

## Opinion in relation to a consultation of a chamber of commerce on whether it must appoint a Data Protection Officer

A letter from a chamber of commerce is presented to the Catalan Data Protection Authority in which it raises whether, pursuant to the provisions of article 37.1.a) of Regulation (EU) 2016/679, of the Parliament and of the Council European, of April 27, 2016, General Data Protection (hereinafter, RGPD), is obliged to appoint a Data Protection Delegate. He questions, specifically, whether the Chamber can fit within the term "public body" referred to in this article of the RGPD.

Having analyzed the request and given the current applicable regulations, and in accordance with the report of the Legal Counsel I issue the following opinion.

I

(...)

II

One of the novelties that the RGPD incorporates in the area of personal data protection is the figure of the Data Protection Delegate (hereinafter, DPD).

Article 37 of the RGPD regulates its designation, in the following terms:

"1. The person in charge and the person in charge of the treatment will appoint a data protection delegate provided that: a) the treatment is carried out by a **public authority or body**, except the courts that act in the exercise of their judicial function; b) the main activities of the person in charge or the person in charge consist of processing operations that, due to their nature, scope and/or purposes, require regular and systematic observation of interested parties on a large scale, or) the main activities of the person in charge or the person in charge encargado consist of the large-scale processing of special categories of personal data in accordance with article 9 and of data relating to convictions and criminal offenses referred to in article 10.

2. A business group may appoint a single data protection officer as long as he is easily accessible from each establishment.

3. When the person responsible for the treatment is a public authority or body, a single data protection officer may be appointed for several of these authorities or bodies, taking into account their organizational structure and size.

4. In cases other than those contemplated in section 1, the person in charge or the person in charge of the treatment or the associations and other organizations that represent categories of persons in charge or persons in charge may appoint a data protection delegate or must appoint him if so required by the Law of the Union or of the Member States. The Data Protection Officer will be able to act on behalf of these associations and other organizations that represent those responsible or in charge.

5. The data protection officer will be appointed based on his professional qualifications and, in particular, his specialized knowledge of law and

practice in the field of data protection and its capacity to perform the functions indicated in article 39.

6. The data protection delegate may form part of the staff of the person in charge or of the person in charge of the treatment or perform their functions within the framework of a service contract.

7. The person responsible or the person in charge of the treatment will publish the contact details of the data protection officer and will communicate them to the control authority."

Of course, in the event that, as a result of the specific activity carried out by a Chamber of Commerce, any of the circumstances provided for in letters b) or c) of section 1 of this article occur, it will be mandatory the appointment of a data protection officer. However, the query that is formulated focuses rather on the interpretation of the concept "authority or public body" contained in letter a) of section 1. It is on this issue that this opinion will focus.

Certainly, as pointed out in the consultation letter, the RGPD does not provide a concept of authority or public body that allows us to delimit to which entities these provisions apply.

However, the position adopted in this regard by the Article 29 Working Group (hereinafter, WG29) in its guidelines document on the Data Protection Delegate, adopted on 5 April 2017 (WP 243 rev.01).

Thus, the GT29 considers that it must be the internal order of each state that determines which subjects must enter this category. Obviously, when it comes to subjects who exercise public powers or powers, they must necessarily be included in this category.

Nor do we find a definition of what is to be understood by "public authority" in the internal regulations. On the contrary, the entities that are considered public administration are clearly defined.

In accordance with article 3.3 of Law 40/2015, of October 1, on the legal regime of the public sector, they are considered public administration:

- The General Administration of the State.
- The administrations of the autonomous communities.
- The entities that make up the local administration.
- Any public body or entity under public law linked or dependent on public administrations.

Without prejudice to the fact that beyond the concept of public administration there may be other entities to which the status of public authority must be recognized, it seems obvious that all entities that have the consideration of public administration are should recognize the status of public authority for the purposes of the GDPR.

Having said that, it should be noted that GT29, in the aforementioned document, recommends that the concept of public authority also include private entities that manage public services. In this sense, it points out that "public authority" as such can be exercised not only by public authorities and bodies but also by other natural or legal persons governed by public or private law. And, in this sense, it makes express reference to certain sectors of activity such as public transport services, water and energy supply, road infrastructures, public broadcasting, public housing or the disciplinary bodies of the professions regulated, depending on the national legislation of each member state. For these cases, it recommends the appointment of a DPD as good practice.

### III

Article 2 of Law 4/2014, of April 1, basic of the official chambers of commerce, industry, services and navigation, states that:

"1. The Official Chambers of Commerce, Industry, Services and Navigation are public law corporations with legal personality and full capacity to act for the fulfillment of their purposes, which are configured as consultative and collaborative bodies with Public Administrations, without prejudice to the interests of private individuals. Its structure and functioning must be democratic.

2. The Official Chambers of Commerce, Industry, Services and Navigation will comply with the provisions of this Law and the development rules dictated by the General Administration of the State or by the Autonomous Communities with jurisdiction in the matter. The legislation relating to the structure and functioning of Public Administrations will apply, with a supplementary character, insofar as it is in accordance with its nature and purposes. Contracting and the patrimonial regime will be governed in accordance with private law and enabling a procedure that guarantees the conditions of publicity, transparency and non-discrimination."

In similar terms, article 2 of Law 14/2002, of 27 June, of the official chambers of commerce, industry and navigation of Catalonia and of the General Council of Chambers, establishes that:

"1. The chambers are set up as public law corporations and consultative bodies of the public administrations, with which they collaborate, with their own legal personality and full capacity to act for the fulfillment of their purposes and for the exercise of powers and the functions they have legally attributed (...)"

In accordance with article 3 of Law 4/2014:

"The Official Chambers of Commerce, Industry, Services and Navigation have as their purpose the representation, promotion and defense of the general interests of commerce, industry, services and navigation, as well as the provision of services to companies that exercise the indicated activities. Likewise, they will exercise the powers of a public nature attributed to them by this Law and those that may be assigned to them by the Public Administrations in accordance with the instruments established by the legal system. (...)"

Article 5 of Law 4/2014 (and in similar terms, Article 11 of Law 14/2002) determines, in its sections 1 and 2, the functions of a public nature that correspond to official chambers of commerce, industry, services and navigation, such as, among others:

"a) Issue certificates of origin and other certifications related to commercial traffic, national and international, in the cases provided for in current regulations. b) (...) c) Be an advisory body to the Public Administrations, in the terms that they establish, for the development of commerce, industry, services and navigation. d) (...) e) Participate with the competent administrations in the organization of practical training in the work centers included in the Vocational Training lessons and in the actions and training initiatives of the Dual Vocational Training, especially in the selection and validation of work centers and companies, in the designation and training of student tutors and in the control and evaluation of program compliance, without prejudice to the functions that can be attributed to business organizations in this area.

f) Process, in the cases in which they are required by the General Administration of the State, the public programs of aid to companies in the terms established in each case, as well as manage the public services related to them when management corresponds to the State Administration. g) (...) h) Act as a single business window, when required to do so by the competent Public Administrations. i) Collaborate with the Public Administrations in the administrative simplification of the procedures for the initiation and development of economic and business activities, as well as in the improvement of the economic-business regulation. j) Promote actions aimed at increasing the competitiveness of small and medium-sized companies, and promote innovation and technological transfer to companies. k) Promote and collaborate with Public Administrations in the implementation of the digital economy of companies. l) If the management authority of the European Union Funds considers it appropriate, the Chambers may participate in the management of European Union Funds aimed at improving the competitiveness of companies. (...)."

For its part, article 34 of Law 4/2014 establishes that:

"1. The Official Chambers of Commerce, Industry, Services and Navigation are subject in the exercise of their activity to the tutelage of the General Administration of the State or of the respective Autonomous Communities, in the event that they had assumed by statute the corresponding powers. (...)"

In the case of Catalonia, this guardianship function corresponds to the "department of the Generalitat that has been assigned powers in this matter" (article 47 Law 14/2002).

(...)

From the set of these precepts it follows, for the purposes that are of interest in this opinion, that:

- The official chambers of commerce, industry, services and navigation are set up as corporations under public law.
- These corporations are endowed with powers and public administrative functions attributed by law, regardless of those attributed to them by delegation by public administrations, and have the representation, promotion and defense of the general interests of commerce, industry and navigation ( a fact that distinguishes them from other private-based associations, such as business associations).
- When they exercise their own or delegated public functions, the legislation on procedure and legal regime of public administrations is additionally applicable to them (art. 2.4 of Law 39/2015, of October 1, on the common administrative procedure of public administrations).
- They are to a greater or lesser extent linked to a territorial public administration, which exercise guardianship regarding their actions.

On the other hand, it is also necessary to bear in mind that the control of the legality of acts and provisions adopted in the exercise of their public functions corresponds to the administrative contentious jurisdictional order (article 2 Law 29/1998), which is, precisely, the competent to control the legality of the actions of public authorities in general and of public administrations in particular.

So, the chambers of commerce, industry, services and navigation are associative or private public bodies that are entrusted with certain functions of a public nature and only to this extent could it be said that they would hold the status of public administration.

Traditionally, in fact, they have been considered to be part of what is called Administration corporate. In this sense, the Constitutional Court has stated in, among others, Judgment 31/2010, of June 28 (Unconstitutionality Appeal 8045-2006) that (FJ 71):

"(...) public law corporations, whether they represent professional interests (Professional associations) or economic interests (Chambers of Commerce, Industry and Navigation or others), have the status of Public Administrations of corporate character, that is to say, they perform, in addition to representative functions of private interests, functions of a public nature under the tutelage of the Administration (...)"

In view of these considerations, it could be understood that, to the extent that they exercise public functions, the chambers of commerce, industry, services and navigation in general and the Chamber of Commerce of (...) in particular should be included in the concept of public authority for the purposes of the RGD, so they should appoint a DPD, in accordance with article 37.1.a) of the RGD.

However, it cannot be overlooked that their scope of action mainly affects legal entities (companies) and that the public functions attributed to them by the provisions set forth are not directly addressed to natural persons (unlike, for example, other corporations under public law such as professional associations, which not only have the capacity to intervene in the organization of the professional activity of numerous natural persons, but are also entrusted with exercising disciplinary power over them).

The processing of personal data that they may carry out whether of individual entrepreneurs or citizens (the RGD does not distinguish between data processing of natural persons in the exercise of their commercial or professional activity and data processing of other natural persons), or the consequences that may arise from these treatments, do not seem a priori to be comparable to those carried out by other public authorities, even other corporate-based administrations.

These circumstances could justify that, in a case like the one proposed, it was understood that the Chamber of Commerce (...) (or the other chambers of commerce) should not be affected by the provisions of Article 37.1 .a) of the RGD and, therefore, that in his case the designation of a DPD would be voluntary.

Point out, at this point, that article 34 of the Draft Organic Law on the Protection of Personal Data, approved by the Council of Ministers on November 10, 2017 (BOCG, series A, no. 13-1, of 24.11. 2017), although for obvious reasons it is not applicable, details some of the entities that are obliged to appoint a DPD, without prejudice to the assumptions established in article 37.1 of the RGD.

This is a non-exhaustive list, which aims to clarify the greatest possible number of cases in which it is considered that certain legal operators fit into the categories listed, fundamentally, by article 37.1.b) ic) of the RGD.

Among these entities, as the Chamber itself highlights, the Chambers of Commerce, Industry, Services and Navigation are not mentioned (only, as also corporate administration, professional associations and general councils (article 34.1.a )), which would seem to show that, in his case, the designation of a DPD could be understood as voluntary.

All in all, and following the criteria of GT29, it would be advisable for the Chamber (or any other) to have a DPD. In the event of his appointment, agree that both the appointment and the contact details of the DPD should be made public on the website of the Chamber, as well as communicate them to this Authority through the corresponding form, available at the Authority's electronic headquarters <https://seu.apd.cat/ca/tramits/DPD> (article 37.7 RGPD).

In this form, the identification data of the person who will act as DPD can be entered, in which case it is necessary to inform them in advance of the communication of their data to the Authority.

Point out that it would also be necessary to notify the Authority of any modification affecting this designation, such as a change in the contact details of the DPD, through the corresponding form (also available on the Authority's website).

In relation to this and other issues related to the figure of the DPD, it may be of interest to consult the opinions CNS 23/2018 and CNS 31/2018, as well as the resources that the Authority makes available to those responsible and in charge of the treatment, for in order to adapt to the new regulations, on its website <http://apdcat.gencat.cat/ca/inici/>.

In accordance with the considerations made so far in relation to the query raised, the following are made,

## **Conclusions**

The recipients and the public functions attributed to the Chambers of Commerce can justify the non-mandatory designation of a data protection delegate under letter a) of article 37.1 of the RGPD, although in the opinion of this Authority, its appointment is recommended. This without prejudice to its obligation in the event that any of the cases provided for in letters b) or c) of the same article 37.1 occur.

Barcelona, 2 October 2018