



TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY (TMT)

DATA PROTECTION OFFICER

BAR ASSOCIATION MAKES ANNOUNCEMENT ON OVERLAPPING ROLES

The GDPR establishes that DPOs are not personally responsible in the event of an infringement by an organisation. It also provides that DPOs can be service providers from outside the organisation.

The General Council of the Portuguese Bar Association («PBA») has finally announced its position on the situation of lawyers who act as Data Protection Officers («DPOs»). This announcement clarifies the PBA's understanding on holding the position of DPO while practising as a lawyer. The PBA's position appears in Opinion no. 14/PP/2018-G, published on 28 September 2018, where it concludes that simultaneously holding the position of lawyer and DPO is an impediment.

The figure of the DPO is not new, although demand and supply for this job have increased exponentially. This increase has been spurred by the application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April («GDPR») since 25 May of this year. Companies have principally sought out lawyers to act as DPOs (although a law degree is not a requirement). They have done this in the expectation of having someone 'close at hand' who can also provide legal support to other areas and departments in business development, compliance and decision-making.

Objectively, the DPO supports compliance by implementing instruments of accountability within an organisation, for example, carrying out data protection impact assessments and enabling or carrying out audits. The DPO also serves as an intermediary between the interested parties, in particular, the supervisory authorities, and in the relationship with data subjects.

The GDPR establishes that the DPO is not personally responsible in the event of an infringement by a given organisation (whether public or private). It is for the data controller and the data processor to demonstrate compliance (accountability). The GDPR also provides that the DPO can be a service provider from outside the organisation.

It should be remembered that the Article 29 Working Party had already published guidelines (WP243, 13 December 2016) on this issue. These guidelines state that the DPO should perform their duties with independence and, in this context, any possibility of a conflict of interests within an organisation should be evaluated and resolved. This means that the DPO may not perform their duties as such simultaneously with another role that allows them to determine the purposes and means of personal data processing.

The PBA has clarified its position on the question raised by the existence of conflicting decisions. It has determined that the nature of an incompatibility between the overlapping of roles may not be evident, but that this is an impediment (under article 83 of the Statute of the Portuguese Bar Association). This is because the performance of the DPO's duties conflicts with and puts at risk the guarantee of the lawyer's impartiality, freedom of action and independence.

In the end, the Portuguese Bar Association has adopted a more restrictive position than the Conseil des barreaux européens («CCBE»), in holding that: «Lawyers may not engage in legal practice and they are thus prevented from representing in court or providing legal advice to entities for which they perform or have performed the duties of Data Protection Officer». With this decision, the PBA has determined that the impediment exists not only in the overlapping of functions that exist in the present, but also in those established previously.

Opinion no. 14/PP/2018-G was approved in plenary meeting of the General Council of the Portuguese Bar Association on 28 September 2018, with one dissenting vote from Councillor Ricardo Brazete. In his voting declaration, Councillor Brazete held, in contrast with his fellow council members, that the overlapping of these positions should be allowed.

As a result, at the moment it seems that in-house lawyers that also occupy the position of DPO must either choose to work only as a lawyer and to give up their position as DPO, or to continue as DPO and suspend their registration as a lawyer.

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 Client Service Law Firm Of The Year
Chambers European Awards 2018

 Portuguese Law Firm of the Year
Who's Who Legal 2017-2015, 2011-2006
The Lawyer European Awards 2015, 2012
Chambers European Excellence Awards 2014, 2012, 2009

 Top 50 - Most Innovative Law Firm in Continental Europe
Financial Times - Innovative Lawyers Awards 2017-2011