apdcat
Autoritat Catalana de Protecció de Dades

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

RESOLUTION of sanctioning procedure no. PS 5/2018, referring to the Catalan Tax Agency of the Department of the Vice-presidency and of Economy and Finance of the Generalitat of Catalonia.

Background

1.- At the end of January 2017, several social media published news about public statements made by Mr. (...) in conferences he gave, in which he referred to the possibility that the Generalitat de Catalunya had obtained tax or fiscal data illegally.

In relation to this news, on 27/01/2017 the person in charge of the Secretary of Finance, dependent on the Department of the Vice-Presidency and of Economy and Finance of the Generalitat of Catalonia (hereinafter, VEH Department), went alone request the Catalan Data Protection Authority to carry out an audit in order to verify whether the processing of personal data carried out in the tax field by the VEH Department and the Catalan Tax Agency (hereinafter ATC) the Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter LOPD) was adjusted.

2.- In the months of February and March 2017, the Catalan Data Protection Authority received 36 complaints made by different people/entities against the VEH Department, with reason for the demonstrations made by Mr. (...), to which the corresponding reference number was assigned. Specifically, those letters denounced the alleged preparation, by the Department of VEH, *of "a tax database of Catalan citizens",* allegations that were based on the aforementioned statements that had been published in the media .

3.- On the same 27/01/2017, the Authority started an audit of the ATC - as the body responsible for the treatment of tax data in the area of the Generalitat de Catalunya - in order to check and rule on compliance with the regulations on the protection of personal data and the rest of the applicable rules, of the processing of fiscal data carried out by this body.
This audit was extended until 05/15/2017, the date on which the final audit report is issued, a copy of which is included in these proceedings.

During this audit, no circumstances were detected that evidenced the collection and/or recording of tax or fiscal data in an illicit manner, treatment to which the complaints specifically referred.

Despite the above, as part of the audit carried out by the Authority, some treatments of personal tax data carried out by the ATC were detected, which might not conform to the provisions of the protection regulations of data and which gave rise to the initiation of this sanctioning procedure. Specifically:

a) On the processing of data of large families or people with disabilities by the ATC

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

According to the audit report, the Department of Work, Social Affairs and Families would be responsible for the aforementioned data, with the ATC acting as the one in charge of processing said data with regard to its transmission to the Agency State of the Tax Administration.
This task of processing would not be formalized in a contract that contemplates the provisions established in article 12 of the LOPD.
Given the above, and to the extent that the eventual lack of a contractor contract is a fact for which the Department of Labor, Social Affairs and Families could be responsible, this Authority initiated a separate prior information (IP 853/2017) in order to find out the circumstances of the facts and the subjects responsible in relation to this matter.

b) On the conservation of tax data voluntarily provided by some people.
The ATC kept personal tax data for the years 2013 and 2014, provided voluntarily by some people, both in paper format and in automated format, when this information would not be necessary to carry out the functions entrusted to the ATC.

c) On the lack of a contract for the ATC data processor with an external company.
During the year 2017 the company (...)(...), SL provided the ATC with the service of transfer and custody of documentation in paper format generated by this entity. The provision of this service involved the processing by (...)(...) of personal data included in the ATC files, so the legal relationship between the ATC and (. ..)(...) would fit into the data controller model provided for in article 12 of the LOPD. The provision of this service during the year 2017, in which (...)(...) would have the status of data controller, was not covered by the legal instrument in force that contemplated the provisions established by the 'article 12 of the LOPD, to the extent that the validity of the contract linking the ATC with the company (...)(...) had ended on 12/31/2016.

d) On the management of the expiration of access passwords to the G@udi system.
The ATC had implemented access control mechanisms that managed the permissions and authorizations to access functionalities and data of users, both internal and external, of its information systems and networks; providing users with personal usernames and passwords for their unequivocal identification. It was detected, however, that the passwords were not changed with the minimum periodicity of one year required by article 93 of Royal Decree 1720/2007, of December 21, which approves the Regulations for the deployment of the LOPD (hereinafter , RLOPD); and that the security document drawn up by the ATC did not foresee this requirement either.

4.- As has been advanced in the 3rd antecedent, during the audit no circumstances were detected that evidenced the collection and/or recording of tax or fiscal data in an illicit manner, treatment to which they referred specifically the allegations. With respect to the events reported, it is necessary to demonstrate that the information published in the media that had been provided with the report, served to accredit the existence of the manifestations of Mr. (...), but these, by themselves, were insufficient for the purposes of certifying whether the ATC, as responsible for the file containing tax data, had carried out the specifically reported data processing.

Despite this, and to the extent that there would be a link between these facts reported and those investigated by Court of Inquiry no. 13 of Barcelona in the corresponding judicial procedure, this Authority, in accordance with the instructions of the Court of Inquiry no. 13 of Barcelona, en

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

the initiation agreement declared the suspension of inspection actions relating to the eventual collection and/or recording of tax or fiscal data in an illicit manner.

5.- On 03/08/2018 the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the ATC, firstly, for an alleged serious infringement provided for in article 44.3.c), in relation to article 4.1 of the LOPD; secondly, for an alleged minor infraction provided for in article 44.2.d), in relation to article 12 of the LOPD; and in the third second, for an alleged serious infringement provided for in article 44.3.h), in relation to article 9 of the LOPD. Likewise, he appointed the official of the Catalan Data Protection Authority, (...) as the person instructing the file. This initiation agreement was notified to the imputed entity on 03/08/2018.

In the initiation agreement itself, the reasons why no imputation was made were explained regarding the facts reported. In this regard, the following was set out in the section on reported facts not imputed in the initiation agreement:
"As indicated in the antecedents, the complaints received by the Authority following the news published in the media, referred to the alleged illegal collection and/or recording of tax or fiscal data. In the framework of the audit carried out by this Authority, no evidence of this illicit treatment to which the complaints referred was detected.

However, the actions that would correspond to this Authority in exercising the power of control inspection - and eventually sanctioning - with respect to the treatments specifically reported, are suspended with this initiation agreement. This decision to suspend actions is adopted in accordance with the instructions of the Court of Instruction no. 13 of Barcelona, in view of the possible coincidence between the facts investigated by the aforementioned Court in the corresponding judicial procedure, and those that had been reported to this Authority. This suspension will have to be maintained until the corresponding pronouncement is made in court, and is based on the principle of criminal priority, as provided for in art. 106.4.a of Law 26/2010, of August 3, on the legal regime of the public administrations of Catalonia, and in article 5 of Decree 278/1993, of November 9, on the sanctioning procedure applied to areas of competence of the Generalitat".

In the initiation agreement, the ATC was granted a period of ten business days from the day following the notification to formulate allegations and propose the practice of evidence that it considered appropriate for the defense of its interests.

6.- The ATC made objections to the initiation agreement by means of a letter dated 04/13/2018, through which it provided various documentation.

7.- On 23/07/2018, the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority declare that the ATC had incurred, in the first place , in a serious violation provided for in the article

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

44.3.c), in relation to article 4.1; secondly, a minor infringement provided for in article 44.2.d), in relation to article 12 of the LOPD; and thirdly, in a serious infringement provided for in article 44.3.h), in relation to article 9, all of them of the LOPD. This resolution proposal was notified on 07/23/2018, and a period of 10 days was granted to formulate allegations.

8.- By means of a letter dated 27/07/2018, the ATC has formulated allegations to the proposed resolution.

Of all the actions taken in this procedure, the facts that are detailed below as proven facts are considered proven.

Proven Facts

1.- On the conservation of tax data voluntarily provided by some people:
The ATC kept on 01/27/2017 (when the audit carried out by the Authority at the ATC began), and also on 05/27/2017 (when said audit ended), data relating to the tax of natural persons for the years 2013 and 2014, provided voluntarily by some people, both in paper format and in automated format, when this information was not necessary to carry out the functions entrusted to the ATC.

2.- On the lack of contract for the person in charge of the treatment:
During the year 2017 the company (...)(...), SL provided the ATC with the service of transfer and custody of documentation in paper format generated by this entity. The provision of this service involved the processing by the company (...)(...), SL of personal data included in the files of the ATC, so the legal relationship between the ATC and the company (...)(...) would fit into the data controller model provided for in article 12 of the LOPD. The provision of this service during the year 2017, in which (...)(...) would have the status of data controller and ATC the file manager, was not covered by the legal instrument in force that contemplated the provisions established by article 12 of the LOPD, to the extent that the validity of the contract that linked the ATC with the company (...) (...) had ended on 12/31/2016 .

3.- About the management of the expiration of access passwords to the G@udi system:
The ATC had implemented access control mechanisms that managed the permissions and authorizations to access functionalities and data of users, both internal and external, of its information systems and networks; providing users with personal usernames and passwords for their unequivocal identification. However, as part of the audit carried out by this Authority, it was detected that the passwords were not changed with the minimum periodicity of one year provided for in article 93.4 of the RLOPD, and that the security document prepared by the ATC did not either did not foresee this requirement.

Fundamentals of Law

1.- The provisions of Law 39/2015, of October 1, on the common administrative procedure of public administrations (hereafter, LPAC), apply to this procedure; as well as in Decree 278/1993, of November 9, on the sanctioning procedure for application to the areas of competence of the Generalitat, as provided for in DT 2ª of Law 32/2010, of October 1, of

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

the Catalan Data Protection Authority. In accordance with articles 5 and 8 of Law 32/2010, the resolution of the sanctioning procedure corresponds to the director of the Catalan Data Protection Authority.

2.- As part of this sanctioning procedure, the accused entity made allegations against the initiation agreement and has also done so against the resolution proposal. The first statement of objections was already analyzed in the resolution proposal formulated by the instructing person, although it is considered appropriate to make a mention of it in the present resolution, given that in the allegations formulated before the resolution proposal those previously formulated before the initiation agreement are reproduced in part. The set of allegations made by the accused entity are then analyzed.

2.1.- On the *"lack of notification of the initiation of the disciplinary proceedings".*

The ATC formulated some considerations about the way in which the notification of the initiation agreement had been practiced. Well, as evidenced by the instructor in the proposal, the notification of the decision was properly made through the EACAT platform and it is certified that it was entered in the ATC register on 03/08/2018 at 12 :15:07 hours. This platform provides all public administrations - including the ATC - an inter-administrative processing service, through the use of the recognized electronic signature and the management of electronic entries in the records, of the issuing body and of entry of the receiving organism. At this point it is necessary to remember that art. 41 of the LPAC provides that notifications must preferably be made by electronic means, *"and in any case, when the interested party is obliged to receive them by this means".* And this is the case of the ATC, in accordance with the provisions of art. 14.2 of the LPAC. Therefore, if the notification made to the ATC through the EACAT platform did not arrive correctly in the S@rcat system, it would in any case be an incident resulting from the lack of integration of both information systems (EACAT and S@rcat) in the part that affects the ATC, a circumstance for which the ATC is responsible.

2.2.- On the conservation of tax data voluntarily provided by some people (fact proven 1st)

In relation to this first imputed fact, the ATC asserted in its statement of allegations in the initiation agreement that, in relation to the tax data kept in paper format, these were destroyed on 07/20/2017 (a copy of the documentation destruction certificate was provided) and that *they were not "destroyed beforehand, precisely because this Agency was being subjected to a voluntarily requested audit for which reason, it was stated by the APDCAT itself the preservation of the documentation until it is finished".*

In relation to *"the computer data" (it* is understood in an automated format), the ATC argued that the same *"ceased to be operational in August 2016, that is to say before the end of the audit".* In this regard, they invoked the report that the ATC had drawn up on 02/22/2017 at the request of the Authority's auditors, which contains the following text

"The ticket manager application was operational from May 2014 until August 2016 when the service was canceled.

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

The termination of the service requests that the backup copies of the servers be maintained for the period established by the service which is 2.
Backups are maintained within the recovery system at (company name) center
If you want to recover the information, it would be necessary to re-enable a database server and deposit the contents of the backup system".

In this regard, the ATC also provided the document entitled *"Request for change/ discharge of service"* , in in relation to the request that the ATC addressed to the Center for Telecommunications and Information Technologies (CTTI). In this request, the termination of certain servers of the "Management/EntradesATC" service was requested; 09/01/2016 was specified as the effective date of execution of the request and the conservation (for preservation purposes) of the *"Production Database"* was requested for a period of 2 years.

To end this point, the ATC affirmed that, in any case, the alleged infringement charged would be time-barred in accordance with the provisions of article 47.1 of the LOPD, which determined that serious infringements are time-barred after two years. Thus, the ATC argued that *"if we take into account that the data provided voluntarily by individuals corresponded to the fiscal years 2013 and 2014, it is obvious that the statute of limitations for the imputed offense (...)"*

As a preliminary issue, it should be highlighted, as was done in the proposal, that the information voluntarily provided by the public that the ATC kept for several years - and specifically on 01/27/2017 when the audit of the authority-, was not necessary for the exercise of its functions, hence such conservation is considered to violate the principle of data quality enshrined in article 4.1 of the LOPD.

The proposal first analyzed until what date the ATC kept the tax information - both in paper and automated format - since it depended on this circumstance
the appreciation or not in the present case of the figure of the prescription invoked by the entity. As explained in the proposal, in the analyzed case we are faced with a permanent infringement, in which the illegal conduct is not exhausted in a single act - which the ATC temporarily placed in the fiscal years of 2013 and 2014 -, but is maintained over time (Supreme Court Judgment of 04/11/2013, FJ 8è). In these cases of permanent infringement, the limitation period begins to count from the day on which the illegal conduct ceases, in accordance with the provisions of article 30.2 of Law 40/2015, of October 1, of the legal regime of the public sector:
"The limitation period for infringements begins to count from the day on which the infringement was committed. In the case of continuous or permanent infringements, the term begins to run from the end of the infringing conduct".

Thus, with regard to the information in paper format, it should be noted that, regardless of whether the documentation was kept during the audit, at the request of the Authority's auditor staff and that it was finally destroyed once this was completed on 07/20/2017, the fact is that the ATC kept this tax information on its own initiative far beyond the period in which it would be justified for its functions, and specifically until 01/27/2017 when started the audit. Therefore, the responsibility for the conservation of tax documentation until

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

at the time the said audit was initiated by this Authority, is attributable solely and exclusively to the ATC.

In short, and without questioning the statement of the ATC made in its letter of allegations to the initiation agreement regarding the request to preserve the documentation by the Authority's auditing staff, as indicated the instructor in the proposal, it is the day 27/01/2017 that must be taken into account as the *cut-off date* of the two-year term that article 47.1 establishes for prescription purposes. Taking into account that the initiation agreement was notified on 08/03/2018, it is clear that the two-year period set by the regulations had not expired on that date and, therefore, it cannot be appreciated in in this case the figure of the prescription.

With regard to the automated databases, the instructor explained on the date she formulated the proposal, that at that time the aforementioned information would still be kept by the ATC, since this was clear from what was stipulated in the *"request for change/ termination of the service"* document - transcribed above - in which the retention of the data for a period of two years was requested on 01/09/2016.

In relation to this last issue, the ATC, in its statement of objections to the proposal, insists on affirming that *"the ATC (...) does not keep the aforementioned data, since, as stated in the certificate of destruction that was provided in the statement of objections* (in the initiation agreement) *as document number 2, commissioned the Center for Telecommunications and Information Technologies (CTTI) on September 1, 2016, the destruction of this data. This order, which was processed by the CTTI, implies that from the request for destruction, this Agency no longer had the aforementioned data and did not have access to them. That is to say, the destruction order meant that the data no longer appeared in any ATC archive. Another matter, unrelated to this Tax Agency, are the contractual relationships between the CTTI and other companies responsible for the destruction of data, which establishes the obligation to preserve this data, along with many other destroyed data, in a backup during a security period of two years. This circumstance is not attributable to this Agency, although it must be emphasized that all the data that is preserved in this backup is completely inaccessible to third parties and, obviously, to the ATC itself".*

Regarding these allegations, first of all it must be said that document no. 2 entitled *"Request for change/ termination of service",* contributed by the ATC to this procedure and to which it alludes in its statement of allegations to the proposal, it does not appear that the conservation for two years was a prerogative of the CTTI - a company that, according to the same document, acts as the person in charge of the treatment - but it can be inferred that it was the ATC that requested it, since in section c) of the 3rd point relating to *"Treatment of the information"* of said document contains the following verbatim:
"What will be the retention time?
(requesting retention time does not imply cancellation. This must be requested explicitly).

two years"

And this document was signed by a person responsible for the ATC, who held the position of data controller. Likewise, he would also certify that he had such a conservation decision

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

adopted by the ATC the fact that finally it was this entity that expressly requested on 07/24/2018 the destruction of the stored information, in accordance with the document provided by the ATC together with its letter of allegations in the proposal and that is mentioned later.

In any case, as the instructor already explained in the proposal, even if it were considered that from the indicated date (09/01/2016) the data was blocked (and therefore canceled in terms of the LOPD), the infringement would not be time-barred, because the initiation of the present procedure was notified before the expiry of the two-year period provided for in article 47.1 of the LOPD for the prescription of serious infringements.

In any case, also with regard to the conservation of data in an automated format, the ATC in its statement of objections to the proposal states that *"in order to remove any doubt about this matter, we attach as document number 3 a certification issued by UTE (...)(...) on July 26, 2018 according to which this data has also been removed from the backup, that is to say, it no longer exists".* In order to prove this statement, a document is provided in which the said company certified that it had destroyed the disputed data.

That being the case, the deletion of the aforementioned information is therefore considered accredited, although this circumstance does not alter the imputation sustained here or its legal qualification. This, without prejudice to the impact that this action will have on the eventual imposition of corrective measures, a matter that will be analyzed in the 7th legal basis

2.3.- About the *"lack of a treatment order contract".*

With respect to the second imputed fact, the ATC in its letter of allegations to the initiation agreement justified the lack of contract in *"the complex administrative and judicial situation regarding the awarding of the collection, transfer, custody contract , consultation and destruction of administrative documentation"* with the company (...)(...). In this sense, in essence I was going to state the following:
- That on 28/12/2016 the three lots subject to contract 1/2017 *"Collection, transfer, custody, consultation and destruction of administrative documentation of the Catalan Tax Agency"* were awarded (lots stipulated based on the different territorial delegations of the ATC) to the company M(...)(...)., - That after the Catalan Public Sector Contracts Tribunal (TCCSP) considered the special appeal in the matter of contracting formulated by the company (...)(...) (which had taken part in the tender), this company was awarded two of the lots through a resolution dated 05/15/2017.

- That this last resolution was appealed by the company M(...)(...) before the TCCSP and dismissed by said Court on 09/11/2017.

In short, in its defense the ATC argued that *"it was not until this date* (09/11/2017) *that the administrative contract has been resolved administratively although the dispute has currently been transferred to the courts of justice and still pending a judicial resolution".*

To end this point, the ATC argued that *"in any case, the types of particular administrative clauses that govern these types of contract are already determined by*

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

clearly in clause thirty the requirements for compliance with the regulations for the protection of personal data which, as the person in charge of the treatment, must be fulfilled by the awarded companies". In this regard, the ATC provided a copy of a set of standard clauses entitled *"Standard set of particular administrative clauses governing the service contract by open and harmonized procedure, with presentation of 3 envelopes",* together with the *"Table of characteristics of the contract"* of the file 01/2017 which object was the *"collection, transfer, custody, consultation and destruction of the administrative documentation of the Tax Agency of Catalonia, divided into 3 batches",* being the stipulated duration *of " January 1, 2017 to December 31, 2018.*

Extendable for two more years".

The instructor in the proposal evidenced that, regardless of the vicissitudes of the recruitment brought up by the ATC, the fact is that from 05/15/2017 the company (...)(...)
managed the service of transfer and custody of documentation in paper format generated by the ATC (in two batches), so that it handled on behalf of the ATC personal data included in its files. That being the case, this treatment had to be covered by a data processor contract, in accordance with the provisions of article 12 of the LOPD and DA 26a of Royal Legislative Decree 3/2011, of 14 November, which approved the revised text of the Public Sector Contracts Law, in force at the time of the occurrence of the event alleged here, and repealed by Law 9/2017, of November 8, on Public Sector Contracts , which in its DA 25th contains a provision similar to DA 26th of the previous rule.

In relation to the copy of the set of standard administrative clauses provided by the ATC, the instructor evidenced, for information purposes, that in the thirtieth clause to which the ATC referred in its allegations, it did not include all of the extremes provided for by article 12 of the LOPD. Indeed, the clause did not specify the security measures - nor the applicable level - that existed
to implement the person in charge of the treatment.

In its allegations to the proposal, the ATC states that the set of administrative clauses refers to the set of technical clauses *"in which the security measures required for the various services are specified".* The ATC provides a document entitled *"Set of technical prescriptions that govern the administrative contracting of a collection, transfer, custody, consultation and destruction service of administrative documentation of the Catalan Tax Agency".*

Faced with the proposed resolution, the ATC declares to have signed the formalized treatment commissioning agreement between this entity and the company (...)(...) on 07/25/2018, of which provide a copy.
So, it would be on this date that the violation situation alleged here was amended. And as has already been indicated with respect to the fact imputed first, the fact that it has also been corrected with respect to the fact imputed second the irregular situation does not alter the imputation or its legal qualification, without prejudice to the incidence that this action has in the event requirement of corrective measures, an issue which, as has been said, will be analyzed in the 7th legal basis.

In relation to the aforementioned contract, to the extent that it has been signed once Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons comes into force it concerns the processing of personal data and the free circulation thereof

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

(RGPD, it must be agreed that the same complies in general terms with the ends provided for in article 28 of the referred rule.

2.4.- About the *"G@udi system password expiration management".*

In relation to the third and last imputation, the ATC stated in its statement of objections to the initiation agreement that, as it was informed at the time to the auditing staff of the APDCAT, *"the improvement of the management of G@udi passwords (including the management of their expiry) was a project on which the ICT area of the ATC was already working and which had to be implemented throughout 2017".* However, according to the ATC, it was not possible to implement it definitively and completely until the end of April due to *"various technical difficulties specific to technological developments".*

Although it must be positively assessed that the ATC has implemented the security measure relating to the change of passwords following the intervention of the Authority, this fact does not alter the fact imputed in this procedure nor its legal qualification, prejudice to the impact that, again, this action may have on the corrective measures that may eventually be imposed, a matter that will be addressed in the 7th legal basis.

In accordance with everything that has been set out in this legal basis, it is considered that the allegations made by the ATC in the course of this procedure cannot succeed.

3.- In relation to the facts described in point 1 of the proven facts section, relating to the principle of data quality, in its aspect of proportionality, it is necessary to refer to article 4.1 of the LOPD - in force at the time of the imputed facts-, which provided for the following:
"Personal data can only be collected to be processed, as well as subjected to this processing, when they are adequate, relevant and not excessive in relation to the scope and the determined, explicit and legitimate purposes for which they are "have obtained".

Well, during the processing of this procedure, the fact described in point 1 of the proven facts section has been duly proven, which is considered constitutive of the serious infringement provided for in article 44.3.c) of the LOPD , which typified as such:
"Processing personal data or using it later in violation of the principles and guarantees established in article 4 of this Law and the provisions that deploy it, except when it constitutes a very serious infringement".

It is worth saying that at the time this resolution was issued, the precepts that contained the infringing rates applied here have been repealed by Royal Decree-Law 5/2018, of 27/7, on urgent measures for the adaptation of Spanish law to the regulations of the European Union in the matter of data protection. But since it is a sanctioning procedure already initiated before the validity of this rule, it must be governed by the previous regulation, to the extent that the new rule does not contain more favorable provisions for the entity concerned (DT 1st RDL 5/2018).

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

4.- With regard to the fact described in point 2 of the proven facts section, regarding the lack of a data processor contract, it is necessary to refer to article 12 of the LOPD, which provided that:
"1. The access of a third party to the data when the access is necessary for the provision of a service to the data controller is not considered data communication.
2. The performance of treatments on behalf of third parties must be regulated in a contract that must be in writing or in some other form that allows the agreement and content to be accredited, and must be established in such a way expresses that the person in charge of the treatment must only treat the data in accordance with the instructions of the person in charge of the treatment, who cannot apply or use them for a purpose other than that stated in the aforementioned contract, or communicate them to others people, not even to preserve them.
The contract must also stipulate the security measures referred to in Article 9 of this Law that the person in charge of the treatment is obliged to implement.
3. Once the contractual provision has been fulfilled, the personal data must be destroyed or returned to the person in charge of the treatment, and also any support or document containing any personal data that is the subject of the treatment.
4. In the event that the person in charge of the treatment uses the data for another purpose, communicates it or uses it in breach of the stipulations of the contract, he must also be considered responsible for the treatment, and must answer for the violations he has personally committed ".

Given that there is a case of administrative contracting here, DA 26a of the TRLCSP which stipulated (in terms similar to those provided for in DA 25a of the current LCSP) was applicable on the date on which the service was formalized, for cases in which the contractor assumes the status of data processor, the following:
"Protection of personal information
1. The contracts governed by this Law that involve the processing of personal data must fully respect Organic Law 15/1999, of December 13, on the protection of personal data, and its implementing regulations.
2. In the event that the contracting involves the contractor's access to personal data for the treatment of which the contracting entity is responsible, that entity is considered to be in charge of the treatment.

In this case, access to this data is not considered communication of data, when the provisions of article 12.2 and 3 of Organic Law 15/1999, of December 13, are met. In any case, the provisions of article 12.2 of the aforementioned Law must be in writing.
When the contractual provision ends, the personal data must be destroyed or returned to the contracting entity responsible, or to the processor designated by it.

The third party in charge of the treatment must keep the data properly blocked as long as they can derive responsibilities from their relationship with the entity responsible for the treatment."

In accordance with the above, the fact recorded in the 2nd point of the proven facts section, is considered to constitute a minor violation of article 44.2.d) of the LOPD, which typified as such: *" The transmission of the data to a data controller without complying with the formal duties established in article 12 of this law".*

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

5.- With regard to the fact described in point 3 of the proven facts section, regarding the violation of the principle of data security, it is necessary to refer to article 9 of the LOPD, which provides that:
"1. The person in charge of the file and, where applicable, the person in charge of the treatment must adopt the necessary technical and organizational measures to guarantee the security of the personal data and avoid their alteration, loss, treatment or unauthorized access, taking into account the state of technology, the nature of the data stored and the risks to which they are exposed, whether they come from human action or the physical or natural environment.
2. Personal data must not be recorded in files that do not meet the conditions determined by regulation in relation to their integrity and security and those of treatment centers, premises, equipment, systems and programs.
3. The requirements and conditions that must be met by the files and the people involved in the processing of the data referred to in article 7 of this Law must be established by regulation.

This regulatory development, in terms of the security measures to be adopted, took carried out through the RLOPD, and, specifically, with its Title VIII. Article 93 of the aforementioned regulation, which is transcribed below, established a basic security measure (art. 81 of the RLOPD), applicable to all files and/or automated processing of personal data:
"Identification and authentication

"1. The person responsible for the file or treatment must take the measures that guarantee the correctness identification and authentication of users.

2. The person in charge of the file or treatment must establish a mechanism that allows the unequivocal and personalized identification of any user who tries to access the information system and the verification that they are authorized.

3. When the authentication mechanism is based on the existence of passwords, there must be a allocation, distribution and storage procedure that guarantees its confidentiality and integrity

4. The security document must establish the periodicity, which in no case must be greater than one year, with which the passwords must be changed which, while they are valid, must be stored in an unintelligible way ".

In accordance with the above, the fact recorded in the 3rd point of the proven facts section, is considered to constitute a minor violation of article 44.3.h) of the LOPD, which typified as such: *" Maintain files, premises, programs or equipment that contain personal data without the proper security conditions determined by regulation."*

6.- Apart from what has been advanced previously about the non-application in the present case of RDL 5/2018, it is worth saying that in the processing of this procedure the eventual application has also been taken into account in the present case as provided for in Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (RGPD). And as a result of this analysis, it is concluded that the eventual application of the RGPD would not alter the legal qualification that is made here, and specifically would not favor the data controller.

7.- Article 21 of Law 32/2010, in line with article 46 of the LOPD, provides that when the infractions are committed by a public administration, the resolution declared by the commission

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

of an infringement, must establish the measures to be adopted so that the effects of the infringement cease or are corrected. In the present case, it is considered that it is not necessary to require the imposition of any corrective measures, since the ATC has certified that it has adopted the appropriate corrective measures with respect to the three facts that are declared here as constitutive of an infringement. In effect, it has destroyed the controversial data of tax significance; has formalized a data controller contract with the company (...)(...); and has also implemented a password renewal period.

In short, that with these actions accredited by the ATC the main purpose pursued with the exercise of the inspection and sanctioning powers entrusted to this Authority, which is none other than to ensure compliance with the regulations for the protection of personal data, and thus prevent this fundamental right from being violated again.

Making use of the powers conferred on me by article 15 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat of Catalonia,

RESOLVED

First.- Declare that the Tax Agency of Catalonia has committed a serious infringement provided for in article 44.3.c), in relation to article 4.1; a minor infraction provided for in article 44.2.d), in relation to article 12 of the LOPD; and, a serious infringement provided for in article 44.3.h), in relation to article 9, all of them of the LOPD, without it being necessary to require corrective measures to correct the effects of the infringement for having already adopted them 'ATC, in accordance with what has been set out in the 7th legal basis.

Second.- Notify this resolution to the Catalan Tax Agency

Third.- Order the publication of the Resolution on the Authority's website (www.apd.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 articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority and 14.3 of Decree 48/2003, of 20 February, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, on an optional basis, 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 provisions of article 123 et seq. of the LPAC or you can directly file an administrative contentious appeal before the Courts of Administrative Disputes, in the period of two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating administrative contentious jurisdiction. If the imputed entity expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended under the terms provided for in article 90.3 of the LPAC.

Carrer Rosselló, 214, Esc. A, 1r 1a
08008 Barcelona

Likewise, the imputed entity may file any other appeal it deems appropriate for the defense of its interests.

The director

M. Àngels Barbarà and Fondevila

Barcelona, (on the date of the electronic signature)