

Opinion in relation to the query made by an entity on the processing of electoral roll and trade union membership data.

A query made by the Data Protection Officer (DPD) of an entity regarding the processing of data from the electoral roll is presented to the Catalan Data Protection Authority.

The DPD proposes:

"The Labor Relations Area (...) is considering collaboration with an external entity (...) to implement a voting system by email, which could also be used for union elections.

Due to the above, it is proposed to provide this external entity, as the person in charge of the treatment, with a series of data, including the electoral roll data, as well as the vote cast by each voter, although this is expected to be encrypted."

In this context, he formulates the following questions:

"- Would it be legitimate, in the context of a data processor contract, to share electoral roll data (...) as a responsible party within the framework of the intended purpose?

- On the other hand, and taking into account the voting encryption system, it would be legitimate, in the same context of the data processor contract, for this system to be used to manage union elections, without the need to collect consent workers' notice, taking into account that union membership is a special category date ?"

Having analyzed the consultation, given the current applicable regulations and in accordance with the report of the Legal Counsel, I issue the following opinion:

I

(...)

II

The DPD states that they are considering collaboration with an external entity to implement a voting system by email, which could also be used for union elections. As indicated, *"due to the above, it is proposed to provide this external entity, as the person in charge of the treatment, with a series of data, among them the data of the electoral roll, as well as the vote cast by each voter, although this is provides for it to be encrypted."*

In this context, the DPD raises two questions:

"- Would it be legitimate, in the context of a data processor contract, to share electoral roll data (...) as a responsible party within the framework of the intended purpose?"

- On the other hand, and taking into account the voting encryption system, it would be legitimate, in the same context of the data processor contract, for this system to be used to manage union elections, without the need to collect consent workers' notice, taking into account that union membership is a special category data?"

Given the limited information provided by the DPD in its consultation, it is interpreted, for the purposes of this opinion, that the purpose of the communication of the data it refers to is the holding of elections for workers' representatives (members of company committee given the number of employees in the entity) by electronic vote.

Focusing the consultation on these terms from the point of view of data protection regulations, it is necessary to analyze, first of all, what is the legal basis for the processing of electoral roll data and the rest of personal data necessary for the development of trade union elections, and, secondly, if there is sufficient authorization to carry out the elections by means of electronic voting.

III

From the point of view of data protection regulations, it must be taken into account that Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General Data Protection (hereinafter, RGPD)) in accordance with the provisions of its article 2.1 applies to the fully or partially automated processing of personal data, as well as to the non-automated processing of personal data contained or intended to be included in a file.

Article 4.1 of the RGPD specifies that personal data is all information about an identified or identifiable natural person (the *"interested party"*), adding that an identifiable natural person is considered any person whose identity can be determined, directly or indirectly, in particular by means of an identifier, such as a name, an identification number, location data, an online identifier or one or more elements specific to the physical, physiological, genetic, psychological, economic, cultural or social identity of said person

Any operation or set of operations on personal data is considered processing, *"whether by automated procedures or not, such as collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, diffusion or any other form of enabling access, comparison or interconnection, limitation, suppression or destruction"* (Article 4.2 RGPD), and all data processing must comply with the principles contained in Article 5 of the RGPD (legal, loyalty and transparency, purpose limitation, minimization, accuracy, retention term limitation, integrity and confidentiality and, proactive liability).

In order for a treatment to be lawful it must have, at least, a legal basis of those provided for in article 6.1 of the RGPD, among which for the purposes that concern, it must be taken into account that the treatment is considered to be lawful if it is necessary for the fulfillment of a legal obligation applicable to the person in charge of the treatment (Article 6.1.c) RGPD) it being necessary to have a standard with the rank of law that regulates them as it follows from Article 6.3 of the RGPD and expressly includes article 8 of the LOPDGDD.

If the treatment is of special categories of data (data revealing ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union membership, and the processing of genetic data, biometric data aimed at identifying univocally a natural person, data relating to health or data relating to the sex life or sexual orientation of a natural person) it is necessary to meet, in addition, one of the circumstances provided for in article 9.2 RGPD.

Thus, section 2 of article 9 includes the following exceptions to the general rule:

"a) the interested party gives his explicit consent for the treatment of said personal data with one or more of the specified purposes, except when the Law of the Union or of the Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party;

b) the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of labor law and of social security and protection, to the extent that this is authorized by the Law of the Union or of the Member States or a collective agreement in accordance with the Law of the Member States that establishes adequate guarantees of respect for the fundamental rights and interests of the interested party;

c) the treatment is necessary to protect the vital interests of the interested party or another natural person, in the event that the interested party is not physically or legally able to give their consent;

d) the treatment is carried out, within the scope of its legitimate activities and with due guarantees, by a foundation, an association or any other non-profit organization, whose purpose is political, philosophical, religious or trade union, provided that the treatment refers exclusively to current or former members of such organizations or persons who maintain regular contact with them in relation to their purposes and provided that personal data is not communicated outside of them without the consent of the interested parties;

e) the treatment refers to personal data that the interested party has made manifestly public;

f) the treatment is necessary for the formulation, exercise or defense of claims or when the courts act in the exercise of their judicial function;

g) the treatment is necessary for reasons of an essential public interest, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish measures adequate and specific to protect the interests and fundamental rights of the interested party".

The carrying out of an electoral process for workers' representatives, as proposed in the consultation, requires the processing of workers' data, not only their identification to be included in the worker census and the voter census, but also other more sensitive

information such as the fact of having exercised the vote or not and, in particular, the meaning of the vote.

The meaning of workers' votes in union elections affects personal aspects related to their political, philosophical or ideological orientation, since they highlight relevant aspects of the set of fundamental ideas that characterize a person's thinking and, therefore, it involves the processing of special categories of data.

In addition to the processing of the political orientation data of the workers who participate in the elections as voters, the management of the electoral process will involve the processing of trade union membership data of the workers who participate in the electoral process as candidates representing the unions to which they are affiliated.

In order for these treatments to be considered lawful, it is necessary that one of the circumstances referred to in article 9.2 RGPD occurs.

In the area to which the query refers, it is appropriate to analyze the assumption provided for in letter b) of article 9.2 of the RGPD, relating to the fact that the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the responsible for the treatment or the interested party in the field of labor law and social security and protection, to the extent authorized by the law of the Union or the Member States or a collective agreement in accordance with the law of the member states that establish adequate guarantees regarding the fundamental rights and interests of the interested party.

In order for this circumstance to occur, it will be necessary:

- a) That the treatment is necessary for the fulfillment of obligations or the exercise of specific rights of the employer or the person interested in the field of labor law or social security and protection, and
- b) That it is authorized by the law of the Union or of the member states or a collective agreement, which establish adequate guarantees regarding the respect of the fundamental rights and interests of the people affected.

Regarding the authorization contained in the law of the member states, recital 41 of the RGPD provides that *"when the present Regulation refers to a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament"*, but adds that this must be understood *"without prejudice to the requirements of the constitutional order of the Member State in question"*. In the case of the Spanish State, in accordance with the constitutional requirements, the rule that foresees this, as it concerns the development of a fundamental right, must have the status of law (Article 53 CE).

In this sense, article 88 of the RGPD has established that member states can, through legislative provisions or collective agreements, establish more specific rules to guarantee the protection of rights and freedoms in relation to the treatment of personal data of workers in the workplace, in particular, among others, for the purpose of fulfilling the obligations established by law or the collective agreement, the management, planning and organization of work. These rules must include appropriate and specific measures to preserve the human dignity of those concerned, as well as their legitimate interests and fundamental rights.

In short, in the case at hand, in order to determine whether the processing of workers' data for the preparation of the electoral roll and for the election of workers' representatives is lawful processing, it is necessary to attend to the which establishes Royal Legislative Decree 2/2015, of October 23, approving the Workers' Statute (hereafter TRLET) and Royal Decree 1844/1994, of September 9, approving the Regulations of elections to representative bodies of workers in the company.

IV

The electoral procedure for workers' representatives is regulated in articles 69 to 76 of the TRLET, in Royal Decree 1844/1994, of September 9, which approves the Regulations for elections to workers' representative bodies in the company _

In accordance with article 67 TRLET, the promotion of elections to staff delegates and members of company committees corresponds to the trade unions that meet the requirements required by the TRLET or to the workers of the work center by majority agreement: *" The most representative trade union organizations, those that have a minimum of ten percent of representatives in the company or the workers of the work center by majority agreement, will be able to promote elections to staff delegates and members of company committees . Unions with the capacity to promote elections will have the right to access the records of the Public Administrations that contain data relating to the registration of companies and employee registrations, to the extent necessary to carry out such promotion in their respective areas. ..)"*

The staff delegates and members of the works committee are elected by the workers through: "personal, direct, free and secret suffrage " (article 69.1 TRLET)
Article 73 of the TRLET establishes:

"1. In the company or workplace, a table will be set up for each school of two hundred and fifty elected workers or fraction.

2. The table will be in charge of monitoring the entire electoral process, presiding over the voting, carrying out the scrutiny, drawing up the corresponding minutes and resolving any complaints that are presented.

3. The table will be formed by the president, who will be the most senior employee in the company, and two members, who will be the older and younger voters. The latter will act as secretary. Substitutes will be appointed to those workers who are the holders of the table in the indicated order of seniority or age.

4. None of the members of the table may be a candidate and, if so, he/she will be replaced in it by his/her substitute.

5. Each candidate or candidacy, as the case may be, may appoint an auditor per table. Likewise, the employer may appoint a representative to attend the voting and the scrutiny."

Article 74 TRLET attributes the following functions to the electoral months:

"1. Having notified the company of the intention to hold elections, this, within seven days, will transmit the communication to the workers who must constitute the table, as well as to the representatives of the workers, simultaneously making it known to the promoters.

The electoral board will be formally constituted, by means of an act granted to that effect, on the date set by the promoters in their communication of the purpose of holding elections, which will be the date of initiation of the electoral process.

2. When it comes to elections for staff delegates, the employer, in the same term, will send the labor census to the members of the electoral board, which will be adjusted, for these purposes, to a standardized model.

The electoral board will fulfill the following functions:

- a) He will make public among the workers the labor census with an indication of who are voters.*
- b) It will set the number of representatives and the deadline for the presentation of candidacies.*
- c) It will receive and announce the candidacies that are presented.*
- d) It will indicate the voting date.*
- e) He will draw up the minutes of scrutiny in a period not exceeding three calendar days.*

(...)

3. When it comes to elections for members of the company committee, the polling station will ask the employer for the labor census and will prepare, with the means that he will provide, the list of voters. This will be made public on the notice boards by means of its exhibition for a period of no less than seventy-two hours.

The board will resolve any incident or claim related to inclusions, exclusions or corrections that are presented up to twenty-four hours after the end of the list's exhibition period. He will publish the definitive list within the next twenty-four hours. Next, the table, or the group of them, will determine the number of committee members that must be elected in application of the provisions of article 66.

(...) ."

Regarding the development of the elections, article 75 TRLET establishes:

*"1. The act of voting will be carried out in the center or place of work and during the working day, taking into account the rules that regulate voting by mail.
The employer will facilitate the necessary means for the normal development of voting and the entire electoral process.*

2. The vote will be free, secret, personal and direct, depositing the papers, which in size, color, printing and quality of the paper will be of the same characteristics, in closed urns.

3. Immediately after the voting is held, the polling station will publicly count the votes by reading the ballots out loud by the president.

4. A record will be drawn up of the result of the scrutiny according to a standardized model, which will include the incidences and protests held in their case. Once the minutes have been drawn up, they will be signed by the members of the board, the auditors and the employer's representative, if any. Afterwards, the polling stations of the same company or centre, in joint meeting, will extend the minutes of the overall result of the voting.

5. The president of the table will send copies of the act of scrutiny to the employer and the auditors of the candidacies, as well as to the elected representatives. The result of the voting will be published on the bulletin boards.

6. The original of the minutes, together with the ballots for invalid or disputed votes by the auditors and the constitution of the board, will be presented within three days to the public office under the labor authority by the president of the table, who may delegate in writing to some member of the table. The public office dependent on the labor authority will proceed on the next working day to the publication on the bulletin boards of a copy of the act, delivering a copy to the unions that request it and will transfer the presentation to the company in said office publication of the act corresponding to the electoral process that has taken place in that one, with an indication of the date on which the period for challenging it ends and will maintain the deposit of the ballots until the periods of challenge are fulfilled. The public office dependent on the labor authority, ten working days after the publication, will proceed or not to register the electoral records.

(...)"

The analyzed articles attribute to the employer, among others, the functions of transferring the notice of the call to the representatives of the workers and to notify the people who must form the electoral board of the holding of the elections (article 74.1 TRLET); provide the Electoral Bureau with the Labor Census and the data necessary for its configuration (article 74.2 and 74.3); as well as facilitating the time and means necessary for the effective exercise of the vote.

Also, these articles attribute to the Electoral Bureau or mesas, among others, the functions of drawing up and publishing the electoral census (provisional and final) (article 74 TRLET), monitoring the development of the entire electoral process (73.2 TRLET), set the number of representatives to be elected, receive and announce the candidacies that are presented, resolve complaints (73.2 TRLET), set the date of the vote, carry out the scrutiny, extend the corresponding minutes of the election results, extend the minutes of the constitution of the table and the acts of scrutiny with the ballots of invalid or contested votes within the legally established terms, etc. (article 75 TRLET).

For its part, the Royal Decree 1844/1994, of September 9, which approves the Regulations for elections to representative bodies of workers in the company, regulates in article 10 the possibility of voting by mail postal and establishes the procedure to be followed in cases where a voter cannot exercise the right to vote in the place that corresponds to him, establish the possibility that he can cast his vote by postal mail prior to communication to the polling station.

The regulation contained in articles 69 to 76 TRLET, as well as the Regulation on elections to employee representative bodies in the company constitute the legal basis that enables the processing of personal data from the electoral roll as well as the rest of the data necessary

for to the management of the electoral process of the elections to staff delegates and members of the company committee, in relation to article 6.1.c) and article 9.2.d) RGPD in the sense that the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person in charge of the treatment and of those interested in the field of labor law regulated in a rule with the rank of law.

With regard to the processing of trade union membership data of candidates who stand to be elected as representatives or staff delegates representing their respective unions, in addition to the exception provided for in article 9. 2.d) of the RGPD also applies to the exception provided for in letter e) of this article, to the extent that it would be personal data that the interested party has made manifestly public.

V

However, the DPD is consulting on the possibility of communicating the data of the electoral roll and the data of the workers' votes to a third entity within the framework of a processing contract with the purpose of carrying out the elections with electronic vote

The regulation of the electoral procedure established by the TRLET is very detailed and regulatory to the point that it establishes that article 74.2 establishes: " *The vote will be free, secret, personal and direct, depositándose las papeletas, que en tamaño, color, impresión and the quality of the paper will be of the same characteristics, in closed urns .*"

Therefore, it is expressly provided that the voting is done on paper ballots and with certain characteristics. In no case is it foreseen that voting will be done by electronic means, nor does it establish, consequently, the necessary guarantees for the treatment of the special categories of data that the use of electronic means in voting would entail.

In relation to this lack of concreteness of the rule, it is necessary to take into account the sentence of the Constitutional Court 76/2019, of 22 May, in which the court recalls that state interference in the field of fundamental rights and public freedoms requires a rule with the rank of law and specifies the indispensable requirements that this rule must meet as a guarantee of legal certainty:

"[...] This double function of the reserve of law translates into a double requirement: on the one hand, the necessary intervention of the law to enable interference; and, on the other hand, that legal norm "must meet all those indispensable characteristics as a guarantee of legal security", that is, "must express each and every one of the budgets and conditions of the intervention" (STC 49/1999 , FJ 4). In other words, "not only does it exclude powers of attorney in favor of regulatory norms [...], but it also implies other requirements regarding the content of the Law that establishes such limits" (STC 292/2000, FJ 15).

The second requirement mentioned constitutes the qualitative dimension of the reserve of law, and is specified in the requirements of predictability and certainty of restrictive measures in the field of fundamental rights . In STC 292/2000, FJ 15, we point out that, even if they have a constitutional foundation, the limitations of the fundamental right established by law "can violate the Constitution if they suffer from a lack of certainty and predictability in the limits they impose and their manner of application", then "the lack of

precision of the Law in the material presuppositions of the limitation of a fundamental right is liable to generate an indeterminacy on the cases to which such restriction is applied"; "when this result is produced, beyond any reasonable interpretation, the Law no longer fulfills its function of guaranteeing the fundamental right that it restricts, as it simply leaves the will of the person who has to apply it to operate instead". In the same sentence and legal foundation we also need the type of violation that entails the lack of certainty and predictability in the limits itself: "it would not only injure the principle of legal security (art. 9.3 CE), conceived as certainty about the applicable order and reasonably founded expectation of the person about what should be the action of the power applying the Law (STC 104/2000, FJ 7, por todas), but at the same time said Law would be injuring the essential content of the fundamental right thus restricted, given that the way in which its limits have been set make it unrecognizable and, in practice, make its exercise impossible (SSTC 11/1981, FJ 15; 142/1993, of April 22 (RTC 1993, 142), FJ 4, and 341/1993, of November 18 (RTC 1993, 341), FJ 7)".

In other words, the impact on the right to data protection that derives from the rule that regulates the treatment of special categories of data must be foreseeable.

In addition, the judgment also determines that the rule must establish adequate guarantees, especially when dealing with special categories of data. In particular, the Court states the following:

"The requirement for special protection of this category of data is provided for in the Convention for the protection of persons with respect to the automated processing of personal data (RCL 1985, 2704), of January 28, 1981 (instrument of ratification published in the Official Gazette of the State No. 274, of November 15, 1985), whose article 6 establishes the following: "Personal data that reveal racial origin, political opinions, religious convictions or other convictions, as well as Personal data relating to health or sexual life may not be processed automatically unless internal law provides for appropriate guarantees. [...]" [...]

Adequate guarantees must ensure that data processing is carried out under conditions that ensure transparency, supervision and effective judicial protection, and must ensure that data are not collected disproportionately and are not used for purposes other than those they justified their obtaining. The nature and scope of the guarantees that are constitutionally enforceable in each case will depend on three factors essentially: the type of data processing that is intended to be carried out; the nature of the data; and the probability and severity of the risks of abuse and illicit use which, in turn, are linked to the type of treatment and the category of data in question. Thus, data collection with statistical purposes does not pose the same problems as data collection with a specific purpose. Nor does the collection and processing of anonymous data involve the same degree of interference as the collection and processing of personal data that are taken individually and are not anonymized, as is the treatment of personal data that reveal ethnic or racial origin, political opinions, health, sex life or sexual orientation of a natural person, than the treatment of other types of data.

The level and nature of the adequate guarantees cannot be determined once and for all, because, on the one hand, they must be revised and updated when necessary and, on the other hand, the principle of proportionality requires verifying whether, with the

development of technology, treatment possibilities appear that are less intrusive or potentially less dangerous for fundamental rights.”

Therefore, the rule with the rank of law that enables the processing of special categories of data must also define the appropriate guarantees for the processing.

In the case at hand, TRLET does not provide for the electoral process to be carried out by electronic means, nor does it establish the minimum guarantees necessary for this type of treatment. Consequently, it can be concluded that the TRLET does not constitute a sufficient legal basis for the processing of workers' data in the electoral procedure for the election of workers' representatives through electronic voting.

As explained in article 9.2.b) and article 88 RGPD foresee the possibility that a collective agreement constitutes the legal basis for the processing of special categories of data in the labor field as long as it establishes the appropriate guarantees in terms of respect for the fundamental rights and interests of the people affected.

To the extent that the matter in question may be the subject of a collective agreement, this could, as long as it contains sufficient guarantees, constitute the legal basis for the processing of special categories of data. However, the electoral procedure does not seem to be subject to collective bargaining. Regarding this issue, the recent judgment of the National Court (Sala del Social) no. 165/2022, of December 12, 2022, has made it clear that the rules that regulate the electoral procedure are rules of necessary law that cannot be bypassed by agreement of the affected parties.

In addition, the judgment concludes that telematic voting is not admissible in the elections to staff delegates and members of the company committee in our legal system, basing its consideration, among others, on the following arguments:

"1.- The TRLET (Royal Legislative Decree 2/2015, of October 23) only accepts paper voting.

The grammatical interpretation (art. 3.1 CC) of art. 75.2 ET does not accept any other type of vote than that issued on printed paper as it indicates in this regard:

"The vote will be free, secret, personal and direct, depositing the papers, which in size, color, print and quality of the paper will be of the same characteristics, in closed ballot boxes".

We cannot consider that a sociological interpretation of the precept, that is, adequate to the social reality of the moment when this rule must be applied, admits telematic voting for the following reasons:

a.- the current revised text of the ET dates from 10-23-2015 at a time when telematic communications were sufficiently implanted in society, therefore, we consider that if the legislator had wanted to admit telematic voting he would have done so;

b.- in fact when the legislator has wanted telematic voting to be admitted in electoral processes as expressly provided for, as it has done in previous and contemporary rules to the current TRLET - so the art. 44 of TRLEBEP, or Chapter VIII of Royal Decree

555/2011, of April 20, which establishes the electoral regime of the Consejo de Policía (arts. 19 et seq.);

c.- what is more, from the most recent legislation on the representation of employed workers, such as the one contained in Law 10/2021 on remote work, a clear intention of the legislator to exclude telematic voting in elections can be deduced to unitary representatives, because of the reading of the art. 19.3 of that rule infers a clear option for the in-person vote of people who work remotely.

2.- The rules that regulate the electoral procedure are necessary rules of law and cannot be avoided by agreement of the affected parties.

We come to the conclusion announced by the amount that as it has been said up to the point, based on the reasoning of STC 73/1984, the rules that regulate the legitimacy to negotiate Collective Agreements of Title III of the ET are rules of absolute necessary law not being able to be ignored by the negotiating parties."

In this sense, in accordance with what was previously stated, the lack of a sufficient legal basis prevents the processing of workers' personal data in an electoral procedure through electronic voting. In the event that this legal basis existed in a rule with the rank of law with sufficient guarantees, it should be in its general forecasts and eventually in the particular forecasts of a regulatory nature for the purposes of evaluating compliance with the regulations of data protection and, for those unregulated aspects, what would be the provisions to be met, within the framework of the personal data protection regulations.

Finally, it is worth analyzing whether the workers' consent, as mentioned by the DPD in its consultation, could be a circumstance that enables the processing of workers' ideology data in an electoral process with electronic voting.

In this regard, it should be borne in mind that article 9.1 of Organic Law 3/2018, of December 5, on Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD) establishes: "For the purposes of article 9.2.a) of Regulation (EU) 2016/679, in order to avoid discriminatory situations, the sole consent of the affected person will not suffice to lift the prohibition of data processing whose main purpose is to identify his ideology, union affiliation, religion, sexual orientation, beliefs or racial or ethnic origin.(...)".

Therefore, the consent of the person affected, in this case the workers participating in the electoral process, is not sufficient to lift the ban on the processing of personal data that allows identification of ideology.

In short, from all the above it can be concluded that there is not considered to be a sufficient legal basis for the processing of workers' personal data in an electoral process through electronic voting. This lack of legal basis prevents analyzing the rest of the issues raised by the DPD in its consultation.

conclusion

The lack of a sufficient legal basis to enable the processing of workers' personal data in an electoral procedure through electronic voting prevents us from answering the questions

raised, as it would be necessary to be specific about the legal authorization and the eventual deployment regulations, to evaluate the specific aspects related to compliance with data protection regulations.

Barcelona, March 3, 2023

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