

Opinion in relation to the query made by a public company on the appointment of a collegiate body as Data Protection Delegate

A letter from a public company is presented to the Catalan Data Protection Authority, in which the possibility of appointing a collegiate body as a Data Protection Delegate is raised.

Having analyzed the query and the documentation that accompanies it, in view of the applicable regulations in force, and in accordance with the report of the Legal Adviser, I issue the following opinion.

I

(...)

II

The consulting entity raises the possibility of appointing a collegiate body as a Data Protection Officer (hereinafter, DPD), which obliges to examine the provisions established for this figure in the data protection regulations.

Article 37 of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereafter, RGPD), regulates the designation of the DPD in the following terms:

"1. The person in charge and the person in charge of the treatment will designate 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 manager consist of processing operations that, due to their nature, scope and/or purposes, require a regular and systematic observation of interested parties on a large scale, or
c) the main activities of the person in charge or the manager consist of the large-scale processing of special categories of data in accordance with article 9 or of personal data relating to convictions and criminal offenses referred to in article 10.

2. (...).

3. When the person responsible for the treatment is a public authority or body, a single data protection officer may be appointed for several of these authorities or bodies, taking into account their organizational structure and size.

4. (...).

5. *The data protection delegate will be appointed taking into account his professional qualifications and, in particular, his **specialized knowledge of law and practice in the field of data protection and his capacity to perform the functions indicated in article 39** .*
6. *The data protection delegate will be able to form part of the staff of the person in charge or of the person in charge of the treatment or perform their functions within the framework of a service contract .*
7. *The person responsible or the person in charge of the treatment will publish the contact details of the data protection officer and will communicate them to the control authority.”*

For its part, article 38 of the RGPD specifies the position of the DPD in the organizational structure of the person responsible for the treatment and the person in charge of the treatment, in the following terms:

1. *The person in charge and the person in charge of the treatment will guarantee that the data protection delegate participates adequately and in a timely manner in all issues related to the protection of personal data.*
2. *The person in charge and the person in charge of the treatment will support the data protection delegate in the performance of the functions mentioned in article 39, facilitating the necessary resources for the performance of said functions and access to personal data and treatment operations , and for the maintenance of their specialized knowledge.*
3. *The person in charge and the person in charge of the treatment will **guarantee that the data protection delegate does not receive any instructions** regarding the performance of said functions. The person in charge or the person in charge will not be dismissed or sanctioned for performing their functions. The data protection officer will report directly to the highest hierarchical level of the person in charge.*
4. *Interested parties may contact the data protection officer for all questions related to the processing of their personal data and the exercise of their rights under this Regulation.*
5. *The data protection officer will be obliged to maintain secrecy or confidentiality in the performance of his duties, in accordance with the Law of the Union or of the Member States.*
6. ***The data protection officer may perform other functions and tasks. The person responsible or in charge of the treatment will guarantee that said functions and tasks do not give rise to a conflict of interest .”***

And article 39 of the RGPD determines the specific functions of the DPD, while establishing the following:

1. *The data protection officer will have at least the following functions:*
 - a) *inform and advise the person in charge or the person in charge of the treatment and the employees who deal with the treatment of the obligations incumbent upon them by virtue of this Regulation and other data protection provisions of the Union or of the Member States;*
 - b) *supervise compliance with the provisions of this Regulation, other data protection provisions of the Union or Member States and the policies of the person in charge or of the person responsible for the treatment in the area of*

personal data protection, including the assignment of responsibilities, the awareness and training of the personnel who participate in the treatment operations, and the corresponding audits;

c) offer the advice requested about the impact assessment related to data protection and supervise its application in accordance with article 35;

d) cooperate with the control authority;

e) act as the point of contact of the control authority for issues related to the treatment, including the prior consultation referred to in article 36, and make inquiries, as the case may be, on any other matter.

2. The data protection officer will perform his duties by paying due attention to the risks associated with processing operations, taking into account the nature, scope, context and purposes of the processing.”

In turn, it is necessary to take into account the provisions of articles 34 to 37 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LOPDGDD), which complement the articles of the RGPD transcribed.

From the entirety of this regulation, the following considerations emerge, for the purposes of interest in the present case:

- All public administrations and their linked or dependent public bodies, which act as responsible or in charge of the processing of personal data, must mandatorily appoint a DPD (Article 37.1.a) RGPD).

It is possible to designate a single DPD for several of these administrations and public bodies. It will depend on their organizational structure and size (article 37.3 RGPD). However, it cannot be ruled out that, in complex administrative structures, it is more appropriate to have several DPDs.

- The DPD can be part of the staff of the public administration (internal DPD) or the services offered by a professional or an organization/company outside the public administration organization (external DPD) can be hired (article 37.6 RGPD).

Therefore, the DPD can be a natural person or a legal person. Thus, the functions of the DPD can be assumed by a single person, who can be supported by a work team or a unit specifically dedicated to data protection, or also by several people working in a team.

In this last sense, the Working Group of Article 29 has pronounced in the Document of guidelines on Data Protection Delegates, of December 13, 2016, revised on April 5, 2017 (WP243, rev .1), which was also approved by European Data Protection Committee (hereafter CEPD) in its first session. The mentioned document points out, among other issues, the possibility of combining individual capacities and strengths so that several individuals working in a team can provide their DPD services to the responsible entity in a more effective way.

- The DPD can carry out its functions full-time or part-time (article 38.6 RGPD) depending, among other criteria, on the volume of the treatments, the special category of the processed data or the risks to the rights or freedoms of the interested parties (article 34.5 LOPDGDD) and must act, at all times, with full independence (article 38.3 RGPD)

Therefore, it is necessary to avoid any possible conflict of interest in the exercise of DPD functions (articles 38.6 RGPD and 36.2 LOPDGDD).

- The DPD must have specialized knowledge of data protection law and practice.
- It is necessary to publish the contact details of the DPD and communicate them to the control authority (Articles 37.7 RGPD and 34.3 LOPDGDD).

III

In view of the above considerations, and in view of the terms in which the present consultation is formulated, a priori there would be no inconvenience for the consulting entity to appoint a collegiate body as DPD of the organization.

As we have seen, the RGPD offers different possibilities regarding the appointment and position of the DPD in the organization of the entities that must appoint him in the legally established cases or that want to appoint one voluntarily. Thus, it can be a single DPD or there can be several, it can be an internal or external DPD, it can be a natural person or a legal person and, therefore, it can also be a team of professionals.

The formula adopted for the appointment or designation of the DPD can therefore be said to depend on the decision that the entity responsible for the treatment may adopt in this regard, as a result of its organizational autonomy. From this perspective, the option of designating a collegiate body as DPD would therefore fit.

However, it must be borne in mind that this designation is a decision of the entity responsible for the treatment (in this case, the consulting entity) which in any case must conform to the requirements established by the data protection regulations for what does, especially, the accreditation of professional skills and the independence of the DPD.

That is to say, what is relevant in the designation of the DPD is not so much the number of DPDs with whom it is counted, whether it is an individual person or different people who are part of a collegiate body, or whether or not it forms part of the responsible entity, but that the requirements that have been set out are met so that they can adequately perform the functions assigned to them by the RGPD, in particular specialization and that the exercise of these functions does not give rise to situations of incompatibility, nor to conflicts of interest.

The collegiate bodies, by definition and without prejudice to the provisions of the specific rules or the agreements that create or regulate them, are constituted by a plurality of people (Law 26/2010, of August 3, on the legal regime and procedure of the public administrations of Catalonia).

Therefore, in case of choosing to designate a collegiate body as DPD of the entity, it would be necessary to certify that each member of the collegiate body has the professional skills referred to in article 37.5 of the RGPD. That is, legal knowledge and experience in data protection, especially in public administrations, and also in information

systems for data processing (specialized knowledge in law and practice in data protection).

Likewise, it would be necessary to guarantee that each of these people will be able to exercise their functions independently, avoiding any conflict of interest.

Given that the DPD acts as an internal adviser and supervisor of GDPR and LOPDGDD compliance, as well as serving as a point of contact and interlocutor between the organization, data protection authorities and interested parties (articles 38.4 and 39.1 RGD, and article 36 LOPDGDD), it seems clear that it cannot at the same time perform other incompatible functions, in the sense that it involves participating in decision-making about the existence of data treatments or about the way in which these data they must be treated.

As the Article 29 Working Group has highlighted in the cited document, managerial or command jobs but also other lower positions in the organizational structure that intervene, directly or indirectly, in the processing of personal data , even positions of legal representation, are areas in which conflicts of interest can potentially or objectively arise. Therefore, it should be avoided to accumulate these tasks with those of the DPD (an example of a possible conflict of interest would be to accumulate the functions of the DPD with those responsible for ICT or information security).

Thus, in a case such as the one examined, it would be necessary, in order to avoid conflicts of interest of the members of the collegiate body, that these people do not hold a position or job in the company at the same time asking that leads them to determine the purposes and means of processing the personal data of the organization, nor that they have attributed functions or other responsibilities in this same sense.

Likewise, and following the recommendations of the Article 29 Working Group, in the case of designating a collegiate body as DPD, it would be convenient to designate a single person as the main contact.

Remember that, once the DPD has been designated, this designation must be made public as well as their contact details (Article 37.7 RGD), so that interested parties can contact them easily and directly.

Also that it is necessary to notify this Authority, within ten days, of the designation of the DPD (as well as, where applicable, the modifications and termination) through the corresponding form, available at the Authority's electronic headquarters (article 34.3 LOPDGDD).

Conclusions _

The designation of a collegiate body as a data protection delegate is not contrary to the provisions established in the RGD and the LOPDGDD. In any case, it is necessary to

ensure that its members demonstrate the required professional skills and that no situation arises from which a conflict of interest arises.

Barcelona, October 19, 2022

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