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CEDPO Submission to the UK public consultation on the data protection reform

In September, the UK Department for Digital, Media, Culture and Sport released a consultation document, entitled *Data – A New Direction, about the future of data protection law in the UK* whereby it proposes significant changes to the existing UK data protection law.

CEDPO, the Confederation of European Data Protection Organisations, would like to offer comments on one of the proposed changes, i.e., the one related to the position of the Data Protection Officer (DPO). The reform proposes to remove the requirement of appointment of a DPO and to replace it by the appointment of an individual in charge of running the privacy management program.

CEDPO believes that the reasons put forward do not justify the removal of the DPO and that this role should be maintained in the UK Data Protection Act as the DPO fosters a reasonable, practical, balanced, effective and expertise-based protection for personal data.

Why the proposal to remove the DPO?

One of the arguments put forward is that organisations struggle in appointing a person with appropriate skills and sufficient independence, in particular, in small organisations or government bodies not processing much personal information.

The shortage of qualified people cannot justify the removal of a protective measure. In the same vein, it would not be understood to remove the mandate of appointment of statutory auditors because of a shortage of professionals. As our economy is data driven, it is essential to develop education on data protection in law schools, engineering and IT schools, business and other schools in order to rapidly increase the number of data protection professionals to ensure a safer data economy and society.

Current legal provisions have been made flexible in order to address the situations of small organisations or of organisations not processing much personal information. Some small organisations, like start-ups, may process very sensitive personal information (e.g., start-ups developing apps in relation to the Covid-19 crisis) or process personal data using novel technology (e.g., AI technologies like machine learning) or otherwise processing personal data in a manner that create high risks for the affected individuals. It is essential that in these data processing activities are, a DPO is involved. While size-wise it is understandable that they may not be able to afford a full time DPO, they can hire a part-time DPO as well as an external DPO. Certain small organisations processing similar types of data and where such processing can be standardised, successfully share the same DPO (e.g., notaries). Furthermore, there is a broad range of service offers available on the UK market for external DPOs. In the case of governmental services, which is turning to be an e-administration and define public policies that impact how the private or the public sector processes personal data for the benefit of the citizens and the economy, **to appoint DPOs is one of the keys of their success to ensure a “data-administration” and an opportunity to lead by example, as we expect from any government.**

Government bodies have a duty to their citizens to ensure that their data is properly protected. While some of them may not process many different types of personal data, the volumes can be very large. If they assess that they don't need a full time DPO, here again, **the current legal provisions provide for flexibility**, they can have a part-time DPO or they can also mutualise a DPO, i.e. share a DPO between several organisations, thereby reducing costs and increasing efficiency.

The reform proposes to replace the DPO by a person responsible for a privacy management programme. Specifying in the new text the need for organisations to develop a privacy management programme appears to be an accountability measure very beneficial to the protection of personal information, as long as flexibility is left in light of the size and data processing activities of the organisation. **However, the role of a privacy programme manager should**

not be confused with the role of the DPO. These two roles go hand in hand. A privacy programme manager is useful for the implementation of a programme (ensuring that tasks are performed, tools, processes and templates are in place) but is **not the person who will be able to design a personal data strategy for the organisation.** Furthermore, this privacy programme manager does not perform the functions of the DPO at design level in advising on how the privacy management programme can make the organisation meet the legal requirements nor does the privacy programme manager perform the two other essential tasks of a DPO which are (i) verifying the organisation's compliance (monitoring) and (ii) being the independent contact point between the data controller on the one hand and data subjects or the supervisory authority on the other hand.

Privacy programme managers receiving instructions from their employers can find themselves in a situation where they do not act in the best interest of data subjects. This is why the DPO enjoys special protection under UK GDPR. **If the DPO role is replaced with a non-statutorily defined and unprotected role, there will be a clear risk that the necessary status, reporting to the highest level of the organisation and the independence enjoyed by DPOs will be devaluated and diluted** and that organisations will, in effect, order the role-holder around. Additionally, the essential right, and independence, to question, audit and monitor data protection compliance could be written out of job descriptions, and all based solely on the commercial demands of the day.

Furthermore, the proposed measure, which suggests that a person may be appointed as being responsible for data protection (with considerable latitude for organisations to select that person), will risk a return to an unsatisfactory situation where data protection compliance will become the brief of a potentially unsuitable role-holder, – whether that be a Chief Information Officer, or a Head of Compliance, – and that, in the process, there will be an obvious loss of subject-matter expertise, not to mention the fact that data protection may thereby become a secondary consideration, or, at worst, an afterthought.

The DPO as navigator through personal data privacy requirements

In our complex data protection legal environment, CEDPO is convinced **that DPOs can help in defining a responsible data strategy, achieving self-regulation¹ and self-monitoring in organisations** by leading the personal data strategy as well as supporting interpretation of

¹ Klug, Christoph, Improving Self Regulation through (law based) Corporate Data Protection Officials https://www.gdd.de/international/english/DPO_Report_by_Christoph_Klug.pdf.

the requirements not yet fully clarified by authorities or causing implementation challenges and by performing qualified internal assessments and checks.

The ICO has underlined for instance that when it comes to data breaches, *“reporting can be higher where there are dedicated DPOs and well-developed breach reporting processes.”*²

DPOs bring to the organisation a greater level of legal certainty and enable those organisations to justify and frame their data processing activities. As the European Data Protection Board Chair Andrea Jelinek said at the 2019 IAPP Global Privacy Summit, *“the importance of the DPO cannot be overestimated”*.³

Supervisory authorities have for a long time strongly advocated in favour of the appointment of DPOs.⁴ In many instances, the ICO has emphasised the importance of the role of DPO into respecting the right to privacy and data protection.⁵ **The appointment of DPOs in organisations has reduced the workload of supervisory authorities who have been able to focus on advising on specific issues or new technological developments and on addressing breaches and claims.** Removing the DPO role in the data protection law creates a risk of increased workload for the UK supervisory authorities.

The DPO is the neutral, reliable figure in the organisation that help the head of the organisation to design and implement a responsible data strategy and towards whom data subjects can turn to in case of concern. **Removing this role and deferring it to a non-independent programme manager risks undermining the confidence of data subjects.**

In addition, organisations have recognised the DPO as a competitive advantage, their independent oversight over an organisation activity being a trust generator as is evidenced by a few quotes gathered by AFCDP⁶ from several managers representing a wide range of organisations from the public and private sectors:

² ICO 2018-2019 Annual Report - Section 2: Regulatory powers and actions, page 29 and the same statement can be found also in the 2020-2021 ICO Annual Report.

³ <https://iapp.org/news/a/study-an-estimated-500k-organizations-have-registered-dpos-across-europe/>.

⁴ [Madrid resolution](#) for International Standards for the Protection of Personal Data and Privacy Section 22, 31st Convention of Data Protection and Privacy Commissioners 5th Nov 2009.

⁵ E.g. Report on Mobile phone data extraction by police forces in England and Wales from June 2020 page 59, the ICO recommended that *“Chief Officers should ensure that Data Protection Officers are engaged in, and consulted on, any new projects involving the use of new technologies for processing personal data.”*

⁶ “I have appointed a DPO and I'm happy about it - Ten data controllers testify”. AFCDP is a French association of privacy practitioners. www.afcdp.net.

“The Data Protection Officer serves as watchguard and stimulus. He is a facilitator, a messenger.” Prosper TEBOUL, Director General - APF

“I expect my DPO to have no qualms about sounding the alarm if the situation calls for it.” Jean-Michel BLANQUER Managing Director, ESSEC Group

“Compliance with the data protection Act should not be an adjustment variable. The DPO has every reason to be in an establishment like ours” Bruno Donius, Deputy Managing Director The Lille University Hospital and Research Complex

“The DPO provides us support in the modernisation and digital transformation processes.” Daniel Lenoir, Managing Director National Family Benefits Office

“Our DPO’s suggestions bring clear added value to what we do. François Béharel, Group Chairman Randstad France

“Our Data Privacy Officer sensitised the entire staff to the Data Protection Act compliance issues; it demonstrates our respect for ethics, which, for an organisation like ours, is extremely important.” Bruno Caccia, Managing Director Neotoa

“Appointing a privacy officer is a powerful act that tells of a company that respects its clients.” Stéphane Champetier de Ribes, Secretary General Argosyn Group

There is therefore more to lose than to gain for the UK in removing the role of the DPO from the data protection law and devaluing the data protection profession, to the detriment of the citizens, the organisations and the privacy professionals. Additionally, the proposal does not outline in any meaningful way what the DPO’s replacement role might look like, nor how its structure would address the diverse and complex data protection challenges that organisations face.

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