

## JusGov Research Paper Series Paper 2022 - 06

---

Tiago Branco da Costa

# The Professional Statute of the Data Protection Officer

## About this Research Paper Series

---

The JusGov Research Paper Series (editor: Sofia Pinto Oliveira) provides full articles submitted for publication by our researchers and by visiting researchers as well as speakers at our centre. The content is the responsibility of individual authors. All papers can be accessed from the JusGov Research Paper Series site on Social Science Research Network (SSRN) online platform (<https://www.ssrn.com/index.cfm/en/jusgov-res/>) and from our official site (<https://www.jusgov.uminho.pt/pt-pt/publications/jusgov-research-paper-series/>).

---

---

# The Professional Statute of the Data Protection Officer

**Tiago Branco da Costa**

*Assistant Lecturer at the University of Minho Law School; PhD student in Private Law at the University of Minho; PhD student fellow of Fundação para a Ciência e Tecnologia; tiagobrancodacosta@direito.uminho.pt.*

**Summary:** Introductory remarks; 1. The Data Protection Officer in the context of the GDPR; 2. Mode of exercise of the Data Protection Officer's profession; 3. The "professional and ethical statute" of the Data Protection Officer; 3.1. The principle of autonomy; 3.2 The principle of Independence; 3.3 The principle of non-accountability; 3.4. The principle of confidentiality; 4. The risk inherent in the data protection officer profession; 5. The professional statute of the accountant and his deontological code; 5.1. Mode of exercise of the profession; 5.2 The responsibility of the accountant; 5.3. The ethical principles governing the activity of the accountant; 6. The professional statute of the lawyer and his deontological code; 6.1 Mode of exercise of the profession; 6.2. The civil liability of lawyer; 6.3. The deontological principles that govern the activity of lawyer; Conclusion.

**Abstract:** The role of the data protection officer, although referred to by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, has been clarified and strengthened in the new legal framework established by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, which sets out the rules on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

In this sense, we intend with our study to offer an analysis of the professional statute of the data protection officer, based on the analysis of the deontological principles governing the profession and the risks inherent in its exercise, in order to encourage reflection on the relevance of the creation of an associative structure representative of the profession, able to control access to and the exercise of the profession, to elaborate technical standards, deontological principles and rules and to create an autonomous disciplinary regime.

**Keywords:** Data Protection Officer; GDPR; Deontological Code; Professional Statute.

## Introductory remarks

The Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, which lays down the rules on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, established the figure of the data protection officer (DPO).

In fact, although this professional is mentioned in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, his role has been clarified and strengthened in this new legal framework, through the creation of his own professional statute.

However, due to the new treatment given to this statute in the context of personal data protection, several doubts arise regarding the role played by the data protection officer in relation to entities that are compulsorily subject to the appointment of a data protection officer and in relation to those that, although not subject to this appointment, voluntarily chose to do so.

Firstly, we are assailed by doubts as to the qualifications that this professional must meet, above all due to the simplicity of the legal description and, concomitantly, by the extent that these technical qualities must assume. In addition, the proclaimed certification of this professional has yet to be achieved.

On the other hand, according to the provisions of article 38 of the General Data Protection Regulation (GDPR), the DPO must enjoy full autonomy and independence and may not be instructed in relation to the exercise of his or her functions. However, the GDPR allowed that the role of data protection officer could be performed by (i) an internal company employee, combining this with other duties (already performed or to be performed in the future)<sup>1</sup>; (ii) an internal employee hired for this purpose or, furthermore, (iii) a professional external to the organisation itself. This diversified way of exercising the role of data protection officer raises doubts as to the independence of this professional, which is why the regime of incompatibilities has been widely discussed<sup>2</sup>, in order to understand which professionals are best qualified to exercise the role and which, due to a possible conflict of interests, should withdraw from the exercise of the role.

In addition to all these issues, there is one of the most relevant problems concerning the function performed by the DPO, which has to do precisely with the (non)accountability in the exercise of the function, which may naturally depend on the way the function is exercised and, therefore, on the link established between this professional and the controller or processor.

In an attempt to provide an answer to these questions and, above all, to provoke reflection on the pertinence of creating an associative structure representative of the profession, capable of controlling the access to and the exercise of the profession, of elaborating technical standards, deontological principles and rules and of creating an autonomous disciplinary regime, we will make our journey, using as a basis of comparison other professions duly regulated and implemented in the Portuguese legal system<sup>3</sup>: the “accountant” and the “lawyer”.

## 1. The data protection officer in the context of the GDPR

In chapter IV, dedicated to the controller and the processor, we can find, in section 4, the regulation of the figure of the data protection officer.

Article 4 of the GDPR, which moves forward with the clarification of several legal concepts employed throughout the diploma, does not, however, provide any definition of the “data protection officer”.

In fact, this figure ends up being concretised by other precepts that characterise his position and his duties and from the outset, summarily, by recital 97, which refers to the assistance that this specialist in data protection law and practice must provide to the controller or processor in monitoring compliance with the legal rules internally.

---

<sup>1</sup> See article 38 of the GDPR, provided this does not result in a conflict of interest.

<sup>2</sup> For a more detailed view *Guidelines on Data Protection Officers (DPOs) of the Article 29 Data Protection Working Party*, adopted on 13 December 2016, available at <https://ec.europa.eu/newsroom/article29/items/612048>, accessed: 18.04.2022, p.27; CORDEIRO, A. Barreto Menezes, *A Autonomia da Função de Encarregado de Proteção de Dados e a Independência do Exercício da Advocacia*, “Revista da Ordem dos Advogados”, Jan./Jun. 2018, Year 78, pp.17-38; Portuguese Bar Association, Opinion of the General Council, Opinion Process 14/PP/2018-G, 28 September 2018, rapporteur: Zacarias de Carvalho, available at <https://portal.oa.pt/media/125991/parecer-14-pp-2018-declaracao-de-voto-expurgado-002.pdf>, accessed: 18.04.2022; ECJ, 2021, X-FAB Dresden v FC, C-453/21, case in progress.

<sup>3</sup> From a wide range of professions, we have selected the professions of “accountant” and “lawyer”, as we consider them to be two relevant examples, in the business context and in the particular context of personal data protection. However, this research work does not question or deny the possibility of establishing other relations with other professions duly regulated in the Portuguese legal system, for this and other purposes. With regard to the profession of accountant, we must consider Law no. 139/2015, of 07 September, which transformed the «Ordem dos Técnicos Oficiais de Contas» into «Ordem dos Contabilistas Certificados», and amended the respective statute, approved by Decree-Law no. 452/99, of 5 November; in turn, with regard to the profession of lawyer, we must consider Law no. 145/2015, of 09 September, which approved the Statute of the Portuguese Bar Association.

Article 37 of the GDPR lists the situations in which the appointment of a data protection officer by the controller and/or processor is mandatory<sup>4</sup>, but allows those who are not subject to this obligation<sup>5</sup> to appoint a data protection officer. In addition, the GDPR has provided for the possibility for a data protection officer to work, within a group of undertakings, with the various controllers (belonging to that group) if the data protection officer is easily accessible from each establishment<sup>6</sup>. Similarly, in the case of a public authority or body, the same possibility exists, that is a single DPO may be designated for several such authorities or bodies, according to their organisational structure and size.

In any case, the controller or the processor shall publish the contact details of the DPO and communicate them to the supervisory authority<sup>7</sup>.

It also follows from article 37 of the GDPR that the data protection officer shall be designated on the basis of their professional qualities and their expert knowledge of data protection law and practice and their ability to fulfil the tasks assigned to them<sup>8</sup>. The level of suitability will in turn be determined according to the processing operations carried out by the controller, the nature of the personal data undergoing processing and the level of security required.

With regard directly to the duties attributed to the DPO, the minimum catalogue defined in article 39 of the GDPR must be observed, which includes the following duties: (i) informing and advising the controller or processor and the data processors about their obligations under the GDPR and other EU or member state data protection provisions; (ii) monitoring compliance with the GDPR, other EU or member state data protection provisions and the controller's or processor's policies relating to the protection of personal data, including the allocation of responsibilities, the awareness and training of staff involved in data processing operations, and the related audits; (iii) provide advice, when requested, in relation to the data protection impact assessment and monitor its conduct; (iv) cooperate with the supervisory authority; (v) be the contact point for the supervisory authority on issues related to processing, including prior consultation; and (vi) consult, where appropriate, with the supervisory authority on any other matter<sup>9</sup>.

Nevertheless, their scope for action is further expanded when a duty is established, in relation to the controller and the processor, to ensure that the DPO is involved, in an appropriate manner and in good time, in all matters relating to the protection of personal data<sup>10</sup>. Alongside this duty, the lawmaker has also laid down a duty for the controller and the processor to support the data protection officer in the performance of his tasks by providing him with the resources necessary to perform those tasks and to maintain his knowledge and by granting him access to personal data and to the processing operations<sup>11</sup>.

Along with this list, the internal implementing law (article 11) assigned three more functions to the DPO: (i) ensure the performance of audits, both periodic and unscheduled; (ii) raise users' awareness on the importance of the timely detection of security incidents and the need to immediately inform the security officer; (iii) ensure relations

<sup>4</sup> According to the abovementioned legal provision, the controller and the processor shall designate a data protection officer where: (a) the processing is carried out by a public authority or body, except for courts acting in their judicial capacity; (b) the core activities of the controller or the processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic monitoring of data subjects on a large scale; or (c) the core activities of the controller or the processor consist of processing on a large scale of special categories of data pursuant to article 9 and personal data relating to criminal convictions and offences referred to in article 10.

<sup>5</sup> "(...)Or, where required by Union or Member State law shall" - article 37(4) of the GDPR.

<sup>6</sup> According to article 37(2) of the GDPR.

<sup>7</sup> See article 37(7) of the GDPR; *Guidelines on Data Protection Officers (DPOs)*, Cit., p. 5, "When an organisation designates a DPO on a voluntary basis, the requirements under articles 37 to 39 will apply to his or her designation, position and tasks as if the designation had been mandatory."

<sup>8</sup> With more detail, CORDEIRO, A. Barreto Menezes, *Direito da Proteção de Dados: à Luz do RGPD e da Lei nº 58/2019*, Almedina, 1st ed., 2020, p.367.

<sup>9</sup> According with CORDEIRO, A. Barreto Menezes, *Direito da Proteção de Dados*, Cit., pp.366-367, which refers to Parliament's proposal when it examined the original Commission proposal with regard to the following recital: "The data protection officer must have the following qualifications as a minimum: broad knowledge of the content and application of data protection law, including technical, organisational and procedural measures; proficiency in technical privacy requirements, from design, privacy by default and data security; sector-specific knowledge according to the size of the controller and processor and with the sensitivity of the data to be processed; ability to perform inspections, consultation, draw up documentation and archival analysis; ability to work with workers' representatives".

<sup>10</sup> See article 38(1) of the GDPR.

<sup>11</sup> See article 38(2) of the GDPR.

with data subjects in matters covered by the GDPR and national data protection legislation. However, we cannot but follow the understanding of the portuguese supervisory authority – *Comissão Nacional de Proteção de dados* (CNPd) as to the content of this legal precept: “as the member state is not given the possibility to legislate on the duties of the DPO, article 11 should be deleted”<sup>12</sup>, without prejudice to the last of these duties may result from the reading of article 38(4) of the GDPR.

In short, the DPO will be in charge of training and informing the various actors involved in the data processing process, assessing compliance of data processing and providing advice, as well as cooperating with the supervisory authority and liaising with data subjects.

## **2. Mode of exercise of the data protection officer profession**

As regards the exercise of the profession of data protection officer, the European lawmaker has laid down different models<sup>13</sup>.

Firstly, the data protection officer may be a member of the staff of the controller or of a processor specially employed for that purpose.

Secondly, the data protection officer may be a member of the staff of the entity responsible for processing or of the processor who combines that function with another function within that entity.

Finally, and thirdly, the data protection officer may perform his or her duties on the basis of a service contract, this is he or she may perform his or her duties as an element external to the organisation itself (of the controller or processor).

The legal enshrinement of this possibility, with regard to the methods of organisation of the exercise of the function, enables us to immediately point out that the principles to which these professionals are bound do not, at first sight, conflict with the exercise of the profession under the legal-labour subordination of another person, or with the exercise of other functions or professions.

What is clear from the various applicable legal provisions is the incompatibility of the exercise of the profession in situations which affect exemption and independence, in recital 97, where it is stated that “these data protection officers, whether or not they are employees of the controller, must be in a position to perform their duties and tasks with independence”.

As we will see below in relation to the two example professions to which we will refer, the Professional Association that supervises the exercise of the profession has the capacity to analyse and pronounce on the validity of the contracts in which the professional is involved, with regard to compliance with professional and ethical duties. It may be asked in the case of the DPO who the competent body will be to promote such a verification and analysis within the current framework. The answer, although not satisfactory from a practical point of view, seems obvious: the data controller or processor, insofar as these are the subjects who, in the context of the processing of personal data, appoint the data protection officer. The practical challenge we refer to has to do with the technical knowledge of the data controller (who, it should be noted, does not have to be, and as a rule will not be, a data protection expert, but will rather be hiring one) and with the set of information he/she has or may or should request from the candidate data protection officer, in order to assess his/her possible incompatibility to exercise the position.

We could also admit that this is an exercise that the DPO himself, as a professional, should carry out (as happens or may happen in other professions, for example), but the problem remains, since if the professional himself has doubts as to a possible incompatibility, he will not be able to resort to any entity or body in order to clarify the situation, leaving him only with the most severe preventive measure, which is the removal of the professional from exercising the profession in that particular case. Similarly, if professionals have the duty to withdraw from the exer-

---

<sup>12</sup> Comissão Nacional de Proteção de Dados, Legal opinion 20/2018, Process 6275/2018, available at <https://www.cnpd.pt/umbraco/surface/cnpdDecision/download/120328>, accessed: 18.04.2022, p.8v.

<sup>13</sup> According to the combined reading of articles 37(6) and 38(6).

cise of their functions due to some type of conflict or incompatibility and they culpably fail to do so, they will not be held liable for disciplinary action<sup>14</sup>.

### **3. The “professional and ethical statute” of the data protection officer**

The principles to which we will pay attention below are those which result, in general terms, from article 38 and recital 97 of the GDPR and which are assumed, albeit “informally”, to be principles of a professional and ethical nature. Traditionally, professional deontology, which refers to ethical principles that should guide the exercise of the profession, is distinguished from the regime of incompatibilities and impediments that is associated with the so-called conflicts of interest. However, both collide and interfere directly with the content of some of the ethical principles, mainly that of independence, for which reason we will establish the necessary connections below.

#### **3.1. *The principle of autonomy***

Following the order set out by article 38 of the GDPR, the first of the principles applicable to the exercise of the profession of data protection officer is the principle of autonomy.

According to this principle, the controller and the processor must provide the data protection officer with the resources necessary to perform his/her duties and maintain his/her knowledge; and allow him/her access to the personal data as well as to the processing operations. The DPO must thus be provided with all the elements which guarantee him adequate autonomy in the performance of his duties, without being subject to any internal organisational, procedural or union measures which could constitute an obstacle to his work. This is supported by the fact that the DPO reports directly to the highest level of management of the controller or processor<sup>15</sup>. This means that the DPO’s activity should not be subordinate to directorates or middle management which could take away the autonomous nature of his/her action.

However, as pointed out by the former Data Protection Working Group, created due to the application of article 29 of Directive 95/46/EC, of 24 October (WG29)<sup>16</sup>, “The autonomy of DPOs does not, however, mean that they have decision-making powers extending beyond their tasks pursuant to article 39”. If on the one hand it is intended to affirm that decisions on data processing fall within the sphere of the data controller, on the other hand it is intended to affirm respect for the technical autonomy of the DPO, in the sense that this autonomy is essential to guarantee the independence that is also required of them.

In this way, the DPO’s decision-making powers are, broadly speaking, limited to what is necessary for him to perform his duties of informing and advising, checking compliance with the law and cooperating with the supervisory authority. This means, under the principle of autonomy, that this professional must not only be equipped with the necessary tools to carry out his or her function but must also enjoy technical autonomy regarding this exercise, regardless of the link that binds him or her to the controller or processor<sup>17</sup>. When this is not the case, the DPO must step away from the performance of his or her duties.

#### **3.2. *The principle of independence***

The principle of independence appears, in this legal framework, to be closely related to the principle of autonomy, insofar as it concretises it. The lawmaker was not satisfied with the autonomy of the DPO, but rather required this professional to exercise his or her profession independently. As such, a prohibition regarding the instruction of the DPO, in the exercise of his/her functions, by the controller or processor, was established in article 38(3).

---

<sup>14</sup> We are not referring to the disciplinary liability that may arise from the employment context or any type of invalidity that this conduct may cause in the employment relationship, when the data protection officer is an employee.

<sup>15</sup> According to article 38(3), final part, of the GDPR.

<sup>16</sup> *Guidelines on Data Protection Officers (DPOs)*, Cit., p.17.

<sup>17</sup> This norm, in a way, resembles the regime provided for in the Labour Code, specifically in article 116, when it says that “Subjection to the authority and direction of the employer does not prejudice the technical autonomy of the worker inherent in the activity provided, under the terms of the applicable legal or deontological rules”, although in this context it has a more refined technical and specialised component.

Also, in the area of the independence of this professional, it should be noted that the DPO must refrain from performing other duties and tasks which could result in a conflict of interests and therefore jeopardise his/her necessary and indispensable independence. This may be particularly relevant when the DPO performs other duties within the same organisation<sup>18</sup>.

The idea explained above concerning the DPO's autonomy is also of particular interest in this area. By ensuring that the DPO reports directly to the highest level of management of the controller or processor, it is, to a certain extent, ensuring that the actions of this professional are not under the control of directorates or middle management who may influence his work and, in this way, control, manipulate, guide or censure it<sup>19</sup>.

Still on this subject, we believe it is pertinent to refer to the remuneration factor. As DIOGO PEREIRA DUARTE points out<sup>20</sup>, although this aspect is not portrayed in the GDPR, it may influence the DPO's performance, when he is attributed, for example, a variable or mixed remuneration, dependent on the financial performance of the areas he has to control.

### **3.3. The principle of non-accountability**

The DPO is further bound by the principle of non-accountability, according to which, he cannot be dismissed or penalised by the controller or processor for the fact that he (competently) performs his duties<sup>21</sup>.

According to the clarification provided by the WG29<sup>22</sup>:

*“This requirement strengthens the autonomy of DPOs and helps ensure that they act independently and enjoy sufficient protection in performing their data protection tasks.*

*Penalties are only prohibited under the GDPR if they are imposed as a result of the DPO carrying out his or her duties as a DPO. For example, a DPO may consider that a particular processing is likely to result in a high risk and advise the controller or the processor to carry out a data protection impact assessment but the controller or the processor does not agree with the DPO's assessment. In such a situation, the DPO cannot be dismissed for providing this advice. (...)*

*As a normal management rule and as it would be the case for any other employee or contractor under, and subject to, applicable national contract or labour and criminal law, a DPO could still be dismissed legitimately for reasons other than for performing his or her tasks as a DPO (for instance, in case of theft, physical, psychological or sexual harassment or similar gross misconduct).”*

We believe that this provision contained in Article 38(3) of the GDPR aims, above all, to ensure that the professional performance of the DPO is not interfered with or influenced by others within the organisation who may cause the DPO harm (leading to his/her dismissal)<sup>23</sup>, and that this professional, who plays a leading role in ensuring compliance with the law and the protection of data subjects' rights, does not act with the intention of currying favour

<sup>18</sup> DUARTE, Diogo Pereira, Commentary on article 38, in CORDEIRO, A. Barreto Menezes (coord.), “Comentário ao Regulamento Geral de Proteção de Dados e à Lei n.º 58/2019”, Almedina, 2021, p.298, “Paragraph 6 allows the DPO to exercise other functions and attributions, not meaning that it must do so.”

<sup>19</sup> In the same sense, see COELHO, Cristina Pimenta, Commentary on article 38, in PINHEIRO, Alexandre Sousa, et. al., “Comentário ao Regulamento Geral de Proteção de Dados”, Almedina, 2018, p. 475.

<sup>20</sup> DUARTE, Diogo Pereira, Commentary on article 38, Cit., p.297.

<sup>21</sup> As stated by the now defunct WP29, *Guidelines on Data Protection Officers (DPOs)*, Cit., p.15, Recital 97 adds that DPOs, ‘whether or not they are an employee of the controller, should be in a position to perform their duties and tasks in an independent manner’. This means that, in fulfilling their tasks under article 39, DPOs must not be instructed how to deal with a matter, for example, what result should be achieved, how to investigate a complaint or whether to consult the supervisory authority. Furthermore, they must not be instructed to take a certain view of an issue related to data protection law, for example, a particular interpretation of the law”.

<sup>22</sup> *Ibidem*, pp.15-16.

<sup>23</sup> See in this regard, COELHO, Cristina Pimenta, Commentary on article 38, Cit., pp.475-476, “(...) the fact that the DPO's opinion is contrary to that of the controller cannot determine the termination of his functions, nor any penalty, as would be the case of the non-existence or delay in awarding promotions, preventing career progression or denying benefits to other employees. On the contrary, nothing prevents the controller or processor from dismissing the DPO if he or she fails to perform his or her duties properly, for example by giving misleading advice on data protection obligations”.

with the data controller or processor (who appointed him or her), with a third party or with himself or herself (where his or her own interests are involved). This irresponsibility on the part of the data protection officer is not, however, absolute or binding on everyone, since we are talking about the responsibility for decisions taken or omissions on the part of the data controller or processor and their consequences for the legal sphere of the data subjects and, where applicable, third parties. The DPO shall therefore not be held liable towards the data subjects and, insofar as he or she has exercised his or her function competently, he or she shall not be held liable towards the data protection officer and the processor. However, as a professional he or she is not exempt from liability, under general terms, for the service that he or she provides to third parties and for the errors or omissions that, in the course of his or her duties, he or she may commit: civil liability when acting as a service provider; or disciplinary liability when acting as an employee.

In this regard, and contrary to the discipline we have been addressing, it is important to refer to the case of the Lisboa City<sup>24</sup>, which resulted in the application of a fine by the Portuguese supervisory authority in the amount of EUR 1,250,000.00 (one million, two hundred and fifty thousand euros), for the 225 (two hundred and twenty-five) administrative offences allegedly committed. In question was the processing of personal data of promoters of demonstrations, specifically the transfer of personal data contained in notices of demonstrations to third parties not provided for in law, including the embassies of the countries from which the demonstrators originated, which constituted a violation of the rules of articles 5, 6, 13, 35 of the GDPR. Following the decision issued by the Portuguese supervisory authority, the EPD of the Lisbon City was removed from office, which raised several doubts about the continuity of the irregular conduct of this entity and about the lack of clarifications regarding the dismissal promoted by the data controller, in this case, the Lisbon City<sup>25</sup>.

### *3.4. The principle of confidentiality*

Finally, we must take into account the confidentiality principle, which binds the data protection officer to the obligation of secrecy or confidentiality<sup>26</sup> in the exercise of his/her functions<sup>27</sup>.

This principle is, in fact, an important corollary of the personal data protection regime and is therefore fully in line with the spirit of the regulation.

According to the provisions on the principle of autonomy, the DPO must have access to personal data and to data processing operations and, therefore, within the organisation, will be one of the subjects with the most information about data subjects.

In addition, data subjects may contact the DPO directly on all matters relating to the processing of their personal data and the exercise of their rights<sup>28</sup>. This means that, in addition to the personal data to which the DPO already has access, through this direct contact with data subjects, the DPO is likely to be able to access further information and data the confidentiality of which must be effectively ensured.

On the other hand, as the guarantor of compliance with the GDPR and of data subjects' data protection, this fundamental principle that should guide all the actions of this professional had to be established.

<sup>24</sup> Case AVG/2021/300, that resulted in CNPD deliberation/2021/1569 of 21 December 2021, available at <https://www.cnpd.pt/umbraco/surface/cnpdDecision/download/121953>, accessed: 18.04.2022.

<sup>25</sup> The Association of Data Protection and Security Professionals (APDPO) presented, following the decision to exonerate the DPO of Lisbon City Council (its associate), a complaint to the National Commission for Data Protection, with the purpose of knowing whether such exoneration complied with article 38(3) of the GDPR: <https://www.dpo-portugal.pt/noticias/190-apdpo-apresenta-participacao-a-cnpd>.

<sup>26</sup> It should be noted that the general wording used by the European lawmaker in article 38 seems, first seeing, to converge the concepts of secrecy and confidentiality. However, each of these terms has its own meaning which we must distinguish. To this end, we must, in this particular regard, have recourse to article 10 of the internal implementing law which establishes, in this regard, this deontological/professional duty incumbent on the DPO. In fact, the duty of secrecy is a duty imposed on a given professional in the exercise of his or her profession, failure to comply with which is subject to the application of sanctions, whereas the duty of confidentiality appears to be a duty, imposed by law or by contract, which is incumbent on a given individual and which translates into the obligation to take all steps in order to be able to keep certain information in the private sphere of its holder. For this reason, article 10(2) of the domestic Implementing Law assigns a duty of confidentiality to all those intervening in the data processing chain, since no duty of professional secrecy applies to all those intervening (with the exception of the DPO, who is a true professional in the exercise of his profession and is subject to his own professional discipline).

<sup>27</sup> In accordance with Union or Member State law - article 38(5) of the GDPR.

<sup>28</sup> See article 38(4) of the GDPR.

Although this principle derives from the legal framework established by the GDPR, the domestic implementing law<sup>29</sup> also enshrined, in article 10, under the heading “Duty of secrecy and confidentiality”, a duty of professional secrecy in everything relating to the performance of the duties of the DPO (“which shall continue after the termination of the duties which gave rise to them”).

As already provided for in the previous Data Protection Act<sup>30</sup>, the Implementing Act establishes the crime of breach of professional secrecy<sup>31</sup>, providing in this regard that any person who, under the obligation of professional secrecy under the law, without just cause and without due consent, discloses or divulges all or part of personal data, shall be punished by a prison sentence of up to 1 (one) year or a fine of up to 120 (one hundred and twenty) days. However, it is certain that it is provided for to be doubled when the agent is a worker in public functions or equivalent, under the terms of the criminal law; is in charge of data protection; is determined by the intention of obtaining any patrimonial advantage or any other illegitimate benefit; or, furthermore, when it endangers the reputation, honour or intimacy of the private life of third parties<sup>32</sup>.

In this way, this duty of professional secrecy appears to be a true embodiment of the fundamental principles governing the processing of personal data, listed in article 5 of the GDPR<sup>33</sup>, especially the principle of integrity and confidentiality<sup>34</sup>.

#### **4. The risk inherent in the data protection officer profession**

The GDPR frequently uses the term “risk”<sup>35</sup>, repeatedly associating it with data processing operations and including it in the description of the tasks to be performed by the data protection officer.

By way of example, see the provisions of article 39(2), which expressly states that the DPO, in performing his or her tasks, shall take into account “the risks associated with processing operations, taking into account the nature, scope, context and purposes of the processing”.

However, the domestic implementing law has chosen to enshrine a solution that removes the need for professional certification for the performance of the profession of data protection officer<sup>36</sup>.

The absence of professional certification may in fact result in an additional risk for the controller or processor, and even for the data subjects, who have no formal guarantee, provided by a competent authority, as to the degree of knowledge and preparation of the professional for the performance of the function. The question therefore arises as to whether it would not be prudent, in view of the complexity and risk associated with the role of data protection officer and the nature of the data subjects’ rights, for a professional title to be awarded by a professional association to individuals wishing to exercise such a profession. The GDPR says nothing about the possible regulation of the profession of data protection officer, however, in the domestic legal landscape, this option does not seem inappropriate, given, on the one hand, the scope of application of Law No. 2/2013 of 10 January, which establishes the legal frame-

<sup>29</sup> Law no. 58/2019, of 8 August, published in *Diário da República* (official gazette), 1st series, no. 151.

<sup>30</sup> Law no. 67/98, of 26 October, which transposed into portuguese law Directive 95/45/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.

<sup>31</sup> See article 51(1) of the internal implementing law.

<sup>32</sup> See article 51(2) of the internal implementing law.

<sup>33</sup> In the specific case, see recital 39, *in fine*, “Personal data should be processed in a manner that ensures appropriate security and confidentiality of the personal data, including for preventing unauthorised access to or use of personal data and the equipment used for the processing”.

<sup>34</sup> See article 5(1)(f) of the GDPR.

<sup>35</sup> In addition to the examples associated with the performance of the DPO’s duties that we have highlighted, it is possible to identify other references, for example, in article 4 (24); 23(2)(g); 24(1); 25(1); 27(2)(a); 32(1) and (2); 33(1); 34(1), (3) and (4); 35; 36; 39; and 49(1)(a), all of the GDPR.

<sup>36</sup> See article 9 of Law no. 58/2019 of 08 August, “The data protection officer is designated based on the requirements set out in article 37(5) of the GDPR and does not require professional certification for this purpose”.

work for the creation, organisation and functioning of public professional associations<sup>37</sup> and, on the other hand, the position taken by the Advocate General of the ECJ, Jean Richard de La Tour, in the Leistriz case<sup>38</sup>, regarding the regulation of the profession of data protection officer. In his Opinion, it reads:

*“(...) The objective of Regulation 2016/679 set out in recital 13 thereof, pursuant to which the EU legislature guarantees the independence of the data protection officer in general terms in the second sentence of article 38(3) of that regulation, justifies the fact that any other measure intended to strengthen that Officer’s autonomy in the performance of his or her duties must be capable of being taken by a Member State.*

*That analysis is not at variance with the effects of a regulation, as defined in the second paragraph of article 288 TFEU, or with the subsequent obligation on Member states not to derogate from or supplement a regulation which is binding in its entirety and directly applicable, unless the provisions of that regulation grant the Member states a margin for manoeuvre which must or may, as the case may be, be used by them under the conditions and within the limits laid down by those provisions.*

*Furthermore, the intention of the EU legislature to leave it to the Member states to supplement the provisions protecting the independence of the data protection officer on the basis of a minimum legislative framework relating to the performance of his duties, defined in accordance with the objectives of Regulation 2016/679, is also manifested by the absence of any prescription regarding the duration of the mandate of that Officer (...).*

*Member states may therefore decide to strengthen the independence of the data protection officer, in so far as he or she participates in the achievement of the objectives of Regulation 2016/679 (...).”*

In this regard, it is also important to highlight another aspect that is related to the need or benefit that may be derived from the creation of the professional public association, which has to do with the creation of a mandatory civil liability insurance. As we will have the opportunity to observe with regard to the example professions that we will analyse next, the creation of professional associations and the consecration of a deontological professional statute, which recognises the public interest inherent to the exercise of those professions, contemplates, as a rule, rules that protect the interests of users, citizens and data subjects, by imposing on the professional the compulsory subscription of civil liability insurance. The aim of this regime is to ensure a (safe) means of compensation for citizens who are harmed by the provision of these services and who see their rights affected. The rights we are talking about here are generally of a special nature, which justifies this concern for special protection, which has been verified, from the outset, with the creation of the so-called professional association.

## 5. The professional statute of the accountant and his deontological code

Law 139/2015, of September 7, transformed the Ordem dos Técnicos Oficiais de Contas (Order of Chartered Accountants) into Ordem dos Contabilistas Certificados (Order of Certified Accountants), and amended the respective statute<sup>39</sup>, approved by Decree-Law 452/99, of November 5, in accordance with Law 2/2013, of January 10, which establishes the legal regime for the creation, organisation and operation of public professional associations<sup>40</sup>. Follow-

---

<sup>37</sup> In accordance with the provisions of article 2 of Law No. 2/2013, of 10 January (Creation, Organization and Operation of Professional Public Associations), professional public associations are considered to be public entities of associative structure representing professions that should be subject, cumulatively, to the control of their access and exercise, the development of technical standards and specific principles and rules of ethics and an autonomous disciplinary regime, by imperative of protection of public interest pursued.

<sup>38</sup> ECJ, 2020, Leistriz AG contra LH, C-534/20 (case in progress), ECLI:EU:C:2022:62. On the issue of the creation of internal rules applicable to the role of the data protection officer, see ECJ, 2021, ZS v KISA, C-560/21 (case in progress).

<sup>39</sup> Within the scope of this transformation, several alterations were also made to the statute of certified accountants, with the republishing of the Statute of the Order of Certified Accountants in annex I and the Code of Ethics of Certified Accountants in annex II.

<sup>40</sup> In accordance with the provisions of article 2 of Law No. 2/2013, of 10 January (Creation, Organization and Operation of Professional Public Associations), professional public associations are considered to be public entities of associative structure representing professions that should be subject, cumulatively, to the control of their access and exercise, the development of technical standards and specific principles and rules of ethics and an autonomous disciplinary regime, by imperative of protection of public interest pursued.

ing the Statute of the Order of Certified Accountants<sup>41</sup> (SOCA), certified accountants are the professionals registered in the professional association, under the provisions of that legal diploma<sup>42</sup>.

Although our study is focused on the deontological principles that govern the profession, it is not unnecessary to proceed to a summary framework of the figure of the certified accountant in relation to his professional activity. In these terms, according to the provisions of article 10 of the SOCA, the enrolment in the professional association allows the exclusive exercise of the following activities (i) to plan, organize and coordinate the execution of the accounting of entities, public or private, which have or should have organized accounting according to the officially applicable charts of accounts or the accounting standardization system, as the case may be, respecting the legal norms, the accounting principles in force and the guidelines of the entities with competences in accounting standardization (ii) assume responsibility for the technical regularity<sup>43</sup>, in the accounting and tax areas, of the entities referred to in the previous subparagraph; (iii) sign, jointly with the legal representative of the entities referred to in subparagraph a), the respective financial statements and tax returns, proving their quality, under the terms and conditions defined by the professional association, without prejudice to the competence and responsibilities attributed by commercial and tax law to the respective bodies<sup>44</sup>.

In addition, the following are permitted: (a) the exercise of consultancy functions in the areas of accounting and taxation; (b) the intervention, in representation of taxpayers for whose accounts they are responsible, in the grace phase of the tax procedure and in tax proceedings, up to the limit beyond which, under the terms of the law, the constitution of a lawyer is obligatory, in matters related to their specific competencies; (c) the performance of any other functions defined by law, related to the exercise of their respective functions, namely those of expert appointed by the courts or by other public or private entities<sup>45</sup>.

### **5.1. Mode of exercise of the profession**

Having clarified, even if only briefly, the functions of the certified accountant, it is important to understand how this professional can exercise his/her activity.

In this regard, article 11 of the SOCA clarifies that certified accountants may exercise their activity (i) as independent professionals, (ii) as partners, administrators or managers of a professional company of certified accountants or of an accounting company, (iii) within the scope of a legal relationship of public employment, as workers exercising public functions<sup>46</sup>, or (iv) within the scope of a contractual relationship entered into with another certified accountant, with a professional company, with an accounting company, with another collective person or with an independent entrepreneur.

From the reading of this precept, it is possible to distinguish, in general terms, two major groups of situations: on the one hand, the certified accountant is authorized to be a service provider, when acting as an independent worker; on the other hand, the certified accountant is also authorized to be an employee, when providing his intellectual activity to an employer.

Furthermore, the Code of Ethics for Certified Accountants (CECA) also makes due reference to the contractual relationship<sup>47</sup>, where it is established that the employment contract entered into by the certified accountant cannot affect his exemption or his technical independence before the employer, nor violate the SOCA or the CECA. For

---

<sup>41</sup> Created by Decree-law no. 452/99, of 05 November.

<sup>42</sup> Article 9(2) of the SOCA operates the extension of the title of certified accountant.

<sup>43</sup> Technical regularity, in the light of the provisions of article 10(3) of the SOCA, should be understood as the execution of the accounting in the terms of the provisions foreseen in the applicable regulations, based on the documents and information provided by the management body or by the entrepreneur, and the decisions of the professional in the accounting field, with a view to obtaining a true and faithful image of the company's financial situation, as well as the sending of the accounting and tax information defined in the legislation in force to the competent public entities, within the legally defined terms.

<sup>44</sup> NUNES, Marco Vieira, *Estatuto da Ordem dos Contabilistas Certificados Anotado*, 2.nd ed., Vida Económica, 2016, pp.83 et seq.

<sup>45</sup> According to the article 10(2) of the SOCA.

<sup>46</sup> In this case, provided that they exercise the profession of accountant in the direct and indirect administration of the state or in the regional or local administration.

<sup>47</sup> See article 4 of the CECA.

this reason, if the prevalence of deontological rules causes a conflict that may put in question the subsistence of the employment relationship, the certified accountant must seek an agreed solution according to the deontological rules and, if this does not seem possible, he must request an opinion from the jurisdictional council of the professional association on the procedure to adopt.

As we have verified with respect to the exercise of the function of data protection officer, the consecration of different models for the exercise of the profession, allows us to immediately point out that the principles to which this professional is bound do not, *prima facie*, conflict with the exercise of the profession under the legal-labour subordination of others. However, one must point out that when certified accountants act in the capacity of independent professionals, they are obliged to sign a written service provision contract<sup>48</sup> in which they personally and directly assume responsibility for the accounting in their charge<sup>49</sup>.

## 5.2 *The responsibility of the accountant*

With regard to the liability of this professional, it results from article 5 of the CECA that the accountant is responsible for all acts he practices in the exercise of his profession, including those of his collaborators. In fact, the recourse to the collaboration of employees or third parties, even within the scope of professional societies, does not remove the individual liability of the certified accountant.

Furthermore, we must emphasize the provisions of article 25(6) of the SOCA, framed within the chapter regarding access to the profession, in which the need to conclude and maintain a professional civil liability<sup>50</sup> insurance during the period in which the professional traineeship takes place is ruled out. A reading of this provision *a contrario sensu*, allows one to immediately understand the obligation to conclude and maintain a professional civil liability insurance in all other cases. Notwithstanding, the SOCA further on expressly establishes this obligation of certified accountants with registration in force, by themselves or through the professional association, to subscribe to a contract of professional civil liability insurance of an amount never less than EUR 50,000.00 (fifty thousand euros)<sup>51</sup>.

If there were any doubts as to the applicability of this precept to professional societies, these are dispelled upon reading the regime provided for in article 121 of the SOCA, which deals precisely with the obligation of subscription of a professional civil liability insurance by these entities. Thus, professional law firms, validly incorporated under the legal regime<sup>52</sup>, which adopt a limited liability company form, must obligatorily take out civil liability insurance to cover the risks inherent in the exercise of the professional activity of their partners, managers or administrators and other collaborators.

The minimum capital compulsorily insured cannot, in these cases, be less than EUR 150,000.00 (one hundred and fifty thousand euros).

Failure to comply with this regime implies the unlimited liability of the partners for company debts generated during the period of non-compliance with the duty to take out insurance.

In turn, the SOCA prescribes with regard to the disciplinary liability of certified accountants that they are subject to the disciplinary power of the organs of the professional association, it being certain that this liability in no way interferes with the disciplinary liability before the respective employers for breach of duties arising from employment relationships<sup>53</sup>. Likewise, the disciplinary action that the professional association promotes against the certified accountant will in no way compromise the eventual civil or criminal liability of that professional<sup>54</sup>. It is further added, in this respect, that each partner of a professional society of certified accountants and the certified accountants in

<sup>48</sup> According to the provision of article 70(5) of the SOCA.

<sup>49</sup> Under the terms of the provision of article 11(2) of the SOCA, the provision of services by the accountant within accounting firms as partners or members of the management or administration is an exception to this situation.

<sup>50</sup> Reference is also made to personal accident insurance in this precept, as can be seen in relation to the other provisions concerning this matter, however, given the focus of our work, we will disregard those mentions for this purpose.

<sup>51</sup> See article 70(4) of the SOCA; NUNES, Marco Vieira, *Estatuto da Ordem dos Contabilistas Certificados Anotado*, Cit., pp.214 et seq.

<sup>52</sup> See article 19 of the SOCA.

<sup>53</sup> In this sense, article 79(2) of the SOCA.

<sup>54</sup> According to article 79(4) of the SOCA.

their service are liable for the professional acts they perform and for the collaborators who are professionally dependent on them. At the same time, the firm is jointly and severally liable for any infringements committed<sup>55</sup>.

### **5.3. The ethical principles governing the activity of the accountant**

With regards to the deontological duties to which certified accountants are bound, the general norm determines that in the exercise of the profession, certified accountants must respect the legal norms and accounting principles in force, adapting their application to the concrete situation of the entities to which they provide services, fighting for accounting and tax truth, avoiding any situation that might put into question the independence and dignity of the exercise of the profession.

However, it results from article 3 of the CECA that, in the exercise of the profession, certified accountants must guide their actions by the principle of independence, in the measure in which they should maintain themselves equidistant from any pressure resulting from their own interests or from outside influences, in order not to compromise their technical independence<sup>56</sup>. Therefore, certified accountants should not subordinate their actions to indications from third parties that may compromise their independence of judgement<sup>57</sup>.

In accordance with the provisions of article 77 of the SOCA, incompatibility in the exercise of the profession of certified accountant is considered to exist whenever their independence may be directly or indirectly affected by conflicting interests<sup>58</sup>.

Likewise, these professionals are obliged to respect the principle of responsibility, that is, they are bound to assume responsibility for the acts practiced in the exercise of their functions, under the terms set out above.

In turn, the principle of competence implies that certified accountants exercise their functions in a diligent and responsible manner, using the knowledge and techniques at their disposal, respecting the law, the accounting principles and ethical criteria<sup>59</sup>.

Lastly, but equally important in this context, certified accountants are bound by a duty of professional secrecy, which derives from article 72 of the SOCA<sup>60</sup>, which states that they must maintain professional secrecy on the facts and documents that come to their knowledge during the exercise of their profession<sup>61</sup>.

The CECA applies both to individual certified accountants and to professionals integrated in professional societies of certified accountants or in accounting societies (with the necessary adaptations), being certain that any conduct contrary to the deontological rules makes the professional incur in disciplinary responsibility.

## **6. The professional statute of the lawyer and his deontological code**

The second example we will address next is that of the lawyer.

Following the same line of thought, we should begin by pointing out that the exercise of the legal profession, that is the practice of acts inherent to the legal profession<sup>62</sup>, in Portugal is, as a rule, admitted to lawyers registered

---

<sup>55</sup> See article 120 of the SOCA.

<sup>56</sup> NUNES, Marco Vieira, *Estatuto da Ordem dos Contabilistas Certificados Anotado*, Cit., p.210, "(...) technical independence should be understood as total autonomy regarding the correct and concrete application of the acts, entries and operations performed by the accountant, without interference from the respective employer".

<sup>57</sup> Without prejudice to hearing other technical opinions that may contribute to a correct interpretation and application of the applicable legal norms, as results from article 4(3) final part of the CECA.

<sup>58</sup> A conflicting interest is verified when a certified accountant, by virtue of the exercise of his functions, or because of them, has to take decisions or has contact with procedures, which may affect, or in which his own particular interests or those of third parties may be at stake, and which thereby harm or may harm his impartiality and rigour - article 77(2). Nevertheless, pursuant to paragraph 4, of the same legal precept, whenever there are founded doubts as to the existence of an incompatibility, certified accountants must request an opinion from the jurisdictional council.

<sup>59</sup> See article 3(1)(e) of the CECA.

<sup>60</sup> Which should be conjugated with the provisions of article 10 of the CECA.

<sup>61</sup> In this regard see NUNES, Marco Vieira, *Estatuto da Ordem dos Contabilistas Certificados Anotado*, Cit., p.231 et seq.

<sup>62</sup> See Law 49/2004, of 24 August.

with the Portuguese Bar Association. The following shall be considered as acts proper of the legal profession<sup>63</sup>: drafting of contracts and practice of preparatory acts aimed at the constitution, amendment, or termination of legal transactions, namely those carried out at registries and notary offices; negotiation aimed at the collection of credits; and exercise of a mandate within the ambit of a complaint or impugnation of administrative or tax acts.

### **6.1 Mode of exercise of the profession**

Similarly to what is provided for the exercise of the profession of certified accountant and of the function of data protection officer, the Statute of the Portuguese Bar Association (SPBA) provides that the exercise of the legal profession may also be carried out in a regime of subordination<sup>64</sup> (other than practice as a liberal profession). Thus, article 73 of the SPBA<sup>65</sup> expressly recognizes the possibility for lawyers to exercise their profession subject to legal subordination, although the Portuguese Bar Association<sup>66</sup> is given exclusive competence to assess the compliance of the clauses of the contract entered into with the lawyer with the deontological principles governing the profession<sup>67</sup>.

Nevertheless, the regulation of this exercise is not sufficient with the mere recognition of its existence and with the validity of the wording of the contract. In effect, the SPBA also focuses its attention on the orientations or instructions that may be given to the lawyer in the exercise of his or her function to the extent that they may restrict the exemption or independence that should govern his or her performance or may even consist in the violation of deontological principles of the profession. In this sense, these invalid situations are once again sanctioned with the regime of nullity<sup>68</sup>.

Further on, on the regime of incompatibilities and impediments, the SPBA prescribes that lawyer shall always exercise the defence of the rights and interests entrusted to them with full technical autonomy and in an exempt, independent, and responsible manner<sup>69</sup>.

Under these terms, the exercise of the legal profession is irreconcilable with any position, function or activity that may affect the exemption, independence and dignity of the profession<sup>70</sup>.

Within the framework of this regime, we find a concretization of what was said above in relation to the exercise of the legal profession in a regime of legal subordination. Thus, any form of appointment or contract, whether of a public or private nature, namely the employment contract, under which the lawyer exercises his or her activity, should respect his or her full technical autonomy, exemption, independence, responsibility, as well as the other deontological rules provided for in the SPBA.

---

<sup>63</sup> As results from the formulation “They are also acts proper of lawyers”, included in article 1(6) of Law no. 49/2004, of 24 August.

<sup>64</sup> In effect, lawyers may exercise the profession by way of provision of services, (i) in an individual practice alone or (ii) by forming or joining law firms, as partners or associates.

<sup>65</sup> MAGALHÃES, Fernando Sousa, *Estatuto da Ordem dos Advogados - Anotado e Comentado*, 11th edition, Almedina, 2016, p.100, “This precept refers to the exercise of the profession under an employment contract regime, attempting to reconcile the independence of the lawyer with the duty of subordination that is an essential element of this type of contract”.

<sup>66</sup> It should be noted that, pursuant to article 73(4), (5) and (6) of the SPBA, the General Council of the Portuguese Bar Association may request public employers that have intervened in such contracts to provide a copy of the contracts in order to assess the legality of the respective clauses. Furthermore, when the employing entity is a private law person, any of the contracting parties may request the General Council to issue a binding opinion on the validity of the clauses or of the acts carried out in the execution of the contract. In the event of dispute, the opinion referred to in the preceding paragraph is mandatory.

<sup>67</sup> Note that clauses of the contract that do not comply with the deontological principles are null and void, under the terms of article 73(2) of the SPBA.

<sup>68</sup> In the same sense, article 81(4) establishing that “any contractual stipulations, as well as any guidelines or instructions of the contracting entity that restrict the exemption and independence of lawyers or that, in any way violate the deontological principles of the profession are null and void”.

<sup>69</sup> See article 81(1) of the SPBA.

<sup>70</sup> See article 81(2) of the SPBA.

## **6.2. The civil liability of lawyers**

One of the fundamental aspects of the professional statute of lawyers has to do with civil liability. Lawyers should take out and maintain a professional civil liability insurance, taking into account the nature and the scope of the risks inherent to their activity.

However, the minimum amounts of the insured capital shall be different depending on the liability regime for which the lawyer chooses. Lawyers shall always benefit from the minimum group professional liability insurance of EUR 50,000.00 (fifty thousand Euros)<sup>71</sup>. However, professionals wishing to have their civil liability limited<sup>72</sup>, in cases where it is based on mere fault, to the amount of 250 000 Euros (two hundred and fifty thousand Euros), should take out and maintain professional indemnity insurance for a minimum capital of 250 000 Euros (two hundred and fifty thousand Euros)<sup>73</sup>.

Recalling, once again, what was said above, the activation of civil liability in no way prejudices the activation of any disciplinary or criminal liability arising from the practice of the same fact<sup>74</sup>.

Finally, as regards the regime of disciplinary responsibility, lawyers are subject to the exclusive disciplinary power of the bodies of the Portuguese Bar Association. In this regard, professionals providing services in the national territory under the regime of freedom to provide services and law firms are put on the same footing as lawyers<sup>75</sup>.

Thus, whenever by action or omission a lawyer violates, maliciously or culpably, any of the duties established in the SPBA, in the respective regulations and in other applicable legal provisions, he or she commits a disciplinary infraction<sup>76-77</sup>.

## **6.3 The deontological principles that govern the activity of lawyers**

Lawyers are immediately subjected to the principle of integrity or probity, according to which lawyers should adopt a public and professional behaviour adequate to the dignity and responsibilities of the function they exercise, in respect for the other deontological principles to which they are subjected<sup>78</sup>.

In turn, the principle of independence is one of the fundamental principles of the professional deontology of lawyers<sup>79</sup> and, in the exercise of his or her profession, lawyers should always maintain their independence, in any circumstance, acting free from any pressure, particularly that resulting from their own interests or from outside influences, abstaining from neglecting professional deontology with the purpose of pleasing their client, colleagues, the court or third parties.

In the same sense, with respect to client relations, it is established that lawyers have the duty to act in such a way as to defend the legitimate interests of their clients, but without prejudice to the compliance with the legal and deontological norms to which they are bound<sup>80</sup>.

Within this context, we would also like to highlight the primordial role assumed by the professional secret (article 92 of the SPBA), according to which lawyers are obliged to keep professional secrecy in relation to all facts that

<sup>71</sup> See article 104(3) of the SPBA.

<sup>72</sup> We refer to a maximum limit.

<sup>73</sup> In this case, the lawyer should write the expression “limited liability” on his letterhead.

<sup>74</sup> MAGALHÃES, Fernando Sousa, *Estatuto da Ordem dos Advogados - Anotado e Comentado*, Cit., p.185, “In addition to being exclusive, the disciplinary competence of the Portuguese Bar Association over lawyers is also independent and autonomous, which is why it is established in paragraph 1 of article 116 of this SPBA that disciplinary responsibility is independent from civil and criminal responsibilities”.

<sup>75</sup> Pursuant to the provisions of article 114(5) of the SPBA.

<sup>76</sup> According to article 115(2) of the SPBA, attempt is punishable.

<sup>77</sup> Under the provisions of article 115(3) of the SPBA, the disciplinary infraction may be light, serious or very serious, depending on the intensity of the violation of professional duties to which he is bound.

<sup>78</sup> See article 88 of the SPBA. Paragraph 2 of this legal precept tells us that “honesty, probity, rectitude, loyalty, courtesy and sincerity are professional obligations”. In this regard, see also the general duty of courtesy prescribed in article 95 of the SPBA.

<sup>79</sup> See article 89 of the SPBA. In this sense, MAGALHÃES, Fernando Sousa, *Estatuto da Ordem dos Advogados - Anotado e Comentado*, Cit., p.127 et seq.

<sup>80</sup> According to article 97(2) of the SPBA.

come to their knowledge in the exercise of their functions or the provision of their services. We are faced with a true duty of secrecy, in the sense we have previously underlined, which is known as the “letterhead of the legal practice”<sup>81</sup>.

Law firms enjoy the rights and are subject to the duties applicable to lawyers that are compatible with their nature, being particularly subject to the deontological principles and rules, as well as to the disciplinary power of the Portuguese Bar Association<sup>82</sup>.

## Conclusion

As is clear from the incursion we have just made into the legal regime governing the exercise of the function of data protection officer contained in the GDPR and the analogy we have established with other duly regulated professions in the Portuguese legal system, it is clear that there is a set of principles common to all these professionals and that there is a high risk in relation to their exercise, which is justified by the general public interest, which requires protection.

Firstly, we have seen that it is common to the three professions portrayed that the respective professionals may exercise their profession as service providers or as employees. The establishment of different ways of exercising the profession shows that there is no incompatibility in principle between exercising the profession in a position of legal subordination and independence in the performance of the respective duties.

The data protection officer does not infringe the principle of independence to which he is subject merely by exercising his profession in a subordinate legal and employment relationship. For that to be the case, there must be an incompatibility between the principles governing the activities of the DPO (and with which that professional must comply) and the exercise of the employer’s powers or contractual provisions.

The absence of a professional association that regulates access to and the exercise of the profession does not allow for consultation and the clarification of any doubts that may exist as to the validity of the contracts in which the professional is involved, as to compliance with the professional and ethical duties to which he or she is subject, or any situations of impediment or conflict of interest. The competence for checking and analysing this type of issue will, under the current framework, fall to the data controller or processor, and ultimately to the data protection officer.

Secondly, we identify similarities with regard to the principle of independence which guides the three professions analysed, insofar as the professional must keep his or her area of activity free from any external or internal pressure or interference. The principle of independence does not therefore conflict with the possibility of exercising the profession in a subordinate capacity or with the responsibility (civil, disciplinary or criminal) of the DPO.

The fact that the DPO may be civilly liable for damage caused to others, criminally liable, and perhaps disciplinarily liable (in cases where they are subordinate in legal and employment matters, since no such professional association exists) does not affect their independence in the exercise of their functions. In fact, the DPO cannot be dismissed or penalised by the controller or processor simply because of the fact that he performs his duties. However, such civil, criminal and disciplinary (employment) liability may arise, depending on the case and the manner in which the profession is exercised, in the situation where the data protection officer fails to perform his/her duties properly, in accordance with the applicable terms.

Last but not least, account should be taken of the degree of responsibility of the decisions taken by the controller on the basis of the data protection officer’s work, as well as of the damage that such decisions may cause when they are based on an opinion issued in breach of the law. Given the risk that the role of data protection officer represents (for the professional and for other subjects, especially data subjects), it would be salutary to prescribe a compulsory professional civil liability insurance.

As we have seen with regard to the example professions, we are faced with a particularly important public interest which justifies the creation of an associative structure representing the profession, capable of controlling access to and the exercise of the profession, elaborating technical standards, principles and deontological rules and creating an autonomous disciplinary regime. This scheme would strengthen the DPO’s autonomy and contribute to reinforcing their independence, thus helping to achieve the objectives of the regulation.

---

<sup>81</sup> MAGALHÃES, Fernando Sousa, *Estatuto da Ordem dos Advogados - Anotado e Comentado*, Cit., p.137.

<sup>82</sup> See article 213(5) of the SPBA.