

CNS 41/2021

Opinion in relation to a consultation of a public law entity on the legitimacy of the processing of corporate contact data by its Foreign Offices

A letter from a public law entity is presented to the Catalan Data Protection Authority, in which it is requested that the Authority issue an opinion on the legality of the processing of corporate contact data by its Foreign Offices.

Specifically, it proposes:

1. If the Foreign Offices of the entity without its own legal personality can process corporate contact data for the purposes of locating the holders in order to maintain a professional relationship or collaboration with them on the basis of article 19.3 of the Law organic law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter, LOPDGDD), despite the fact that these are people who work for companies and/or professionals not located or not resident in Spain.
2. If these Foreign Offices also have the consideration of public authority in order to be able to apply the LOPDGDD or other Spanish regulations in the different countries where these offices are located.
3. In the event that article 19.3 of the LOPDGDD does not apply, what would be the justification for the aforementioned data processing.
4. If the application of the LOPDGDD and other Spanish regulations is confirmed, if said Foreign Offices can send commercial communications to these people on the basis of article 21.2 of the Law on Company Services of Information and Electronic Commerce (hereafter, LSSICE).
5. If the Foreign Offices with their own legal personality can process corporate contact data for the purposes of locating their holders in order to maintain a relationship or professional collaboration with them on the basis of article 19.3 of the LOPDGDD and send -commercial communications on the basis of article 21.2 of the LSSICE, or the regulations of the country where they are located should be analyzed.

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

The entity mentions in its letter CNS Opinion 40/2017 issued on October 4, 2017 by this Authority in relation to a query made by this same entity regarding the submission of certain contact and professional data to the regulations of data protection and the legitimation for its treatment (available on the website <http://apdcat.gencat.cat/ca/inici/>).

In that opinion, the Authority analyzed the data processing proposed by the entity in accordance with the regulations in force at that time, concluding, for the purposes of this opinion, that:

"The consulting entity cannot process these professional data without the need to obtain the consent of the holders based on article 6.1.f) of the RGPD, although it can process them based on other sections of the same article, such as articles 6.1.a), 6.1.b) or based on the authorization provided for in article 6.1.e) consisting in the fact that the treatment is necessary for the fulfillment of a mission carried out in the public interest or the exercise of public powers conferred on the data controller."

The entity maintains that, in view of this conclusion, the entity (headquartered in Barcelona) processes corporate contact data of professionals and people who work in companies and organizations with which it interacts (name, surname, electronic address, postal address and telephone number), on the basis of article 6.1.e) of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Protection of Data (hereafter, RGPD), to be necessary for the exercise of powers relating to the promotion, promotion and development of the company that it carries out as a mission of public interest, in accordance with the Law 11/2011, of December 29, restructuring the public sector to speed up administrative activity.

He then declares that he sometimes obtains this data from professional contact cards and at other times from the websites of the companies for which these corporate contacts work or from professional websites, among others, considering that he is protected article 19.3 of the LOPDGDD, an issue that, for temporary reasons, was not examined in Opinion CNS 40/2017, cited, given that it was issued prior to the approval of the LOPDGDD.

Article 19 of the LOPDGDD, to which the entity refers, establishes a presumption of legality for the processing of contact data, of individual entrepreneurs and liberal professionals in the following terms:

"1. Unless proven otherwise, the treatment of contact data and, where appropriate, those relating to the function or position performed by individuals who provide services in a legal entity provided that the following requirements are met:

a) That the treatment refers only to the data necessary for your professional location. b) That the purpose of the treatment is solely to maintain relations of any kind with the legal entity in which the affected party provides its services.

2. The same presumption will operate for the treatment of data relating to individual entrepreneurs and liberal professionals, when they refer to them only in that condition and are not treated to establish a relationship with them as natural persons.

3. Those responsible or in charge of the treatment referred to in article 77.1 of this organic law may also treat the data mentioned in the two sections

anteriores when it derives from a legal obligation or is necessary for the exercise of its powers.”

Among the data controllers included in article 77.1 of the LOPDGDD, to which this article 19 of the LOPDGDD expressly refers, we find, among others, the public law entities that depend on the Administration of the Generalitat

Therefore, the treatment of this data by the entity could certainly also find protection in the same LOPDGDD, as long as the requirements established in this article 19 are met, that is that the treatment is framed in the exercise of the powers which is attributed by law; refers only to the contact data necessary for the professional location of the affected persons (natural persons who provide services in a legal entity and individual entrepreneurs); and has the purpose of maintaining relations of any kind with the legal entity in which the affected person provides his services or, in the case of individual entrepreneurs, to address them within the framework of his business activity (not to establish - there is a relationship as natural persons).

III

Having made this point, the entity raises in its letter whether the aforementioned article 19.3 of the LOPDGDD could also legitimize the processing of corporate contact data by its foreign offices, taking into account that some do not have their own legal personality and others do, as well as the people affected are not located or do not reside in Spain.

The entity is a public agency whose mission is to promote the competitiveness and growth of the Catalan business fabric, through the promotion of innovation, business internationalization and the attraction of investments (Law 11/2011, of 29 December , restructuring of the public sector to speed up administrative activity). For this purpose, and according to the information available, it has a main headquarters in Barcelona, 7 delegations in Catalonia and a network of 40 foreign offices distributed in more than 100 countries.

It should be remembered that the RGPD is a mandatory community rule in all its elements and directly applicable to the Member States (Article 288 TFEU), so it does not require internal rules of transposition nor, in most cases, rules of development or application.

For this reason, those responsible and those in charge of processing, to whom the RGPD applies in accordance with its article 3, must adapt the processing of personal data they carry out to the RGPD.

However, they will also have to take into account other applicable rules, such as the sectoral legislation of the European Union or the Member States and national legislation. The GDPR itself allows its rules to be specified or restricted by the law of Member States to the extent necessary for reasons of consistency and for the national provisions to be comprehensible to their addressees. Under no circumstances may national legislation contradict the provisions of the Community law.

Controllers and processors must therefore ensure that they know and also comply with the additional conditions and frameworks of the Member States in which they carry out the processing of personal data, which may vary from one Member State to another. other

Accordingly, in Spain the LOPDGDD was approved with the aim, as indicated in its article 1.1, of adapting the Spanish legal system to the RGPD and completing its provisions.

Article 2 of the LOPDGDD specifies the scope of application of titles I to IX and articles 89 to 94 the following terms:

"1. The provisions of Titles I to IX and Articles 89 to 94 of this organic law apply to any fully or partially automated processing of personal data, as well as non-automated processing of personal data contained or intended to be included in a file

2. This organic law will not apply:

a) To the treatments excluded from the scope of application of the General Data Protection Regulation by article 2.2, without prejudice to the provisions in sections 3 and 4 of this article. b) To the processing of data of deceased persons, without prejudice to what is established in article 3. c) To the processing subject to the regulations on the protection of classified materials.

3. The treatments to which Regulation (EU) 2016/679 is not directly applicable because they affect activities not included in the scope of application of European Union Law, will be governed by the provisions of its specific legislation if any and additionally by what is established in the aforementioned regulation and in this organic law. In this situation, among others, the treatments carried out under the organic legislation of the general electoral regime, the treatments carried out in the field of penitentiary institutions and the treatments derived from the Civil Registry, the Property and Mercantile Registries.

4. The data processing carried out on the occasion of the processing by the judicial bodies of the processes of which they are competent, as well as that carried out within the management of the Judicial Office, will be governed by the provisions of the Regulation (EU) 2016/679 and this organic law, without prejudice to the provisions of Organic Law 6/1985, of July 1, of the Judiciary, which are applicable to it."

The precept transcribed does not establish any provision regarding the scope of spatial or territorial application of the LOPDGDD. All in all, and taking into account that the purpose of the LOPDGDD is to adapt the Spanish legal system to the RGPD and complete its provisions, it seems necessary to conclude that it will apply to the entities to which it applies the RGPD.

Consequently, the authorization conferred by article 19.3 of the LOPDGDD for the treatment of contact data, of individual entrepreneurs and liberal professionals by those responsible or in charge of the treatment referred to in article 77.1 of the 'LOPDGDD, as long as it is carried out in compliance with the requirements established by the same precept, may also be applicable to the external offices of the entity to which the RGPD applies.

In this sense, article 3.1 of the RGPD provides that "this Regulation applies to the treatment of personal data in the context of the activities of an establishment of the person in charge or of the person in charge in the Union, regardless of whether the treatment takes place in the Union or not."

Recital 22 of the RGPD specifies that "all processing of personal data in the context of the activities of an establishment of a person in charge or a person in charge of the treatment in the Union must be carried out in accordance with this Regulation, regardless of whether the treatment takes place in the Union. An establishment implies the effective and real exercise of an activity through stable modalities. The

The legal form covered by such modalities, whether it is a branch or a subsidiary with legal personality, is not the determining factor in this regard."

Given that the processing of corporate and/or professional contact data by the Foreign Offices would be carried out in the context of the public activities attributed to the entity, with its main office in Barcelona, it is understood that the provisions of the RGPD, regardless of whether the foreign offices are located in a European Union country or not.

In view of this, the legitimacy for the processing of the data referred to in the query must be sought in the provisions of article 6 of the RGPD. It should not be forgotten, however, that the treatment must also comply, if applicable, with the national data protection legislation that may be applicable in each case.

In this sense, it can be said that the legal basis provided for in article 6.1.e) of the RGPD, regarding which the treatment is necessary to fulfill a mission carried out in the public interest or in the exercise of conferred public powers to the data controller, it could also apply to the processing of corporate contact data carried out by their foreign offices, which are an integral part of the entity.

And this would also affect foreign offices, even if they have their own legal personality, because this data would not by itself lead to the exclusion of the applicability of the RGPD, given that it would continue to be activities carried out in the context of the organization's activities.

However, in the case of foreign offices with their own legal personality, if it is not one of the entities referred to in article 77 of the LOPDGDD, article 19.3 LOPDGDD would not apply but the Article 19.2.

There could be another possibility, given that, in view of the concurrent circumstances, it may be that, with respect to the processing of corporate contact data for the public purposes indicated, these offices do not have sufficient capacity to determine the purposes and the means of this treatment, so it cannot be ruled out that, in a case like the one proposed, they may act on behalf of the entity.

Article 4.8) of the RGPD defines the person in charge of the treatment as "the natural or legal person, public authority, service or other organism that treats personal data on behalf of the person in charge of the treatment."

In this case, it would be necessary to formalize a data processor contract in the terms established in article 28.3 of the LOPDGDD.

That being the case, in this case the said foreign offices could process the data in question on the same basis that legitimizes the processing of this data by its manager, that is article 6.1.e) of the RGPD, in connection with the Article 28.3 of the RGPD.

v

The consultation also considers whether the Foreign Offices, once the corporate and/or professional contact details have been collected, can send commercial communications to the people they refer to on the basis of the exception established in article 21.2 of the LSSICE.

Article 21 of the LSSICE prohibits the sending of commercial communications made through e-mail or other equivalent means of electronic communication in the following terms:

"1. It is prohibited to send advertising or promotional communications by email or other equivalent electronic means of communication that have not previously been requested or expressly authorized by their recipients.

2. The provisions of the previous section shall not apply when there is a previous contractual relationship, provided that the provider had lawfully obtained the addressee's contact data and will use them to send commercial communications relating to products or services of his own company that are similar to those that were initially contracted with the client.

In any case, the provider must offer the recipient the possibility to object to the processing of their data for promotional purposes through a simple and free procedure, both at the time of data collection and in each of the commercial communications sent to them.

When the communications had been sent by electronic mail, said medium must necessarily consist of the inclusion of an electronic mail address or another valid electronic address where this right can be exercised, being prohibited from sending communications that do not include said address."

Articles 2 to 5 of the LSSICE determine the scope of application of the rule referring, in any case, to information society service providers and not to any other subject.

Section c) of the Annex of the LSSICE defines the "service provider or lender" as the "natural or legal person that provides an information society service".

And section a) of this same Annex defines the "information society service" as:

"All services normally provided for a fee, at a distance, electronically and at the individual request of the recipient.

The service concept of the information society also includes services not remunerated by their recipients, to the extent that they constitute an economic activity for the service provider.

The following are services of the information society, among others and always representing an economic activity:

1.º The procurement of goods or services by electronic means. 2.º The organization and management of auctions by electronic means or virtual markets and commercial centers. 3. The management of online purchases by groups of people. 4. The sending of commercial communications. 5.º The provision of information via telematics.

They will not be considered information society services that do not meet the characteristics indicated in the first paragraph of this section and, in particular, the following: (...)."

The concept of information society services revolves around the development of an economic activity, whether directly or indirectly remunerated, but, in any case, that entails

the obtaining of a benefit for the provider (as long as it is a service provided remotely, electronically and at the recipient's individual request).

As we have seen, the entity is considered public administration and its creation (regardless of its organization) responds to the fulfillment of a mission in the public interest, in such a way that the actions it carries out are understood as activities public or general interest other than the economic activities referred to in the LSSICE.

Therefore, a priori, and to the extent that it concerns activities that are part of the mission in the public interest entrusted to it, the LSSICE would not be applicable, given that it would not have the character of a service provider the information society in accordance with the definitions given by the same Law.

As has been made clear in this opinion, the collection of corporate and/or professional contact data by the external offices of the entity, with or without its own legal personality, would respond to the fulfillment of this mission in the public interest attributed, by law, to the entity (in the case of Foreign Offices with legal personality, as in charge). Therefore, they could not be used for other purposes that are incompatible (articles 5.1.b) RGD and 6.4 RGD).

In the case that we are concerned with the sending of electronic communications about activities or services that the entity provides or offers to these people, it would be framed within the purpose for which it is collected, so they could be carried out on the legal basis of article 6.1.e) of the RGD and article 19.3 LOPDGDD.

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

Conclusions

The external offices of the entity can collect and process this data on the basis of article 6.1.e) of the RGD and article 19.3 LOPDGDD. In the event that the Foreign Office does not adopt the form of one of the entities referred to in article 77.1 LOPDGDD, article 19.2 LOPDGDD would apply.

These authorizations would also include the sending by the Foreign Offices of electronic communications about the services and activities offered by the entity, as part of the public interest mission that justifies its creation.

All this without prejudice to the fact that the foreign offices must also adapt their activity, if applicable, to the regulations in force in the different states in which they operate.

Barcelona, September 3, 2021