

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

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 of Regulation (EU) 2016/679, of the Parliament and of the European Council, of 27 of April 2016, General of 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 37.1 a) of the RGPD or whether it can be considered that its main activity, due to its nature, scope and/or fines, require a regular and systematic observation of interested parties on a large scale referred to in article 37.1 b) of the RGPD.

Analyzed the request, in view of the current applicable regulations, and in accordance with the report of the Advisory I issue the following legal opinion

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. (...)"

With regard to the first query that is formulated, it 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.

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 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 should recognize the status of public authority for the purposes of the GDPR.

However, it does not seem that an entity like this, an entity under public law 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 the matters in which the budgetary, accounting, financial control, effectiveness control and recruitment.

Article 1 of the Statutes provides that it has the nature of a commercial company of the City Council 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) Manage and administer the public service of municipal parking lots, underground and surface guarded, installed or that may be installed in the municipal area, as well as those establishments for concurrence and parking of public transport vehicles that must manage the municipality. b) Manage the service consisting of carrying out mechanical removal operations with the crane, with prior notification to the traffic officers, of vehicles immobilized or abandoned on the public road, of those that prevent circulation, constitute a danger to that or seriously disturb it. c) Any other activity related to the purposes expressed in this article, as well as. In their case, more extensive in relation to their social object, to carry out all kinds of civil, commercial, industrial or financial operations without limitation".

Article 2.2 of the Statutes provides that "the society (...), is considered as the City Council's own means and technical service (...), for all those activities related to the social 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 the municipal society is configured as a local mercantile society created as a means of direct management of public services owned by the City Council to manage and operate underground and surface car parks as well as any activity aimed at improving mobility, circulation, safety and road discipline and transport, in which 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 social 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 the actions of facilitating the vehicle parking, energize and help the urban economy by facilitating parking for commerce, hospitality, cultural life, etc. and improve mobility in the city (better communication and less unnecessary traffic). In fact, as we have seen, the areas of the management of certain infrastructures are expressly mentioned in the guidelines of GT 29 as cases in which the appointment of a data protection delegate would be advisable.

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.a) 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, in the event that a data protection delegate were to be appointed voluntarily, it would be perfectly permissible for the company to designate as delegate the same person who acts as such with respect to the City Council, whether it is staff from the City Council itself City Council, whether a person external to both entities.

IV

With regard to the second query that is formulated, it is about determining whether it could be considered that the main activity consists of processing operations that, by reason of their nature, scope and/or purpose, require "a regular and systematic observation of "large-scale interested parties" that require the appointment of a data protection delegate as established in letter b) of paragraph 1 of article 37 of the RGPD, referred to in Legal Basis II.

Regarding the concept of "habitual and systematic observation", it is not defined in the RGPD, but following the guidelines of WG 29, "habitual" is interpreted with one or more of the following meanings: continuous or occurring at specific intervals during a specific time period; recurrent or repeated at predetermined times and/or that takes place constantly or periodically. In addition, "systematic" is interpreted with one or more of the following meanings: that occurs in accordance with a pre-established, organized or methodical system; takes place as part of an overall data collection plan and/or carried out as part of a strategy.

The RGPD also does not give a concept of what is meant by "large-scale treatment" that allows us to delimit an exact figure, either in relation to the amount of data or the number of people affected that can be applied in all situations

In the domestic legal system, we also do not find any definition of large-scale processing or any standard method to identify in more specific or quantitative terms what constitutes "large-scale" with respect to certain types of common processing activities.

However, the position adopted by the GT29) in its guidelines document on the Data Protection Delegate can serve as a guiding criterion.

Thus, WG29 recommends that the following factors be taken into account when determining whether a treatment is carried out on a large scale:

- The number of interested parties affected, either as a specific figure or as a proportion of the population corresponding
- The volume of data or the variety of data elements that are the subject of processing - The duration, or permanence of the data processing activity, and - The geographical scope of the processing activity.

In this case, and in the absence of more information, it seems that the company's processing activity covers the entire municipality. Although the period of retention of the data and the specific type of analysis made of it is unknown, it seems that the number of users may be high (residents, non-residents, tourists, etc.), they could be treated different types of data (identification, financial, location, video surveillance, habits, etc...) and the volume of data subject to treatment could be considerable. For this reason, its designation could be considered mandatory, in accordance with the provisions of article 37.1.b) of the RGPD. However, it is the company, which has all the information to carry out this analysis accurately and which, prior to an internal analysis, with all the information and taking into account the factors described above, will have to determine if the data processing is carried out on a large scale.

In consideration of all the above, for the purposes of the RGPD and following the criterion of GT 29, in the event that, as a result of the specific activity carried out, there are factors that determine that the treatment of data is carried out on a large scale, it could be understood that in this case, the circumstances provided for in letter b) of section 1 of article 37 of the RGPD are met and the designation of a data protection delegate would be mandatory data

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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 so far in relation to the query raised, the following are made,

Conclusions

Given the subjects affected and the functions attributed to the municipal mercantile company, this Authority considers that the appointment of a data protection delegate under Article 37.1.a) of the RGPD would not be required, even though which would constitute good practice. This is without prejudice to its obligation in the event that the case provided for in letter b) of article 37.1 of the RGPD or in another rule from which its obligation is derived occurs.

Barcelona, 2 September 2019