

File identification

Resolution of sanctioning procedure no. PS 74/2020, referring to the University of Lleida.

Background

1. On 11/18/2019, the Catalan Data Protection Authority (hereinafter, APDCAT) became aware through different means of communication that the University of Lleida (hereinafter, UdL) was carrying out a research project called "Acculturation and linguistic acculturation of the descendants of migrants. Challenges and potential for language learning and linguistic and socio-educational inclusion" (hereafter, the project). According to the media, as part of this project, a survey was carried out among the students of compulsory secondary education (ESO), among whom were the students of the Institute (...) of Tarragona. In this survey, students would be asked about their ideology, among other issues.
2. The Authority opened a preliminary information phase (no. IP 309/2019), 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 26/11/2019, the UdL was required to inform, among other things, which ESO courses the survey was aimed at; the reasons why it was necessary to identify the person answering the survey, taking into account that according to the media the answers were returned anonymous later; how the anonymization of the data of the surveyed students was carried out; what would be the legal basis that would legitimize this data processing and in the event that special categories of data were collected, that it be specified which of the circumstances provided for in article 9.2 of the RGPD would allow its processing; as well as whether the students were required to answer the survey. In turn, the UdL was also required to provide copies of 3 surveys answered by students of the Institute (...) from Tarragona.
4. On 10/12/2019 the APDCAT received, by referral from the Spanish Data Protection Agency, a letter from the Asociación Hablamos Español in which it filed a complaint against the UdL and the Department of Education of the Generalitat de Catalunya, due to an alleged breach of the regulations on personal data protection. Specifically, the reporting entity explained that a survey had been carried out to the 3rd and 4th year ESO students of the Institut (...) in Tarragona in which data were collected on ethnic or racial origin, political opinions, religious or philosophical convictions of the students and their families, without the consent of the minors affected or their legal representatives. The reporting entity added that the survey was carried out in schools at the behest of the Department of Education, which sent the questionnaire to several schools

prepared by a research group of the UdL, the recipient of the data collected being the UdL. The reporting entity provided various documentation.

This complaint was assigned the number IP 331/2019.

5. On 11/12/2019, the UdL responded to the request made on 26/11/2019, by means of a letter from its data protection delegate, in which it stated, among others, the following:

- Que l'objectiu del projecte d'investigació era afavorir la incorporació, en condicions d'igualtat, en la societat espanyola en general, i en la catalana en particular, dels descendents de persones immigrades.
- That several educational centers participated in the project.
- That the project aimed to analyze the particular case of the descendants of Romanians and Moroccans who were in the last stage of ESO not only in Catalonia, but also in other autonomous communities, such as the Community of Madrid or Asturias.
- That the UdL data protection delegate himself acknowledges that the first knowledge he had of the treatment of ideological data by the teaching and research staff (PDI) of the UdL was following the publication of a news item in the press on 15 /11/2019., and immediately admits "malpractice within the UdL, regarding the control of personal data processed by the institution, especially in relation to special category personal data", which "basically results in the non-implementation of adequate data control and protection measures already from the design, that is to say, from the very moment of the proposal and approval of the research project, and in any case before starting its execution."
- That the data protection delegate, despite his requests to the rectory, does not form part of the respective research ethics committees on people, linked to the UdL, emphasizing the fact that "it was a minimum measure to avoid incurring incidents similar to the one we are dealing with."
- That the principal investigator (PI) demonstrated "ignorance and lack of advice on the treatment of special categories of personal data", which "proves that it is necessary, as soon as possible, to give informative talks to researchers in the different university campuses, as the general secretary proposed in previous meetings with the vice-chancellor of University Research, and devise a procedure so that these incidents can be prevented from the origin of the research projects."
- That the surveys carried out as part of the project identified the people interested in first and last names.
- That there was a survey model specifically aimed at students of foreign origin (survey with code "OI") and another model aimed at "native" students (survey with code "A").
- That, in addition to the survey, the collaboration of the teaching tutor responsible for the surveyed students was requested, so that they could carry out a small evaluation of each of them.
- That the data from the surveys and the evaluation of the teachers were entered "pseudonymized" (with an identification code, of which only the members of the research team were aware) to a computer program hosted on the hard disk of

the IP's laptop, to which only he had access with his respective access key, which identified him as UdL staff.

- That the computer program not only made it possible to generate final results of a statistical type and absolutely dissociated from each specific person surveyed, but also the specific profile of each individual considered in isolation (according to four possible profiles: "integrated" - maintains his customs and adopts the natives -; "assimilated" - he forgets his customs and adopts the natives -; "separate" - maintains its customs, and rejects or does not adopt the natives -; or "marginalized" - does not take any position on it). These profiles were drawn up both for immigrants (Moroccans and Romanians) and for natives (in the latter case, the same profiles were drawn up, but in relation to the Spain/Catalonia dichotomy).
- That the identification of the people, with the consequent preparation of the profiles, responded to the specific requirements of the research, given that in a second phase following the surveys and the evaluation of the teaching staff, it was necessary to interview those people (native, Romanian or Moroccans) whose surveys revealed results of special scientific significance. Other activities were foreseen, also subsequent to the surveys, in the form of discussion groups with groups of indigenous students, and interviews with teaching staff (about their teaching work, perceptions, etc.), in which questions were never raised in relation to any specific student, nor was any person's identifying information revealed. Given the sudden interruption of the project, the research group did not conduct any of these interviews or focus groups.
- That the information that emerged in the press according to which "the answers were later made anonymous" is not accurate, but that they were pseudonymized to guarantee the identification of each student surveyed and their inclusion within a certain profile.
- That in the paper documentation, the surveys were separated from the respective "informed consents", so that the data holder of each survey could only be identified indirectly through the codes.
- That all paper documents were kept filed or stored in cabinets locked up
- That the participation in the project by both the students and the teachers was voluntary, and this was expressly stated in the "informed consent" section on the first page of the survey form.
- That there were students in some schools who refused to answer the survey. In these cases, the teachers assigned them alternative academic tasks, while their classmates answered the survey.
- That the information provided by the research group, at least that which is in writing, did not include all the content required by the regulations in force regarding the protection of personal data.
- That "There is no doubt that the surveys include questions that can reveal the ideology or the ethnic or racial origin of the students. El dos models d'enquesta inclouen preguntes d'identificació personal amb la cultura i llengua catalanes i espanyoles, o fins i tot amb el "moviment independentista"; preguntes sobre "sentir-se" català o espanyol; or if it is "more important to learn English or French than Catalan"; or if "Spanish is a beautiful language", among many others. At the end of the survey, it asks about the specific religion one professes and the degree of religious practice, if applicable."
- That all these data were essential for the project.

- That the Department of Education was not only informed by the research group about the scope of the project, and not only did it authorize its activities in the educational centers, but that there are signs of co-responsibility as an active collaborator and essential in this process of collecting and processing personal data.
As stated in the project report, the coordinator, in the Territorial Services in Lleida, of the Plan for Language and Cohesion is an active part of the working group Social Department of Education.
- That the Department provided the group with the dissociated data of all the students of the ESO degrees of all secondary schools in Catalonia, classified according to their nationality and the centers in which they were enrolled, with the aim that the group could identify suitable centers for the purpose of the research.
- That once the centers were chosen, the research group asked the Department to address an email to the chosen centers requesting their collaboration in the project based on an informative text that the research group wrote at the Department's request.
- That the members of the research group contacted, by telephone and/or e-mail, the different institutes chosen to verify the receipt of the information sent by the Department; and to offer them the possibility of expanding the information in writing and, even if the centers considered it appropriate, to provide them with an informative letter addressed specifically to the parents of the students in the centers. Of the ten centers where the surveys were conducted, only three accepted this offer to receive additional information.
- That the different educational centers collaborated in the pseudonymization process of the students' identification data, since the research group assigned the codes to each survey and evaluation carried out by the teaching staff based on the official lists of the students of the institute. These lists were sent by the management of the center.
- That the lists were printed and the corresponding identification code was noted, which then it also carried over to each survey and each evaluation by the teaching staff.
- That the research group did not obtain, prior to the surveys, the authorization of the respective parents or legal guardians of the students, because it only wanted to offer the possibility of participation to 3rd and 4th grade ESO students. The group considered that these minors, in any case, would have reached the age of 14 at the time of the surveys.
- That the IP (the main researcher) recognized that, by mistake, in a certain high school the survey was made available to 2nd year ESO students. These surveys were removed once the error was detected.
- That it was not taken into account that, in the surveys carried out during the last quarter of 2019 in classrooms of 3rd ESO students, it was possible that some students had not reached the age of 14 at that time.
- That the surveys were carried out during the hours that each center allocated for tutoring, with the aim of disturbing as little as possible the ordinary functioning of the academic activity, and always in the presence of the teaching staff responsible for the educational center.
- That as urgent measures to correct the situation, the IP was informed to proceed with the immediate and complete destruction of all paper documentation, once the "informed consents" have been scanned and saved on UdL servers, and once the survey data essential for the research project have been entered into the computer program.

- That the IP also communicated that, following an urgent meeting with representatives of the Department of Education, it was decided to provisionally suspend the survey campaign in schools.
- That the UdL has undertaken to approve an action protocol that not only imposes the appropriate security, risk analysis and impact assessment measures for the protection of the rights of the minors involved, and the subsequent anonymization of the data once the execution of the project has been completed.
- That the UdL had the necessary legitimacy to process the essential data for the project's objectives, without the need for the consent or authorization of these minors or their parents or guardians, in accordance with article 6.1.f) [of context of the answer it is inferred that the UdL was referring to article 6.1.e] and article 9.2.j), both of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (hereafter, RGPD). According to these precepts, special categories of data may be processed for the purposes of scientific research, as long as this scientific research is carried out in the public interest or in the exercise of public powers and unless a law in a specific field requires the consent or authorization of the affected persons.
- That the project is included in the scientific research plans regulated by Law 14/2011, of June 1, on science, technology and innovation; and which "intends to contribute to the full integration of minors in our society" (hereinafter, Law 14/2011).
- That the shortcomings and errors of the project focus on the "non-existence of a training policy for UdL researchers in basic concepts of personal data protection; the lack of effective supervision by the University of the Project before the start of execution (...); the non-signing of an agreement between the UdL and the Department of Education to delimit the respective obligations in the protection of minors' rights; the incomplete content of the information that was made available to students; the reluctance of most educational centers not to inform parents and guardians about the Project, despite the Research Group's proposal; the non-implementation by the Research Group of the essential security measures in the storage of the data of minors; and the lack of an analysis of the risks and an assessment of the impact that the processing of data of special protection, such as ideological data, or of racial or ethnic origin, may entail on the fundamental rights and freedoms of the Minors."

The reported entity attached various documentation to the letter.

6. On 20/01/2020 the APDCAT received 15 letters by which several parents of students from the Institut (...) of Tarragona and the Assembly for a Bilingual School in Catalonia (entity who also represented the rest of the complainants), filed a complaint against the UdL and the Department of Education.

The complainants stated that since the beginning of 2019, the UdL had been carrying out the controversial project, in which the Department of Education collaborated. The complainants added that 2nd, 3rd and 4th grade ESO students from 10 schools had already participated in the said project. In turn, they stated that the surveys answered by the students asked about identity, ideology and religious beliefs. Likewise,

they indicated that in certain cases the survey had not been voluntary, that parents had not been informed beforehand and that consent would not have been properly obtained to process special categories of data. The complainants provided various documentation.

IP numbers 15 to 29/2020 were assigned to these complaints.

7. On 28/01/2020, the UdL provided a copy of the action protocol it had approved "to correct the deficiencies detected, and guarantee compliance with the data protection regulations, in relation to the project d Controversial 'research'.

8. On 02/13/2020 and still within the framework of this preliminary information phase, the Department of Education was required to inform, among others, whether it was co-responsible (together with the UdL) in relation to the treatments linked to the aforementioned project; what was the legal basis that would legitimize the communication of students' personal data to researchers.

This requirement will be repeated on 03/12/2020.

9. On 03/13/2020, the Department of Education complied with this request by means of a letter stating, among others, the following:

- That the Department of Education is not co-responsible, in relation to the treatments linked to the study carried out by the UdL, since it does not participate, nor has it participated in the definition of the objectives or purposes of the research projects.
- That the Department of Education considers that the UdL is solely responsible for reviewing and approving the objectives and purposes of the project proposals it develops, and which includes the aspects derived from the analysis of the procedures and means involved and the legal foundations that enable its development, including the legal, technical and organizational analysis that must guarantee compliance with the set of principles and guarantees that apply in matters of data protection, among others.
- That given the sociolinguistic study proposed by the UdL, personal data of the students was provided, in accordance with the legal basis provided for in article 9.2.j) of the RGPD, to consider the processing of the data necessary for statistical purposes, based on the Law 1/2003, of 19 February, on Universities of Catalonia and Law 14/2011.

The Department of Education provided various documentation.

10. On 02/12/2020, the director of the APDCAT agreed to initiate disciplinary proceedings against the UdL for 5 alleged infractions: a first infraction provided for in article 83.5.a) in relation to articles 5.1.a) and 9; a second offense provided for in article 83.5.b) in relation to articles 13 and 14; a third offense provided for in article 83.4.a) in relation to article 32; a fourth violation provided for in article 83.4.a) in relation to article 35; and a fifth violation provided for in article 83.4.a) in relation to article 38; all of them from the RGPD. This initiation agreement was notified to the imputed entity on 07/12/2020.

11. The initiation agreement explained the reasons why no charge was made, in relation to not providing all the information provided for in articles 13 and 14 of the RGPD; on the one hand, to the students of the institutes (...), (...), (...), (...), (...), (...), (...) and (...), for the infringement to be time-barred; and on the other hand to the students of the high schools (...), (...), (...), given that they did not participate in the controversial study (but in a previous one) and, in any case, the any violation of the principle of transparency would also be prescribed.

12. On 29/12/2020, the UdL made objections to the initiation agreement. The accused entity provided various documentation with its letter.

13. On 02/18/2021, the person instructing this procedure formulated a proposed resolution, by which it proposed that the director of the APDCAT admonish the UdL as responsible for 5 infractions: a first infraction provided for in article 83.5.a) in relation to articles 5.1.a) and 9; a second offense provided for in article 83.5.b) in relation to articles 13 and 14; a third offense provided for in article 83.4.a) in relation to article 32; a fourth violation provided for in article 83.4.a) in relation to article 35; and a fifth violation provided for in article 83.4.a) in relation to article 38; all of them from the RGPD.

This resolution proposal was notified on 02/19/2021 and a period of 10 days was granted to formulate allegations.

14. The deadline has been exceeded and no objections have been submitted.

proven facts

1. In the framework of the research project called "Acculturation and linguistic acculturation of the descendants of migrants. Challenges and potential for language learning and linguistic and socio-educational inclusion", in 2019 the UdL carried out a survey of 2nd, 3rd and 4th year ESO students from various educational centers owned by the Department of Education.

Among the information provided to the students when completing the survey, it was indicated that they would be asked for "information on some personal data and opinions", which is why "consent to participate in this study" was requested.

The affected persons were informed that the processing of their data was based on their consent, although the UdL later stated that the processing was based on another legal basis (the exercise of a mission in the public interest) .

On the other hand, in the information provided to the affected people, it was also pointed out that "participation is voluntary, anonymous and confidential, therefore, your name will not appear, nor any information that allows you to reveal your identity. At any time you can withdraw from participating in the study or answer any question."

However, the UdL collected the students' first and last names, their signature and assigned them a code for their identification within the framework of the project.

In the survey filled out by the students' tutors about the student's general ability and the level of their linguistic knowledge, the students were also identified through said code and their first and last names.

The identification of the student, according to the UdL, was also necessary for a second phase of the project, consisting of interviewing certain students, establishing discussion groups or interviews with the teaching staff.

Through the aforementioned survey, data was collected from students on their ideology, ethnic or racial origin or religious beliefs, among other issues, without any of the circumstances provided for in Article 9.2 RGPD that allow the processing of special categories of data.

2. In the collection of data from the students of the institutes (...) (15/11/2019) and (...) (06/11/2019) who participated in the study, the UdL reported on the identity of the person in charge of the treatment and the contact details, the purpose, the legal basis that legitimized the treatment (consent as reported, although the UdL later stated that the legal basis was the exercise of a mission in the public interest) and the right to withdraw consent.

The UdL did not report in the collection of the data on the other extremes required by article 13 of the RGPD. In turn, it was also not reported that the tutors of the students participating in the study were asked to fill out a short survey about the general ability of each student and the level of their linguistic knowledge.

Likewise, in relation to the students of the Institute (...), and prior to the completion of the survey, the UdL collected through the institute certain data of its students (among which, the name and surnames and nationality).

The UdL did not inform the students of said institute about any of the extremes required by article 14 of the RGPD, although at the time when the students carried out the controversial survey they were provided with information about the aspects before mentioned.

3. In relation to the processing of personal data linked to the aforementioned project, as the UdL has admitted, a risk analysis had not been carried out to determine the appropriate technical and organizational measures to guarantee the security of the data.

In turn, the UdL has also stated that it had not trained UdL researchers in basic concepts of personal data protection.

4. In relation to the data processing linked to said project, the UdL has also admitted that did not carry out an impact assessment related to data protection (hereinafter, AIPD) prior to the start of treatment.

5. The data protection delegate of the UdL did not participate in the controversial project, regarding the obligations derived from the data protection regulations.

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 not made allegations in the resolution proposal, but it did so in the initiation agreement. Regarding this, it is considered appropriate to reiterate below the most relevant part of the motivated response of the instructing person to these allegations.

2.1. On the processing of special categories of data (1st proven fact).

In the 1st section of its statement of objections to the initiation agreement, the accused entity stated that in the report of the Spanish Data Protection Agency (hereinafter, AEPD) number 10601/2019 s 'indicates that public universities could treat special categories of data to carry out scientific research when the circumstance provided for in article 9.2.j) of the RGPD is met.

In advance, it must be emphasized that the APDCAT and the AEPD are related based on the principle of collaboration, without any kind of hierarchy or dependency between them, so that the decisions or criteria of the AEPD do not bind to this Authority.

Without prejudice to the above, the invoked AEPD report which, in other words, was published on its website on 09/24/2019, that is to say, after the UdL had already started collecting data from categories special, it is addressed in a "generic way" if in the investigations that are part of institutional research projects developed by public universities in a field not related to health, article 9.2.j) of the RGPD could be applicable . This provision of the RGPD provides that:

"2. Section 1 (prohibition of processing special categories of data) will not apply when one of the following circumstances occurs:

(...)

j) the treatment is necessary for filing purposes in the public interest, purposes of scientific or historical research or statistical purposes, in accordance with article 89, paragraph 1, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to the protection of data and establish appropriate and specific measures to protect the interests and fundamental rights of the interested party."

In the aforementioned report of the AEPD it is concluded that "article 9.2.j) lifts the prohibition to treat said data, if it does so in the terms established by the Law of the Union or of the Member States, for what will be that take into account what is provided for in the special regulations that apply depending on the data that is intended to be processed."

On this issue, in the opinion in relation to the consultation of the data protection delegate of the UdL on the deletion of the data of minors employed in the framework of the research project that concerns us here (CNS opinion 4/ 2020), this one Authority also reached the same conclusion:

"This provision of Article 9.2.j) of the RGPD would enable the processing of special categories of data to carry out the research project in question, provided that it is done on the basis of a rule with the rank of law that regulates adequate guarantees for the rights and freedoms of those affected.

In other words, the enabling effectiveness of the case provided for in article 9.2.j) of the RGPD is conditional on what the Law of the Union or the law of the Member States, which in our case must be a norm with the rank of law, establish these guarantees."

And, at this point, the opinion of the APDCAT mentions Judgment 76/2019, of 22 May, of the Constitutional Court (hereinafter, TC), which is not cited in the AEPD report. In this judgment it is pointed out that "all state interference in the field of fundamental rights and public liberties must respond to a constitutionally legitimate purpose or aim at the protection or safeguarding of a constitutionally relevant asset, because "if this Court has declared that the Constitution does not prevent the State from protecting rights or legal goods at the expense of the sacrifice of others equally recognized and, therefore, that the legislator can impose limitations on the content of fundamental rights or their exercise, we have also specified that, in such cases , those limitations must be justified in the protection of other rights or constitutional goods(...) and, in addition, they must be proportionate to the end pursued with them (...)" (FJ V).

As indicated in said opinion, the TC then recalls that this state interference in the field of fundamental rights and public liberties requires a rule with the status of law and specifies the indispensable requirements that this rule must meet as to guarantee legal security (FJ V):

"(...) is specified in the requirements of predictability and certainty of restrictive measures in the field of fundamental rights. In STC 292/2000, FJ 15, we point out that, even if they have a constitutional foundation, the limitations of the fundamental right established by law "can violate the Constitution if they suffer from a lack of certainty and predictability in the limits they impose and their manner of application", because "the lack of precision of the law in the material presuppositions of the limitation of a fundamental right is liable to generate an indeterminacy about the cases to which such restriction is applied"; "when this result occurs, beyond any reasonable interpretation, the law no longer fulfills its function of guaranteeing the fundamental right that it restricts, as it simply leaves the will of the person who has to apply it to operate instead". In the same sentence and legal foundation we also need the type of violation that entails the lack of certainty and predictability in the limits itself: "not only

would violate the principle of legal security (art. 9.3 EC), conceived as certainty about the applicable order and reasonably founded expectation of the person about what the performance of the power applying the law should be (STC 104/2000, FJ 7, por todas), but at the same time said law would be injuring the essential content of the fundamental right thus restricted, given that the way in which its limits have been set make it unrecognizable and, in practice, make its exercise impossible (SSTC 11/1981, FJ 15; 142/1993, of April 22, FJ 4, and 341/1993, of November 18, FJ 7)".

In addition to meeting the requirements previously transcribed (legal provision and legitimacy of the purpose pursued), the TC also determines in the same Judgment that it is necessary for the rule to establish adequate guarantees and specifies the nature and scope of this requirement (FJ VI) in the following terms:

"(...) c) The need to have adequate guarantees is especially important when the treatment affects special categories of data, also called sensitive data, because the use of these latter is likely to compromise more directly dignity, freedom and the free development of personality. (...)

Adequate guarantees must ensure that data processing is carried out under conditions that ensure transparency, supervision and effective judicial protection, and must ensure that data are not collected disproportionately and are not used for purposes other than those they justified their obtaining. The nature and scope of the guarantees that are constitutionally enforceable in each case will depend on three factors essentially: the type of data processing that is intended to be carried out; the nature of the data; and the probability and severity of the risks of abuse and illicit use which, in turn, are linked to the type of treatment and the category of data in question. Thus, data collection with statistical purposes does not pose the same problems as data collection with a specific purpose. Nor does the collection and processing of anonymous data involve the same degree of interference as the collection and processing of personal data that are taken individually and are not anonymized, as is the treatment of personal data that reveal ethnic or racial origin , political opinions, health, sex life or sexual orientation of a natural person, than the treatment of other types of data.

The level and nature of the adequate guarantees cannot be determined once and for all, because, on the one hand, they must be revised and updated when necessary and, on the other hand, the principle of proportionality requires verifying whether, with the development of technology, treatment possibilities appear that are less intrusive or potentially less dangerous for fundamental rights.

d) In conclusion, political opinions are sensitive personal data whose need for protection is, to that extent, greater than that of other personal data. Adequate and specific protection against its treatment constitutes, in short, a constitutional requirement, without prejudice

that, as seen, also represents a requirement derived from European Union Law. Therefore, the legislator is constitutionally obliged to adapt the protection it provides to said personal data, where appropriate, imposing greater requirements so that they can be the object of treatment and providing specific guarantees in their treatment, in addition to those that may be common or general.”

Given the above, in CNS opinion 4/2020 the Authority pointed out that neither Organic Law 6/2001, of December 21, on Universities nor, especially, Law 14/2011 (applicable to the present case in dealing -se of data processing for the purposes of scientific research) do not contemplate clear and precise rules that regulate the scope of the interference in the rights and freedoms of those affected, nor any provision relating to the establishment of adequate guarantees for to the protection of these rights and freedoms in the terms indicated by the TC.

Therefore, the authorization conferred by article 9.2.j) of the RGPD to treat categories of data specifically for the purposes of scientific research was not applicable in the present case for these reasons.

In this respect, it is worth saying that the AEPD report that has been invoked by the UdL does not state whether Law 14/2011 would enable the processing of special categories of data in accordance with article 9.2.j) of the RGPD, but focuses on considering that this rule would allow public universities to go to the legal basis provided for in article 6.1.e) of the RGPD.

In relation to this issue, as indicated by the instructing person in the resolution proposal, it should be pointed out that in the present sanctioning procedure the UdL is not charged with the processing of personal data without any of the conditions of legality of the processing being met that establishes article 6 of the RGPD, but what is imputed is the treatment of special categories of data without any of the circumstances provided for in article 9.2 of the RGPD.

And it is the person in charge of the treatment who is responsible for analyzing, prior to the treatment of special categories of data, the circumstances that must legitimize the treatment of this type of data. In this sense, it does not hurt to remember that the entities subject to the scope of action of the APDCAT (such as the UdL) can request that it issue an opinion in relation to the doubts that they may have about data processing (art. 5.or Law 32/2010).

Having said that, and as the instructing person also explained in the resolution proposal, the claims of the UdL are not supported when it alludes to a disparity of criteria between the AEPD and the APDCAT, for the reasons that have been explained , or in a scenario of legal uncertainty to be able to "discern the legality of the treatment of "special categories of data" other than health, in research activity".

Likewise, the accused entity highlights that even if it had obtained the explicit consent of the affected persons (which is one of the circumstances provided for in Article 9.2 of the RGPD that allows the treatment of special categories of

data), the processing would not have been lawful since article 9.1 of the LOPDGDD prevents processing with mere consent the data of ideology, trade union affiliation, religion, sexual orientation, beliefs or racial or ethnic origin.

The previous statement is also not shared given that article 9.1 of the LOPDGDD prevents it treat said special categories of data with explicit consent, when this may give rise to discriminatory situations. In this regard, CNS opinion 4/2020 indicated that it was not inferred that the processing of student data by the UdL research group had given rise to discriminatory situations. Therefore, in cases like the one we are dealing with, the explicit consent of those affected could legitimize the treatment

of those special categories of data (art. 9.2.a RPD), as long as and when the consent met all the requirements to be considered valid, which were addressed in said opinion.

On the other hand, the fact that in the present case neither the LOU nor Law 14/2011 do not allow recourse to the circumstance provided for in article 9.2.j) of the RPD, does not mean that public universities cannot treat special categories of data in the framework of its scientific investigations, whenever and wherever any of the other circumstances provided for in article 9.2 of the RPD occur. In this regard, as has just been explained, if the UdL considers it appropriate, it can request an opinion on this issue.

Finally, the UdL alleged in its statement of objections to the initiation agreement that "when the treatment for research purposes lies in special categories of data other than health data, no it is possible to know a priori what exactly is the conduct that violates the principle of legality, so that the alleged infraction committed by the University (according to the Agreement, provided for in article 72.1.e) of the LOPDGDD) would be lacking , in this case, of the mandatory regulatory predetermination or taxativity required by article 25.1 of the Constitution in penal matters, as well as the principle of legal certainty in article 9.3 of the Constitution and the principle of typicality in article 27 of Law 40/2015, of October 1, on the legal regime of the public sector."

Regarding this allegation it must be said that article 5.1.a) of the RPD establishes that personal data will be treated lawfully. And in the case of special categories of data, article 9.1 of the RPD determines that their treatment is prohibited, prohibition which is not applicable if any of the circumstances contemplated in section 2 of article 9 of the RPD occur.

Having said that, it must be clarified that the typification of data protection violations from the date of full application of the RPD (25/05/2018) is contained in sections 4, 5 and 6 of article 83 GDPR. Norm which, it must be remembered, is a Community Regulation that enjoys not only direct effect for its application, but also supremacy over any other norm of the internal law of the member states, so that it must be applied with priority over other internal rules that may conflict with them.

In the case we are concerned with, the precept applied in the infringement relating to the illicit processing of special categories of data is that provided for in article 83.5.a) of the RPD, which typifies as an infringement, the violation of the "principles basics of the treatment, including the conditions

for consent in accordance with articles 5, 6, 7 and 9", which includes the principle of legality of the processing of special categories of data (articles 5.1.ai 9 RGPD).

In this regard, the Judgment of the Supreme Court of November 12, 2008 (rec. 10781/2004) already endorsed a similar legislative technique used by article 43.4.b) of Organic Law 15/1999 in its original wording .

Regarding Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereafter, LOPDGDD), it is necessary to point out that this rule describes typical behaviors and establishes the distinction between very serious, serious and minor, taking into account the differentiation that the RGPD establishes when setting the amount of the penalties. As pointed out in the statement of reasons of the LOPDGDD, the categorization of offenses is introduced only for the purpose of determining the limitation periods, and the description of typical behaviors has as its sole object the enumeration in an exemplary manner of some of the punishable acts that must be understood as included within the general types established by the European standard.

In any case, article 72.1.e) of the LOPDGDD describes for the purposes indicated what the typical behavior is: "The processing of personal data of the categories referred to in article 9 of the Regulation (EU) 2016/679, without any of the circumstances provided for in the aforementioned precept and article 9 of this Organic Law."

In short, as the investigating person concluded in the resolution proposal, the principle of typicality is not violated, given that the violation of article 9 of the RGPD is properly classified through article 83.5.a) of the GDPR as an infringement.

Aside from what has been explained so far, it should be noted that the initiation agreement indicated that the conduct described in the 1st section of facts that motivated the initiation of the sanctioning procedure (which coincide with the conducts described in proven fact 1 of this proposal), apart from the legality of the special categories of data, also violated the principle of loyalty in relation to the treatment of special categories of data. And it was added that these behaviors, due to their connection, should only be sanctioned for the violation of the principle of lawfulness of the processing of special categories of data, given that the violation of the principle of loyalty would be subsumed by the first violation , in accordance with article 29.5 of the LRJSP.

Well, it should be noted that the UdL did not formulate any allegation in relation to the imputation related to the violation of the principle of loyalty before the initiation agreement.

2.2. On the principle of transparency.

Subsequently, the accused entity alleged in the statement of objections to the initiation agreement that it provided the basic information in accordance with what is established in Recital 42 of the RGPD and article 11.2 of the LOPDGDD, and that "as for the rights of the affected persons, the most transcendent, effective and understandable right for minors was communicated, which, together with the knowledge of the contact details to exercise it, guaranteed from

the beginning of the treatment that minors could, in practice, defend their rights and legitimate interests." All this was alleged by the UdL for "the purpose of justifying the relevant adequacy between the appropriate sanction, and the seriousness of the fact constituting the infraction and the concurrent circumstances, in the terms of article 29.4 of the Law 40/2015."

Well, with regard to recital 42 of the RGPD, it should be pointed out that it refers to the conditions that consent must have in order to be considered valid. Among these conditions, there is the one relating to informed consent. For this purpose, Recital 42 of the RGPD determines that the interested person must know, at least, the identity of the person responsible for the treatment and the purpose of the treatment. Otherwise, the consent would not be informed and therefore not considered valid.

However, the fact that consent can be informed does not exclude that the data controller, in application of the principle of transparency, must provide all the information provided for in articles 13 or 14 of the RGPD, depending on whether it is the person himself who provides the data (art. 13 RGPD) or the data is obtained by a different route from that of the interested person (art. 14 RGPD).

In any case, it is necessary to point out that the same imputed entity has recognized that the treatment was not based on the consent of the affected person.

It is then appropriate to address whether the UdL provided the basic information, the minimum content of which is determined by article 11.2 of the LOPDGDD:

"2. The basic information referred to in the previous section must contain, at least:

- a) The identity of the data controller and his representative, if applicable.
- b) The purpose of the treatment.
- c) The possibility of exercising the rights established by articles 15 to 22 of Regulation (EU) 2016/679.

If the data obtained from the affected person must be processed for profiling, the basic information must also include this circumstance. In this case, the affected person must be informed of his right to object to the adoption of automated individual decisions that produce legal effects on him or significantly affect him in a similar way, when this right of agreement is given with what is provided for in article 22 of Regulation (EU) 2016/679."

In the present case, it should be pointed out that the UdL did not inform the students of the institutes (...) and (...), when collecting their data (on the date the survey was carried out), neither on the possibility of exercising the rights established by articles 15 to 22 of the RGPD, nor on the creation of profiles based on the data obtained. This is why it must be concluded that the basic information determined by article 11.2 of the LOPDGDD was not provided.

Having said that, to consider that the right to information is effective, it is not enough to provide the basic information established by article 11.2 of the LOPDGDD, but the rest of the information determined by the article must also be provided 13 of the GDPR.

Indeed, article 11.1 of the LOPDGDD provides that when "the personal data is obtained from the affected person, the data controller can comply with the duty of information established by article 13 of Regulation (EU) 2016/ 679 providing the affected person with the basic information referred to in the following section and indicating an electronic address or other means that allows him to easily and immediately access the rest of the information.

On the other hand, I respect the data that the UdL collected from the students of the Institute (...) before carrying out the survey, referring to their first and last names and nationality, the UdL has not certified that it had provided the students of said institute with all the information required by article 14 of the RGPD (nor in the form provided for in art. 11.3 of the LOPDGDD). In this case, the data of the students of the Institute (...) (name and surname and nationality) were not obtained directly from the affected persons, but through the institute, which is why the information that had to be facilitating was established in article 14 of the RGPD. All this, without prejudice to the fact that when the students of the Institute (...) carried out the controversial survey they were provided with information on some aspects related to the treatment of their data (described in the proven fact 2nd of this resolution), as explained.

Having settled the above, it should be noted that the sanctioning regime applicable to the UdL does not provide for the imposition of a financial penalty, but rather a warning in accordance with the provisions of article 77 of the LOPDGDD, which by its very nature it is not susceptible to graduation. Likewise, it should be noted that as indicated in the initiation agreement, the imputed conduct that is addressed here has been collected as a minor infraction in article 74.a) of the LOPDGDD.

2.3. About risk analysis and impact assessment related to data protection.

In its statement of objections to the initiation agreement, the accused entity acknowledged that "it is true that the University of Lleida did not carry out any risk analysis or any impact assessment". However, the UdL considered that in "practice, the essential security measures required by the processing of special protection data with a high risk of affecting the rights and freedoms of the minors affected were implemented, in accordance with the "analysis and evaluation that was subsequently prepared by the University in May 2020".

On the other hand, the UdL detailed the security measures that had been implemented before carrying out said analysis. In the last one he added that "neither the lack of training of the research staff, nor the lack of intervention by the data protection delegate, nor the lack of a risk analysis and an impact assessment, what does express reference to the Agreement, did not prevent the implementation of the same security measures that would have been implemented if the risk analysis and impact assessment had been carried out prior to the start of the execution of the Project, before the collection of data through surveys in educational centers. Therefore, the non-compliance referred to in the Agreement, and which entails the alleged commission of the offenses provided for in letters f) it) of article 73 of the LOPDGDD, actually becomes a formal irregularity not invalidating the

insofar as the protection of the rights and freedoms of minors (...) has been, in practice, all that the University could guarantee, and all that is required of any public entity, in accordance with the National Scheme of Security."

In this regard, as the instructing person pointed out in the resolution proposal, it must be said that the accused entity has acknowledged that it had not even carried out a risk analysis to determine the appropriate technical and organizational measures to guarantee a level of security appropriate to the risk as determined by article 32 of the RGPD, nor had it carried out an impact assessment related to data protection prior to starting the treatment as required by article 35 of the RGPD. In other words, he has admitted the commission of these two facts that are imputed to him in the present sanctioning procedure, which are constitutive (each of them) of the infringement provided for in article 83.4.a) of the RGPD.

In the specific case of the risk analysis, it is necessary to specify that regardless of whether the measures that had been implemented before the month of May 2020 could be qualified as adequate to guarantee the security of personal data, a circumstance that is also not has accredited, it is necessary to carry out a risk analysis in the terms provided for in article 32 of the RGPD, which must be documented, in order to determine if these measures are sufficient or if there are any shortcomings.

2.4. On the training of researchers in data protection.

Regarding the training of researchers on personal data protection, the UdL explained in its statement of objections to the initiation agreement that during the last quarter of 2020 the first editions of two specific training activities in the field of personal data protection, which would also be given during the year 2021 "to ensure that the training reaches practically all teaching and research staff, as well as administration and service staff, of the UdL". The UdL added that it had also designed two protocols on data processing for scientific research purposes.

Well, in its letter the UdL did not question the veracity of the facts that were attributed to it, consistent with the fact that the UdL researchers had not been trained in basic concepts of personal data protection.

Having said that, as stated by the instructing person in the proposed resolution, the actions he has taken subsequently and those he stated that the UdL would carry out to train its staff.

2.5. On the lack of intervention of the data protection representative.

In relation to the imputation consisting in the fact that the UdL's data protection delegate did not participate in the aforementioned project, in relation to data protection, the imputed entity set out in its statement of allegations before the 'initial agreement that this circumstance did not entail a "real impact on the rights and freedoms of minors, since the security measures effectively implemented have been, since the beginning of the treatment, the same as those that would have been implemented if the delegate had intervened."

Well, the eventual adoption of security measures did not exempt the data controller from his obligation to ensure that the data protection delegate participates in an appropriate manner and at the right time in all matters relating to the protection of personal data , as required by article 38.1 of the RGPD.

Having said that, and in view of the facts presented, it can be inferred that if the participation of the data protection delegate had been allowed, as the instructing person explained in the proposed resolution, some of the violations that they are imputed to the UdL.

2.6. About the actions of the UdL.

Finally, the UdL explained in its statement of objections to the initiation agreement that from the moment it became aware of the imputed facts, following the news published in the press, it cooperated with the Authority and mitigated the harmful effects for the rights and freedoms of minors (the UdL detailed a series of actions in that letter).

Certainly the UdL maintained a collaborative attitude within the framework of the previous actions, a question but that does not affect its responsibility for the acts imputed nor its qualification. It should be remembered at this point that the entities that process personal data have the obligation to assist this Authority (articles 58.1 RGPD and 19 of Law 32/2010). Likewise, it is also necessary to remember the duty of collaboration of all people with the Administration that exercises the power of inspection, a duty imposed by art. 18 of the LPAC.

In relation to the actions carried out by the UdL to correct the effects of the imputed infractions, it should be noted that by means of a resolution dated 03/03/2020 the vice-chancellor of the UdL ordered "the Principal Investigator to destroy the set of personal data processed for the purpose of carrying out surveys within the framework of the Project. This destruction must be supervised by the corresponding technicians of the Archive and Document Management unit, and of the Information and Communications Systems unit, who must guarantee the complete elimination of all information on paper and in electronic media ."

At this point, it is worth saying that in opinion CNS 4/2020 issued by the Authority at the request of the UdL, it was also pointed out the need to delete all the personal data of minors used in carrying out said surveys in the framework of the research project.

Despite what was ordered in the vice-chancellor's resolution previously identified, in its statement of objections to the initiation agreement the UdL stated that "all the documentation that the Project has generated during 2019 (the surveys , the lists of students, the evaluations of the teachers, and the consents granted) has been removed from the hard drive of the laptop of the IP [principal researcher], and remains archived in network units of the UdL or in closed cabinets in offices of the University under the control of the IP". Therefore, from the above it can be concluded that the UdL would not have deleted the personal data collected as part of the project subject to the present sanctioning procedure. In any case, in accordance with article 32 of the LOPDGDD during the processing of this procedure

sanctioner the data could be kept blocked for the demand of possible responsibilities derived from the treatment and only for the limitation period of these.

Without prejudice to the above, it is necessary to point out that the eventual adoption of measures to correct the effects of the infringement would not distort the imputed facts, nor would they change their legal classification.

In relation to this, it must be reiterated that the sanctioning regime applicable to the UdL (reprimand) is not susceptible to graduation due to its nature, which is why the circumstances invoked by the UdL (mitigating the effects of the infringement and the degree of cooperation with the Authority) cannot be taken into account for the purposes of determining the penalty of reprimand.

3. The conduct described in the 1st section of the proven facts violates the principles of loyalty and legality, both contemplated in article 5.1.a) of the RGPD. This precept that personal data will be treated in a way "treated in a lawful, fair and transparent manner in relation to the interested party".

For its part, article 9.2 of the RGPD, regarding the treatment of special categories of data, provides that the prohibition of their treatment does not apply if one of the following circumstances is present:

"a) the interested party gives his explicit consent for the treatment of said personal data with one or more of the specified purposes, except when the Law of the Union or of the Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party; b) the treatment is necessary for the fulfillment of obligations and the exercise of specific rights of the person responsible for the treatment or of the interested party in the field of labor law and of social security and protection, to the extent that this is authorized by the Law of the Union of the

Member States or a collective agreement in accordance with the Law of the Member States that establish adequate guarantees of respect for the fundamental rights and interests of the interested party; c) the treatment is necessary to protect the vital interests of the interested party or another natural person, in the event that the interested party is not physically or legally able to give their consent; d) the treatment is carried out, within the scope of its legitimate activities and with due guarantees, by a foundation, an association or any other non-profit organization, whose purpose is political, philosophical, religious or trade union, provided that the treatment refers exclusively to current or former members of such organizations or persons who maintain regular contact with them in relation to their purposes and always

that personal data are not communicated outside of them without the consent of the interested parties; e) the treatment refers to personal data that the interested party has made manifestly public;

f) the treatment is necessary for the formulation, exercise or defense of claims or when the courts act in the exercise of their judicial function; g) the treatment is necessary for reasons of an essential public interest, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish measures adequate and specific to protect the fundamental interests and rights of the interested party; h) the treatment is necessary for the purposes of preventive or occupational medicine, evaluation of the worker's labor capacity, medical diagnosis, provision of health or social assistance or treatment, or management of health and social care systems and services, on the basis of the Law of the Union or of the Member States or by virtue of a contract with a healthcare professional and without prejudice to the conditions and guarantees contemplated in section 3; i) the treatment is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health, or to guarantee high levels of quality and safety of health care and medicines or health products, on the basis of the Law of the Union or of the Member States that establishes appropriate and specific measures to protect the rights and freedoms of the interested party, in particular professional secrecy, j) the treatment is necessary for purposes of archiving in public interest, purposes of scientific or historical research or statistical purposes, in accordance with article 89, paragraph 1, on the basis of the Law of the Union or of the Member States, which must be proportional to the objective pursued, essentially respect the right to data protection and establish appropriate and specific measures to protect the fundamental interests and rights of the interested party."

As indicated by the instructing person, during the processing of this procedure the conduct described in point 1 of the proven facts section, which are constitutive of two infractions (the violation of the principle of legality for the treatment of special categories of data and the violation of the principle of loyalty), in both cases provided for in article 83.5.a) in relation to article 5.1.a) of the RGPD. In turn, with regard to the offense linked to the violation of the principle of legality in relation to processing of special categories of data, in addition to article 5.1.a) RGPD, article 9 of the RGPD must also be consulted.

Article 83.5.a) of the RGPD, typifies as an infringement, the violation of the "basic principles of the treatment, including the conditions for consent pursuant to articles 5, 6, 7 and 9", among which they contemplate both the principle of loyalty (art. 5.1.a RGPD), and the principle of lawfulness of the processing of special categories of data (articles 5.1.ai 9 RGPD).

These behaviors have also been included as a very serious infringement in articles 72.1.a) and 72.1.e) of the LOPDGDD, in the following form:

- "a) The processing of personal data that violates the principles and guarantees established by article 5 of Regulation (EU) 2016/679. (...)
- "e) The processing of personal data of the categories referred to in article 9 of Regulation (EU) 2016/679, without any of the circumstances provided for in the aforementioned precept and article 9 of this Law organic."

In the present case, it has been considered that both infringements, the violation of the principle of loyalty and the violation of the principle of legality with regard to the treatment of special categories of data, are closely linked.

In this sense, article 29.5 of the LRJSP provides that "When the commission of one offense necessarily leads to the commission of another or others, only the penalty corresponding to the most serious offense committed must be imposed ."

In the present case, both the violation of the principle of loyalty and that of the principle of legality in relation to the treatment of special categories of data, are typified in article 83.5.a) of the RGPD, so that the seriousness of 'both violations are coincidental. In front of this, it is considered that the conduct described in the 1st section of the proven facts, due to their connection, should only be sanctioned for the violation of the principle of lawfulness of the processing of special categories of data, given that this violation would subsume the violation of the principle of loyalty.

4. With regard to the facts described in point 2 of the proven facts section, it is necessary to go first to paragraphs 1 and 2 of article 13 of the RGPD, which establish the information that must be provided when personal data is obtained from the person concerned:

"1. When personal data relating to an interested party is obtained, the data controller, at the time it is obtained, will provide all the information indicated below:

- a) the identity and contact details of the person in charge and, where appropriate, of their representative;
- b) the contact details of the data protection officer, if applicable;
- c) the purposes of the treatment for which the personal data is intended and the legal basis of the treatment;
- d) when the treatment is based on article 6, section 1, letter f), the legitimate interests of the person in charge or of a third party;
- e) the recipients or the categories of recipients of the personal data, as the case may be;
- f) in its case, the intention of the person in charge to transfer personal data to a third country or international organization and the existence or absence of an adequacy decision by the Commission, or, in the case of the transfers indicated in articles 46 or 47 or article 49, section 1, second paragraph, refers to the adequate or appropriate guarantees and the means to obtain a copy of these or the fact that they have been provided.

2. In addition to the information mentioned in section 1, the controller will provide the interested party, at the time the personal data is obtained, the following information necessary to guarantee a fair and transparent data processing:
- a) the period during which personal data will be kept or, when not possible, the criteria used to determine this period;
 - b) the existence of the right to request from the person responsible for the treatment access to the personal data relating to the interested party, and its rectification or deletion, or the limitation of its treatment, or to oppose the treatment, as well as the right to the portability of the data ;
 - c) when the treatment is based on article 6, section 1, letter a), or article 9, section 2, letter a), the existence of the right to withdraw consent at any time, without it affecting the legality treatment based on consent prior to its withdrawal;
 - d) the right to present a claim before a control authority;
 - e) if the communication of personal data is a legal or contractual requirement, or a necessary requirement to sign a contract, and if the interested party is obliged to provide personal data and is informed of the possible consequences of not providing such data;
 - f) the existence of automated decisions, including the creation of profiles, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information on the logic applied, as well as the importance and expected consequences of said treatment for the person concerned."

For its part, sections 1 and 2 of article 11 of the LOPDGDD, referring to transparency and information of the affected party, provide that:

"1. When the personal data is obtained from the affected person, the controller can comply with the duty of information established by Article 13 of Regulation (EU) 2016/679 by providing the affected person with the basic information referred to in section below and indicating an electronic address or other means that allows you to access the rest of the information in a simple and immediate way.

2. The basic information referred to in the previous section must contain, at least:

- a) The identity of the data controller and his representative, if applicable.
- b) The purpose of the treatment.
- c) The possibility of exercising the rights established by articles 15 to 22 of Regulation (EU) 2016/679.

If the data obtained from the affected person must be processed for profiling, the basic information must also include this circumstance. In this case, the affected person must be informed of his right to object to the adoption of automated individual decisions that produce legal effects on him or significantly affect him in a similar way, when this right of agreement is given with what is provided for in article 22 of Regulation (EU) 2016/679."

Secondly, when the data is not obtained from the interested person, it is necessary to go to sections 1 to 4 of article 14 of the RGPD, which provide the following:

"1. When personal data has not been obtained from the interested party, the data controller will provide the following information:

- a) the identity and contact details of the person in charge and, where appropriate, of their representative;
- b) the contact details of the data protection officer, if applicable;
- c) the purposes of the treatment for which the personal data is intended, as well as the legal basis of the treatment;
- d) the categories of personal data in question;
- e) the recipients or the categories of recipients of the personal data, in your case;
- f) in its case, the intention of the person in charge to transfer personal data to a recipient in a third country or international organization and the existence or absence of an adequacy decision by the Commission, or, in the case of the transfers indicated in the articles 46 or 47 or article 49, paragraph 1, second paragraph, refers to adequate or appropriate guarantees and the means to obtain a copy of them or the fact that they have been provided.

2. In addition to the information mentioned in section 1, the data controller will provide the interested party with the following information necessary to guarantee fair and transparent data processing with respect to the interested party:

- a) the period during which the personal data will be kept or, when that is not possible, the criteria used to determine this period;
- b) when the treatment is based on article 6, section 1, letter f), the legitimate interests of the person responsible for the treatment or of a third party;
- c) the existence of the right to request from the person in charge of the treatment access to the personal data relating to the interested party, and its rectification or deletion, or the limitation of its treatment, and to oppose the treatment, as well as the right to the portability of the data ;
- d) when the treatment is based on article 6, section 1, letter a), or article 9, section 2, letter a), the existence of the right to withdraw consent at any time, without it affecting the legality of the treatment based on the consent before its withdrawal;
- e) the right to present a claim before a control authority;
- f) the source from which the personal data come and, where appropriate, if they come from publicly accessible sources;
- g) the existence of automated decisions, including profiling, referred to in article 22, sections 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party.

3. The data controller will provide the information indicated in sections 1 and 2:

- a) within a reasonable time, once the personal data has been obtained, and at the latest within a month, given the specific circumstances in which said data are processed;
 - b) if the personal data must be used to communicate with the interested party, at the latest at the time of the first communication to said interested party, or
 - c) if it is planned to communicate them to another recipient, at the latest at the time when the personal data are communicated for the first time.
4. When the controller plans the further processing of personal data for a purpose other than that for which they were obtained, he will provide the interested party, before said further processing, with information about that other purpose and any other relevant information indicated in section 2."

In accordance with what has been presented, as indicated by the instructing person, the fact recorded in point 2 of the section on proven facts constitutes the violation provided for in article 83.5.b) of the RGPD, which typifies as such as the violation of "the rights of interested parties pursuant to articles 12 to 22", among which is the right to information provided for in articles 13 and 14 of the RGPD.

The conduct addressed here has been included as a minor infraction in article 74.a) of the LOPDGDD, in the following form:

"a) Breach of the principle of transparency of information or the right to information of the affected person for not providing all the information required by articles 13 and 14 of Regulation (EU) 2016/679."

5. Regarding the fact described in point 3 of the proven facts section, it is necessary to go to article 5.1.f) of the RGPD, which regulates the principle of integrity and confidentiality, according to which personal data will be "treated in such a way as to guarantee adequate security of personal data, including protection against unauthorized or illegal processing and against accidental loss, destruction or damage, through the application of appropriate technical or organizational measures".

For its part, article 32 of the RGPD, regarding data security, establishes the following:

"1. Taking into account the state of the art, the costs of application, and the nature, scope, context and purposes of the treatment, as well as risks of variable probability and severity for the rights and freedoms of natural persons, the person responsible and the treatment manager will apply appropriate technical and organizational measures to guarantee a level of security adequate to the risk (...).

2. When assessing the adequacy of the level of security, particular consideration will be given to the risks presented by data processing, in particular as a result of the accidental or unlawful destruction, loss or alteration of personal data transmitted, stored or processed

otherwise, or unauthorized communication or access to said data. (...)"

This implies having to carry out an assessment of the risks involved in each treatment to determine the security measures that need to be implemented, which could include training staff on data protection.

In accordance with what has been presented, as indicated by the instructing person, the fact recorded in point 3 of the section on proven facts constitutes the violation provided for in article 83.4.a) of the RGPD, which typifies as such as the violation of "the obligations of the person in charge and of the person in charge pursuant to articles 8, 11, 25 to 39, 42 and 43", among which there is that provided for in article 32 RGPD.

In turn, this conduct has been included as a serious infraction in article 73.f) of the LOPDGDD, in the following form:

"f) The lack of adoption of technical and organizational measures that are appropriate to guarantee a level of security adequate to the risk of the treatment, in the terms required by article 32.1 of Regulation (EU) 2016/679."

6. With regard to the fact described in point 4 of the proven facts section, it is necessary to go to sections 1 to 4 of article 35 of the RGPD, which establish the following:

"1. When it is likely that a type of treatment, in particular if it uses new technologies, by its nature, scope, context or purposes, entails a high risk for the rights and freedoms of physical persons, the person responsible for the treatment will, before the treatment, an evaluation of the impact of the processing operations on the protection of personal data. A single evaluation may address a series of similar treatment operations that involve similar high risks.

2. The data controller will seek the advice of the data protection officer, if appointed, when carrying out the data protection impact assessment.

3. The data protection impact assessment referred to in section 1 will be required in particular in the event of:

a) systematic and comprehensive evaluation of personal aspects of natural persons that is based on automated processing, such as the creation of profiles, and on the basis of which decisions are taken that produce legal effects for natural persons or that significantly affect them in a similar way;

b) large-scale processing of the special categories of data referred to in article 9, paragraph 1, or of personal data relating to convictions and criminal offenses referred to in article 10, or

c) large-scale systematic observation of a public access area.

4. The control authority will establish and publish a list of the types of treatment operations that require a relative impact assessment

to data protection in accordance with section 1. The control authority will communicate those lists to the Committee referred to in article 68.”

In turn, article 28 of the LOPDGDD relating to the general obligations of the person in charge and in charge of the treatment, states that:

"1. Those responsible and in charge, taking into account the elements listed in articles 24 and 25 of Regulation (EU) 2016/679, must determine the appropriate technical and organizational measures that they must apply in order to guarantee and certify that the treatment is in accordance with the aforementioned Regulation, this Organic Law, its implementation rules and the applicable sectoral legislation. In particular, they must assess whether the impact assessment on data protection and the prior consultation referred to in section 3 of chapter IV of the aforementioned Regulation should be carried out.
2. For the adoption of the measures referred to in the previous section, those responsible and those in charge of the treatment must take into account, in particular, the higher risks that may occur in the following cases:

When the treatment may generate situations of discrimination, identity theft or fraud, financial losses, damage to reputation, loss of confidentiality of data subject to professional secrecy, unauthorized reversal of pseudonymization or any other economic, moral or social harm significant for those affected.

When the treatment may deprive those affected of their rights and freedoms or may prevent them from exercising control over their personal data.

When the non-merely incidental or accessory processing of the special categories of data referred to in articles 9 and 10 of Regulation (EU) 2016/679 and 9 and 10 of this Organic Law or of the data related to the commission occurs of administrative infractions.

When the treatment involves an evaluation of personal aspects of those affected in order to create or use personal profiles of them, in particular through the analysis or prediction of aspects related to their performance at work, their economic situation, your health, your personal preferences or interests, your reliability or behavior, your financial solvency, your location or your movements.

When data processing is carried out for groups of affected people in a particularly vulnerable situation and, in particular, minors and people with disabilities.

When mass processing takes place involving a large number of affected persons or involves the collection of a large amount of personal data.

When personal data must be the subject of a transfer, on a regular basis, to third states or international organizations in respect of which an adequate level of protection has not been declared.

Any others that, in the opinion of the person in charge or the person in charge, may be relevant and in particular those provided for in codes of conduct and standards defined by certification schemes.”

In accordance with the provisions of article 35.4 of the RGPD, the Authority published on 06/05/2019 the "list of types of data processing that require an impact assessment related to data protection" prior to its start. As indicated in said document, when the treatment meets two or more of the criteria included in said list, in principle it may be necessary to make an AIPD. The more criteria the treatment in question meets, the greater the risk this treatment entails and the greater the certainty of the need to carry out an AIPD.

In the present case, it is considered that the treatment would meet, at least, the following criteria:

- Treatments that involve profiling or assessment of subjects, including the collection of data on the subject in multiple areas of their life (performance at work, personality and behaviour), which cover various aspects of their personality or their habits (criterion number 1).
- Treatments that involve the use of special categories of data referred to in Article 9.1 of the RGPD, data relating to convictions or criminal offenses referred to in Article 10 of the RGPD or data that allow determining the financial situation or patrimonial solvency or deduce information about people related to special categories of data (criterion number 4).
- Data processing of vulnerable subjects or at risk of social exclusion, including data of children under 14 years of age, adults with some degree of disability, disabilities, people who access social services and victims of gender violence, as well as their descendants and persons under their care and custody (criterion number 9).

In accordance with what has been presented, as indicated by the instructing person, the fact recorded in point 4 of the section on proven facts constitutes the violation provided for in article 83.4.a) of the RGPD, which typifies as such, the violation of "the obligations of the person in charge and of the person in charge pursuant to articles 8, 11, 25 to 39, 42 and 43", among which there is that provided for in article 35 RGPD.

In turn, this conduct has been included as a serious infraction in article 73.t) of the LOPDGDD, in the following form:

"t) The processing of personal data without having carried out the assessment of the impact of the processing operations on the protection of personal data in the cases in which it is required."

7. With regard to the fact described in point 5 of the section on proven facts, it is necessary to go to article 38.1 of the RGPD, which establishes that the "responsible and the person in charge of the treatment will guarantee that the delegate of protection of datos participates adequately and in a timely manner in all matters relating to the protection of personal data."

In accordance with what has been presented, as indicated by the instructing person, the fact recorded in point 5 of the section on proven facts constitutes the violation provided for in article 83.4.a) of the RGPD, which typifies as such, the violation of "the obligations of the person in charge and of

in charge pursuant to articles 8, 11, 25 to 39, 42 and 43", among which there is that provided for in article 38.1 RGPD.

In turn, this conduct has been included as a serious infraction in article 73.w) of the LOPDGDD, in the following form:

"w) Not to enable the effective participation of the data protection delegate in all matters relating to the protection of personal data, not to support him or interfere in the exercise of his functions."

8. Article 77.2 LOPDGDD provides that, in the case of infractions committed by those in charge or in charge listed in art. 77.1 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 addition, it can propose, where appropriate, the initiation of disciplinary actions in accordance with what is established by current legislation on the disciplinary regime for personnel in the service of public administrations. This resolution must be notified to the person responsible for the file or the treatment, to the person in charge of the treatment, if applicable, to the body to which they depend and to the affected persons, if any".

By virtue of this faculty that is attributed to the director of the Authority, given that the data processing that is addressed here is considered to violate the principle of loyalty and that it also violates the principle of legality with regard to the special categories of data, as proposed by the instructing person in the proposed resolution, the UdL should be required to as soon as possible, and in any case within a maximum period of 10 days from the day after the notification of this resolution deletes all the data of minors collected in the framework of the research project identified in the section of proven facts that have not yet been deleted, without prejudice to their blocking.

Once the corrective measure described has been adopted, within the specified period, the UdL must inform the Authority within the following 10 days, without prejudice to the inspection powers of this Authority to carry out the corresponding checks.

The requirement for the deletion of the collected data means that it becomes unnecessary to require the adoption of any corrective measures regarding the right to information (proved fact 2nd), the risk analysis (proved fact 3rd) or the evaluation of impact related to data protection (fact tested 4th).

Regarding the lack of intervention of the data protection delegate in the controversial research project, it is not considered necessary to require any corrective measures given that this conduct has already been consummated (proved fact 5th).

For all this, I resolve:

1. Admonish the University of Lleida as responsible for 5 infractions: a first infraction provided for in article 83.5.a) in relation to articles 5.1.a) and 9; a second offense provided for in article 83.5.b) in relation to articles 13 and 14; a third offense provided for in article 83.4.a) in relation to article 32; a fourth violation provided for in article 83.4.a) in relation to article 35; and a fifth violation provided for in article 83.4.a) in relation to article 38; all of them from the RGPD.
2. Require the UdL to adopt the corrective measures indicated in the 8th legal basis and certify to this Authority the actions taken to comply with them.
3. Notify this resolution to the UdL.
4. Communicate the resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.
5. 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 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.



Autoritat Catalana de Protecció de Dades

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

PS 74/2020

The director,

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