

Data Protection Officers wearing multiple hats

Navigating the governance and conflict-of-interest issues

In the dynamic realm of privacy and data protection, the role of Data Protection Officers (DPOs) has become increasingly crucial. As organisations strive to safeguard data and navigate complex compliance frameworks, **appointing a DPO is not merely a requirement**; rather, it signifies adopting a proactive commitment to ensuring robust data protection governance and measures within an organisation - a **strategic priority!**

The current newsletter aims at shedding light on the often-overlooked challenge of **establishing proper governance around the DPO**, encompassing roles, resources, knowledge and reporting duties, while also addressing the intricacies of **managing conflicts of interest that arise when DPOs assume multiple roles within an organisation.**

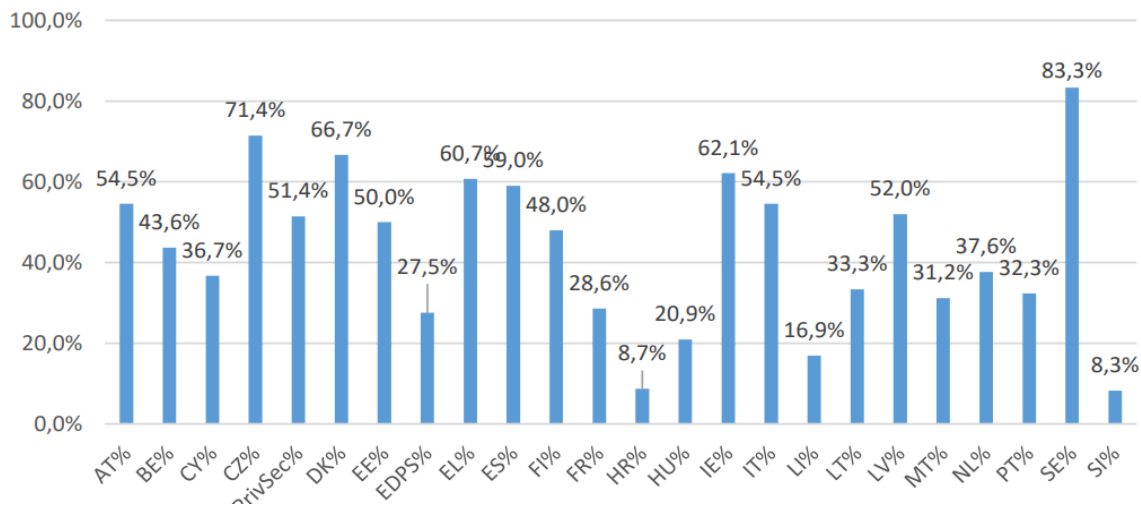
DPO market insights

The main shortcomings of EU entities in 2023

Absence of designation of a DPO, even if mandatory

Insufficient resources allocated to the DPO

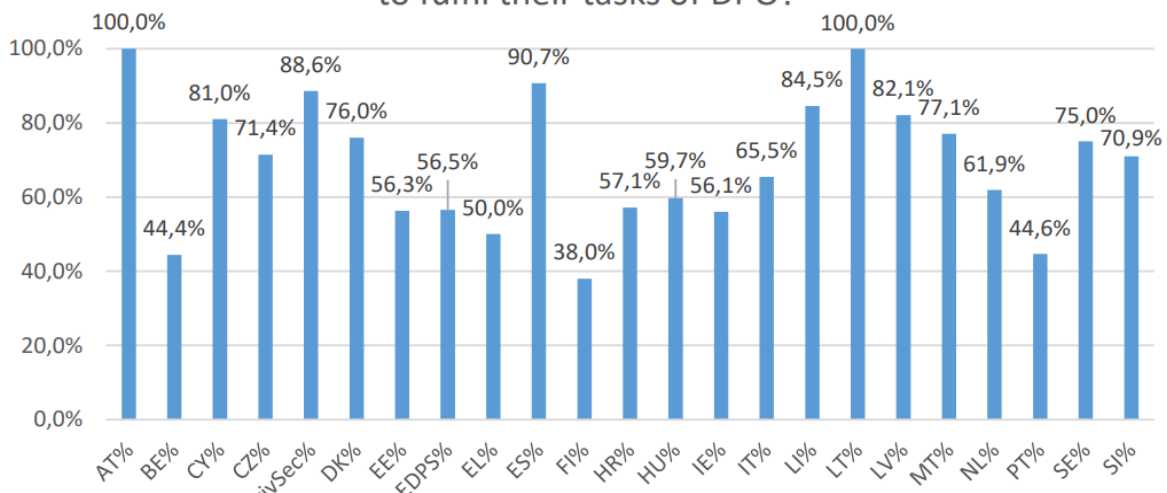
Q18. How many DPOs are full-time DPOs?



DPO conflict of interests and lack of independence

Insufficient expert knowledge of DPO

Q22. How many DPOs consider their resources as sufficient to fulfil their tasks of DPO?



DPOs not being fully or explicitly entrusted with the tasks required under GDPR

Lack of reporting by the DPO to the organizations' highest management level

Source: EDPB Coordinated Enforcement Action regarding the Designation and Position of DPO, dated January 2024
 Source: WP29 Guidelines on Data Protection Officers, dated April 2017

Conflict of interests and lack of independence

Article 39(1) entrusts DPOs with the duty to (a) **inform and advise** the controller (b) **monitor compliance** with the GDPR (c) provide advice on **DPIA** (d) cooperate with the supervisory authority and (e) act as the contact point for the supervisory authority.

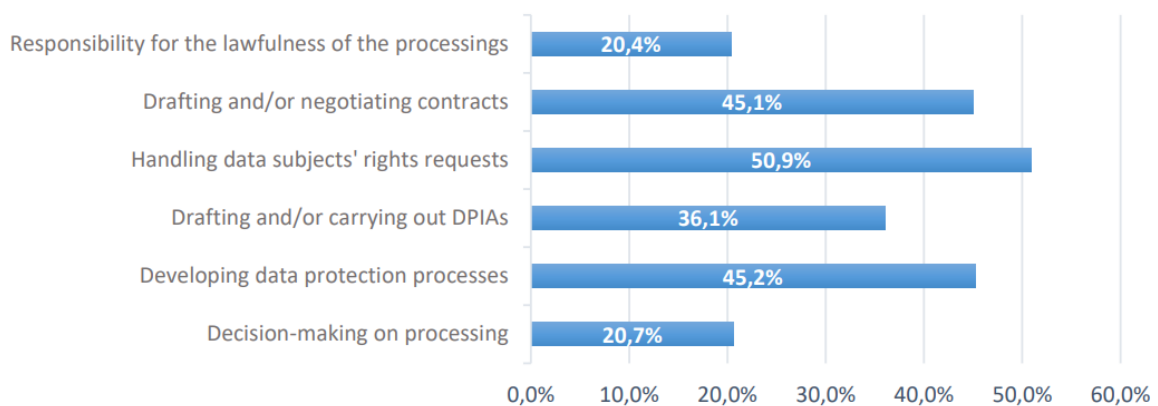
In performing the above, the controller shall ensure that the **DPO does not receive any instructions** and maintains his/her **independence**.

Conflict of interest due to conflicting tasks

While **Article 38(6) GDPR does allow DPOs to fulfil other tasks and duties**, it is **up to the controller to ensure that they do not result in a conflict of interests**, as well as that his/her independence is respected.

This holds particularly true when DPOs are tasked with **implementation and day-to-day GDPR activities**, conventionally part of the first line of defense, **in addition to the advisory and monitoring functions** outlined in Article 39(1), typical of the second line of defense. **How can independence be ensured when DPOs are tasked with monitoring their own activities?**

Q17. Which of the following additional tasks are committed/assigned to the DPO?



By way of **example**, most part of the DPOs are requested by the controller to **draft and carry out** Data Protection Impact Assessments (“**DPIA**”). However, in this context, it is important to recall that Article 35(2) of **GDPR specifically requires that the controller “shall seek advice” of the DPO** when carrying out a DPIA to assess “*whether or not it has been correctly carried out and whether its conclusions are in compliance with the GDPR*”.

While DPOs can be significantly involved in the drafting of a DPIA, they should have the **sufficient independence to evaluate the DPIA and its outcomes**. The same rationale shall apply in case DPOs are entrusted with tasks not strictly related to the advisory and monitoring role detailed within article 39(1) of GDPR.

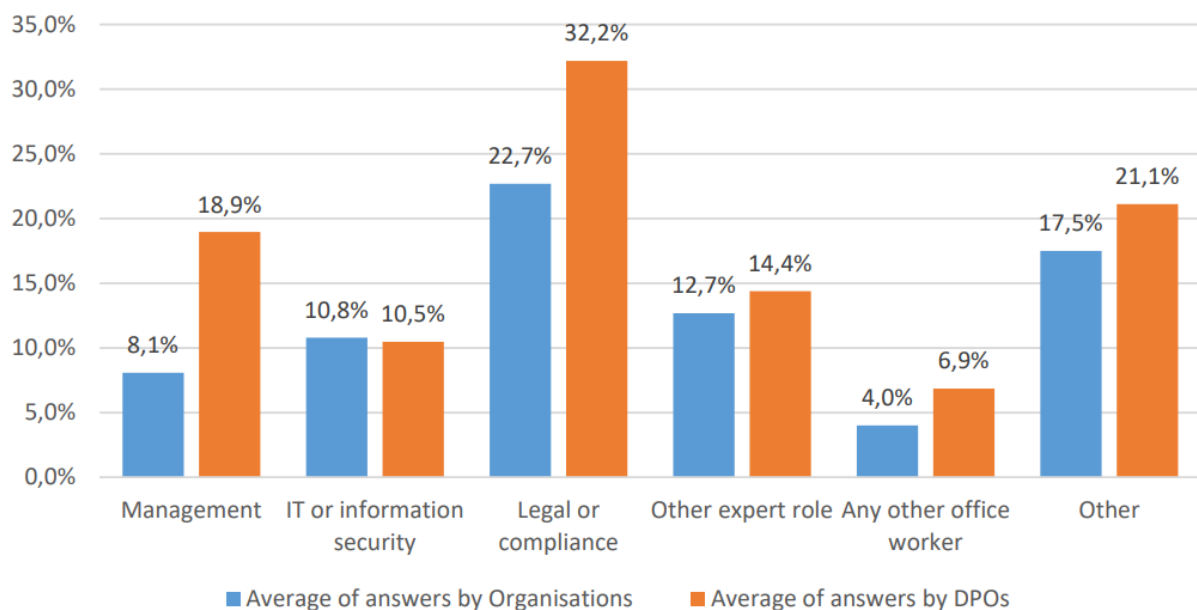
Source: EDPB Coordinated Enforcement Action regarding the Designation and Position of DPO, dated January 2024
Source: WP29 Guidelines on Data Protection Officers, dated April 2017

Conflict of interest due to conflicting roles

In-house DPOs sometimes hold positions or have **duties related to the (highest) management level of their organization.**

This means that these DPOs may **wear multiple hats** acting as directors or heads of departments – including senior management positions (such as chief executive, chief operating, chief financial, head of marketing department, head of Human Resources or head of IT departments) – where they are **likely to take decisions on the purposes and the means of the data processing activities** of their organization.

Q25. Which additional tasks/roles does the DPO also have?



However, the **CJEU** has recently concluded that a **conflict of interests may exist when a DPO holds a role or position within an organization that involves determining the purposes and the means of the processing** of personal data, as **DPOs have to evaluate, scrutinize and possibly criticize such processing independently** under Article 39(1)(b) GDPR.

In other words, the DPO cannot hold a position within the organization that leads him or her to takes part in the decision-making processing for personal data processing. According to the **CJEU X-Fab Dresden Judgment**, “*the determination of the existence of a conflict of interests [...], must be carried out, case by case, on the basis of an assessment of all the relevant circumstances, in particular the organizational structure of the controller or its processor and in the light of all the applicable rules, including any policies of the controller or its processor*”.

Source: EDPB Coordinated Enforcement Action regarding the Designation and Position of DPO, dated January 2024

Source: WP29 Guidelines on Data Protection Officers, dated April 2017

Source: CJEU Judgment of 9 February 2023, C-453/21, X-Fab Dresden GmbH & Co. KG, ECLI:EU:C:2023:79 ('CJEU XFab Dresden Judgment')

Luxembourg

Conflict of interest arises when an individual holds the roles of both **DPO and Head of Compliance, Money Laundering Reporting Officer**.

CNDP, 13 October 2021 (decision [here](#))

Italy

Conflict of interest arises when a **DPO is requested to represent the controller before the courts**.

Garante, 9 June 2022 (decision [here](#))

Croatia

Conflict of interest arises when an individual simultaneously serves as a **DPO and** holds the position of **Hotel Manager**.

AZOP, 26 September 2023 (decision [here](#))

Germany

Conflict of interest exists when an individual serves as both a **DPO and the Managing Director** of two service companies that process personal data on behalf of the controller.

BlnBDI, 20 September 2022 (article [here](#))

Spain

Conflict of interest occurs **when a DPO engages in activities or provides advice on matters that may be influenced by the protection of personal data of members, staff, or users of the controller**.

AEDP, 2022 (decision [here](#))

Belgium

- Conflict of interest arises when an individual holds the roles of both **DPO and Director of Audit, Risk, and Compliance**

ADP/GBA, 28 April 2020 (full article [here](#))

- Conflict of interest occurs when an individual simultaneously serves as a **DPO and** holds positions such as **Head of Operational Risk Management or Information Risk Management department, and Special Investigation Unit**.

ADP, 16 December 2021 (decision [here](#))

Suggested activities and remediation

DPO conflict of interests and lack of independence

Conflict of interest analysis

- Conduct interviews with key stakeholders to evaluate their respective roles and responsibilities
- Conduct a thorough conflict of interest analysis, including a detailed examination of the organizational structure and applicable regulations

Identify and remedy the conflict

- Identify the tasks or positions which would be incompatible with the function of DPO
- Develop customized conflict resolution strategies
- Define clear boundaries around the tasks and duties allocation to avoid the conflict in the future

Formalization of DPO role and duties

- Formalize within a dedicated policy the relevant DPO role, detailing his/her duties and tasks
- Establish proper governance arrangements to ensure the DPO has sufficient resources and support from other stakeholders

Conflict of interest policy

- Draft / update the conflict-of-interest policy
- Draft / update the organisation governance description amending the stakeholders / DPO roles and duties accordingly

Awareness-raising activities

- Implement awareness-raising activities, information and enforcement actions on the independence of the DPO to prevent conflicts of interests

Continuous monitoring and improvement

- Implement continuous monitoring measures to ensure the effectiveness of conflict resolution strategies and perform adjustments as needed

The Need for Immediate Action

Failure to detect a DPO conflict of interest and remedy it promptly may result in **severe financial and reputational consequences** for your business.

Mazars' GDPR experts are prepared to navigate you through this intricate landscape, providing **customised solutions for establishing a robust data protection governance framework**. This includes **managing conflicts of interest**, offering **external DPO services** and/or equivalent **GDPR advisory and compliance activities**.

Feel free to [reach out](#) or experts **Jean-Hubert Antoine** (Director) and **Claudio Orlando Miele** (Manager and Privacy Leader) for a preliminary informative call to discuss about your current governance arrangements and necessities.

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