

Report on the Draft Decree on the data protection delegated persons of the Administration of the Generalitat and its public sector

Background

A letter is submitted to the Catalan Data Protection Authority in which it is requested that the Authority issue a report on the Draft Decree on the data protection delegated persons of the Administration of the Generalitat and its public sector .

Having analyzed the Project, taking into account the current applicable regulations, and in accordance with the report of the Legal Adviser, I issue the following report:

Legal Foundations

I

(...)

II

The purpose of the Draft Decree being analyzed is to regulate the model for the implementation of the figure of the data protection delegate in the Departments of the Administration of the Generalitat and its public sector.

The model included in the project accommodates several of the possibilities provided for in the RGPD. Like this,

it is expected that the scope of action of the persons delegated for data protection includes the department of assignment and the entities that make up its institutional public sector. In the case of the Department of Education, it would also include teaching centers. However, other possibilities are also envisaged:

- The public sector entities can designate , in advance authorization of the department of assignment , and depending on the complexity and volume of data they manage, a data protection delegate.
- Attribution to a public sector entity or order through a service contract .
- possibility to agree on the designation of a sectoral data protection delegate, in attention to specificity and special complexity of one certain sector of administrative activity .
- designation of a single person delegated Data Protection for several departments , by groups of companies or public sector entities .

- Forecast of the possibility of a system of its own for Department of Health .

This diversity of models is fully adapted to the possibilities provided for in article 37 of Regulation (EU) 2016/679, of April 27, general data protection (RGPD), which certainly offers a lot of flexibility in to decide which model to opt for.

It should be noted that, in the scope of Organic Law 7/2021 of May 26, on the protection of personal data processed for the purposes of prevention, detection, investigation and prosecution of criminal offenses and the execution of criminal sanctions (LOPDSPJP), it is established that in the event that a delegate of data protection in the scope of the RGPD, he will assume the functions of delegate also with respect to the scope included in the LOPDSPJP (art. 40.2). This would not, however, prevent the designation of a specific delegate for these authorities, when deemed necessary.

In this regard it should be noted that article 40.3 LOPDSPJP provides for the possibility of appointing a single data protection delegate for several competent authorities (reference to be understood made to the competent authorities related to article 4 of the Organic Law) . However, it is not envisaged that this function can be commissioned through a service contract. Therefore, it would be appropriate for the regulation to take into account the particularities for the designation of the data protection delegate in these competent authorities.

Apart from this, the Project also regulates the functions of data protection delegates, their personal status, appointment and termination, and the Data Protection Coordination Commission.

III

With regard to the content of articles 4 (functions) and 5 (personal status) of the Project, which clearly exceed organizational issues and which come to regulate substantive aspects related to this figure, their content comes to reproduce what is already established by the regulations in force in matters of data protection.

Thus, article 4 includes the functions provided for in article 39 of the RGPD, and the other functions attributed to the data protection delegate by Organic Law 3/2018, of December 7, on personal data protection and guarantee of digital rights (LOPDGDD).

On the other hand, article 5 (specifically its first three sections) includes some aspects of the regulation of the position of the data protection delegate regulated in article 38 of the RGPD.

Regarding this, it should be remembered that the RGPD does not enable member states to regulate these issues. What's more, to the extent that the provisions of these articles reproduce current legislation, consideration must be given to recital 8 of the RGPD, which states that "*In the cases in which this Regulation establishes that sus rules they are specified or restricted by State law _ members , estos , to the extent that it is necessary for reasons of consistency and for national provisions be understandable to them recipients , they can incorporate it into their National law elements of this Regulation.*". All the more

reason to avoid the unnecessary reproduction of the RGPD when it comes to areas in which the RGPD does not refer to the rights of the member states.

Therefore, and to the extent that the regulation contained in these articles (article 4 and the first three paragraphs of article 5) is not necessary for the understanding of the rest of the rule, it is recommended to limit the content of the rule to organizational aspects specific to the data protection delegate model implemented by the Administration of the Generalitat and its public sector, without incorporating the regulation of other aspects of the regulation applicable to this figure.

IV

Article 6 regulates the appointment and termination of data protection officers.

At the outset, it is necessary to make a clarification, because despite the title of the article it seems to indicate that it regulates any case in which a natural person is designated as a data protection representative, then it seems that it only regulates cases in which the designation fall to administration personnel. On the other hand, the appointment is not regulated when it falls to a person who is not part of the administration's staff (for example when an external natural person is appointed as data protection representative through a service contract).

Apart from this, the system of appointment and termination that is opted for is free appointment.

It should be noted that if the RGPD does not establish a specific system for the provision of the post of data protection representative, it does establish certain conditions to guarantee its qualification, stability and independence.

Thus, on the one hand, it is established that the data protection delegate must be appointed taking into account his professional qualities and, especially, his specialized knowledge of law, practice in the field of data protection and the ability to exercise the functions (art. 37.5 RGPD). And on the other hand, it is also prohibited for the data protection delegate to receive instructions on the exercise of these tasks (art. 38.3 RGPD), and that the person in charge or the person in charge cannot dismiss or sanction him for perform their functions (art. 38.4 RGPD).

Article 36.2 of the LOPDGDD and articles 40.2 and 41.2 of the LOPDSPJP are pronounced in similar terms.

The provision of the system of free appointment (and, therefore, the free termination inherent in this figure), would not agree with the nature of the figure of the data protection delegate.

In this regard, article 80 of the Basic Statute of the Public Employee (EBEP), approved by Royal Legislative Decree 5/2015, of October 30, establishes the following:

"1. free her designation with public call consists of the discretionary appreciation by the organ competent of the suitability of the candidates in relation to the requirements required for the performance of the position .

2. The laws of Public Function that are dictated in development of the present Statute they will establish the criteria to determine the positions for which they have special responsibility and trust they can be covered by the libre procedure designation with public call .

(...)

4. Job holders _ provided by the libre procedure appointment with public call may be terminated discretionary _ (...)"

For its part, article 63 of the revision of the legal texts in force in the field of public service, approved by Legislative Decree 1/1997, of October 31, establishes:

- ranking secretary and those other positions of a managerial nature or of special responsibility or which, due to the nature of their functions, are determined in the workplace relations are provided by this system. The head of the management center, the organization or the entity in which the appointed position appears must issue a report prior to the corresponding appointment ."

And in this sense, repeated jurisprudence of the Supreme Court recalls the exceptional nature of this provision procedure, which in any case must be justified by the specific characteristics of the workplace. An example is the STS of May 30, 2013 (rec. 2398/2012) which contains the jurisprudence on this issue

"As a complement to the previous must remember what the recent judgment of this Chamber of July 31 , 2012 (RJ 2012, 9144) (Casación 1206/2010) has declared on the justification that the libre system requires designation _

In it the following was underlined :

"1.- The jurisprudence of this Chamber comes insisting on the exceptional nature of the Law assigns to this libre system designation and in the necessity of that when it is considered necessary to go to him se haga , too exceptionally , and justifying , case by case, why must to be used [this has been stated , among others , in the judgments of March 11 , 2009 (RJ 2009, 2153) (case 2332/2005), February 9 , 2009 (RJ 2009, 960) (case 7168/2004), 10 of December 2008 (RJ 2008, 8088) (case 10351/2004), September 24 , 2008 (RJ 2008, 7246) (case 5231/2004), July 2 , 2008 (RJ 2008, 6725) (case 1573 / 2004), April 7, 2008 (RJ 2008, 2412) (case 7657/2003), December 17 , 2007 (case 596/2005), September 17, 2007 (case 5466/2002), July 16 , 2007 (RJ 2007, 6783) (case 1792/2004)].

It should be added that that justification , so that it can be considered sufficient , requires describe the concrete ones circumstances and assignments concurrent in the position in question that allow to assess whether or not to appreciate the character in the same directive or the special responsibility of those on whom the validity of the libre system depends designation , and which are not sufficient for these purposes formulas stereotyped or the mere designation applied to the position ."

The system of free appointment provided for in the Project may have a negative impact on compliance with the requirement not to submit to instructions, or the impossibility of

termination for reasons derived from the exercise of their functions that the legal system provides for the figure of the data protection representative. And this taking into account, moreover, that in general, jobs with a remuneration level equivalent to that originally provided for in the Draft Decree (remuneration level of head of service), are not normally provided by this system.

In this sense, the terms in which the Article 29 Working Group pronounced in its Guidelines on data protection delegates (WP 243), also assumed by the European Data Protection Committee, are of interest in your first session:

"In this context , it fits point out that the GDPR does not specify how or when a DPD can be dismissed or replaced by another person. However , how much the more stable the DPD contract and more guarantees exist against dismissal inappropriate , more probability the DPD must be able to act independently . Therefore , the Article 29 Working Group would welcome the efforts of the organizations in this regard ."

And these considerations are not distorted by the fact that the Decree foresees the appointment for a period of five years (which has a difficult fit in the legal regulation of the figure of free appointment), therefore, far from operating as a guarantee of stability, and unlike the rest of the jobs in the administration that are provided by competition, this would lead to a decrease in the guarantees of stability of these public workers and could compromise their ability to act freely.

These considerations would also be applicable, in general, to the temporary nature, limited to 5 years, provided for in article 7.2 of the Project.

V

Article 8 of the Project creates the Data Protection Coordination Commission, which has the function of guaranteeing coordination and homogeneity in the preparation and application of action criteria in the exercise of the functions assigned to the delegated persons of data protection in the scope of the decree.

Although it is necessary to positively assess the creation of a body that allows collaboration between the different data protection delegates, with a view to a homogeneous application of the data protection regulations, and given the definition of the content of the principles of collaboration, cooperation and coordination of article 140 of Law 40/2015, of the 1st of October on the legal regime of the public sector, it would be more appropriate to refer to it as a collaboration body or cooperation. The note of the obligation inherent in coordination (art. 140.1.e) LRJSP) has little to do with the independence that each data protection delegate must enjoy in their field of action.

VI

Other issues:

- The art. 6.4 of the Project establishes that " *The appointment and termination of the Data Protection delegate must be communicated by the competent body, within ten days, to the*

Catalan Data Protection Authority . " Given the provisions of article 37.7 of the RGPD, article 34.3 LOPDGDD and article 40.4 of the LOPDSPJP, the reference to the competent body should be replaced by a reference to the data controller. This is without prejudice to the fact that in the case of different entities that depend on another body (for example public sector entities dependent on a department, or educational centers), it may be the body on which they depend that communicates it

- The first section of the additional provision states that " *The competent department in education will appoint a data protection delegate who will exercise his functions in relation to the department and teaching centers.* ".

It would be appropriate to clarify that the reference to teaching centers should be understood as referring to teaching centers that depend on the Department, and not, on the other hand, to chartered or private teaching centers.

- Section 2 of the additional provision states that " *By means of Government Agreement, the department competent in health matters organizes its own system of data protection delegations that covers the department and health centers. The person delegated for Data Protection represents the delegations of the health centers in the Data Protection Coordination Commission .* "

The use of the term "delegations" in this article may lead to confusion with the figure of the delegation of powers. For this reason, it is recommended to use the expression "data protection delegate"

Conclusions

Having examined the Draft Decree on the data protection delegates of the Generalitat Administration and its public sector, it is considered adequate to the provisions established in the regulations on personal data protection, as long as the considerations are taken into account made in this report.

Barcelona, July 22, 2022