apdcat
Autoritat Catalana de Protecció de Dades

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File identification

Resolution of sanctioning procedure no. PS 1/2019, referring to the Catalan Billiards Federation

Background

1. En data 30/07/2018, va tenir entrada a l'Autoritat Catalana de Protecció de Dades, per remissió de l'Agència Espanyola de Protecció de Dades (en endavant, AEPD), un escrit de la Federació Espanyola de Billar (hereinafter, RFEB) presented to the AEPD on 15/12/2017 for which he filed a complaint against the Catalan Billiard Federation (hereinafter, FCB), on the grounds of an alleged breach of the regulations on the protection of personal data staff The reporting entity stated the following and provided various documentation on the facts reported.

   Specifically, the complaint stated that the FCB had published on its website, a document called "Censo RFEB", with the personal data of the members of the RFEB. The functionality of the census was limited to the electoral process of 2016 and its publication would not have been authorized or consented to by the RFEB or by the affected parties related to this document.

   In order to prove the facts he was reporting, he provided a printed copy of the information obtained from the website "www.fcbillar.cat", on 15/12/2017, where in the "News" section, under the title " Registration of players in the Territorial Delegation", the referenced document "RFEB Census" and "FCB Census" was published. He also provided a copy of the content of the document "Census of RFEB", which consists of a list called "Censo definitivo del estamento de deportistas (state constituency)", which contains personal data of these athletes.

2. The AEPD, before warning that the competence to process the present complaint corresponded to the Catalan Data Protection Authority and giving the corresponding transfer, carried out a series of previous actions to determine whether the facts reported were capable of motivating the initiation of a sanctioning procedure ((...)).

3. In this phase of preliminary investigation actions, the AEPD verified on 19/12/2017, that indeed on the website indicated by the reporting entity, there were published two documents with personal data, relating to the census of people of the RFEB and the FCB. Later, on 31/01/2018, he required the FCB to report on the reasons why on its website (www.fcbillar.cat), under the title "Player registration in the Territorial Delegation", it was published the census of the RFEB. He was also required to report on the legal basis that would protect the publication of said census, as well as that of the FCB census, also published. Finally, he was asked if the entity had the authorization to make public the data of the people who appeared in both

   censuses

4. On 02/16/2018, the FCB responded to the aforementioned request of the AEPD through a letter in which it stated the following:

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- That the objective of the publication on its website of the census of RFEB pool players was to "explain and/or clarify to the players that they could register as independents in the Delegación Territorial de Catalunya and not as members of a club, since they were the demands of the Spanish Billiards Federation; we proceeded to publish these censuses on the web, so that the same would serve as an example to those interested. After two days, we realized the human error, since we have data protection protocols in place and proceeded to immediately remove the census from the web. To date, we have not received any complaints from the affected holders".

- That "there is no regulation that restricts the publication" and that "we do not have authorization and for the reasons stated above, we proceed to remove the censuses from the web".

5. On 03/13/2018, also in the context of this preliminary information phase, the AEPD states to a diligence that a series of checks have been made via the Internet on the facts subject to complaint Thus, it confirms that on this date the data contained in the "RFEB Census" and "FCB Census" have already been removed from the "www.fcbillar.cat" website , as announced by the FCB.

6. Once the AEPD detected that the investigated data processing referred the complaint and the investigative actions carried out to the Authority, which were received on 07/30/2018. On 01/22/2019, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against the FCB, for an alleged serious infringement provided for in article 44.3.k) in relation to article 6.1 of the LOPD Likewise, he appointed the official of the Catalan Data Protection Authority, (...) as a person instructing the file. This initiation agreement was notified to the imputed entity on 8/2/2019.

   In the initiation agreement, the accused entity was granted a term 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 .

7. On 2/22/2019, the FCB made objections to the initiation agreement. the entity accused provided various documentation with her letter.

8. On 03/29/2019, the person instructing this procedure formulated a proposal for a resolution, by which he proposed that the director of the Catalan Data Protection Authority warn the FCB, in accordance with the provisions article 45.6 of LOPD, as responsible for an infringement provided for in article 44.3.k) in relation to articles 6.1 and 11, all of them of the LOPD. This resolution proposal was notified on 04/05/2019, and a period of 10 days was granted to formulate allegations.

   This term has been exceeded by far without any objections having been made to the resolution proposal.

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

Proven Facts

Of all the actions taken in this procedure, the facts detailed below are considered accredited.

On an undetermined date, but in any case included within the period between 12/13/2017 and 12/19/2017, the FCB published on its website www.fcbillar.cat, in the "News" section and under the title "Registration of players in the Territorial Delegation", a document called "Census RFEB", which consisted of a list entitled "Census definitivo del estamento de deportistas (state constituency)" , which contained data on people registered in the RFEB. Specifically, it included, among others, the names and surnames of these people, federation and club to which they were affiliated, license number, age, and ID number. The disclosure of this document was not consented to by the persons identified there. From the research actions carried out by the AEPD, it is also inferred that the FCB published a document corresponding to the people associated with the FCB itself, although it is unknown what specific personal data would be contained in this second document.

Once the FCB became aware of the existence of a complaint for these facts, it removed the documents from the website where they had been published, an extreme which was noted on 03/13/2018 by the AEPD, in the framework of the research actions carried out.

Fundamentals of Law

1. The provisions of Law 39/2015, of 1 October, on the common administrative procedure of public administrations (LPAC) and article 15 of Decree 278/1993, of 9 November, on the sanctioning procedure applied to the areas of competence of the Generalitat, according to what is foreseen in the DT 2a of Law 32/2010, of October 1, of 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.- The imputed entity has not made allegations against the resolution proposal, but it did so against the initiation agreement. In this regard, it is considered appropriate to reiterate below the most relevant part of the reasoned response given by the investigating person to these allegations that the accused entity had made before the initiation agreement.

Specifically, the accused entity acknowledged in its statement of objections to the initiation agreement that the "publication was carried out on December 13, 2017 and that the inclusion of the census documents be due to human error", and emphasized that the facts

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reported were committed without the intention of violating the regulations regarding the protection of personal data "even if in these cases we have not been completely diligent".
The denounced entity added in its defense that it had not received "any communication, complaint or claim on this subject from any person affiliated to our federation or the Spanish Federation".

2.1.- On human error or lack of intention.

The invocation of the denounced entity to the existence of human error and the lack of intentionality, as pointed out by the instructing person in the resolution proposal, must be traced back to the principle of culpability. In relation to this principle, it is worth saying that both the Supreme Court and the Constitutional Court have often declared that the sanctioning power of the Administration, as an expression of the "ius puniendi" of the State, is governed by the principles of criminal law , and one of its principles is that of culpability, incompatible with a regime of objective responsibility without fault.

Well, as this Authority has pronounced in several resolutions (for all, the resolution of sanctioning procedure no. 52/2012 -available on the website http://apdcat.gencat.cat-) it is necessary to go to the jurisprudential doctrine on the principle of guilt, both from the Supreme Court and from the Constitutional Court. According to this doctrine, the sanctioning power of the Administration, as a manifestation of the "ius puniendi" of the State, is governed by the principles of criminal law, and one of its principles is that of guilt, incompatible with a regime of objective responsibility without fault, in accordance with what was determined by article 130.1 of the already repealed Law 30/1992, and what is currently provided for by article 28.1 of Law 40/2015, of October 1, of the legal regime of the public sector (hereinafter the LRJSP).

In this regard, the Supreme Court in several rulings, all of 16 and 22/04/1991, considers that from this element of culpability it follows that the action or omission classified as an administratively punishable infraction must be in in any case, imputable to its author, due to grief or imprudence, negligence or inexcusable ignorance. Also the National Court, in the Judgment of 06/29/2001, precisely in matters of personal data protection, has declared that to appreciate this element of culpability "simple negligence or non-compliance with the duties imposed by the Law is sufficient to the persons responsible for files or data processing to exercise extreme diligence...". In this regard, it is clear that the FCB did not act with the necessary diligence in the treatment of the disputed data, since if it had done so the illicit communication of data would have been avoided. Consequently, the culpability element required by article 28.1 of the LRJSP also applies here.

At this point it is also worth highlighting that the duty of care is maximum when activities are carried out that affect fundamental rights, such as the right to the protection of personal data. This was declared by the SAN of 5/2/2014 (RC 366/2012) issued in matters of data protection, when it maintained that the status of person responsible for the processing of personal data "imposes a special duty of diligence when it comes to the use or treatment of personal data or its transfer to third parties, in what concerns the fulfillment of the duties that the legislation on the protection of physical persons, and especially their honor and personal and family privacy, whose intensity is enhanced by the relevance of the legal assets protected by those rules".

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The SAN of 08/10/2003 is also of interest, which explains the following:

"Therefore, contrary to what is ordered in art. 11.1 of Law 15/1999, of December 13 on Protection of Personal Data, the appellant entity communicated personal data to a third party without the consent of the affected person, without meeting the causes established in section 2 of that article for that consent is not required, and without his conduct being covered by art. 12 of the same Law.

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For what affects culpability, it must be said that generally this type of behavior does not have a malicious component, and most of them occur without malice or intentionality.
It is enough to simply neglect or fail to comply with the duties that the Law imposes on the persons responsible for files or data processing to exercise extreme diligence to avoid, as in the case at hand, a processing of personal data without the consent of the person concerned , which denotes an obvious lack of compliance with those duties that clearly violate the principles and guarantees established in Organic Law 15/1999, of December 13, on the Protection of Personal Data, specifically that of the consent of the affected person.

Likewise, the judgment of the Supreme Court of 25/01/2006, also issued in the area of data protection, is based on the required diligence and establishes that intentionality is not a necessary requirement for a conduct to be considered guilty .

Regarding the degree of diligence required, the SAN of 12/14/2006 declares: "the Supreme Court considers that imprudence exists whenever a legal duty of care is neglected, that is, when the offending subject does not behave with diligence required And the degree of diligence required must be determined in each case in attention to the concurrent circumstances, such as the special value of the protected legal property, the professionalism required of the infringer, etc.""

In short, it is necessary that in the conduct that is imputed there must be an element of culpability, but in order for culpability to exist it is not necessary that the facts have occurred with intent, but it is sufficient that negligence or simple non-observance

Based on the jurisprudence doctrine exposed, as indicated by the instructing person in the resolution proposal, the allegation expressed by the imputed entity regarding the lack of intentionality in the commission of the reported facts cannot succeed, since that the FCB's action is due to the lack of due diligence in the processing of the personal data of the people registered in the RFEB census, as it was the FCB itself that carried out the actions that led to the publication on its website www.fcbillar.cat of the disputed personal data, without having the legitimacy to carry out this communication and/or transfer of personal data.

2.2- About the absence of complaints from the affected people.

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The accused entity also stated in its statement of allegations that it had not received any complaint or claim from any federated person. In this regard, the first thing that was specified in the resolution proposal is that the facts that were considered proven were reported by the RFEB to the AEPD, so it could not be ruled out that some of the people affected had directed the RFEB to complain about the disclosure of personal data, which could have resulted in the submission of the complaint by the RFEB. In any case, as the instructing person pointed out in the resolution proposal, including the eventual circumstance that none of the affected persons had taken any action to complain about the unlawful processing of their personal data, this does not prevent this Authority from exercising its sanctioning power, as a competent institution with respect to the treatments that are subject to imputation. In this regard, it should be noted that sanctioning procedures are always initiated ex officio by agreement of the competent body, on its own initiative or as a result of a superior order, at the reasoned request of other bodies or by complaint (articles 58 and 63.1 of the LPAC). And for the presentation of the complaint it is not required that a person directly affected do so, but it can be formulated by any person who has knowledge of a fact that may constitute an infringement (article 62 of the LPAC).

In any case, the eventual lack of complaint by the affected persons could not be interpreted as giving their consent to the controversial publication. Regarding consent, it is necessary to take into account article 6.1 of the LOPD, which provides the following: "The processing of personal data requires the unequivocal consent of the affected person, unless the law provides otherwise" .

Thus, article 6.1 of the LOPD provided very conclusively that for the processing of personal data, the unequivocal consent of the affected person was required, unless a rule with the rank of law provides otherwise. And this provision must be put in relation to article 3.h) of the LOPD, in which it is foreseen that consent must be "any manifestation of the will, free, unequivocal, specific and informed, through in which the interested party consents to the processing of personal data concerning him".

However, whatever form the consent takes, what the LOPD requires is that it be unequivocal, as expressed by the National Court Judgment of 02/28/2007: "(...) For otherwise, the requirements for consent are limited to the need for it to be "unequivocal", that is to say, that there is no doubt about the provision of said consent, so that in this matter the legislator, through article 6.1 of the The LO of such a quote, goes to a substantive criterion, that is, it tells us that whatever form the consent takes - express, presumed or tacit - it must appear as evident, unequivocal - that does not admit of doubt or equivocation -, because this and no other is the meaning of the adjective used to qualify consent, so that the establishment of presumptions, such as the failure to report the facts by the affected person or the other circumstances referred to in the claim, would be equivalent to establish a system a of assumptions that would pulverize this essential requirement of consent, because it would cease to be unequivocal to be "equivocal", that is to say, that its interpretation would admit several senses and, in this way, the nature and meaning that it performs as a guarantee in the protection would be distorted of the data, and it would fail to fulfill the purpose it is called to verify, that is, that the power to dispose of the data corresponds solely to its holder.(...)"

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Regarding the provision of this consent by the group of affected persons, neither during the actions carried out during the prior information, nor once the present procedure has been initiated, its existence has not been proven, and based on exposed, as already pointed out by the instructing person in the resolution proposal, the argument invoked by the FCB regarding the eventual lack of complaint by any of the affected individuals cannot be considered as tacit consent either.

Therefore, this dissemination of personal data carried out by the FCB could only be considered lawful if it had the consent of those affected, or if it was authorized by a rule with the rank of law, and in relation to the latter, it must be said than the allegations made
by the imputed entity, no legal rule enabling the aforementioned communication of personal data had been invoked for the purpose.

Based on what has been set out in this legal basis, in the resolution proposal it was concluded that the allegations made by the FCB could not succeed, a consideration against which no allegations were made in the procedure hearing, and which is maintained in this resolution.

3.- In relation to the facts described in the proven facts section, relating to the processing of personal data without the consent of those affected, it is necessary to refer to articles 6.1 or 11 of the old LOPD, which provided for the following:

"Article 6. Consent of the affected.
The processing of personal data requires the unequivocal consent of the affected person, unless the law provides otherwise".

"Article 11. Communication of data.
1. The personal data subject to treatment can only be communicated to a third party for the fulfillment of purposes directly related to the legitimate functions of the assignor and the assignee with the prior consent of the interested party.
2. The consent required by the previous section is not necessary: a)
When the transfer is authorized by law (...)."

Well, as the instructing person indicated, during the processing of this procedure the fact described in the proven facts section, which is constitutive of the serious infringement provided for in article 44.3.k) has been duly proven of the LOPD, which typifies as such:

"The communication or transfer of personal data without justification for this in the terms provided for in this Law and its regulatory provisions of deployment, unless this constitutes a very serious infringement."

In relation to the facts described in the proven facts section, it should be borne in mind that article 26 of Law 40/2015, of October 1, on the legal regime of the public sector, provides for the application of the sanctioning provisions in force at the time of the occurrence of the facts, unless the subsequent modification of these provisions favors the alleged offender. In accordance with this rule, given that the acts alleged here were committed before 05/25/2018, the LOPD, which has been repealed by Organic Law 3/2018, of 5

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December, of protection of personal data and guarantee of digital rights (LOPDGDD). Likewise, it is worth saying that in the processing of this procedure, the eventual application to the present case of the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27/4, has been taken into account to the protection of natural persons with regard to the processing of personal data and the free movement of such data (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.

4.- As the FCB is a private law entity, the general sanctioning regime provided for in article 45 of the LOPD applies.

The aforementioned precept provides, for serious infractions, a penalty of a fine of 40,001 to 300,000 euros.

Notwithstanding the above, as was anticipated in the initiation agreement and the resolution proposal, paragraph 6 of article 45 of the LOPD provides for the possibility of issuing a warning instead of imposing the corresponding fine , a solution that should be applied here, for the reasons that will be explained below. Said precept determines the following:

"Exceptionally, the sanctioning body, with the prior hearing of the interested parties and given the nature of the facts and the significant concurrence of the criteria established in the previous section, may not agree to the opening of the sanctioning procedure and, instead, warn the responsible subject in order to, within the period determined by the sanctioning body, accredit the adoption of the corrective measures that are relevant in each case, provided that the following conditions are met:

a) That the facts constitute a minor or serious infringement in accordance with the provisions of this Law.

b) That the offender has not been previously sanctioned or warned.
If the warning is not heeded within the period that the sanctioning body has determined, the opening of the corresponding sanctioning procedure is appropriate for this non-compliance".

In the present case, as proposed by the instructing person, the requirements contained in sections a) and b) of the mentioned article 45.6 of the LOPD are met, given that on the one hand, the facts described in the section on proven facts, are considers that they could constitute a serious infraction (specifically, the one provided for in article 44.3.k) of the LOPD) and the other, because the accused entity has never been sanctioned or previously warned by the commission of offenses provided for in the LOPD.

Along with the above, the nature of the facts imputed here is taken into account, and a significant concurrence of the criteria provided for in article 45.5 LOPD is appreciated for the purpose of applying the warning. On the one hand, that of art. 45.5.a), since there would be a qualified reduction of the culpability of the accused entity, given that several of the criteria enunciated in paragraph 4 of said precept 45 of the LOPD could be appreciated, such as that the entity reported does not have as its main activity the processing of personal data, which does not include the obtaining of any benefit as a result of the commission of the infringement, and the absence of damages caused to the persons concerned or to third parties. On the other hand, the circumstance provided for in art. 45.5.b) of the LOPD, given that the entity has regularized the situation

diligently, every time from the moment he became aware that the facts were being investigated, he removed the publication of the controversial data from his website, and has acknowledged his guilt.

5.- Given the findings of the violations provided for in article 44 of the LOPD, for the case of privately owned files or treatments, article 21.3 of Law 32/2010, of October 1, of the Catalan Data Protection Authority empowers the Director of the Authority so that in the resolution declaring the infringement, in addition to imposing the corresponding sanctions -
according to what has been set out in the previous legal basis - can establish the measures to be taken so that the effects of the infringement cease or are corrected. In the present case, it becomes unnecessary to require corrective measures for the effects of the infringement given that the document called "Censo RFEB" with the personal data of the members of the RFEB has already been removed from the FCB website (www.fcbillar.cat), and for these purposes, it is considered that its publication was motivated by an isolated event.

In short, that with this action accredited by the FCB 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.

resolution

For all this, I resolve:

First.- To warn the Catalan Billiard Federation, in accordance with the provisions of article 45.6 of the LOPD, as responsible for an infringement provided for in article 44.3.k) in relation to articles 6.1 and 11, all of them from the LOPD, without it being necessary to require corrective measures to correct the effects of the infringement, in accordance with what has been set out in the 5th legal basis.

Second.- Notify this resolution to the Catalan Billiards Federation.

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 file an administrative appeal directly before the Courts of Administrative Disputes, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating the administrative contentious jurisdiction. If the imputed entity declares its own to the Authority

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intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended in the terms provided for in article 90.3 of the LPAC.

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

The director,