

INTERNET PRIVACY AND EU DATA PROTECTION

The Data Protection Officer (“DPO”)

prof. dr. Gerrit-Jan Zwenne

November 13th, 2023



1



Artan Jacquet (Data Protection Officer) will be leaving Utrecht University

9 November 2022

Utrecht University's Data Protection Officer (DPO), Artan Jacquet, will lay down his duties as of 15 November 2022 and be leaving our university as of Februari 1st. Artan was the university's first DPO since May 2018. Some years before that, he supported UU in all the preparations for the introduction of the General Data Protection Regulation (GDPR). He did this in addition to his actual job as a pension expert and management information advisor at HR.

About his departure Artan says: "It is with much regret that I will leave Utrecht University. The alternative – a (test case) lawsuit to clarify the proper role of a DPO and his protection against dismissal – would be long, expensive and complex. And given the public debate that would inevitably arise about our GDPR compliance: damaging to our university's reputation."

"A DPO should be able to firmly stand his ground. However, all things considered the better alternative, both for the organisation and myself, seemed to assent to a termination agreement. I hope you understand."

"Anyhow, with or without me, the university shall still need to take important steps towards GDPR compliance. Awareness and good will are there. The requisite knowledge rapidly increases. Governance and unburdening remain important underlying issues: who is responsible, who has to do what, and how do we enable everyone to do the right thing? On the ground, things are going well, but clearly defined managerial ambitions and choices are needed, and hence: exemplified

2

But first...

A newspaper offers a new special online subscription:

*a 25 percent discount will be given
subscribers that consent to the
provision of their reading
preferences to an advertisement
agency*

According to a consumer interest group, the GDPR does not allow this.

What do you think?

3

Also...

- *what are special data and why are the specific rules for such data?*
- *in the context of purpose specification and purpose limitation, what is the «compatibility test»...?*
- *what is the accountability principle? how can controllers and processors comply with that principle?*

4

what is a data protection officer or DPO..?

- someone (m/f) in the organization of a controller or processor
- who informs and advises that controller or processor on data protection compliance, and particularly on DPIA's
- **and who monitors compliance with applicable DP-law**
- and cooperates with DPA's and acts as contact-point

not a committee or commission, but an individual

could be an employee, but could also be someone from an external organization

not part of management(!)

but not necessarily a whistleblower!

5

conflicts of interest?

- *draft processor agreements and privacy policies?*
- *data breach notifications?*
- *...?*

- DPO may fulfil **other tasks** and duties
- controller or processor must ensure that any such tasks and duties do not result in a conflict of interests

**Art. 38(6)
GDPR**

Technology Law Dispatch

HOME > REGULATORY > BELGIAN DPA FINES COMPANY €50,000 FOR APPOINTING DPO WITH CONFLICTING ROLE

Belgian DPA fines company €50,000 for appointing DPO with conflicting role

By Cynthia O'Donoghue and Sarah O'Brien on 3 June 2020
Posted in Regulatory

On 28 April 2020, the Belgian data protection authority (DPA) fined a company €50,000 for having appointed its head of compliance, risk and audit as its data protection officer (DPO). The DPA's decision is only available in Dutch ([here](#)) and in French ([here](#)).

What was the breach?

The reason for the fine was not that the DPO had a second role, as this is permitted under article 38(6) of the General Data Protection Regulation (GDPR). The DPA issued the fine because it determined that the DPO's second role required him to make decisions about the purposes and means of processing personal data, and the making of such decisions is a material conflict of interest, which is a breach of article 38(6) of the GDPR.

What does this mean for businesses that have appointed a DPO?

If your business has appointed a DPO, we recommend undertaking an assessment of the tasks and duties the DPO is likely to perform (in all of their roles) to ensure that they are unlikely to be subject to a conflict of interest. This is important because the role of a DPO is to be independent and to **inform and advise** the controller or the processor, and the employees who carry out the personal data processing, of their obligations under the GDPR. A DPO is not permitted to make decisions about the purposes and means of processing personal data.

It would be wise to document the assessment of the tasks and duties of the DPO, and to implement a conflicts policy to ensure the DPO does not become subject to a conflict of interest in the future. Implementing such documentation will also help to demonstrate compliance with the GDPR under the accountability principle, which, as we know, is a key principle of the GDPR.

6

who should appoint a data protection officer?

- public authority or body (but not courts to the extent...)
- core activities consist of processing operations that require systematic large-scale monitoring of data subjects
- core activities consist of large-scale processing of special data and/or criminal data

determined under national law...
universities, bar associations?

'primary activities, i.e. not ancillary activities'

key operations to achieve the controller's or processor's goals

Therefore, not salary administration, unless that is the core-activity of a processor (e.g. Workday)

The number of data subjects concerned - either as a specific number or as a proportion of the relevant population

- volume of data and/or the range of different data items being processed
- duration, or permanence, of the data processing activity
- geographical extent of the processing activity

hospitals, public transport, fastfood delivery, search engines, telco's, banks etc.

7

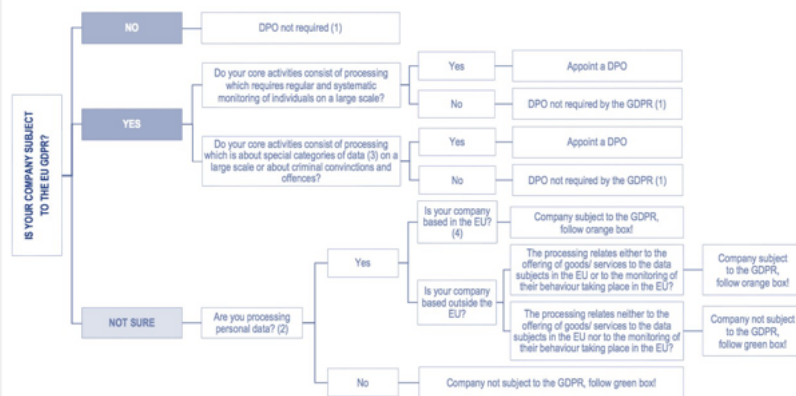
*in the context of the DPIA-
requirement of art. 35.1 GDPR*

91. [...] The processing of personal data should not be considered to be on a large scale if the processing concerns personal data from patients or clients by an individual physician, other health care professional or lawyer

8

SHOULD YOUR COMPANY APPOINT A DATA PROTECTION OFFICER (DPO) UNDER THE EU GDPR?

DPO Network Europe
European Privacy Recruitment



(1) EU Member States may have / introduce other laws which require appointment of DPOs. Organizations may also opt to appoint DPOs even if there is no legal requirement at EU or Member State level. (2) For a definition of personal data, consult Article 4(1) of the EU GDPR. (3) For a definition of special categories of personal data, consult Article 9(1) of the EU GDPR. (4) See 3(2), list of EU Member States. This document has been prepared for informational purposes only. The content of this document does not constitute legal advice and should not be relied upon as such. Consult your legal counsel when in any doubt about understanding your rights and obligations in order to comply with the law and regulations.

9

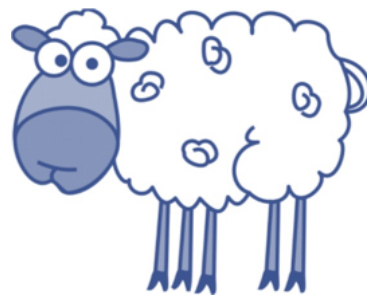


10

the tasks of a data protection officer?

- informing and advising a controller or processor on data protection compliance, and particularly on DPIA's
- **monitoring compliance with applicable DP-law**
- and cooperation with DPA's and acting as contact-point

Art. 39
GDPR



11

what are the requirements for a DPO?



- expertise and professional qualities, and the ability to fulfill his or her tasks
- independent

on DP-law, on the organization of the controller or processor, on data flows, ICT, etc.

all of the above, and well-positioned in the organization of the controller or processor

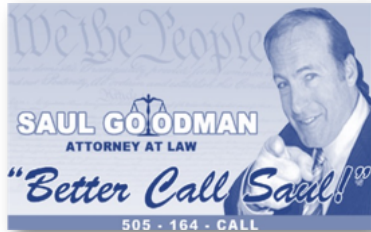
exclude or provide for solutions in case of conflicts of interest

QUESTIONS

- *could lawyer working in a law firm be a DPO for a client?*
- *is a controller allowed to designate the Data Governance Officer as DPO?*



12



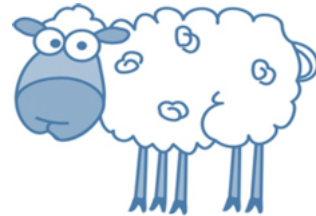
DPO must be in a position to efficiently communicate with data subjects and cooperate with the supervisory authorities

This also means that this communication must take place in the **language or languages** used by the supervisory authorities and the data subjects concerned.

should have expertise in national and European data protection laws and practices and an in-depth understanding of the GDPR

knowledge of the business sector and of the organisation of the controller is **useful**.

should also have **sufficient understanding** of the processing operations carried out, as well as the information systems, and data security and data protection needs of the controller.



13



14

why a data protection officer?

because of

- DPO-obligation (art. 37(1) GDPR)
- accountability-obligation (art. 5(2) GDPR)
- DPA's expectations
- data subjects' expectations
- customers' expectations
- suppliers' expectations
- ...



15

questions?

g.j.zwenne@law.leidenuniv.nl

16