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Autoritat Catalana de Protecció de Dades

# Opinion in relation to the consultation made by a foundation on the need to carry out the impact assessments relating to the protection of data provided for in Law 10/2010, of April 28, on the prevention of money laundering and the financing of terrorism

A letter from a foundation is presented to the Catalan Data Protection Authority in which it considers whether foundations and associations must carry out the data protection impact assessments provided for in Law 10/2010, of 28 of April, on the prevention of money laundering and the financing of terrorism.

Having analyzed the query, in view of the current applicable regulations, and in accordance with the report of the Legal Adviser, I issue the following opinion.



## I

(...)

## II

Law 10/2010, of April 28, on the prevention of money laundering and the financing of terrorism, aims to protect the integrity of the financial system and other sectors of economic activity by establishing obligations to prevent money laundering and terrorist financing (Article 1).

These obligations are of three types: due diligence (Chapter II), information (Chapter III) and internal control measures (Chapter IV).

Among the different internal control measures (Chapter IV), Law 10/2010 establishes the obligation of obliged subjects to carry out a data protection impact assessment (hereinafter, AIPD) regarding certain data treatments, in order to adopt reinforced technical and organizational measures in order to guarantee the integrity, confidentiality and availability of personal data, as well as the traceability of data access and communications.

Specifically, the treatments for which an AIPD must be carried out are:

- According to article 32.4 of Law 10/2010, those data treatments carried out for the fulfillment of the obligations established in its Chapter III, this is for the fulfillment of the obligations regarding information: special examination (article 17), communication by indication (article 18), systematic communication (article 20) and collaboration with the

Commission for the Prevention of Money Laundering and Monetary Infringements ( CPBCIM) and/or with its Executive Service (SEPBLAC) (article 21).

- According to article 32 bis, section 4, of Law 10/2010, those data treatments carried out for the fulfillment of the obligations established in its Chapter II, this is for the fulfillment of the obligations in the matter of due diligence, addressed mainly to identify and know all natural or legal persons who intend to establish business relations or intervene in any operations with the obliged subjects (article 3 et seq.).

- According to article 33.5 of Law 10/2010, those data treatments linked to the development of support systems for the exchange of certain information with the CPBCIM and/or the SEPBLAC.

Given this, the consulting entity considers whether foundations and associations must carry out the AIPD provided for in Law 10/2010, to which reference has been made.

**III**

Foundations and associations are included in the categories of persons and entities that, due to their activity, hold the status of obliged subjects, although it must be taken into account that they are not ordinary obliged subjects but of a special regime . This is clear from article 2.1.x) of Law 10/2010 which provides that *" this Law will apply to the following subjects obliged (...) (x) foundations and associations, in the established terms in article 39."*

Thus, a priori, foundations and associations would remain subject only to the obligations provided for in article 39 of Law 10/2010, which provides the following:

> *"The Protectorate and the Board of Trustees, in exercise of the functions attributed to them by Law 50/2002, of December 26, on Foundations, and the personnel with responsibilities in the management of the foundations will ensure that these are not used for money laundering of capital or to channel funds or resources to persons or entities linked to terrorist groups or organizations.*
> *For these purposes, all foundations will keep records during the period established in article 25 with the identification of all persons who contribute or receive free of charge funds or resources from the foundation, in accordance with articles 3 and 4 of this Law . These records will be at the disposal of the Protectorate, the Commission for the Surveillance of Terrorism Financing Activities, the Commission for the Prevention of Money Laundering and Monetary Infractions or their supporting bodies, as well as the administrative or judicial bodies with powers in the scope of the prevention or prosecution of money laundering or terrorism.*
> *The provisions in the previous paragraphs will also apply to associations, corresponding in such cases to the governing body or general assembly, to the members of the representative body that manages the interests of the association and to the body in charge of verifying its constitution, in the exercise of the functions attributed to it by article 34 of Organic Law 1/2002, of March 22, regulating Association Law, comply with the provisions of this article.*

*Taking into account the risks to which the sector is exposed,* ***the remaining obligations established in this Law may be extended by regulation to foundations and associations*** *."*

This article 39 of Law 10/2010 imposes on foundations and associations the obligation to keep records in which the identity of all those persons who contribute or receive free of charge funds or resources from the foundation or association, according to the case In turn, it makes a reference to other obligations that, in the matter of preventing money laundering and the financing of terrorism, may be established towards these entities via regulations.

This makes it necessary to also take into account the provisions established in Royal Decree 304/2014, of May 5, which approves the Regulation of Law 10/2010, of April 28, on the prevention of money laundering and financing of terrorism. Specifically, article 42 of this Regulation, which provides the following:

*"1. Foundations and associations will identify and verify the identity of all persons who receive free funds or resources. When the nature of the project or activity makes individual identification unfeasible or when the activity carried out carries a low risk of money laundering or terrorist financing, the group of beneficiaries and the counterparties or collaborators in said project will be identified or activity*
*2. Foundations and associations will identify and verify the identity of all persons who contribute free of charge funds or resources for an amount equal to or greater than 100 euros.*
*3.* ***Without prejudice to the provisions of article 39*** *of Law 10/2010, of April 28, and the obligations that are applicable to them in accordance with its specific regulations, foundations and associations* ***will apply the following measures*** *:*
*a) Implement procedures to guarantee the suitability of the members of the governing bodies and other positions of responsibility of the entity.*
*b) Apply procedures to ensure the knowledge of their counterparts, including their adequate professional career and the respectability of the people responsible for their management.*
*c) Apply adequate systems, depending on the risk, to control the effective execution of its activities and the application of the funds as planned.*
*d) Keep for a period of ten years the documents or records that accredit the application of the funds in the different projects.*
*e) Inform the Executive Service of the Commission of facts that may constitute evidence or evidence of money laundering or terrorist financing.*
*f) Collaborate with the Commission and its support bodies in accordance with article 21 of Law 10/2010, of April 28.*
*4. The Public Administrations or their dependent organisms that grant subsidies to associations and foundations, as well as the Protectorates and the organisms in charge of verifying the constitution of associations mentioned in article 39 of Law 10/2010, of April 28, they will communicate to the Executive Service of the Commission those situations that they detect in the exercise of their powers and that may be related to money laundering or the financing of terrorism. These organizations will inform the Secretariat of the Commission reasonably when they detect breaches of the obligations established in article 39 of Law 10/2010, of April 28, or of what is provided in this article. "*

This article 42 of RD 304/2014 extends the obligations initially imposed by article 39 of Law 10/2010 on foundations and associations.

Thus, among others, it establishes that these entities must inform SEPBLAC of those facts that may constitute an indication or proof of money laundering or terrorist financing (section 3.e)). In other words, they must carry out, when appropriate, the communications by indication referred to in article 18 of Law 10/2010.

It also provides that these entities must collaborate with the CPBCIM and the SEPBLAC by sending them the documentation and information that is required of them in the exercise of their powers (section 3.f)), an obligation also provided for in article 21 of Law 10/2010.

As we have seen, article 32.4 of Law 10/2010 imposes the obligation to carry out an AIPD in relation to those treatments that are carried out for the fulfillment of the information obligations provided for in the Chapter III of the same Law, among which we find the communications by indication and the delivery of certain documentation to the SEPBLAC.

At the outset, it must be stated that we are not faced with a clear interpretative question, which can be derived from the literal and systematic interpretation of the precepts, especially considering that there have been significant regulatory changes in the field of data protection , following the entry into force of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (RGPD), as well as the regulatory referrals between Law 10/ 2010 and the regulation that develops it, which obliges to try to apply the rest of the hermeneutic criteria of article 3 of the Civil Code, in particular the teleological element, and to also attend to the applicable principles in the field of data protection, specified in this case around risk assessment and the principle of proportionality.

A first joint reading of the forecasts examined so far could lead to the interpretation that foundations and associations, given that they are obliged to make communications by indication to SEPBLAC (and to collaborate with it), would also be obliged to carry out the AIPD referred to in article 32.4 of Law 10/2010. However, there are several elements that lead to consider whether this interpretation of the rule is the one that should prevail in the present case, as explained below.



## IV

At the outset, it can be seen that there are many, and very varied, obliged subjects and not all of them are forced to bear the same obligations or burdens in terms of preventing money laundering and the financing of terrorism, given the risk-oriented approach based on Law 10/2010.

The degree of exposure to risk, the different sector of activity in which they operate and/or the different possibilities of introducing funds into the legal system depending on the activity carried out, that is to say, the risk of the subjects obliged to money laundering and terrorist financing is very different. For this reason, when the risk is greater, the greater the degree of awareness of the obliged subjects must be and, therefore, the greater the control mechanisms and means of prevention that they must implement in order to carry out an effective prevention of money laundering of capital and the financing of terrorism.

Foundations and associations are not part of sectors of activity in which criminal organizations have historically tried to penetrate, although they cannot be said to be exempt from this risk. In their case, the main risk derives from the interest they arouse in those people who intend to use them for money laundering or to finance terrorism, relying on their good reputation before society and the same donors and/or associates (and therefore also putting it in danger).

In this sense, the greater operational risk would entail the necessary adoption of protective measures in terms of data protection, but it would not seem, apart from what is clearly deduced from the rule, that these measures must be adopted preventively when this it would mean abstractly transferring an obligation to a very large group, and not directly connected with the obligations derived from Law 10/2021.

The legislator himself is aware of this reality and, as previously stated, considers them to be mandatory subjects but with particularities (or special regime), in such a way that, in these cases, he moderates the intensity of the legal preventive measures planned Thus, adapting the application of the rule to the specific reality of the activity of this type of entity, it does not impose on them the fulfillment of all the obligations established in chapters II, III and IV of Law 10/2010 , nor does it subject them to the supervision or control of the SEPBLAC (in the case of foundations the protectorate must be in charge and in the case of associations the body in charge of verifying their constitution).

Therefore, it seems clear that the requirement of these obligations and their control by the competent bodies must be governed by the principle of proportionality and not harm the legitimate activities of foundations and associations.

The obligation to carry out an AIPD in relation to certain data processing in the examined context is relatively new. Articles 32 and 33 of Law 10/2010 were modified by the second final provision of Law 18/2022, of September 28, on the creation and growth of companies, and article 32 bis of Law 10/ 2010 added by article 3.15 of Royal Decree-Law 7/2021, of April 27, transposing European Union directives in the areas of competition, prevention of money laundering, credit institutions, telecommunications, tax measures, prevention and repair of environmental damage , displacement of workers in the provision of transnational services and consumer protection.

The Statement of Reasons does not convey to us any justification for this incorporation that transfers interpretive criteria applicable to the case, aside from the fact that it would be an adaptation of the provisions of article 35 of the RGPD to the subjects bound by the Law 10/2021.

The very location of these articles within the legal text - they are part of the bulk of internal control measures (chapter IV) - would seem to indicate that it (the AIPD) is an

obligation designed for ordinary obliged subjects, given that in these cases, since they must fulfill the set of obligations contained in Chapters II, III and IV of Law 10/2010 without exception, it is inevitable that they carry out the processing of personal data that is necessary for this purpose (and in relation to which the AIPD is required).

It should not be forgotten, moreover, that the mandatory status of associations and foundations is not included directly in Law 10/2010 but, as we have indicated, was incorporated by regulation in 2014.

To point out, at this point, that the RGPD imposes the obligation on those responsible for the treatment to assess the impact of the treatment operations on the protection of personal data, when it is likely that the treatment entails a significant risk for the rights and freedoms of people (article 35), starting from the basis of the intention to carry out such treatment, that is to say, that the treatment is intended to be carried out. Therefore, in the case of subjects obliged under the ordinary regime, the requirement of an AIPD seems reasonable.

In the case of foundations and associations, however, it is not foreseeable that they will carry out the aforementioned treatments. In this sense, it must be borne in mind that the regulations examined only impose the obligation to inform SEPBLAC in a timely manner when they have an indication or suspicion of any fact that could constitute money laundering or terrorist financing (article 42 RD 304/ 2014) and, when appropriate, to collaborate with them. An information obligation that can be said to have its own characteristics, given that they are not required to undergo the special examination provided for in Article 17 of Law 10/2010, from which the communication must be carried out by indications of the Article 18 of the same Law, nor would they have a specific channel enabled to carry out this type of communications.

Considering that these entities, by default, must carry out an AIPD - an expensive procedure - in relation to a processing of personal data that is unlikely to end up materializing would represent an obvious burden for said entities that, both from from an economic and risk management point of view, it might not be justified.

For this reason, taking into account the principle of proportionality and the spirit and purpose of the interpreted rule, it would not follow that foundations and associations must always carry out the AIPD referred to in article 32.4 of Law 10/ 2010

This does not prevent that the purpose of the rule is that, when any fact can be detected that could constitute evidence or evidence of money laundering or terrorist financing, an AIPD should be carried out simultaneously, which would imply that they should carry out the necessary data treatments to comply with the obligation to notify SEPBLAC, as well as, where appropriate, to collaborate with it, in order to implement security measures reinforced

The previously indicated without prejudice to the fact that the entity itself, due to its uniqueness, nature of the functions, or magnitude of the contributions that are channeled, among other circumstances, considers it appropriate to proceed to previously carry out an AIPD for the case that you could encounter any of the communication conditions imposed by Law 10/2010.

## conclusion

Having examined the regulations on the prevention of money laundering and the financing of terrorism, in relation to the AIPD established therein, it could be interpreted that foundations and associations should only do the AIPD at the same time as , if applicable, detect facts that could be indications of money laundering or terrorist financing, given the obligation to report them to SEPBLAC. This is without prejudice to the fact that, given the concurrence of certain particularities, the entity considers it appropriate to carry it out in advance in the event that it may encounter any of the communication assumptions imposed by said regulation.

Barcelona, March 17, 2023