apdcat
Autoritat Catalana de Protecció de Dades

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File identification

Resolution of sanctioning procedure no. PS 8/2019, referring to Ferrocarril Metropolità de Barcelona, SA.

Background

1. On 23/11/2018, Transports Metropolitans de Barcelona, SA (hereinafter, TMB) made an initial notification to the Catalan Data Protection Authority of a security breach (NVS 35/2018), which was completed on 11/28/2018. Specifically, TMB explained that, on 18/10/2018, Ferrocarril Metropolità de Barcelona, SA (hereinafter, FMB) published on TMB's intranet (although only accessible to FMB employees) "the Census Provisional election" corresponding to the elections to members of the works committee; and on 31/10/2018, the "Definitive Electoral Census". TMB indicated that the said census, in which more than 3,700 employed persons appeared, contained unnecessary data in order to achieve the purpose of allowing the employed person to know whether or not they could vote. In particular, he considered the inclusion of the ID number, date of birth and seniority unnecessary. In turn, it was stated that the Good Governance Management Area of TMB had requested the Human Resources Department of TMB and the Labor Relations Manager of FMB to replace the census with another without excessive data. In the last one, TMB pointed out that it had received several inquiries and opposition requests from people employed by FMB, in relation to the data that appeared in the published census.

2. The Authority opened a preliminary information phase (no. IP 336/2018), 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 notified to the Authority were capable of motivating the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances that were involved.

3. In this information phase, on 29/11/2018 FMB was required to report, among others, on the reasons why all personal data were included in the publication of the census (provisional and final) that there appeared, and in particular, the DNI number, date of birth and seniority; as well as what was the legal basis that would enable the publication of the census with all that personal data. In the last, FMB was required to indicate the reasons why it did not proceed to withdraw and replace the "definitive electoral census" with another one that did not include all the previously indicated data, in the face of the warnings formulated from the TMB Good Governance Management Area.

4. On 17/12/2018, FMB responded to the above-mentioned request in writing in which it stated, among others, the following:

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- That the "definitive electoral census" was published until 11/29/2018.
- That the publication of the "electoral census" (provisional and definitive) in the terms that was carried out was enabled by labor regulations; as well as for the legitimate interest of the people with the right to vote in the elections to the works committee.
- That article 6.2 of Royal Decree 1844/1994, of September 9, which approves the Regulations for elections to employee representative bodies in the company (hereinafter, RD 1844/1994), establishes that the board will make public, among the workers, the labor census with an indication of who are the voters and eligible, considering the list of voters provided for in article 74.3 of the Royal Legislative Decree 2/2015, of October 23, by which the revised text of the Workers' Statute Law (hereinafter, TRLET) is approved.
- That article 6.3 of RD 1844/1994 states that the "electoral census" in companies with 50 or more workers (as was the case with FMB) must contain the first and last name, sex, DNI, date of birth, seniority and professional category, differentiating those with a contract of more than one year from those with a contract of less than one year, distributing these workers into a technical and administrative group, and another group of specialists and unqualified.
- That the publication of the "electoral roll", with said information, has the purpose that any person with a legitimate interest can contest the list if there is an error in its preparation.

- That FMB did not have the intention or the legal authorization to withdraw and replace the "electoral census", since this competence belonged to the electoral board and the publication conformed to labor regulations.

The reported entity attached various documentation to the letter.

5. On 03/14/2019, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against FMB for an alleged infringement provided for in article 83.5.a), in relation to article 5.1 .c) of 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 (hereinafter, RGPD). Likewise, Mr. (...), an official of the Catalan Data Protection Authority, was appointed as the person instructing the file.

6. This initiation agreement was notified to the imputed entity on 03/22/2019.

7. In the initiation agreement, the accused entity was granted a period of 10 working days, counting from the day after the notification, to formulate allegations and propose the practice of evidence that it considered appropriate to defend their interests.

8. On 04/05/2019, FMB submitted objections to the initiation agreement.

The accused entity provided various documentation with its letter.

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9. On 06/21/2019, the person instructing this procedure formulated a resolution proposal, by which it was proposed that the director of the Catalan Data Protection Authority impose on FMB the sanction consisting of a fine of 40,000.- euros (forty thousand euros), as responsible for an infringement provided for in the Article 83.5.a) in relation to Article 5.1.c), both of the RGPD.

This resolution proposal was notified on 25/06/2019 and granted a period of 10 days to formulate allegations.

10. On 07/05/2019, the accused entity submitted a letter in which it acknowledges its responsibility for the alleged acts and certified that on 07/04/2019 it had made the voluntary advance payment of the monetary penalty that the instructing person proposed, once the reductions provided for in article 85 of the LPAC have been applied.

proven facts

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

As part of the elections for members of the works council, FMB published on its intranet the list of voters, provisional and final, which contained the following information for approximately 3,700 employees: personnel number, first and last names , sex, NIF, date of birth, seniority, professional category and assigned electoral college.

The data that made up the said list of voters relating to staff number, sex, NIF number, date of birth, seniority and professional category, were not necessary so that the employed persons, identified through their first and last names, could verify whether they had the status of electors and, therefore, whether they could exercise the right to vote.

The publication of the list of voters (provisional and final), accessible to all FMB employees, took place between 18/10/2018 (the date on which the provisional list of voters was published) and on 29/11/2018 (last day on which the definitive voter list was published).

Fundamentals of law

1. The provisions of the LPAC, and article 15 of Decree 278/1993, according to the provisions of 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.

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2. In accordance with article 85.3 of the LPAC, both the recognition of responsibility and the voluntary advanced payment of the proposed monetary penalty lead to the application of reductions. The effectiveness of these reductions is conditioned on the withdrawal or renunciation of any action or appeal through the administrative route against the sanction. For both cases, sections 1 and 2 of article 85 of the LPAC provide for the termination of the procedure.

Although FMB presented allegations in the initiation agreement, it has not formulated allegations in the proposed resolution, since in this procedure it has stated that it "recognizes the responsibility incurred" and has accepted the 'advanced payment option which implies the reduction of the penalty. In any case, it is considered appropriate to reiterate below the most relevant of the reasoned response that the instructing person gave to the allegations made before the initiation agreement.

2.1. On the principle of minimization.

In the first two sections of its statement of objections to the initiation agreement, the accused entity explained that it used the "standardized models published in the rules of mandatory compliance, as well as on the website of the Generalitat of Catalonia, no more data was published than was required and necessary to hold the elections". It is worth saying that FMB did not provide a copy of the "standardized" models it advertised, nor did it specify on which website of the Generalitat de Catalunya they would be published. However, the instructor verified that a labor census model is published on the website of the Department of Labor, Social Affairs and Families. In this regard, as indicated by the instructing person in the resolution proposal, it should be noted that the violation of the principle of minimization that is imputed here does not refer to the preparation of the labor census, but to the preparation of the list of electors, which is configured from the labor census, as will be indicated later.

Having established the above, FMB stated that the data that was published was adequate, relevant and limited to what was necessary to comply with the right to suffrage established in the aforementioned articles of the rules that support trade union rights. And then, the entity accused invoked sections 2 and 3 of article 6 of Royal Decree 1844/1994, of September 9, which approves the Regulations for elections to employee representative bodies in the company (hereafter, RD 1844 /1994), which provide the following:

> "2. In the elections for Personnel Delegates and members of the Company Committee, the company is notified of the intention to hold elections for its promoters, it will, within seven days, transmit said communication to the workers who must form the table and at the same time it will send to the members of the polling station the labor census, with an indication of the workers who meet the age and seniority requirements, in the terms of article 69.2 of the Workers' Statute, necessary to hold the status of electors and eligible

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> The polling station will make public, among the workers, the labor census with an indication of who are electors and eligible according to article 69.2 of the Estatuto de los Trabajadores, which will be considered for voting purposes as a list of electors.
>
> When it comes to elections for Works Councils, the list of electors and eligibles will be published on the notice boards for a period of no less than seventy-two hours.
>
> 3. When it comes to companies or workplaces with 50 or more workers, the number, two surnames, gender, date of birth, national identity document, category or professional group and seniority in the company must be stated in the labor census of all workers, distributed in a school of technicians and administrators and another of specialists and unqualified, and a third school, if this had been agreed in the Collective Agreement, in accordance with the provisions of article 71.1 of the Workers' Statute. "

So article 6.2 of RD 1844/1994 provides that in the elections to company committees the list of voters must be published on the notice boards, at least, for 72 hours.
In the same sense, article 74.3 of Royal Legislative Decree 2/2015, of 23 October, is pronounced, by which the revised text of the Workers' Statute Law (hereafter, ET) is approved. And article 6.3, also transcribed, refers exclusively to the content that must be included in the employment census that must be sent to the polling station, but in no case does it allude to the content of the list of voters that must be subject to publication.

With regard to the list of voters, also article 74.3 ET establishes that "When it comes to elections for members of the company committee, the constituted electoral board will ask the employer for the labor census and prepare, with the means that will have it to facilitate this, the list of voters."

Certainly, as the instructing person pointed out in the proposed resolution, the content of the list of voters is not regulated. However, given that its preparation and publication constitute a processing of personal data, it is necessary that in its preparation and disclosure the principles relating to the treatment provided for in article 5 RGPD and, in particular, the principle of minimization of the data (art. 5.1.c RGPD). In accordance with this principle, personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed. In other words, only those data that are necessary to achieve the intended purpose can be processed.

In the present case, the purpose that justifies the processing of voters' personal data in the list to be published is that they could verify if they had the status of voter, that is, if they had recognized the right to vote. Precisely, article 5.6 RD 1844/1994 provides that

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"The right to vote will be proven by inclusion in the list of voters published by the polling station and by proof of the voter's identity."

Well, in order to achieve this purpose (proving the status of voter) it is considered sufficient to identify the electors through their first and last names. And, in case of coincidence of names and surnames between the electors, it would be justified to include the data related to the DNI in the list of voters that is the subject of publication, although not in its complete version but in part. In other words, four numerical digits of the DNI, as established by additional provision 7a of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LOPDGDD). In relation to this additional provision, it should be pointed out that this Authority, together with the Spanish Data Protection Agency, the Basque Data Protection Agency and the Andalusian Data Protection and Transparency Council, have proposed a guidance for the provisional application of safeguards to protect the disclosure of the national identity document, foreigner's identity number, passport or equivalent document of the interested parties. Well, with regard to the DNI, what is proposed is to publish the digits that in the format occupy the fourth, fifth, sixth and seventh positions (given a DNI with format 12345678X, it would be published as follows: 4567 **) .

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That being the case, in order to achieve the objective pursued, it becomes unnecessary for the list of voters that was the subject of publication to contain the sex, full DNI/NIF, date of birth, seniority, and professional category of the voters, already identified through their first and last names.

2.2. About the intervention of the Good Governance Department of TMB

As stated by the accused entity in its statement of objections to the initiation agreement, the Good Governance Department of TMB warned the Human Resources Area of FMB that, in accordance with the criterion of the Authority expressed in several public pronouncements, the publication of the labor census with its full content contravened the principle of data minimization. Specifically, the Authority's criteria was explained in opinion CNS 18/2008, which despite referring to elections to the representative bodies of civil servants, what was set out there (its adequacy to the principle of proportionality or minimization of the data) could also be applied to the elections for members of the works committee of FMB, with the understanding that the regulations that regulate the electoral process for electing the members of the works committee of a joint-stock company also do not provides what the content of the list of voters must be.

In this regard, the actions include several communications from the Department of Good Governance of TMB which, following the complaints of several employees, warned the Human Resources Area about the fact that the publication of the labor census on the intranet, with all the personal data that make it up, violated the regulations on data protection. In these communications, the Good Governance Department of TMB pointed out

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that this Authority had already instituted a disciplinary procedure against another entity for the same facts, as well as a copy of CNS opinion 18/2008, mentioned above, was attached.

In turn, it is worth saying that in another of the communications addressed to the Human Resources Area of FMB (email of 08/11/2018), the Department of Good Governance of TMB indicated that it had consulted these facts with "Data Protection Experts hired by TMB" for advice on compliance with data protection regulations, and that they "endorse the opinion of the APDCAT and their recommendation [of the experts] from the perspective of data protection data is not only to estimate the rights of opposition (...) but also to withdraw the currently published census and publish a new census that includes only the essential data to know whether the workers are voters or not."

However, the Human Resources Department ignored these warnings and maintained the publication of the document relating to the labor census, in its full version.

As the instructing person did in the proposed resolution, it is considered necessary to highlight the attempts by the Department of Good Governance of TMB, following the existence of complaints from several workers, in order to stop the publication of all that personal data. Indeed, the various attempts by the aforementioned Department to get FMB to comply with data protection regulations are recorded in the proceedings, but these were unsuccessful.

This neglect of its internal requirements led the TMB Department to notify this Authority of the existence of a breach in data security, in terms of confidentiality. At this point it is necessary to specify, in relation to FMB's invocation of the security of the intranet where the document had been published, that in order to consider that a security breach has occurred it is not essential that there is external access to the personal data of the data controller, but the confidentiality of the data is also violated if unauthorized people from the organization access it, as was the case with excessive data. It is worth saying that this notification to the Authority is an obligation that Article 33 RGPD imposes on the data controller in the face of any security breach, unless it is unlikely that said breach constitutes a risk to the rights and freedoms of the physical persons In the case presented here, it is necessary to highlight the very high number of people affected and who in turn could access the set of excessive data, which evidenced a risk for the aforementioned rights and freedoms. That being the case, it must be considered that the notification of the security breach was made in compliance with a legal obligation, and if it had not been done, such failure could have been constitutive of the infringement provided for in the article 83.4.a) RGPD in relation to article 33 RGPD, an independent infringement that would be accumulated to the one charged here for violation of the minimization principle.

In this regard, the fact that this Authority became aware of the facts that are imputed here from the notification of the security violation, must be taken into account as

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a mitigating factor in the determination of the amount of the administrative fine to be imposed. In fact, if the recommendations of the Good Governance Department of TMB had been followed by FMB, and taking into account that there was a notification of the violation of the confidentiality of the data to the Authority, the person instructor stated that she would have proposed that the administrative fine be replaced by the warning provided for in article 58.2.b) RGPD, as allowed by article 83.2 of the RGPD.

Regarding the allegation of FMB before the initiation agreement, regarding the lack of complaint by the unions for the publication of the labor census in its full version, as stated by the instructing person in the proposed resolution, it is suffice it to reiterate the existence of several complaints from workers at the TMB Government Department, who had expressly exercised their right to oppose the maintenance of the controversial list of their data that they considered excessive. And in any case, the legal qualification of the facts that are imputed here for the alleged violation of the fundamental right to the protection of data of natural persons, cannot be conditioned by the existence or not of complaints or claims by any trade union.

2.3. About contesting lists

Next, FMB argued in its statement of objections to the initiation agreement that article 29 of RD 1844/1994 provides for the possibility of contesting the lists of voters.

The precept invoked, in accordance with the established in art. 76.2 ET, provides the following:

> "2. Those who have a legitimate interest in an election may challenge it, as well as the decisions adopted by the board or any action taken by it throughout the electoral process, based on the following causes specified in article 76.2 of the Workers' Statute:
> a) Existence of serious defects that could affect the guarantees of the electoral process and alter its result.
> b) Lack of capacity or legitimacy of the chosen candidates.
> c) Discordance between the act and the development of the electoral process.
> d) Lack of correlation between the number of workers listed in the election report and the number of elected representatives."

Well, the complaints that affect the lists of voters in the framework of the elections to members of the company committee, are expressly provided for in article 74.3 ET:

> "3. When it comes to elections for members of the works committee, the polling station will ask the employer for the labor census and, with the means provided by the latter, will draw up the list of voters. This [list of voters] will be made public on the bulletin boards by means of its exhibition for a period of no less than seventy-two hours.

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> The board will resolve any incident or claim related to inclusions, exclusions or corrections that are presented up to twenty-four hours after the end of the list's exhibition period. He will publish the definitive list within the next twenty-four hours. Next, the table, or the group of them, will determine the number of committee members that must be elected pursuant to the provisions of article 66. (...)"

Therefore, in the elections to members of the company committee, the complaints refer to the inclusions, exclusions or corrections that affect the list of voters, so any complaints that could be presented did not justify the publication of the full labor census with all the data listed above. In effect, what was proceeding was the publication of the list of voters drawn up from the labor census, and which had to contain only strictly adequate, pertinent and limited data to what was necessary to achieve the purpose pursued, in accordance with the principle of minimization

In short, as the instructing person argued in the proposed resolution, we are not faced with a case of collision between the fundamental right to data protection and the fundamental right to freedom of association, as invoked by the accused entity in his letter of objections to the initiation agreement, since the sectoral regulations do not contemplate the publication of the full labor census in the case of elections to members of the company committee.

2.4. About guilt

Then FMB stated in its statement of objections to the initiation agreement that it would have proven what it calls "absence of fault". And to that end, he invokes the judgment of the National Court of 04/06/2006.

In this regard, this Authority has recalled in several resolutions (for all of them, the resolution of sanctioning procedure no. PS 52/2012 -available on the website apdcat.gencat.cat, section resolutions-) the jurisprudential doctrine on the principle of culpability, both of the Supreme Court, as of 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 this sense, 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 offense must be in all 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 the matter of personal data protection, has declared that to appreciate this element of guilt: "simple negligence or breach of duties that the Law

requires the persons responsible for files or data processing to exercise extreme diligence...".

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 14/12/2006 declared: "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 or intent, but it is sufficient that negligence has intervened or lack of diligence.

In the present case, as explained by the instructing person in the resolution proposal, we would not be faced with a case of negligence or lack of diligence, but rather the offense was committed with intent, or at least maintained with grief, given that FMB received

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internal notices according to which their actions violated the RGPD, and despite these warnings, decided - consciously - to persist in the publication of personal data.

On the other hand, to justify the lack of culpability, the accused entity invoked the archive resolution of the actions referring to file E/00391/2009, issued by the then director of the Spanish Data Protection Agency (AEPD). Leaving aside that the facts addressed there (the inclusion of a person in a patrimonial solvency file) have no relation to those referred to here, it is not superfluous to remember that the Catalan Data Protection Authority is not subject to the criterion of the AEPD, given that there is no hierarchy or dependency relationship, but that each of the control authorities acts independently within its competence framework, without prejudice to the existing instruments for the purpose of coordinating criteria.

2.5. About the measures taken

In its fourth allegation against the initiation agreement, FMB referred to a series of measures it had adopted in order to comply with data protection regulations, and in this context it mentions the promotion of activities training on the matter, and the designation of a data protection delegate, which would be mandatory, given that one of the main activities of FMB is the processing of images through the various cameras installed on the metro network, so that there is regular and systematic observation of interested persons on a large scale (art. 37.1.b RGPD).

In the same line, in the final part of its statement of allegations, FMB announced that it would also carry out other measures: the drafting of rules for the preparation of the list of voters; a reminder to the members who make up the electoral months on how to draw up the list of voters, which has been published internally; and a reminder of the importance of revalidating any issue related to personal data with TMB's Good Governance Department, taking into account the criteria of this Authority.

Well, as the instructing person pointed out in the resolution proposal, it is necessary to emphasize at this point the good predisposition of FMB to ensure that the conduct imputed here does not occur again. This set of measures announced by FMB must be evaluated positively, but they do not alter the facts specifically imputed here, nor their legal qualification. Likewise, since these were measures announced or planned but not executed and therefore not accredited, they could not be taken into account as mitigating the penalty to be imposed.

3. In relation to the facts described in the proven facts section, relating to the principle of data minimization, it is necessary to refer to article 5.1.c) RGPD, which provides that "Personal data will be (...) c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are treated ("minimization of data")."

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As indicated by the instructing person, during the processing of this procedure the fact described in the proven facts section, which is considered constitutive of the infringement provided for in article 83.5.a) of the RGPD, has been duly proven , which typifies the violation of "the basic principles for treatment (...)".

It is worth saying that at the time when the facts alleged here occurred, the precept of Organic Law 15/1999, of December 13, on the protection of personal data (hereinafter, LOPD) which contemplated the infringing types (art. 44), had 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, which in its article 4 it stated that "The violations of Regulation (EU) 2016/679 referred to in sections 4, 5 and 6 of article 83 constitute infringements". In turn, the LOPD and RDL 5/2018 have been repealed by the LOPDGDD.

In any case, in relation to this concurrence of rules, it must be specified that in accordance with article 26 of Law 40/2015, of October 1, on the legal regime of the public sector, the provisions apply sanctions in force at the time of the occurrence of the facts, so that the provisions of the RGPD are applicable.

4. Since FMB is a private law entity, the general penalty regime provided for in article 83 of the RGPD applies.

Article 83.5 of the RGPD provides for the infractions provided for there, to be sanctioned with an administrative fine of 20,000,000 euros at most, or in the case of a company, an amount equivalent to 4% as a maximum of the global total annual business volume of the previous financial year, opting for the higher amount. This, without prejudice to the fact that, as an additional or substitute, the measures provided for in clauses a) ah) ij) of Article 58.2 RGPD may be applied.

As indicated by the instructing person in the resolution proposal, it is necessary to reiterate here what has been indicated about the mitigation of the penalty due to the fact that this Authority became aware of the alleged facts following the notification of the security violation, which it would even be possible to replace the sanction of an administrative fine with the sanction of reprimand provided for in article 58.2.b) RGPD, an option but which must be discarded due to the fact that FMB ignored the repeated warnings of the Department of Good Governance from TMB on the violation of the RGPD and the need to cease the publication of the controversial list.

Once the application of the reprimand as a substitute for the administrative fine has been ruled out, it is necessary to determine the amount of the administrative fine sanction that corresponds to impose According to what is established in article 83.2 of the RGPD, and also in accordance with the principle of proportionality enshrined in article 29 of Law 40/2015, as explained by the instructing person in the proposed resolution, the sanction must be imposed of

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40,000 euros (forty thousand euros). This quantification of the fine is based on the weighting between the aggravating and mitigating criteria indicated below.

As mitigating criteria, the concurrence of the following causes is observed:
- the categories of personal data affected by the infringement (art. 83.2.g RGPD)
- the way in which the Authority became aware of the infringement – after the notification of a security breach, which has a special impact as a mitigating criterion – (art. 83.2.h RGPD); - the lack of benefits as a result of the commission of the offense (art. 83.2.k RGPD).

On the contrary, as aggravating criteria, the following elements must be taken into account: - the number of interested parties affected - approximately 3,700 FMB employees - (art. 83.2.a RGPD);
- the infractions previously committed by FMB - sanctioning procedures nos. PS 16/2007, PS 25/2008, PS 25/2011 and PS 44/2015 (art. 83.2.e RGPD); - and the linking of FMB's activity with the processing of personal data (art. 83.2.k RGPD).

5. On the other hand, in accordance with article 85.3 of the LPAC and as stated in the initiation agreement and in the proposed resolution, if before the resolution of the sanctioning procedure the imputed entity acknowledges its responsibility or makes the voluntary payment of the pecuniary penalty, a 20% reduction on the amount of the proposed penalty should be applied, notwithstanding that it is modified in the resolution of the procedure. If the two aforementioned cases occur, as in the present case, the reduction is applied cumulatively (40%).

As has been advanced, the effectiveness of the aforementioned reductions is conditional on the withdrawal or renunciation of any action or appeal through the administrative route against the sanction (art. 85.3 of the LPAC, in fine).

Well, as indicated in the antecedents, by means of a letter dated 07/05/2019 the accused entity has acknowledged its responsibility. Likewise, on 04/07/2019 he paid twenty-four thousand euros (24,000 euros) in advance, corresponding to the amount of the penalty resulting once the cumulative reduction of 40% has been applied.

6. Given the findings of the violations provided for in art. 83 of the RGPD in relation to 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 for the resolution declaring the infringement to establish the appropriate measures so that its effects cease or are corrected. This, in addition to imposing the corresponding sanctions. In the present case, however, given that the controversial list is no longer published, as stated by the instructing person in the resolution proposal, the adoption of corrective measures should not be required to correct the effects of the infringement.

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resolution

For all this, I resolve:

1. Impose on Ferrocarril Metropolità de Barcelona, SA the sanction consisting of a fine of 40,000.- euros (forty thousand euros), as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1 .c), both of the RGPD. Once the reduction is applied provided for in article 85 of the LPAC, the resulting amount is 24,000 euros (twenty-four thousand euros), an amount already paid by FMB.

It is not necessary to require corrective measures to correct the effects of the infringement, in accordance with what has been set out in the 6th legal basis.

2. Notify this resolution to FMB.

3. Order that this resolution be published 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 February 20, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from the day after its notification, in accordance with what they provide article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal 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, regulating the 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 in the terms provided for in article 90.3 of the LPAC.

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

The director,