

CNS 28/2019

Opinion in relation to the query made by a city council on whether an autonomous body of a deputation is considered to be in charge or responsible for the treatments that the city council has delegated to it.

A request for an opinion from a city council is submitted to the Catalan Data Protection Authority on whether an autonomous body of a deputation is considered to be in charge or responsible for the treatments that the city council has delegated to it.

Having analyzed the query, which is not accompanied by other documentation, in accordance with the report of the Legal Counsel I issue the following opinion:

I

(...)

II

The consultation sets out as background that the town councils can delegate to the County Council the powers of management, liquidation, inspection, verification and collection of their income, and that these delegated functions are carried out by an autonomous body of the County Council.

This body, according to article 2 of its Statutes, has as its purpose, by virtue of the competences of the Provincial Council or assumed by delegation from the municipalities and other public administrations or their dependent bodies, the exercise of the functions next:

"a) The management and settlement of all types of taxes. b) The management and settlement of public prices and other managed income. c) Voluntary and executive collection of all types of income during the payment period. d) The inspection of taxes and the checking and verification of the rest of the income managed. e) Design, development and maintenance of the information systems that allow the provision of services. f) Carrying out as many related or complementary activities as are necessary to improve the effectiveness of their performance.

According to this same article of the statutes, these functions can be carried out "by virtue of the various forms of action and relationship between public administrations and their dependent entities, being actions of collaboration, cooperation, assignment of management and other instruments enabled for these purposes."

In this context, the city council states that it has several different delegations carried out according to the taxes in such a way "there are taxes, such as the IBI or the vehicle tax that has been delegated all the

tax management; but there are others, that the City Council has only delegated the collection on a voluntary or executive basis" and, as a result of the review of the processing tasks corresponding to these delegations (we understand that to adapt them to the RGPD), the doubt arises whether, in accordance with this new regulation, the autonomous body is considered to be in charge of the treatments that the City Council has delegated to it or, on the contrary, it would be a co-responsible person for the treatment.

III

First of all, to answer the question raised, it is necessary to analyze the definitions of responsible, co-responsible and person in charge of the treatment carried out by Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General of Data Protection (hereinafter, RGPD).

Article 4.7 of the RGPD defines the data controller as "the natural or legal person, public authority, service or any other body that, alone or together with others, determines the purposes and means of the treatment; if the law of the Union or of the member states (in) determines the purposes and means of the treatment, the person responsible for the treatment or the specific criteria for his appointment may be established by the law of the Union or of the member states"

When the determination, both of the purposes and the means of the treatment, is carried out by two or more persons responsible, they are considered to be jointly responsible for the treatment, in accordance with that established by article 26 of the RGPD, according to which :

"1. When two or more controllers jointly determine the goals and means of the treatment, they are considered jointly responsible for the treatment. The co-responsible parties must determine transparently and by mutual agreement their respective responsibilities, in the fulfillment of the obligations imposed by this Regulation, in particular with regard to the exercise of the rights of the interested party and their obligations to supply information referred to in articles 13 and 14, unless and to the extent that, the responsibilities of the co-responsibles are governed by the law of the Union or the member states. This agreement may designate a point of contact for interested parties.

2. The agreement mentioned in section 1 must reflect the functions and relationships of the co-responsible parties in relation to the interested parties. The essential aspects of the agreement must be made available to the interested party.

3. Regardless of the terms of the agreement referred to in paragraph 1, the interested parties can exercise the rights recognized by this Regulation against each of the responsible parties and against each of them."

On the other hand, article 4.8 of the RGPD defines the data controller as "the natural or legal person, public authority, service or any other body that processes personal data on behalf of the data controller"

According to this definition, the person in charge can be both a natural person and a legal person, or a public authority or any other body, which provides a service to the data controller that involves the processing of personal data on behalf of the latter .

Article 28 of the RGD imposes on the controller the obligation to select only those in charge who offer sufficient guarantees to apply the appropriate technical and organizational measures to comply with the requirements of the RGD, and formalize the order through a contract or other legal act that binds the person in charge with respect to the person in charge and establishes the object, duration, nature and purpose of the treatment, the type of personal data and the categories of interested parties, as well as the obligations and rights of the person in charge (art. 28.3 RGD).

The delimitation of the figures of responsible and person in charge of the treatment has significance with regard to the determination of the responsibilities derived from the data protection regulation.

The Article 29 Working Group (GT29), (replaced by the European Data Protection Committee, since May 25, 2018), published Opinion 1/2010, of February 16, on the concepts of "responsible for treatment" and "in charge of treatment", to provide clarifications and concrete examples that allow the delimitation of both figures in an environment of increasing complexity in the organization of entities, both public and private, and of development and integration of information and communication technologies.

Although the opinion predates the GDPR, its conclusions are valid under the current regulation.

Thus, after analyzing the definitions of responsible and data controller and different examples of their application, GT29 concludes that:

"The definition of the Directive consists of three fundamental components: the personal aspect ("the natural or legal person, public authority, service or any other organism"); the possibility of plural control ("that alone or together with others"); the essential elements to distinguish the person in charge of the treatment from other agents ("determine the purposes and means of the treatment of personal data").

The analysis of these components leads to the following main results:

- The ability to "determine the ends and the means" can arise from different legal circumstances and/or de facto: an explicit legal competence, when the legislation establishes the appointment of the person responsible for the treatment or provides the task or the obligation to collect and treat certain data; general legal norms or existing traditional functions that, by the common, imply a certain responsibility within certain organizations (for example, the employer in relation to the data on its employees); de facto circumstances and other elements (such as contractual relationships, real control exercised by a party, visibility to interested parties, etc.). (...)

The fact of determining the "purposes" of the treatment brings with it the consideration of responsible for the treatment (de facto). Instead, the determination of the "means" of the processing can be delegated by the person in charge of the treatment to the extent that it is about technical or organizational issues. However, the fundamental issues that are essential to the legitimacy of the treatment — such as the data to be treated, the duration of its conservation, access, etc. — must be determined by the person responsible for the treatment. (...)

This opinion also analyzes the concept of data controller, whose existence depends on a decision taken by the data controller, who can decide that the data is processed within his organization or delegate all or part of the processing activities to a external organization. Therefore, to be able to act as data controller, two basic conditions must be met: on the one hand, to be a legal entity independent of the data controller and, on the other hand, to carry out the processing of personal data on behalf of the data controller. This processing activity can be limited to a very specific task or context or leave a certain degree of discretion on how to serve the interests of the data controller, allowing the data controller to choose the most appropriate technical and organizational means. (...)"

So, the existence of the person in charge of the treatment depends on a decision of the person in charge of the treatment which consists in deciding whether to treat the personal data by himself or to entrust the treatment to another, whether a natural or legal person, outside to the organization of the data controller and how this relationship is articulated in each specific case.

As this Authority has highlighted, in the ["Guide on the person in charge of the treatment in the RGPD"](#) to facilitate the distinction between the person in charge and the person in charge, we must take into account that it is up to the person in charge to decide on the purposes and the uses of the information while the person in charge of the treatment must comply with the instructions of those who entrust him with a certain service, in relation to the personal data to which he has access as a result of the provision of this service.

In the fulfillment of the treatment order, the entity or body in charge may adopt certain organizational and operational decisions necessary to provide the service within the framework of the instructions received from the person in charge, without changing the purposes in any case. In this sense, it must be taken into account that if the person in charge establishes relations with the affected persons in his own name and without it being known that he is acting on behalf of the person in charge of the treatment, he will be considered responsible for the treatment, and also if he uses the data for its own purposes (art. 33.2 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD)).

It should be borne in mind that in some specific case, it is already the same rules of administrative procedure that attribute the status of data controller. Thus, article 11.2 of Law 40/2015, of 1 October on the Legal Regime of the Public Sector (LRJSP), in regulating the management assignment, already expressly provides that the body to which the assignment is made will have the status of data controller with respect to the processing of the data to which it has access in the execution of this entrusts

This does not mean, however, that this is the only case in which the management assignment can occur. It will be necessary to see, in any case, if in view of these considerations in the specific case raised by the city council in its consultation, the characteristics established by the data protection regulations for the concurrence of the figure of the person in charge are given of the treatment, if applicable, of the person in charge of the treatment.

IV

The local regime legislation attributes to the councils the powers for the management, liquidation, inspection and collection of their own taxes and other public law revenues that correspond to them. This attribution of powers constitutes the legitimate basis (Article 6.1.c) of the RGPD) for the treatment by the city council of the personal data of those liable for those taxes or revenues under public law.

These powers, in accordance with article 106.3 of Law 7/1985, of April 2, on the Basics of the Local Regime, can be exercised by the town councils, either with their own means or through collaboration formulas with other entities, or be subject to delegation in favor of other local entities or the autonomous community:

"It is the responsibility of the local entities to manage, collect and inspect their own taxes, without prejudice to the delegations that may be granted in favor of the local entities of a higher scope or the respective Autonomous Communities, and of the collaboration formulas with other Local entities, with the Autonomous Communities or with the State, in accordance with what the State legislation establishes»

In line with this precept, article 7 revised text of the Law Regulating Local Finances (hereafter TRLRHL), approved by Royal Legislative Decree 2/2004, of March 5, regulates the delegation of powers of the faculties of tax management, settlement, inspection and collection in the following terms:

"1.(...)

2. The agreement adopted by the Plenary of the corporation must set the scope and content of the aforementioned delegation and will be published, once accepted by the corresponding government body, always referred to the Plenary, in the case of Local Entities in whose territory are included in the "Official Gazettes of the Province and of the Autonomous Community", for general knowledge.

3. The exercise of the delegated powers must comply with the procedures, procedures and measures in general, legal or technical, relating to the tax management established by this law and, additionally, those provided by the General Tax Law. The acts of management that are carried out in the exercise of said delegation will be contestable according to the procedure that corresponds to the managing body, and, ultimately, before the Contentious Administrative Jurisdiction.

The delegated powers will be exercised by the organ of the delegated entity that proceeds in accordance with the internal rules for the distribution of powers specific to said entity.

4. Entities that under the provisions of this article have assumed by delegation of a local entity all or some of the powers of management, liquidation, inspection and collection of all or some of the taxes or resources of public law of said entity local, may exercise such delegated powers throughout their territorial scope and even in that of other local entities that have not delegated such powers."

This delegation will apply, in addition to the regulation provided for in the aforementioned article 7 of the TRLRHL, what is established in article 9 of Law 40/2015, of October 1, Legal Regime of Public Sector (LRJSP) and article 8 of Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia, which regulate the figure of the delegation of powers as a mechanism that allows alter the exercise of competition.

Regarding the configuration of the delegation of powers regulated by article 8 of the aforementioned Law 26/2010, it is necessary to take into account, for the purposes that concern us now, what is provided for in sections 4, 5 and 7, according to which: "the delegation of a competence may reserve, in favor of the delegator, the powers of control and monitoring of the exercise of the delegated competence, and may be subject to a condition, suspensive or resolute or to a deadline" (8.4); "the delegation of competence can be revoked at any time by the body that conferred it" (8.5); "administrative acts that are adopted by delegation are considered dictated by the delegating body, and must include the words "by delegation" (...) before signature" (8.7). Faculties all of which are linked to the position of

So, in view of the regulations analyzed, we can advance that, from the point of view of the data protection regulations (in accordance with the elements that allow the delimitation of the figures of the person in charge and the person in charge of the treatment set out in the third legal basis of this report), in the delegation by the town councils of the powers relating to the powers of management, settlement, inspection and collection of their own taxes and other revenues under public law that correspond to them, the administration on which this delegation is carried out will be considered to be in charge of the processing in relation to the processing of the personal data to which it has access as a result of the provision of this service.

This conclusion is based on the very nature of "administrative competence", which according to the regulations governing the legal regime and administrative procedure, "is inalienable and must be exercised precisely by the administrative bodies that have it attributed as own" (article 6.1 of Law 26/2010). Both, the delegation of the competence and the management assignment, "do not entail the alteration of the ownership of the competence, but they do alter the determining elements of the exercise of the competence that are estab

The city council, which holds the powers related to the management, settlement and inspection of its own taxes and other revenues under public law, may decide to exercise this power directly through its own resources or commission another, in the event that we are in charge of an autonomous body of the Provincial Council, which carries them out through the corresponding delegation, and can also decide the terms and scope of this delegation. Thi

highlighted the opinion of GT29, one of the elements that allows determining the existence of a person in charge of the treatment.

The entity that receives the delegation, for the exercise of the delegated functions, must process the personal data of the tax payers by means of the corresponding processing order. To carry out the task, it may adopt certain organizational and operational decisions, within the framework of the instructions received from the City Council (art. 28.3 RGPD), which are necessary for the provision of the service, without the need for the city council to intervene in these decisions that are transferred to the body in charge based on the principle of specialization. In any case, the person in charge must comply with the obligations provided for in Article 28.3 RGPD and which must be specified in the processing order.

In this case, there would not be an assumption of co-responsibility of the treatment because the objectives of the treatment are not decided jointly by the Provincial Council and the town council but only by the town council which is the one that has the competence attributed by law.

The body that acts by delegation, in this case the autonomous body of the Provincial Council, cannot use the data to which it has access for any purpose other than those relating to the development of the functions that have been delegated to it and must inform the data holders that he acts as the person in charge, by delegation of the city council.

In accordance with the considerations made in this opinion in relation to the query raised, the following are made,

Conclusions

The body or entity that carries out the management, liquidation, inspection, verification or collection of taxes and other public law revenues specific to the municipality, either by management order or by delegation from the City Council, has the status of in charge of the processing of the data to which it has access as a result of the provision of these services.

Barcelona, July 2, 2019