

**Opinion in relation to a consultation of a municipal commercial company on whether it must appoint a Data Protection Officer**

A letter from a municipal commercial company 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. Consider, in particular, whether it can fit within the term "public body" referred to in this article of the RGPD.

Analyzed the request, and the documentation that accompanies it, and seen the report of the Advisory Legally, the following is ruled

I

(...).

II

The RGPD has incorporated the figure of the Data Protection Delegate in the area of personal data protection.

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 encargada 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. (...)"

Thus, in the event that, as a result of the specific activity carried out by the municipal mercantile company, any of the circumstances provided for in letters b) or c) of section 1 of this article occur, it will be mandatory to appointment of a data protection officer.

However, the query that is formulated focuses rather on determining whether the municipal mercantile company should be included in the concept of "public authority or body" referred to in letter a) of section 1, which, as we noted above, requires the appointment of a data protection officer. This opinion will focus on this question.

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 by the Article 29 Working Group (in

hereinafter, WG29) in its guidance document on the Data Protection Officer, 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 2.3 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.

However, it does not seem that this entity, a public law entity in the form of a trading company, can fit into the concept of public administration established by Law 40/2015.

On the other hand, article 34 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), provides for other cases that, beyond the general criteria contained in the article 37.1 RGPD, make the figure of the data protection delegate mandatory. It does not seem that the company referred to in the query fits into any of the cases provided for in this article of the LOPDGDD.

Having said that, note that WG 29, 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

Law 7/1985, of April 2, regulating the bases of the local regime (LRBRL), provides, in its article 85.2, that public services of local competence can be managed by means of a local mercantile company, as long as its share capital is publicly owned.

Article 85 ter of the LRBRL adds that local mercantile companies are fully governed, whatever their legal form, by the private legal system, except for

subjects in which the budgetary, accounting, financial control, effectiveness control and contracting regulations apply.

Article 1 of its Statutes provides that it has the nature of a commercial company of the City Council and is constituted as a special urban planning entity, with the powers conferred by urban planning legislation as a company with one hundred percent municipal ownership.

Article 2.1 of the said Statutes establishes the social object of the company to achieve the following purposes:

"a) Promotion of sheltered housing and promotion of the rehabilitation of properties and others of general or common interest. b) Realization of building and urban planning studies, including the drafting of corresponding projects, planning instruments and urbanization projects and the initiative for their processing and approval by the competent body. c) Plan and execute, through any of the action systems provided for in the Land Law, urban improvement plans and operations that the City Council assigns. d) Acquisition, for any title, of land and buildings, especially those provided for in the Municipal Land Heritage. e) Execution of construction works, remodeling and urban rehabilitation and provision of urban services and facilities for use and public service. f) Execution of actions included in comprehensive plans or similar instruments that affect neighborhoods or specific areas of the city, and which can be both urbanistic and social in nature (employment, participation, immigration, treatment of cases of social exclusion, integration, health and the like) cultural, promoting private actions provided for in this comprehensive plan or instrument, and others of a similar nature.

g) Alienation, if applicable, of the actions executed.

h) Acquisition, transmission, modification and extinction of all kinds of rights on movable and immovable property. i) Act as a beneficiary of the expropriations necessary for the execution and realization of the social object. j) Establish agreements with all kinds of public and private persons and organizations, both for the direct or shared execution of the actions and the administrative and advisory management that they establish. k) Receive aid and subsidies and access the capital market through credit operations or any form of fundraising. l) The construction, operation, leasing, conservation and maintenance of any public equipment, by order of the City Council of (...). m) Execution of functions within the scope of its internal control for entities with private legal personality that are part of the institutional public sector of the City Council of (...)."

Article 2.2 of the Statutes provides that "the Company (...) is considered as the City Council's own means and technical service (...), for all those activities related to the corporate purpose described in the previous paragraph. In this sense, it will be obliged to carry out the management assignments given to it by the City Council (...), in accordance with the unilateral instructions set by it. The management assignment must be related to the corporate object, and must foresee the conditions of execution and its financing".

From the set of these precepts it follows that this municipal company is configured as a local mercantile company created as a means of direct management of the public services owned by the City Council, in which the Plenary of the City Council exercises the functions of the General Meeting and appoints the members of the board of directors and management, participates directly and contributes all the share capital.

Certainly, some of the functions attributed to this company could be exercised by the City Council through its own organization, and in this case the enforceability of the figure of the data protection delegate would be indisputable (art. 37.1 RGPD). But it is no less true that most of the functions carried out by the company can also be carried out by other private sector entities that would compete in the market with the public capital company to carry out promotion actions urban management instruments, housing promotion, infrastructure execution, among others, or even the management of public facilities. In fact, as we have seen, the areas of the management of certain infrastructures, or of public housing, are expressly mentioned in the guidelines of GT 29 as cases in which the designation of a data protection delegate would result recommended

For this reason, and without prejudice to emphasizing the undeniable advantages that for the attention of citizens' rights, for the organization itself, and also for the exercise of the functions attributed to you by this authority, the designation of a data protection delegate, it does not seem that it can be concluded that his designation is mandatory in the case at hand, in accordance with what is established in articles 37.1 RGPD and 34.1 LOPDGDD.

In view of all the above, for the purposes of the RGPD and following the criterion of GT 29, to the extent that the company carries out activities that can be considered public functions, it could be understood that in this case, it would constitute good practice to appoint a data protection delegate.

In any case, it must be remembered that according to the provisions of article 37.5 of the RGPD, the data protection delegate does not necessarily have to be a member of the entity itself. Therefore, it would be perfectly permissible for the company to designate as a data protection delegate the same person who acts as such with respect to the City Council, either a staff member of the City Council itself, or a person external to both entities.

#### IV

In the event that they are appointed, it must be agreed that both the appointment and the contact details of the DPD should be made public on the website of the municipal society, 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 accordance with the considerations made in this opinion in relation to the query raised, the following are made,

#### Conclusions

Given the subjects affected and the functions attributed to the municipal commercial society, this Authority considers the appointment of a data protection delegate to be good practice. This without prejudice to its obligation in the event that any of the cases provided for in letters b) or c) of article 37.1 of the RGPD occur.

Barcelona, July 16, 2019