apdcat
Autoritat Catalana de Protecció de Dades

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File identification

Resolution of sanctioning procedure no. PS 33/2019, referring to the General Directorate of Youth of the Department of Work, Social Affairs and Families.

Background

1. On 04/12/2019, the Authority received a letter in which a person filed a complaint against the General Directorate of Youth of the Department of Work, Social Affairs and Families (hereinafter, the DGJ), on the grounds of an alleged breach of the regulations on the protection of personal data. Specifically, the complainant - assigned to the said DGJ - complained about the use of his corporate email address for matters unrelated to his job; in the words of the complainant, for *"matters that have nothing to do with work".*

The reporting person, in order to prove the above facts, provided a copy of an email sent to different people on (...)/2019 at 1:00 p.m., from the corporate email address of a person working at the DGJ with the subject *"Solidarity Fund to pay Solidarity Bond 30 cases 1-O",* in which the recipients were encouraged to make contributions to the *"Solidarity Fund" [which] allows legal expenses and/or financial responsibilities to be met by natural persons as a result of their participation in civic, peaceful, non-violent and democratic actions framed in the process towards independence".*

2. The Authority opened a preliminary information phase (no. IP 118/2019), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure of application to the areas of competence of the Generalitat, and article 55.2 of Law 39/2015, of October 1, on the common administrative procedure of public administrations (henceforth, LPAC), to determine whether the facts they were likely to motivate the initiation of a sanctioning procedure, the identification of the person or persons who could be responsible and the relevant circumstances involved.

3. In this information phase, on 04/25/2019 the DGJ was required to report on the circumstances that would have led to the sending of the email subject to the complaint; and, if applicable, set out the reasons that would have justified this sending to the workers assigned to the DGJ that are listed there.

4. On 08/05/2019, the DGJ responded to the above-mentioned request in writing in which it stated the following:

- That *"the DGJ did not intervene in the sending of the e-mail in question and that, therefore, the circumstances that led to its sending are foreign to it. In other words, the DGJ did not give any instructions or make any kind of suggestion to the DGJ worker*

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*so that he sent the email object of complaint to the corporate addresses of colleagues attached to the DGJ".*

- That *"the DGJ has reminded the worker of the importance of complying with the data protection regulations by all public workers, and in particular, of always acting in accordance with Instruction 3/2018, on the use of information and communication technologies in the Administration of the Generalitat". That "the working person assumes responsibility for sending the mail in question in a personal capacity"*
- That *"the working person has also stated that from his corporate address he will not send any other mail that can be considered unrelated to work (...). He has also expressed that being aware that he should not have sent the email in question, he has decided to apologize in person to all the colleagues who received it".*

The DGJ provided a copy of Instruction 3/2018, which determines the following in point 8.5 of the *"Use of email"* section :

*"Staff may make private use of the corporate e-mail as long as it is done in an exceptional, non-abusive and circumstantial manner and for the purpose of attending to inexcusable matters that avoid absence from the workplace or that facilitate the reconciliation of life family and work. Under no circumstances may email be used to carry out private activities whose compatibility has been authorized".*

5. On 17/10/2019, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the DGJ for an alleged infringement provided for in article 83.5.a), in relation to the article 5.1.b); both 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) .

This initiation agreement was notified to the imputed entity on 10/28/2019.

6. On 07/11/2019, the DGJ made objections to the initiation agreement.

7. On 23/12/2019, the instructor of this procedure formulated a resolution proposal, by which she proposed that the director of the Catalan Data Protection Authority admonish the DGJ as responsible for an alleged infringement in article 83.5.a) in relation to article 5.1.b), both of the RGPD.

This resolution proposal was notified on 12/23/2019 and a period of 10 days was granted to formulate allegations.

8. On 09/01/2020, the accused entity submitted a statement of objections to the proposed resolution.

proven facts

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

On (...)/2019, a person attached to the DGJ sent from his corporate email account to the corporate addresses of different people - who also provided services to the said DG -, an email that in no way was linked to issues related to
the labor field. Specifically, in this mail, identified with the subject *"Solidarity Fund to pay 30 1-O joint bail",* recipients were encouraged to make contributions to the *"Solidarity Fund" [which] enables to legal expenses and/or financial responsibilities that natural persons receive as a result of their participation in civic, peaceful, non-violent and democratic actions framed in the process towards independence".*

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.

2. The accused entity has made allegations both in the initiation agreement and in the resolution proposal. The first ones were already analyzed in the proposed resolution, but even so it is considered appropriate to mention them here since they have been reiterated again in the letter formulated by the DGJ before the proposed resolution. Next, the set of allegations made by the accused entity in the context of this procedure will be analysed.

In its allegations, the DGJ maintains that it acted at all times *"with the required diligence in compliance with data protection regulations",* from which it is clear that it would base its allegations on its lack of guilt , lack based on the following elements: a) that *"the DGJ did not intervene either directly or indirectly in the sending of the email in question. That he did not give any instruction, indication or suggestion to the person working at the DGJ to prepare it and/or send it to the corporate addresses",* b) that as soon as the DGJ became aware of the facts, *"it was remembered to the working person the importance of complying with the data protection regulations by all public workers",* c) that *"the working person assumed responsibility for sending the mail in a personal capacity and confirmed that it will not receive any instructions from their superior or managers of the DGJ"; and, d)* that *"the DGJ acts with the required diligence in matters of data protection, training workers",* in short, that *"it has been made clear that at all times that - prior to sending and subsequently – the DGJ has acted in accordance with the data protection regulations and with the diligence required as data controller".*

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In order to prove the above, the DGJ provided a list of data protection training that the Department of Work, Social Affairs and Families has given to its staff over the years 2018 and 2019.

Indeed, as the DGJ claims, the commission of the offense charged here would be materially attributable to a specific person who provides services to said DGJ. However, according to the system of responsibility provided for in the RGPD and particularly in article 70 of the Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereafter, LOPDGDD), the responsibility for breaches of data protection regulations falls, among others, on those responsible for the treatments, and not on the people who provide service to the organization. Specifically, the mentioned article 70 of the LOPDGDD establishes that:

*"Responsible subjects.*
*1. They are subject to the sanctioning regime established by Regulation (EU) 2016/679 and this Organic Law:*
*a) Those responsible for the treatments.*

So things are, in accordance with the responsibility regime provided for in the data protection regulations and from the point of view of the right to the protection of personal data, the responsible for the facts that are considered proven is the DGJ, given the his status as responsible for the treatment in relation to which the offense alleged here has been committed.

Certainly, the principle of culpability, that is to say, the need for there to be intent or fault in the punitive action, is fully applicable to administrative sanctioning law, in accordance with what is provided for in article 28 of Law 40/2015, of October 1, of the legal regime of the public sector. This need for culpability as a constitutive element of the administrative offense has been expressly recognized by the Constitutional Court in its ruling 76/1990. However, it should also be noted that the Constitutional Court recognizes, in this same sentence, that the reception of the constitutional principles of the criminal order in the penal administrative law cannot be done mechanically and without nuances, that is, without weighing the aspects that differentiate one and another sector of the legal system. Therefore, starting from this premise, the question of the responsibility of legal entities will be analyzed next, specifically, their responsibility towards the acts of their employees.

The Supreme Court has established the responsibility of the legal person in these cases, taking into account the existence of a fault *"in eligendo"* or *"in vigilando".* Thus, in the STS of 28/11/1989, relating to a penalty imposed for violation of a Municipal Regulation in the matter of central markets, the Court argued the following:

*"For this, the aforementioned article 68 of the Regulation establishes the direct administrative responsibility of the user or concessionaire for faults of this nature (contrary to the Regulation) committed by employees or family members in their service; precept that has its coverage in the municipal powers to organize the operation of the public service of the market and to which the penal principles that the appealed judgment improperly applies are not applicable*

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*to proclaim its ineffectiveness; residing the correct foundation of the employer's administrative responsibility for the faults of the employees or family members in his service and committed with the occasion of lending it, in the fault "in eligendo" or/ and in the "in vigilando", with millenary roots in common law, as stated in the Sentence of the former 3rd Chamber of this High Court of April 29 from 1988; in the same way that, and with the same foundation, the jurisprudence declares with a general character in the field of penal administrative law, the responsibility of legal persons for the actions of their dependents and employees."*

It is true that the jurisprudence of the Supreme Court at some point was not entirely peaceful with regard to the liability of legal persons. However, the controversy was definitively resolved many years ago, with the Constitutional Court Judgment no. 276/1991, in which the highest interpreter of the Constitution pronounced in the following terms:

*"In this respect, we must remember now that although it is true that this Constitutional Court has repeatedly declared that the principles inspiring the criminal order are applicable, with certain nuances, to the sanctioning administrative law, given that both are manifestations of the punitive order of the State - STC 18/1987 por todas-, it is not least that we have also alluded to the caution with which it is advisable to operate when it comes to transferring constitutional guarantees extracted from the criminal order to the sanctioning administrative law. This operation cannot be done automatically, because the application of these guarantees to the administrative procedure is only possible to the extent that they are compatible with their nature -STC 22/1990)-. Specifically, on guilt, this Court has declared that, in effect, the Spanish Constitution undoubtedly enshrines the principle of guilt as a basic structural principle of criminal law and has added that, however, the constitutional enshrining of this principle does not imply in any way that the Constitution has converted into a norm a certain way of understanding it -STC 150/1991-. This principle of culpability also governs matters of administrative infractions, because to the extent that the sanction of said infraction is one of the manifestations of the ius puniendi of the State, a regime of objective or no fault liability is inadmissible in our system - STC 76/ 1990-.*

*Even this Court has qualified as "correct" the principle of personal responsibility for own actions -principle of the personality of the penalty or sanction- (STC 219/1988). All this, however, does not prevent our Administrative Law from admitting the direct responsibility of legal persons, recognizing them, pues, infringing capacity. This does not mean, at all, that for the case of administrative offenses committed by legal persons the subjective element of guilt has been suppressed, but simply that this principle must necessarily be applied in a different way to how it is done with respect to persons physical*

*This different construction of the imputability of the authorship of the infringement to the legal person is born from the very nature of legal fiction to which these subjects respond. They lack the volitional element in the strict sense, but not the ability to infringe the rules to which they are subject.*

So, with regard to the responsibility of legal entities in relation to the actions of their employees, it must be what has been decided by the Constitutional Court, which has been inclined

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for the thesis of the existence of a fault *in eligendo* or *in vigilando* on the part of the legal person in these cases.

Collecting the doctrine of the Constitutional Court in relation to the culpability of legal entities, the Supreme Court pronounces itself in the following terms in the Judgment dated 04/15/1996:

*"According to this latest jurisprudential doctrine, banking and credit institutions are administratively responsible for the negligence of their employees in the use of the security measures mandatorily installed in compliance with the current provisions, except when such action is not the result of inattention but of circumstances or situations of serious personal risk for the own employees or third parties. Neither the principle of typicality of the infraction nor that of the personality of the sanction are violated with such an interpretation because, in the scope of the sanctioning Administrative Law, legal persons can incur liability for the actions of their dependents, without being able to excuse themselves, as rule, in the behavior observed by them.*

*The art. 9 of Royal Decree Law 3/1979 refers to non-compliance with security regulations to companies, that is to say, to the owner of the same, not to their dependents or employees, which in the case of not attending to the instructions given by him on the compliance of the security rules could incur liability, but not in front of the Administration, but in front of its principal. The above-mentioned sentences express that the exposed doctrine does not suppose a preterition of the principles of culpability or imputability but its adaptation to the effectiveness of the legal obligation to comply with the security measures imposed on companies, a duty that entails, in case of non-compliance , the corresponding responsibility for the owner of the same, although it has its origin in the action of the employees to whom the employer had entrusted its effective implementation, direct responsibility that takes on greater meaning when the owner of the company is a legal person, constrained, by the demands of its own nature, to act through natural persons, a solution also advocated by the Constitutional Court Sentence 246/1991, of December 19, whose doctrine has been, to a large extent, determinant of the change in orientation of the jurisprudence of this Supreme Court, breaking with the thesis supported by the judgment appealed with foundation or in the previous jurisprudence that it cites, just as the procedural representation of the appealed banking entity does in its pleadings."*

Judgment no. is also of interest in this regard. 339/2010, of 26/11/2010 (RCA no. 52/10, ordinary procedure) issued by the Administrative Court no. 1 of Barcelona, which confirms the sanctioning Resolution issued by this Authority on 26/11/2009, in which a Public Administration was declared responsible for the serious infringement provided for in article 44.3.g), in relation with article 10, both of the currently repealed Organic Law 15/1999, of December 13, on the protection of personal data, due to the fact that one of its employees had disclosed information about traffic violations contained in the system of management of fines.

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*"The person responsible for the file is the City Council, an organization that is required to maintain secrecy pursuant to art. 10 of the LOPD. This Administration imposes traffic sanctions, through its agents and bodies, collects the information to be able to process the files.*
*In the present case, therefore, the breach of the duty of secrecy on the part of the City Council is sanctioned, for not having guaranteed confidentiality in a matter processed by the City Council, allowing personal information to pass to unauthorized third parties."*

And finally, the recent judgment of the National Court of 02/22/2019 is also illustrative. In this case, the appellant entity - which had been sanctioned by the Spanish Data Protection Agency - based its appeal, among others, on the violation of the principle of culpability and argued in this regard that *"it was formed in the people who were going to make the visits and were provided with materials on how they should behave. At all times the objective was to comply with the LOPD, and the collection of any personal data was prohibited, unless the affected person so consented, and the only data that had to be collected were those contained in the Form. The AEPD, without motivating the concurrence of culpability, imputes the infringing conduct to the (…) and (…)."*

Well, the National Court considered that in this case there was culpable conduct on the part of the entity that had been sanctioned by the AEPD, *"conduct that constitutes an administrative offense - article 44.4.b) of the LOPD in relation to article 7 of the same- which requires the existence of guilt, and is specified, in the present case, in the collection of personal data relating to ideology with respect to persons who have denied their consent for said data treatment, or with respect to persons who they did not even know that said collection of personal data was taking place.*

*Lack of diligence that constitutes the element of culpability of the administrative offense and is imputable to the appellant entity, and that does not require the concurrence of intent".*

In accordance with what has been explained, this Authority considers that in the analyzed case the culpability element required by the regulations is present and that allows the DGJ to be charged with the commission of the offense related to the violation of the principle of limitation of purpose that is detailed below.

3. In relation to the facts described in the proven facts section, relating to the principle of purpose limitation, it is necessary to refer to article 5.1.b) of the RGPD, which provides for the following:

> *"The personal data will be: (...) b) collected for specific, explicit and legitimate purposes, and will not be subsequently processed in a manner incompatible with said purposes; in accordance with article 89, section 1, the further processing of personal data for archival purposes in the public interest, scientific and historical research purposes or statistical purposes will not be considered incompatible with the initial purposes ("limitation of the purpose") ".*

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During the processing of this procedure, the fact described in the proven facts section, which is considered constitutive of the violation provided for in article 83.5.a) of the RGPD, which typifies the violation *"of the basic principles for the treatment, including the conditions for the consent pursuant to articles 5, 6, 7 and 9",* in this case of the principle of limitation of the purpose transcribed above.

The conduct addressed here has been included as a very serious infraction in article 72.1.a) of the LOPDGDD, in the following form:

> *"The processing of personal data that violates the principles and guarantees established by Article 5 of Regulation (EU) 2016"*

4. Article 77.2 of the LOPDGDD provides that, in the case of infractions committed by those in charge or in charge listed in art. 77.1 of the LOPDGDD, the competent data protection authority:

> *"(...) must issue a resolution that sanctions them with a warning. The resolution must also establish the measures to be adopted so that the conduct ceases or the effects of the offense committed are corrected.*
> *The resolution must be notified to the person in charge or in charge of the treatment, to the body to which it depends hierarchically, if applicable, and to those affected who have the status of interested party, if applicable."*

In terms similar to the LOPDGDD, article 21.2 of Law 32/2010, determines the following:

> *"2. In the case of violations committed in relation to publicly owned files, the director of the Catalan Data Protection Authority must issue a resolution declaring the violation and establishing the measures to be taken to correct its effects (...)".*



In the case we are dealing with, as the instructor pointed out in the resolution proposal, it is not appropriate to require the adoption of any corrective measures, since it would be a matter of specific facts already accomplished.

resolution

For all this, I resolve:

1. Admonish the General Directorate of Youth as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.b), both of the RGPD.

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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 legal basis 4t..

2. Notify this resolution to the General Directorate of Youth

3. Communicate the resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.

4. Order that this resolution be published on the Authority's website (apdcat.gencat.cat), in accordance with article 17 of Law 32/2010, of October 1.

Against this resolution, which puts an end to the administrative process in accordance with 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 the provisions of 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,