

Legal report in relation to the draft Decree of the National Commission for a Coordinated Intervention against Gender Violence

Background

A letter from a Department is presented to the Catalan Data Protection Authority in which it is requested that the Authority issue a report on the draft Decree of the National Commission for a Coordinated Intervention against Gender Violence.

Having analyzed the Project, given the current applicable regulations and in accordance with the report of the Legal Counsel, the following is reported.

Legal Foundations

I

(...)

II

Law 5/2008, of April 24, on the right of women to eradicate male violence "[...] has as its object the eradication of male violence and the removal of social structures and cultural stereotypes that they perpetuate it, with the aim of fully recognizing and guaranteeing the inalienable right of all women to develop their own lives without any of the forms and areas in which this violence can manifest itself" (article 1.1) . And "[...] establishes comprehensive measures regarding the prevention and detection of male violence and awareness regarding this violence, with the aim of eradicating it from society, and also recognizes the rights of women who they suffer from care, assistance, protection, recovery and comprehensive reparation" (Article 1.2).

In accordance with what is established in article 6 of Law 5/2008, the comprehensive measures referred to in article 1.2 have the purpose, among others, of establishing mechanisms to conduct research on gender-based violence and disseminate the results, and also establish mechanisms for social awareness and information aimed at women (article 6.d), evaluate every two years the comprehensive care and recovery network for women who suffer male violence (article 6.h) and establish mechanisms for a comprehensive and coordinated intervention against sexist violence, and create specific ones to address second-order violence, through the collaboration of the public administrations of Catalonia and of the participation of women's organizations, professionals and citizen organizations that act against gender violence (article 6.i).

In turn, article 78 of Law 5/2008 establishes that *"The competent public administrations must transfer to each other the necessary personal data, in order to be able to manage the services of the Network in an appropriate manner of Comprehensive Care and Recovery and the financial benefits established by this law, and also others established by law, related to gender-based violence. For this purpose, a specific file must be created, which must be regulated by regulation.*

Article 82 of Law 5/2008 creates the National Commission for a Coordinated Intervention against Male Violence, dependent on the Catalan Women's Institute, as a specific institutional coordination and advisory body in the commitment to make effective the right of non-discrimination of women and which is given the function of promoting, following, controlling and evaluating the actions in the approach of male violence, without prejudice to the powers of promotion, monitoring and control of departments of the Generalitat.

And, section 3 of article 82, establishes that the composition, operation and powers of the National Commission for a Coordinated Intervention against Gender Violence must be established by regulation, and also the coordination of the Commission with other bodies.

In the framework of this forecast, Decree 60/2010, of May 11, of the National Commission for a Coordinated Intervention against Gender Violence was approved, which establishes that the Commission is constituted as the highest body of institutional coordination to promote, monitor and evaluate actions to address gender-based violence carried out by the departments of the Generalitat, as well as to encourage their participation and collaboration with the entities and bodies of the civil society working in this area (article 2).

Regarding their functions, article 3 of the aforementioned Decree establishes that they are, among others, to coordinate the actions of the different departments of the Generalitat and the bodies related to gender violence, to promote instruments of participation, collaboration and cooperation between public administrations, social organizations, economic and social agents, women's groups and professional people from different fields as necessary elements to improve forecasting, care and recovery, as well as ensure compliance with agreed actions and actions evaluate the actions, and formulate proposals on practices and new projects to be launched.

The purpose of the Decree project presented by the Department is to modify Decree 60/2010, of 11 May, of the National Commission for a Coordinated Intervention against Gender-Based Violence .

The general report that accompanies the draft Decree states that *"Law 5/2008 has been modified by Law 17/2020, of December 22, expanding the different areas and forms of sexist violence, such as those found in the 'in the digital sphere, in the institutional sphere, in the sphere of sexual and reproductive health (sexual consent is defined for the first time), vicariousness against daughters and sons [...]' and, further on, he goes on to explain that "[...] facts and legislative and social evolution have revealed the need for its modification, in order to adapt and update its function, composition and purpose to the current reality."*

And, in accordance with what is foreseen in the report on the impact assessment of the draft Decree, the objective of this is *"[...] regulate a new structure of this Commission adapted to the objectives of the Government Plan and updated to respond effectively to the*

modifications produced by Law 17/2020, of December 22, which reforms Law 5/2008 of April 24, with Decree 21/2021, of May 25 and Decree 249/20 21, of June 22".

At the outset, in advance, it must be noted that this Authority did not inform at the time of the draft law on the rights of women to eradicate male violence (currently, Law 5/2008, of April 24, of women's right to eradicate male violence), nor the project Decree 60/2010, of 11 May, of the National Commission for a Coordinated Intervention against Male Violence.

This report is issued exclusively with regard to the assessment of the incidence that the draft Decree may have from the point of view of the protection of personal data.

For these purposes, personal data is considered "*any information about an identified or identifiable natural person ("the interested party"); Any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a number, an identification number, location data, an online identifier or one or more elements of identity, shall be considered an identifiable physical person physical, physiological, genetic, psychological, economic, cultural or social of said person "* (article 4.1 RGPD).

And, on the other hand, treatment is considered "*any operation or set of operations carried out on personal data or sets of personal data, either by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of enabling access, comparison or interconnection, limitation, deletion or destruction".*

Therefore, the regulations for the protection of personal data will be applicable to the processing of data of identified or identifiable natural persons carried out by the National Commission for a Coordinated Intervention against Gender-Based Violence (henceforth, in accordance with the nomenclature of the submitted Decree project, CNVM) .

III

In accordance with what has been explained, the purpose of the draft Decree sent is to modify Decree 60/2010, of 11 May, of the National Commission for a Coordinated Intervention against Gender-Based Violence .

Having analyzed the project, it is noted that it maintains the structure of Decree 60/2010, that is to say, it regulates the CNVM from the perspective of its constitution, affiliation and nature (article 1), the purpose (article 2) and the its functions (Article 3), the composition (Article 4), the operating regime (Article 5), the legal regime (Article 6) and incorporates a provision relating to data protection (Article 7).

Based on its analysis, changes are identified that affect the entire text of Decree 60/2010, in the sense that, in accordance with what the attached documentation points out (the general report and the impact assessment report), in general it is an adaptation and update following the modifications that have been made to Law 5/2008, among other circumstances.

For example, article 2 of the project, relating to the purpose of the CNVM, establishes in a similar way to the provision of the same name in the current Decree 60/2010, the following:

"[...] aims to establish itself as the maximum institutional coordination body to promote, monitor and evaluate actions, tools, funding, intervention protocols, and other spaces and mechanisms that are necessary to address sexist violence carried out by the Generalitat de Catalunya, as well as to encourage the participation and collaboration of the rest of the public administrations and civil society bodies that work in this area".

However, there are also other more substantial modifications, such as those relating to the functions and operating regime of the CNVM.

In particular, regarding the functions of the CNVM, article 3 of the project details more comprehensively the list of functions that the CNVM must perform, such as, it introduces the function of promoting, advising, monitoring and evaluating the actions of the administrations in addressing gender-based violence (section b), reporting on the rules, provisions and policies approved and implemented by the Administration of the Generalitat referring to addressing gender-based violence, without prejudice of the functions attributed to other bodies (section g), and that of agreeing the cooperation and coordination mechanisms between the members of the Commission itself and of these with other administrations and institutions (section k).

And, with regard to the operation of the CNVM, provided for in article 5, the draft Decree introduces several modifications relating to the operation of the Plenary and, among other issues, specifies the fact that the CNVM will operate through three stable groups of a permanent nature, the inter- departmental group, the technical monitoring group and the working group "Analysis of cases of homicide due to male violence", which is now called "Analysis of cases of Femicide" in accordance with the which establishes article 5.5, and establishes the objectives of each of them.

A priori, it must be borne in mind that, also taking into consideration the provisions of Law 5/2008 and Decree 60/2010, it does not follow that the CNVM must process personal data with the main objective of achieving "an *appropriate complicity between civil society, the institutions and the Government of the Generalitat of Catalonia with the aim of coordinating and favoring comprehensive approach policies against gender-based violence*" (preamble to Decree 60/2010).

Nor is it apparent from the terms in which article 7.5 of Law 5/2008 refers to the development and evaluation of public policies on gender-based violence. In particular:

"The adequacy of the approach to male violence requires a quantitative and qualitative analysis beforehand. The obligation to obtain official statistical data for the development and evaluation of public policies on gender-based violence must be carried out within the framework of Catalan legislation on statistics, especially with regard to the regulation of statistical secrecy, in the terms established by the Catalan statistics regulations, the regulations on the protection of personal data and the other applicable regulations, without prejudice to the functions of the Gender Equality Observatory and of the Center for Studies, Research and Training on Gender Violence."

In other words, it does not appear that the CNVM must process personal data to carry out the objectives and functions referred to in Law 5/2008 (art. 82.2), with the aim of coordinating and promoting the policies of comprehensive approach against gender violence (preamble to Decree 60/2010).

To this end, it should be noted that recital 26 of the RGPD, in relation to the concept of personal data referred to in article 4.1, provides that "[...] *the principles of data protection do not apply to anonymous information, that is to say information that is not related to an identified or identifiable natural person, nor to data converted into anonymous information so that the interested party is not identifiable, or ceases to be so. Consequently, this Regulation does not affect the treatment of said anonymous information, including for statistical or research purposes*".

Therefore, the data protection regulations will only be fully applicable to the extent that the CNVM processes personal data of identified or identifiable natural persons, in the terms referred to in article 4.1 of the RGPD.

IV

However, without prejudice to what has been set out in the previous legal basis, it is necessary to demonstrate that there are certain modifications introduced in the draft of the decree sent which generate doubts in relation to the fact that, in practice, the CNVM does not access personal data. In other words, there are certain modifications which do not allow us to rule out the possibility that the CNVM processes personal data in practice, and on which it is necessary to discuss certain issues that must be taken into account.

At the outset, article 7 of the draft Decree states that *"the transmission of information to the Commission's offices must comply with the guarantees of data protection legislation. This guarantee must also be complied with in all the processing of personal data that may derive from the performance of the functions of the National Commission for a Coordinated Intervention against Gender-Based Violence"*.

From a strictly formalist perspective of the submitted project, it is positively valued that a forecast with this content has been incorporated. However, it should be remembered that the obligation to comply with data protection regulations derives directly from the content of the RGPD and Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (LOPDGDD). In any case, given the importance of data protection, especially in areas such as that which is the subject of the draft decree, it is certainly advisable to include provisions that, however obvious they may seem, recall and value the protection of personal data imposed by the constitutional and statutory regulations and which, at the same time, must be transferred to the practical application of the regulatory regulations and the operation of the CNVM .

For this reason, it is necessary to connect article 7 of the draft Decree with certain issues of the operation of the CNVM, such as with the provision of article 3.2.4 relating to the duty of collaboration of the vocal authorities, as well as the "Analysis group for Femicide cases " (article 5.5).

Article 3.2.4, in relation to the functions of the CNVM, provides for the following:

"The bodies that make up the Commission have the duty to collaborate with the sending of the information requested for the preparation of the evaluation reports. The Commission must publicize and disseminate the annual report, at least, by electronic means through the

web space of the department competent in addressing sexist violence, without prejudice to other spaces."

Article 4.1.5 of the draft Decree foresees, among other issues, which people must integrate, either by virtue of their position or by appointment, the CNVM's members, and among which it indicates that there must be a representative of the City Council of Barcelona, the Superior Prosecutor of Catalonia, the Catalan Corporation of Audiovisual Media, the Catalan Society of Gynecology and Obstetrics, the Council of the Elderly of Catalonia, the National LGBTIQ+ Council, the Disability Council of Catalonia and the Center for Legal Studies and Specialized Training, among others.

Femicide Case Analysis Group ", article 5.5 of the draft Decree establishes that its purpose is *"to know and analyze the circumstances of each femicide , with the ultimate aim of proposing improvements or changes that make it possible to improve the approach to sexist violence and guarantee women's rights"*.

At the same time, it may also be relevant to relate article 7 of the draft Decree with the provision of article 5.8, which foresees that the CNVM gathers the experience of the territory from the deployment of certain bodies for each of the vegueries, in the following terms:

"a) The Institutional Board is the political and strategic body, it has the objective of ensuring political commitment and institutional support that enables the proper functioning of the Gender Violence Addressing Circuit in each municipality.

b) The Technical Commission, as a technical and strategic body that supports the Regional Teams and the Proximity Teams and must provide the necessary tools for the Circuit to Address Gender Violence to function properly at an operational level. To achieve these objectives, he must work together with the Institutional Board.

c) The Local or Regional Teams have the objective of guaranteeing coordinated and networked intervention of sexist violence that takes place in the region or municipality, dynamizing and coordinating local professional teams in the corresponding circuits. They are mainly operational bodies, which must be able to raise their strategic contributions to the technical commission.

d) The Proximity Agents have the objective of carrying out the tasks of prevention, reparation and investigation of situations of male violence that women, adolescents and children live or have lived in the territory, as well as developing work in a grassroots network ."

From the analysis of the forecasts of the articles presented, it is clear that the CNVM can come to deal with a large amount of information whose origin can be very diverse. And, at the same time, in accordance with what has been progressed, it does not seem possible to rule out the fact that the CNVM, as can be seen from the draft Decree sent, processes data relating to identified or identifiable physical persons, in particular, regarding to women who find themselves in situations of gender-based violence, and even their dependent sons and daughters.

To the extent that the CNVM processes personal data, the data protection regulations are fully applicable.

Therefore, it must be agreed that in accordance with the provisions of article 5.1.a), any processing of personal data must be lawful, loyal and transparent in relation to the interested party and, in this sense, the RCPD establishes the need to comply with one of the legal

bases of article 6.1, among which section c) provides for the assumption that the treatment "is necessary for *the fulfillment of a legal obligation applicable to the person responsible for the treatment* " and, the section e), when "*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 of the LOPDGDD, data processing can only be considered based on these legal bases of article 6.1.c) and e) of the RGPD when so established by a rule with the rank of law.

And, in addition, other considerations must be taken into account in the event that the processing of personal data carried out, if applicable, by the CNVM, also affects special categories of personal data referred to in article 9 of RGPD

Article 9 of the RGPD establishes the general prohibition of the processing of personal data "[...] *that reveal ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation, 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*", unless one of the circumstances referred to the second section.

And, article 9 of the LOPDGDD, establishes the following:

" 1. For the purposes of article 9.2.a) of Regulation (EU) 2016/679, in order to avoid discriminatory situations, the consent of the affected person alone will not be sufficient to lift the prohibition of data processing whose main purpose is to identify their ideology, trade union affiliation, religion, sexual orientation, beliefs or racial or ethnic origin.

The provisions of the previous paragraph will not prevent the processing of said data under the remaining assumptions contemplated in article 9.2 of Regulation (EU) 2016/679, when applicable.

2. The processing of data contemplated in letters g), h) ei) of article 9.2 of Regulation (EU) 2016/679 based on Spanish law must be covered by a rule with the rank of law, which may establish additional relative requirements to your security and confidentiality.

In particular, said rule may cover the treatment of data in the field of health when this is required by the management of public and private healthcare and social systems and services, or the execution of an insurance contract of which the affected be part ."

Therefore, the processing of special categories of data must be carried out on the basis of what is provided for in article 9 of the RGPD and article 9 of the LOPDGDD, but it must also take into account certain issues to which we refer below.

Recital 10 of the RGPD provides the following:

"The present Regulation also recognizes a margin of maneuver for the Member States to specify their rules, including for the treatment of special categories of personal data ("sensitive data"). In this sense, this Regulation does not exclude the Law of the Member States that determines the circumstances relating to specific situations of treatment,

including the detailed indication of the conditions in which the treatment of personal data is lawful ."

And, in relation to this issue, Constitutional Court Judgment 76/2019 has established the following:

"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 como lo qualifica su considerando 10. [...]. The regulation contains, therefore, a specific obligation of the Member States to establish such guarantees, in the event that they are authorized to treat 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. (...)

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.

*d) In conclusion, political opinions are sensitive personal data whose need for protection is, to that extent, greater than that of other personal data. Adequate and specific protection against treatment constitutes, in short, a constitutional requirement, without prejudice to the fact that, as we have seen, it also represents a requirement derived from European Union law. **Therefore, the legislator is constitutionally obliged to adapt the protection it provides to said personal data, where appropriate, imposing greater requirements so that they can be the object of treatment and providing specific guarantees in their treatment, in addition to those that may be common or general "***

In summary, in any case, the processing of special categories of data requires that some of the circumstances and conditions referred to in article 9 of the RGPD, and article 9 of the LOPDGDD, as well as in accordance with the constitutional doctrine. In particular, (1) it is necessary that it is provided for by law, without being able to refer to a subsequent regulatory rule or to the decisions that may be made subsequently by the person in charge of the treatment, (2) where the purpose of the data processing, without a generic mention being sufficient for this purpose, so that it details the restrictions of the fundamental right (clear rules on the scope and content of the data processing it authorizes) and, at the same time, (3) establishes 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 their obtaining.

But, in addition, it should be noted that the person responsible for the treatment must also ensure that they comply with the rest of the principles and guarantees established by the data protection regulations, such as the principle of data minimization (article 5.1.c) of the 'RGPD) and the principle of integrity and confidentiality (Article 5.1.f) of the RGPD), in relation to the data security guarantees referred to in Article 32 of the RGPD.

So, although article 32 of the RGPD establishes that those responsible for the treatment and those in charge of the treatment must apply appropriate technical and organizational measures to guarantee a level of security appropriate to the risk, such as pseudonymization and the encryption of personal data, it is clear that this does not exclude the need to also take into account the principle of data minimization ("*los datos personales serán: [...] adecuados, pertinentes y limitedados a lo necesario in relation to the purposes for which they are treated (<< data minimization>>)))* .

Guidelines 4/2019 relating to Article 25 Data protection by design and by default are illustrative of the European Data Protection Committee (CEPD) (https://edpb.europa.eu/system/files/2021-04/edpb_guidelines_201904_dataprotection_by_design_and_by_default_v2.0_es.pdf),

which develop in section 76 the essential elements from the design and by default in relation to data minimization:

- *Avoidance of data: All treatment of personal data will be avoided when it is possible to fulfill the relevant purpose.*
- *Limitation: The amount of personal data collected will be limited to what is strictly necessary for the intended purpose.*
- *Limitation of access: Data processing will be configured in such a way as to minimize the number of people who need access to personal data to perform their functions, and access will be limited accordingly.*
- *Relevance: The personal data must be relevant to the treatment in question, and the person responsible for the treatment must be able to prove said relevance.*
- *Necessity: Each category of personal data will be necessary for the specified purposes and should only be processed if the purpose cannot be fulfilled by other means.*
- *Aggregation: Aggregated data must be used when possible.*
- *Pseudonymization : Personal data must be pseudonymized when it is no longer necessary to have directly identifiable personal data, and the identification keys will be kept separately.*
- *Anonymization and suppression: When personal data is not or has ceased to be necessary for the intended purpose, it will be anonymized or deleted.*
- *Data flow: The data flow must be efficient enough not to create more copies than necessary.*
- *"State of the art": The data controller must apply up-to-date and adequate technologies to avoid and minimize the use of data."*

conclusion

Having examined the draft Decree of the National Commission for a Coordinated Intervention against Gender Violence, it is considered adequate to the provisions established in the regulations on personal data protection, without prejudice to the considerations made in this report.

Barcelona, April 3, 2023