

THE INTERVENTION OF PUBLIC ADMINISTRATIONS IN SPORT: COMPETENCES TO ENSURE THE IMPACT OF NEW TECHNOLOGIES WITHIN SPORTS FEDERATIONS

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Abstract: *This study aims to highlight the relevance of the figure of the data protection officer established by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation or GDPR) when it comes to guaranteeing the protection and supervision of personal and private information of athletes that has to be processed by sports federations. In this regard, it is essential to analyse the essential contours of this new figure and how it affects and what effects it has within the Spanish legal system, which must directly implement and complement with internal regulations the postulates of this new community regulation on privacy and personal data protection, by means of Organic Law 3/2018, of 5 December, on Personal Data Protection and guarantee of digital rights or LOPDGDD.*

Key words: *sport; sports federations; GDPR; LOPDGDD; personal data; data processing*

I. Initial status

As we know, sports federations are private entities of public utility that exercise, by delegation, various public functions in relation to their own sphere of activity. More specifically, we are in the presence of second-degree associative forms, currently regulated, in general terms, by Law 10/1990, of 15 October, on Sport¹.

On the basis of this consideration, the federations could have been considered as Public Entities or Public Law Corporations, although the aforementioned regulation, by alluding to the public function that all sports federations must exercise through delegation, considers them as collaborating agents of the Public Administrations.

In any case, in general terms, the interrelation between sport and the Public

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1. Official State Gazette (hereinafter BOE) n°. 249, 7 October 1990.

Administrations is constant and occurs as a result of the promotion activity of the latter, which translates into the development of an activity of granting aid, whether direct or indirect, for the configuration and maintenance of sporting competitions, on the one hand, and of the facilities that allow them to be developed, on the other, these subsidies for sporting activities being an essential point of sporting policy and an element shared by all public bodies.

However, there is a less common, but equally necessary, approach from which to focus on the work of sports federations and, at the same time, the supervision that the Public Administrations must exercise over the activity they carry out, not so much by submitting to the direct control derived from their purely financial work, but rather to the indirect control that underlies and is embodied in the privacy control authorities. This is because sports federations are subject to the specific regulation on privacy, with no exceptions of any kind, and may therefore be sanctioned in accordance with the sanctioning regime provided for in that regulation.

These supervisory bodies, conceived as independent public authorities established by the various Member States, are responsible, among other things, for monitoring the application of data protection regulations, as embodied, at European level, in Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (hereinafter, General Data Protection Regulation or GDPR)² and, from a national perspective, complementing and developing certain postulates of the EU text, Organic Law 3/2018, of 5 December, on the Protection of Personal Data and the guarantee of digital rights (hereinafter, LOPDGDD)³.

As a complement to this control, to be carried out within organisations, of the processing of personal data by controllers and data processors and, therefore, as an indispensable element in facilitating the supervisory work of the aforementioned supervisory authorities, is the figure of the data protection officer (hereinafter, DPO - according to its acronym in Spanish - or DPO - following the Anglo-Saxon terminology). These delegates, incorporated for the first time in a compulsory manner at European level in our domestic legal system thanks to the

2. Official Journal of the European Union (hereinafter DOUE) L 119/1 of 04 May 2016.

3. BOE no. 294, of 06 December 2018. This Law, which is organic in that it affects a fundamental right such as that relating to the protection of personal data, framed in article 18.4 of the Spanish Constitution (BOE no. 311, of 29 December 1978), entails the repeal of the pre-existing law, embodied in Organic Law 15/1999, of 13 December, on the Protection of Personal Data (hereinafter, LOPD -BOE no. 298 of 14 December 1999), which transposed Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter, DPDP - Official Journal of the European Communities, OJEU, L 281/31 of 23 November 1995), now repealed following the appearance of the RGPD (Article 94)

RGPD (articles 37 to 39), firstly, and the LOPDGDD (articles 34 to 37), then, constitute the immediate element that guarantees respect for the data subject's fundamental right to the protection of his or her personal data and the strengthening, ultimately, of his or her legal position, a basic objective that motivated the appearance of this renewed regulation on the subject.

For this reason, it is essential to analyse how the work of the data protection officer unfolds its effects in the context of sports federations and how, in a supervening manner, this will be reflected in the audit that, by means of and through these officers, the public bodies will have to carry out of the actions of those obliged to respect the set of obligations emanating from this new regulatory framework: data controllers and data processors. Consequently, it is essential to analyse whether the appointment of the data protection officer is mandatory or whether, on the contrary, we are dealing with a voluntary appointment, which is advisable in order to promote more adequate compliance with the principle of proactive responsibility or accountability (which, emanating from the Anglo-Saxon influence that permeates the entire Regulation, determines the need not only to limit oneself to complying with the provisions of the regulation, but even more so to implement them in an effective manner), but, even more so, to proactively implement all those actions that, like this one, make possible and promote a more efficient respect for the owner of the personal data -which is why we could say that they are, in short, sources of obligations, whether mediate or indirect, as opposed to the direct and immediate ones, such as those strictly required by this privacy regulation-)⁴.

II. Desenvolvimiento de la figura en el ámbito de las federaciones deportivas

Sports federations, as indicated in the preceding section, are fully immersed within the scope of application of the RGPD (Articles 2 and 3) and the LOPDGDD (Article 2). This is not specific to the sports federation, whether autonomous or national, as it also affects any other entity that forms part of the same sphere, as is the case of the sports limited company, the foundation and the club, which, also in the performance of their duties, must carry out processing operations involving the processing of personal data of natural persons, including children or minors.

This new regulation on the protection of personal data introduces substantial

4. For a more complete and detailed study of the figure of the DPO from a general perspective, *vid.* Rodríguez Ayuso (2019), *Figuras y responsabilidades en el tratamiento de datos personales*, Barcelona, Ed. Bosch; Rodríguez Ayuso (2021), “La figura del *Data Protection Officer* en la contratación pública en España”, en *Revista Digital de Derecho Administrativo*, num. 25, 2021, pp. 309-336.

new aspects, such as those relating to the rights corresponding to the data subject, where we move from the traditional ARCO rights (access, rectification, cancellation and opposition) to the current AROLPOD rights (access, rectification, oblivion -deletion-, limitation of processing, data portability, opposition and the right not to be subject to automated individual decisions, including profiling)⁵. The basis for this increase in the number of rights available to the data subject, as well as for the reinforcement of the content of those already existing, is once again to be found in the aim pursued of strengthening the data subject's legal position with regard to the processing of his or her data by data controllers and data processors.

Likewise, it is imperatively incorporated in the regulation as follows, as already announced at the beginning of this study, the DPO, whose appointment will be necessary in the case of sports federations, whenever they process personal data of children. This is established literally in Article 34.1 LOPDGDD, which, in regulating the cases of mandatory appointment of data protection officers for certain sectors of activity, establishes the following:

"Data controllers and processors must appoint a data protection officer in the cases provided for in Article 37.1 of Regulation (EU) 2016/679 and, in any case, in the case of the following entities:

(o) Sports federations when they process data of minors".

The same conclusion could be drawn from Article 37 GDPR, although this would require an interpretative task that is unnecessary if we go directly to the aforementioned provision.

In the first of these cases, the GDPR refers to public authorities or bodies, although it does not provide a definition of what is meant by them. Thus, in order to specify the scope of these terms, we must refer to Article 2 of Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations⁶, which, in regulating the subjective scope of application of the regulation, specifies what is to be considered when we speak of the public sector. In this sense, it establishes that the public sector will be comprised and made up of the General State Administration, the Administration of the Autonomous Communities, the Entities that make up the Local Administration and, finally, the institutional public sector.

Consequently, public authorities or bodies will be all those that form part of any of the levels of administration listed above, with the exception made in relation to the courts acting in the exercise of their judicial function. To this, and as

5. Rallo Lombarte (2019), "Del derecho a la protección de datos a la garantía de nuevos derechos digitales", en García Mahamut and Omás Mallén (coords.), *El Reglamento General de Protección de Datos: un enfoque nacional y comparado. Especial referencia a la LO 3/2018 de Protección de Datos y garantía de los derechos digitales*, Valencia, Ed. Tirant lo Blanch, p. 137.

6. BOE no. 236, of 02 October 2015.

far as it is relevant here, it is worth adding the clarification made by the Article 29 Working Party⁷, which warns of the advisability of appointing a DPO, in addition to the aforementioned bodies of a public nature, to those private organisations that carry out the performance of public functions or perform some kind of public authority (as in the case of sports federations).

This being so, we could ask ourselves whether the activity of the DPO in these cases covers all processing operations carried out or only those that are related to the performance of a public function or the exercise of a public authority. The answer is that it covers all processing operations carried out, including those which are not related to the performance of a public task or the exercise of a public authority⁸.

Likewise, the case described in point (b) also seems to apply. In order to understand this case, it is useful to consider what is meant by "main activity". In this regard, the Article 29 Working Party, in the aforementioned Guidelines, clarifies that the main activity occurs in relation to those operations that are essential for the performance of the activity of both the controller and the processor in order to achieve their purposes; to these should also be added those processing operations on personal data of data subjects which form an inseparable part of those core activities (e.g. the core business of a hospital is to provide healthcare; however, a hospital could not provide healthcare in a safe and efficient way without processing health-related data, such as patient records. Therefore, the processing of such data should be considered as one of the core activities of any hospital and hospitals should accordingly appoint a DPO). On the other hand, it does not refer to other supporting or ancillary activities

The scope of other relevant concepts, such as "routine and systematic observation", should also be clarified. Again, the Article 29 Working Party has proceeded to establish the contours of the concepts of routine and systematic.

On the one hand, it considers a treatment to be "routine" when it falls into one of the following categories:

(a) Firstly, when the processing carried out is continuous, or, in other words, when it is carried out in specific periods over a specific period of time.

b) Secondly, when the treatment carried out is recurrent or repeated at pre-determined times.

c) Thirdly and finally, that the processing of personal data is carried out on a constant or periodic basis.

7. Grupo de Trabajo sobre Protección de Datos del Artículo 29, *Directrices sobre los delegados de protección de datos (DPD)*, 16/ES WP 243 rev.01, adoptadas el 13 de diciembre de 2016 y revisadas por última vez y adoptadas el 5 de abril de 2017..

8. Davara Rodríguez (2017), "El Delegado de Protección de Datos", en *Consultor de los ayuntamientos y de los juzgados: Revista técnica especializada en administración local y justicia municipal*, num. 24, pp. 3094-3095.

On the other hand, for the processing of personal data to be "systematic", it must meet the following requirements:

(a) Firstly, that the processing is carried out in accordance with a specific system.

b) Secondly, the processing must be pre-established and organised or methodical.

(c) Thirdly, that the processing takes place as part of a general plan for the collection of personal data.

d) Fourthly and finally, that the processing of personal data is part of a strategy.

Finally, we have to look at the concept of 'large scale', where it is not possible to give an exact figure, either in relation to the amount of data processed or the number of persons concerned, that can be applied in all situations. However, we must turn again to the Article 29 Working Party, which helps to clarify the aspects to be taken into account in order to clarify when such large-scale processing takes place. Thus, the factors to be applied are as follows:

a) Firstly, the number of data subjects concerned by the processing. Here, both a given number and the percentage of data subjects concerned should be taken into account in relation to a specific and determined population.

b) Secondly, the geographical scope of the activity. By way of example, consideration could be given to whether the processing is carried out at local, provincial, regional, national, European or global territorial level.

Beyond the above, and even if, in certain cases, the appointment of a DPO is not compulsory in the case of sports federations (especially in view of the fact that no personal data relating to minors are processed there), the fact is that their appointment is always advisable on the basis of the principle of proactive responsibility in Article 5.2 of the GDPR.

In these cases, and even if a DPO is appointed on a voluntary basis, once appointed, the requirements established by the new data protection regulations in Articles 37 to 39 GDPR and 34 to 37 LOPDGDD must also be met⁹. The appointment of a DPO can be very useful in many respects, in particular for the purpose of proving and demonstrating compliance with the principle of accountability.

More specifically, even when a controller or processor is not obliged to appoint a DPO, there are circumstances that may make the appointment of a DPO advisable, such as the following:

The difficulty and legal complexity of the processing of personal data, re-

9. Botella Pamies (2019), "Designación de un delegado de protección de datos", en Arenas Remiro and Ortega Giménez (dirs.), *Protección de datos: Comentarios a la Ley Orgánica de Protección de Datos y Garantía de Derechos Digitales (en relación con el RGPD)*, Madrid, Ed. Sepin Editorial Jurídica, Madrid, p. 188.

quiring a specialist on the subject who can permanently advise controllers and processors, in order to rigorously meet the requirements imposed by the new data protection regulations.

The penalties currently envisaged, which are considerably higher than those of the previous regulation (they can amount to administrative fines of up to €20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the total annual global turnover of the previous financial year, whichever is higher).

To address the foreseeable increase in the number of complaints or the exercise of rights by the data subject, given the greater awareness of citizens in relation to the protection of personal data concerning them.

Once this designation has been made, whether compulsory or voluntary, data controllers and data processors shall notify the AEPD or, where appropriate, the regional data protection authorities (Articles 57 et seq. LOPDGDD), within 10 days, of the designations, as well as the appointments and dismissals of the DPOs. The AEPD and the regional data protection authorities will maintain, within the scope of their respective competences, an updated list of DPOs, which will be accessible by electronic means (Article 34(3) and (4) LOPDGDD).

III. Basic regulatory requirements

We could say that one of the main challenges facing sports federations (in fact, all those sectors of activity obliged to appoint a data protection officer) is to choose the DPO who, meeting the requirements of suitability to carry out his or her function, is suitable for this area.

Initially, the most frequent decision within sports federations (perhaps because it was the most recurrent, although not the most appropriate) was to hire the services of consultancies, which, until then, focused their work in the field of data protection on carrying out projects for adapting to the regulations then applicable¹⁰. This decision, however, has proved to be hardly effective, as it is difficult for the DPO to intervene, at the same time, in the supervision and control of his own activity (the same as happens with security officers, from a more technical perspective), as he would lack the essential notes of independence, objectivity and impartiality in the performance of this function, when analysing the work of controllers and data processors with regard to the processing of the data subject's personal data.

In this respect, a solution that may be suitable, taking into account the train-

10. Cazorro Barahona (2020), "El Delegado de Protección de Datos (DPD) en el sector de las Federaciones Deportivas", en Simón Castellano and Bacaria Martrus, *Las funciones del delegado de protección de datos en los distintos sectores de actividad*, Las Rozas (Madrid), Ed. Bosch, p. 209.

ing and qualifications that the data protection officer must have, is to select a person who, already belonging to the organisation, can adequately perform this task, logically making it compatible with the work he/she has been carrying out until now (if the two are not incompatible in the terms set out above) or, directly, replacing him/her (if they are incompatible, either on the basis of criteria of time or functional distribution).

Another possible measure is to hire an external profile that, in addition to having the necessary independence, objectivity and impartiality, has consolidated and accredited experience and training in the field of personal data protection. A priori, the main advantage of this type of professionals is their qualification, highly specialised in this field, and their obligatory permanent updating, in order to be aware of all the new developments in terms of risks, threats and processing in relation to new pronouncements by the control authorities or publications by the doctrine. To this must be added the professional experience of permanently facing, as a general rule, multiple projects from a wide variety of companies, of different sizes and with very different peculiarities in relation to these processing operations.

Beyond the above, it is worth bearing in mind the minimum training required by the General Data Protection Regulation, which is also the subject of subsequent interpretation by the Article 29 Working Party in the aforementioned Guidelines. In this regard, Article 37.5 GDPR provides as follows:

"The data protection officer shall be appointed on the basis of his or her professional qualities and, in particular, his or her specialised knowledge of data protection law and practice and his or her ability to perform the tasks referred to in Article 39".

This requirement is, moreover, preceded by a certainly more detailed explanation, located in Recital 97 of the same Community text, which states the following:

"When supervising internal compliance with this Regulation, the controller or processor must be assisted by a person with specialist knowledge of data protection law and practice if the processing is carried out by a public authority, with the exception of courts or other independent judicial authorities acting in their judicial role, if the processing is carried out in the private sector by a controller whose main activities consist of large-scale processing operations requiring regular and systematic monitoring of data subjects, or if the main activities of the controller or processor consist of large-scale processing of special categories of personal data and of data relating to criminal convictions and offences. In the private sector, the main activities of a controller are related to its primary activities and are not related to the processing of personal data.

Therefore, as regards the knowledge that the DPO must have, in this case in the field of sports federations, it should not only be specific to this field of sports law, but also commensurate with the level of complexity and the volume

of personal data processed by the organisation concerned. This means that, when such operations are particularly complex or when they involve a large amount of personal information corresponding to the data subject (it should be noted that, as regards minors, we would be in the presence of particularly sensitive processing, not so much in relation to the personal data itself - and therefore, solely in relation to this circumstance, we would not be in the situation of a particularly sensitive processing of personal data, we would not be incurring in the case described in Articles 9 RGPD and 9 LOPDGDD-, but rather the data subject, who, having not yet reached the age of majority, does not have sufficient rational development), the ideal would be for the data protection officer to have more in-depth or specialised knowledge and support from third parties.

As regards the professional qualities that the DPO should have in this context, although not specified in the rule, it is essential (and imperative in practice) that he or she has a thorough knowledge of internal and EU data protection law and practice¹¹. To this should be added, although (in my opinion wrongly) nothing is indicated (neither in the legislation nor in the Guidelines, neither of the Working Party, initially, nor of the European Data Protection Committee, later), a proven experience in the study of the technical aspects related to privacy, so as to be able to determine, *inter alia*, whether the risk analysis carried out under Article 32 GDPR is adequate and whether, therefore, the corresponding security measures to be applied to protect the integrity, confidentiality and availability of the information are sufficient or whether, on the contrary, they require greater rigour or stringency (this obligation also stems from the regulation - Article 5. 1.f) of the General Data Protection Regulation) or whether the impact assessment (to be applied in those cases in which, as in this case, the risk involved in the processing is particularly high) has been carried out correctly and has therefore taken into consideration the different obligations arising from Articles 35 and 36 GDPR (which deal with the impact assessment itself and, as a result thereof, the prior consultation to be carried out with the supervisory authority (Spanish Data Protection Agency, in our country), respectively).

These statements, many of them, we repeat, the subject of a necessary doctrinal interpretation of the European regulation, have been, to a certain extent, resolved or, at least, complemented with the important pronouncement subsequently issued by the LOPDGDD, which, in Article 34, states the following:

"Compliance with the requirements established in Article 37.5 of Regulation (EU) 2016/679 for the appointment of the data protection officer, whether a natural or legal person, may be demonstrated, among other means, through voluntary certification mechanisms that will take particular account of obtaining

11. Botana García (2018), "La formación del Delegado de Protección de Datos (DPO)", en *Actualidad civil*, num. 5.

a university degree accrediting specialised knowledge in data protection law and practice".

IV. Specialities of the treatments to be supervised

The specific role and powers to be performed by the DPO within the sports federation which, acting in its capacity as data controller or data processor (or both, simultaneously, depending on the processing) proceeds to his or her appointment, are set out in Articles 39 of the General Data Protection Regulation and 37 of the national Organic Law. Among these, and probably the most basic or core task, is to supervise, agree and align the work of the organisation with the principles of the applicable privacy regulations.

Similarly, it will have to guide the actions of the entity in which it provides its services in terms of its data protection policies, where the assignment of responsibility and the regularity of the training actions of employees who often process personal data of data subjects and who, therefore, must respect what the responsible sports federation committed itself to at the time.

It will also be essential to advise and inform all parties involved in the processing about the obligations to be fulfilled and how to fulfil them. This consultation and information work is essential and, within the sports federations, may be reflected in many and varied issues, some of which are reflected below:

Firstly, he/she must attend to any query, related to the processing of personal data within the entity, raised by any member of the same, to which he/she must provide an adequate response in the shortest possible time.

Secondly, he/she shall advise on all matters relating to the appropriate response by the data controller, or information to the data controller, by the data processor, to the exercise of rights by the data subject, regulated in articles 15 to 22 RGPD and 12 to 18 LOPDGDD.

Thirdly, it will have to provide guidance as to the guidelines to follow and the processes to implement in order to comply with the internal regulations on communication, as well as in relation to the appropriate interpretation and/or action to be carried out at the different stages of the defining information system of the sports federation in question.

Fourthly, the work of the data protection officer will also be necessary when advising the sports organisation on aspects relating to the updating, maintenance and adaptation of new aspects in terms of guides, protocols and applicable rules.

Finally, fifthly, it should detect any privacy deficiencies and send notices of these to all persons involved and affected.

In order to comply with all the above issues, the DPO will have to review, in essence, the set of: a) protocols; b) security measures; c) documents; d) subjects related to the processing of personal data; and e) programmes used to carry out

the compliance with the fundamental right of data subjects to the protection of their personal data.

In relation to the above, it is important to underline the work of the data protection officer in periodically reviewing the documentation in the possession of the sports federation that affects private or confidential information. This documentation includes, particularly due to its sensitivity, the following:

A set of contracts, legends and clauses relating to privacy and data protection dealt with by the staff that form part of the sports federation concerned.

A set of information forms (drawn up in accordance with articles 12 to 14 RGPD and 11 LOPDGDD), used to collect the data and inform the data subject of the circumstances surrounding the processing, whether by means of automated (computerised) or non-automated media (on traditional paper).

Register of processing activities, which must be complete and permanently updated and available to the supervisory authority upon request. All of the above in accordance with the provisions of Articles 30 RGPD and 31 LOPDGDD.

Security documentation, essentially embodied in the security policy, which must include the risk analysis (which must also be complete and permanently updated) and the corresponding security measures, as well as, if necessary and appropriate, the corresponding privacy impact assessments and the privacy policy by design and by default, under the premises of the provisions of Articles 32, 35, 36 and 25 of the General Data Protection Regulation, respectively.

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