
Company fined 50.000 euros for having an in-house Data Protection Officer with a conflict of interest

In its decision 18/2020 of 28 April 2020, the dispute chamber of the Belgian Data Protection Authority fined a company because its head of compliance, audit and risk also assumed the role of the organization's Data Protection Officer (DPO). According to the dispute chamber, this combination of roles creates a conflict of interest and therefore constitutes an infringement of Article 38 (6) GDPR.

Pursuant to Article 38 (6) GDPR a DPO is allowed to fulfill other tasks and duties as long as these tasks do not result in a conflict of interest. According to the Guidelines on Data Protection Officers of the Article 29 Data Protection Working Party, a conflict of interest *inter alia* exists when the DPO holds a position within the organization that leads him or her to determine the purposes and means of the processing of personal data. The Data Protection Working Party states that this should be assessed on a case-by-case basis, as the structure of each organization is different. By way of example, the Data Protection Working Party indicates that conflicting positions may not only include senior management positions (such as chief executive, chief operating, chief financial, chief medical officer, head of marketing department, head of Human Resources or head of IT departments), but also other "lower" roles in the organizational structure if such positions lead to the determination of purposes and means of the processing of personal data.

Indeed, as stated by the Belgian Data Protection Authority in its Recommendation 04/2017, the role of the DPO is to provide guidance to the data controller. Therefore, the DPO cannot be the one who carries out the processing operations, but merely the one who advises the controller on the way in which those operations should be carried out.

In its decision 18/2020, the dispute chamber of the Belgian Data Protection Authority noted that the defendant's DPO had a managerial function, more specifically the one of head of compliance, audit and risk. Subsequently, the dispute chamber found that the individual concerned performs tasks involving significant operational responsibility for data processing operations that fall under the domain of audit, risk and compliance.

Although the assessment whether there is a conflict of interest should be made on a case-by-case basis, the dispute chamber seems to consider on a general basis that the function of "head of a department" cannot be reconciled with the function of a DPO.

Therefore, the organization's defense that (i) the individual concerned and the departments he or she heads do not take decisions itself but have a purely advisory role, (ii) the necessary measures were taken internally

to avoid the risk of conflicts of interest and (iii) these measures were formalized in a DPO charter, was put aside by the dispute chamber.

In order to enforce the GDPR effectively, the dispute chamber imposed a "proportionate, effective and dissuasive" fine of 50.000 euros, in addition to the obligation to bring the data processing in line with Article 38 (6) GDPR.

In determining the amount of the administrative fine, the dispute chamber *inter alia* took into account (i) the nature and seriousness of the infringement, (ii) the fact that the processing of data is one of the core activities of the defendant, (iii) the fact that the defendant processes the personal data of millions of people and (iv) the duration of the infringement.

Through its decision, the Data Protection Authority confirms that it is risky and potentially problematic to appoint an in-house DPO who also has an executive function within an organization.



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Janson advises and assists its clients on a daily basis on issues relating to GDPR. For further questions or more information, feel free to contact us.

