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File identification

Archive resolution of the previous information no. IP 136/2020, referring to Rosanbus, SL.

Background

1. On 11/05/2020, the Catalan Data Protection Authority received a letter from a trade union in which it filed a complaint against Rosanbus, SL (hereinafter, Rosanbus), on the grounds of an alleged non-compliance with the regulations on personal data protection. Specifically, the reporting entity explained that Rosanbus had processed the "SEPE [Public Employment Service] provision, without asking for individual consent from the workers. This has resulted in an entry into the bank accounts of an undue unemployment benefit, after the ERTE [temporary work regulation file] presented by the company collectively by the Department of Labor and Social Affairs was rejected. This fact has also not been communicated to the workers individually."

The reporting entity provided various documentation relating to the events reported on 06/11/2020.

2. The Authority opened a preliminary information phase (no. IP 136/2020), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), to determine whether the facts they were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances involved.

3. In this information phase, on 06/16/2020 the reported entity was required to report, among others, on the legal basis that would legitimize the communication of data to the SEPE of the employees affected by the 'ERTE; as well as whether the affected workers were informed about this communication.

This requirement was reiterated on 07/21/2020.

4. On 31/07/2020, Rosanbus responded to the aforementioned request through a letter in which it stated, among others, the following:

- That the collective application for unemployment benefits affected people intended to provide the public transport service managed by Rosanbus.
- That it was not considered necessary to request individual authorization because it was a collective request addressed to a public entity in compliance with the provisions of Royal Decree-Law 8/2020, of March 17, on extraordinary urgent measures to deal with to the economic and social impact of COVID 19 (hereinafter, RDL 8/2020).

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- That all the company's workers had signed to be informed that "Your data may be transferred to the competent public entities at tax, labor and social security level, as well as to other legally competent bodies and entities (forces and bodies of security, judicial bodies, fiscal ministry,...) when this is proven in accordance with the legislation in force at any given time."

- That the legal basis for the communication of employee data to the SEPE is in the RDL 8/2020.
- That the ERTE request was submitted on 03/26/2020 in accordance with RDL 8/2020, but two days later Royal Decree-Law 9/2020, of March 27, was published by which complementary measures are adopted, in the labor field, to mitigate the effects derived from COVID-19 (hereafter, RDL 9/2020), which complemented and detailed some measures relating to the processing of ERTE provided for in RDL 8 /2020 and specified the procedure for recognition of the contributory unemployment benefit, as indicated in the statement of reasons of RDL 9/2020.
- That article 3 of RDL 9/2020 provides the following:

> "1. The procedure for recognition of the contributory unemployment benefit, for all persons affected by procedures for suspension of contracts and reduction of working hours based on the cases provided for in articles 22 and 23 of Royal Decree-Law 8/2020, of March 17 , will be initiated by means of a collective request presented by the company to the entity managing unemployment benefits, acting on behalf of those.
>
> This request will be completed in the form provided by the entity managing unemployment benefits and will be included in the communication regulated in the following section.
> 2. In addition to the collective request, the communication referred to in the previous section will include the following information, individually for each of the affected workplaces: (...) f) For the purposes of accrediting the representation of the persons trabajadoras, a responsible declaration in which it will be stated that the authorization of those has been obtained for its presentation. (...)
>
> 3. The communication referred to in the previous point must be sent by the company within 5 days of the request for the temporary employment regulation file in cases of force majeure to which article 22 of the Royal Decree-law refers 8/2020, of March 17, or from the date on which the company notifies the competent labor authority of its decision in the case of the procedures regulated in its article 23. The communication will be sent through electronic media and in the form to be determined by the State Employment Service.
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> In the event that the request had been made prior to the entry into force of this royal decree-law, the 5-day period will begin to count from this date.

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> 4. The non-transmission of the communication regulated in the previous sections will be considered conduct constituting the serious infraction provided for in article 22.13 of the consolidated text of the Law on Infractions and Sanctions in the Social Order, approved by Royal Legislative Decree 5/2000 , of August 4. (...)"

- That due to the brevity of the deadline marked by the RDL 9/2020 (5 days), it was considered it is sufficient to inform through the notice board and the company committee, taking into account that the workers had already been informed about the communication of their data.

The reported entity attached various documentation to the letter.

Fundamentals of law

1. In accordance with the provisions of articles 90.1 of the LPAC and 2 of Decree 278/1993, in relation to article 5 of Law 32/2010, of October 1, of the Authority Catalan Data Protection Agency, and article 15 of Decree 48/2003, of February 20, which approves the Statute of the Catalan Data Protection Agency, the director of the Catalan Data Protection Authority.

2. Based on the account of facts that has been set out in the background section, it is necessary to analyze the reported facts that are the subject of this file resolution.

Previously, as explained in the background, Rosanbus has informed that the collective application for unemployment benefits that is the subject of a complaint, affected the employees assigned to provide the public service that it manages.

Therefore, this Authority is competent to address the facts reported in accordance with article 3.f) of Law 32/2010, since they refer to a treatment that is linked to the provision of public services managed by Rosanbus.

Having said that, the reporting entity considers that once the Rosanbus company raised the ERTE due to force majeure, this company communicated the data of its employees to the SEPE to process unemployment benefits without the consent of the people
affected employees, which would not have been communicated to the affected workers individually.

In this last sense, according to Rosanbus, the workers had already been informed prior to the reported communication of data, that one of the categories of recipients of their data could be the competent public entities in the field of labor and social security. To this end, Rosanbus has provided a document signed by several workers through which they state that they have read the document "Comunicación a los empleados en materia de confidenidad y protección de datos de personal character", in which they were informed about the recipients of their data

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Having said that, RDL 8/2020 provided for a series of measures to make the mechanisms for temporary adjustment of activity more flexible to avoid layoffs. Among these measures qualified as exceptional, there were those relating to the procedures for suspension of contracts and reduction of working hours due to force majeure -cause invoked by the reported entity- (article 22) or for economic, technical, organizational and production reasons (article 23).

In relation to these unemployment protection measures provided for in precepts 22 and 23 of RDL 8/2020, article 25 of the same rule established the following:

> "1. In the event that the company decides to suspend contracts or temporarily reduce the working day for the reasons provided for in article 47 of the consolidated text of the Workers' Statute Law, based on the extraordinary circumstances regulated in this real decree law, the Public Service of State Employment and, where applicable, the Social Institute of the Navy, will adopt the following measures:
> a) The recognition of the right to unemployment benefits, regulated in title III of the consolidated text of the General Law of Social Security, approved by Royal Legislative Decree 8/2015, of October 30, for the affected workers , although they lack the minimum quoted occupation period necessary for it. (...)"

For its part, article 3.1 of RDL 9/2020 which developed article 25 of RDL 8/2020, established that "The procedure for recognition of unemployment benefits, for all persons affected by suspension procedures of contracts and reduction of working hours based on the cases provided for in articles 22 and 23 of Royal Decree-law 8/2020, of March 17, will be initiated through a collective request submitted by the company to the entity managing unemployment benefits , acting on behalf of those."

And the second section of article 3 of RDL 9/2020 determined that along with the collective request, the communication to the SEPE would include "In order to accredit the representation of the working people, a responsible statement in the that it must be stated that authorization has been obtained from those for its presentation" (letter f).

The communication of the information required by article 3.2 of RDL 9/2020 had to be sent by the company "within 5 days from the request for the temporary employment regulation file in cases of force majeure referred to in article 22 of Royal Decree-Law 8/2020". And in the event that the request had been submitted prior to the entry into force of RDL 9/2020 (28/03/2020), "the 5-day period will begin to count from this date."

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Therefore, the applicable sectoral regulations required companies that decided to suspend contracts or temporarily reduce working hours to submit a collective request to start the procedure for recognition of the contributory benefit for unemployment, which 'had to be accompanied by a responsible declaration in which the company stated that it had obtained the authorization of the employed persons for the submission of the application on their behalf.

Well, aside from these and other requirements imposed by the sectoral regulations analyzed earlier, from the perspective of the regulations on the protection of personal data we are faced with a treatment whose legal basis is not based on consent of the affected people.

In relation to the consent of interested persons, article 4.11 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data and the free circulation of these (hereafter, RGPD) defines it as "any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a declaration or a clear affirmative action, the treatment of data personal that concern him".

Therefore, in order for the consent to be valid, among others, it must be free. That is to say, the affected person must have a capacity for real choice and control. In this respect, the RGPD establishes in recital 43 that, to ensure that consent has been given freely, this must not constitute a valid legal basis for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller and therefore it is unlikely that consent was freely given in all the circumstances of this particular situation.

For the reasons stated, the communication of data by the company to the SEPE could not be based on the consent of the employees. In the case reported, it is considered that the treatment was based on other legal bases also contemplated in article 6.1 of the RGPD. Specifically, in the legal bases provided for in
article 6.1.b) (the treatment was necessary to execute a contract to which the interested party was a party), in article 6.1.c) (the treatment was necessary to fulfill a legal obligation applicable to the person in charge of the treatment - imposed by RDL 8/2020 and RDL 9/2020-, which required the submission of said application collectively), or even in article 6.1.f)
(the treatment is necessary to satisfy the legitimate interests pursued by the person in charge of the treatment), all of them from the RGPD.

3. In accordance with everything that has been set out in the 2nd legal basis, and given that during the actions carried out in the framework of the previous information it has not been accredited, in relation to the facts that have been addressed in this resolution, no fact that could be constitutive of any

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of the infractions provided for in the legislation on data protection, it is necessary to agree on their archive.

Therefore, I resolve:

1. File the actions of prior information number IP 136/2020, relating to Rosanbus, SL.

2. Notify this resolution to Rosanbus and communicate it to the reporting entity.

3. Order the publication of the resolution on the Authority's website (apdcat.gencat.cat), in accordance with article 17 of Law 32/2010, of October 1.

Against this resolution, which puts an end to the administrative process in accordance with article 14.3 of Decree 48/2003, of 20 February, which approves the Statute of the Catalan Data Protection Agency, the denounced entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority, within one month from the day after its notification, in accordance with the which provides for article 123 et seq. of Law 39/2015. An administrative contentious appeal can also be filed directly before the administrative contentious courts, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998 , of July 13, governing the contentious administrative jurisdiction.

Likewise, the reported entity can file any other appeal it deems appropriate to defend its interests.

The director,