), the information relating to the identification of the person responsible that is stated in the

Machine Translated by Google

resolution must include only your first and last name, not other identifying data such as the DNI number or the professional identification number, if applicable. Likewise, make it clear that the information on the contact details must be understood as referring in any case to the professional contact details.

For the purposes of clarifying these aspects, it is suggested to modify the wording of **article 37.5** in the following sense:

"a) The first and last name and professional contact details of the person appointed by the competent body, as responsible for monitoring the execution of the accessory penalty.

conclusion

Having examined the Draft Decree for the deployment of the sanctioning procedure in the field of equal treatment and non-discrimination and the ancillary sanctions, it is considered adequate to the provisions established in the regulations on the protection of personal data, as long as they are taken into account take into account the considerations made in this report.

Barcelona, July 15, 2022

Machine Translated