

Opinion in relation to a consultation of the municipal commercial society on whether it must appoint a Data Protection Delegate

A letter from the 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.

Having analyzed the request, in view of the current applicable regulations, and in accordance with the report of the Legal Counsel, I issue the following 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 RGD, 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), establishes, in its article 86.2, the reservation in favor of local entities of the public passenger transport service, and defines this service as essential.

Article 85.2 of the LRBRL states 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. Its capital is one hundred percent municipal ownership.

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

"Organize and provide public passenger collective transport services and collaborate with other transport systems and urban services of any type that, in a main or determining way, serve the needs of the City.

Carry out the evaluation studies and the mobility, transport and territory plans that the City Council (...) assigns until they are processed and approved by the competent body.

Any other activity related to the purposes expressed in this article.

The company may, in relation to its corporate object, carry out all types of commercial, industrial, or financial civil 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 object 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 the public services owned by the City Council to carry out, among others, mobility plans, transport and territory, provide public passenger collective transport services as well as collaborate with other transport systems and urban services of any type, in which the City Council Plenary 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 the actions of providing services public collective passenger transport and collaborate with other transport systems and urban services of any kind that contribute to improving mobility in the city (better communication, more sustainable and accessible to everyone). In fact, as we have seen, the areas of management of certain sectors of activity such as public transport services are expressly mentioned in the guidelines of WG 29 as cases in which the designation of a protection delegate of data 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 of the municipal company consists of processing operations that, by reason of their nature, scope and/or purpose, require "a regular and systematic observation of interested parties on a large scale" that requires the appointment of a data protection delegate as established by letter b) of paragraph 1 of article 37 of the RGPD, referred to in the Legal Basis II.

The RGPD does not give a concept of what is meant by "habitual and systematic observation", 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 period of time; 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 in this regard by GT29, mentioned above, can serve as a guiding criterion, which 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 treatment; - The duration, or permanence of the data processing activity, and - The geographical scope of the processing activity.

In fact, WG 29 expressly mentions in its guidelines, as an example of large-scale processing, the processing of travel data of people using a city's public transport system (for example, tracking using cards of transport) as a case in which the appointment of a data protection delegate would be advisable.

In this case, and in the absence of more information, due to the type of public service provided by the company, it seems that the processing activity takes place in a constant and methodical manner, covering the entire municipality. Therefore, the number of users (passengers) and consequently the amount of data collected can be very high (e.g. if video surveillance systems are used inside vehicles) or if personalized travel tickets are used exclusive use of the holder (such as the Club dels Tarraconins card for minors, the T-Jove, the retired card, the pensioners card, the social status card and the T-Advance) so that depending on the periods of data conservation can allow establishing guidelines for behavior linked to travel.

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 that has all the necessary information and who, prior to an internal analysis, with all the information and taking into account the factors described above, will have to determine whether data processing is carried out on a large

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 will be mandatory data

v

In the event that their appointment is made, it is necessary to agree that both the appointment and the contact details of the person denied data protection should be made public on the website of the municipal society, as well as communicated 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 data protection delegate 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 data protection delegate, 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