

## File identification

Resolution of sanctioning procedure no. PS 19/2021, referring to the Municipal Finance Institute of Barcelona.

## Background

1. On 08/06/2020 the Catalan Data Protection Authority received a letter from Mr (...) (hereafter, complainant), in which he filed a complaint against the Municipal Institute Treasury of Barcelona (hereafter, IMH), due to an alleged breach of the regulations on personal data protection.

In particular, the complainant explained that the IMH had published four announcements in the Tablón Edictal Único (TEU) of the Official State Bulletin (BOE-Notification Supplement), linked to a sanctioning procedure for violating traffic regulations, where his NIF was erroneously listed, since all four notifications were addressed to another person, who was identified in the advertisements as "Vásquez J", and they were linked to a vehicle with registration number (...). The complainant stated that these four advertisements were still accessible through the citizen folder of the TEU.

2. The Authority opened a preliminary information phase (no. IP 153/2020), 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 were capable of motivating the initiation of a sanctioning procedure.

3. On 05/02/2021, the Authority required the reporting person to provide a copy of the announcements published in the BOE, as well as the notifications of the acts that were accessible through their citizen folder of the TEU.

4. On 02/09/2021, the Authority received a written response from the complainant, accompanied by several documents, which showed that the 4 advertisements were still accessible by the complainant through the "folder" space ciudadana" of the BOE's electronic headquarters, by entering your NIF. The 4 notification announcements had been published in the "notification supplement" section of the following newsletters:

- BOE no. (...), dated (...)/2017: the notification notice dated (...)/2017 of, among others, the ex officio initiation agreement of the sanction file no. 2017(...), linking it to the NIF of the complainant, together with the surname and initial of the name of a third person ("Vásquez J"), and the registration number of the vehicle linked to the infringement ((...)).

- BOE no. (...), of date (...)/2017: the notification notice of date (...)/2017 was published in the summons procedure to appear. The act that was notified linked to the NIF of the complainant is a provision of coercion, and linked to his NIF is the last name and initial of the name of the same third person ("Vásquez J").
- BOE no. (...), of date (...)/2018: the notification announcement of date (...)/2017 was published in the notification procedure for the ex officio initiation of disciplinary proceedings. The act that was notified linked to the NIF of the complainant is a request for information, and linked to his NIF was the last name and initial of the name of the same third person ("Vásquez J").
- BOE no. (...), dated (...)/2019: the notice of notification dated (...)/2019 was published in the summons procedure to appear. The act that is notified linked to the NIF of the complainant is an information request. In this announcement there was no name or surname associated with this event.

5. On 02/21/2021 the IMH was required to point out, among other issues, whether the four advertisements published in the BOE were addressed to the person making the complaint, or to another person, and in such case that indicated the reason why the NIF of the reporting person was included.

6. On 02/25/2021, the IMH responded to the aforementioned request in writing in which it stated, among others, the following:

- *"The IMH initiated the 2017-(...) disciplinary proceedings against the company (...), SL, owner of the registration vehicle (...).*

*At the request of the IMH, on April 4, 2017, the aforementioned company submitted a letter to this corporation, (...), by virtue of which it replied that on the day of the offense the driver of the vehicle was:*

*DRIVER DATA:*

*NUMBER: J(...) VASQUEZ (...)*

*ID: (...)7L*

*ADDRESS: (...)*

*PROVINCE: BARCELONA"*

- *"Then there was a material and specific error in the mechanization of the NIF provided by the owner of the vehicle, specifically in its letter ((...)7L).*

*Following this, the NIF (...)7H (of Mr. (...)) was linked to the 2017- (...), maintaining the first and last name as well as the address for the purposes of notifications provided by (...), SL in the identification of the driver (Mr. Jxxx xxx Vasquez xxx, with address at xxxx, Barcelona).*

- *"Given the negative result of the notifications carried out in the 2017-(...) sanction file, the corresponding announcements were issued through the BOE."*
- *"Regarding the 2017-(...) penalty file, the information relating to the driver of the vehicle is what we have following the letter presented on April 4, 2017 (...), SL in this Administration (...)."*
- *"The four announcements are part of the same sanctioning file: 2017-(...). These are the different notifications published in the voluntary and executive phases of the processing."*
- *"Currently, the NIF (...)7H is no longer listed in the municipal tax database."*

The IMH accompanied its letter with various documentation, including a copy of the letter presented by the entity (...), SL to this Institute, as well as a negative certificate dated 02/24/2021 of debt of the reporting person towards Barcelona City Council, and in which it was also pointed out that this person was not registered in the municipal tax databases.

7. On 11/03/2021, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the IMH for an alleged infringement provided for in article 83.5.a), in relation to article 5.1.d), 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 of these (hereinafter, RGPD). This initiation agreement was notified to the IMH on 03/17/2021.

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

8. On 03/29/2021, the IMH made objections to the initiation agreement.

9. On 28/04/2021, the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority admonish the IMH as responsible for a violation provided for in article 83.5.a), in relation to article 5.1.d), both of the RGPD.

This resolution proposal was notified to the IMH on 05/03/2021, who was granted a period of 10 days to formulate allegations.

10. On 05/14/2021, the IMH submitted a statement of objections to the proposed resolution.

proven facts

The IMH treated inaccurately the data relating to the NIF of the person who had allegedly committed an infringement of the traffic regulations, associating the acts of sanctioning procedure no. 2017-(...) that was initiated against that person, in the NIF of another person, specifically the person making the complaint here, and as a result also treating his NIF inaccurately.

Within the framework of the sanctioning procedure mentioned, the IMH ordered the publication in the *Tablón Edictal Único (TEU)* of the BOE of four notices of notification of various administrative acts mentioned in the antecedents - three of them published while the repealed Organic Law 15 was in force / 1999, of December 13, on the protection of personal data (LOPD)-, which contained the NIF of the reporting person, together with the surname and the initial of the name of the allegedly infringing person, as well as the registration number of the vehicle, and other information referring to the offense committed and to the administrative acts issued voluntarily or executively against that person.

The processing of inaccurate data of the reporting person, consisting of the linking of his NIF to the sanctioning procedure indicated, remained in the BOE citizen folder (where there were four notifications of acts unduly linked to his person), at least until on 9/02/2021, when the complainant accessed it, according to the documentation that this person has provided to the Authority. And with regard to the tax databases of the IMH, this processing of inaccurate data of the reporting person (and consequently also of the infringing person) would have lasted since 04/04/2017 (or at a later but close date to this one, in which the IMH has stated that it erroneously entered the NIF of the person reporting in its databases) until 02/24/2021, as can be seen from the certificate of the same date that the IMH has provided before the Authority.

Fundamentals of law

1. The provisions of the LPAC and article 15 of Decree 278/1993 apply to this procedure, according to the provisions of DT 2a of Law 32/2010, of October 1, of 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 IMH has formulated 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, given that they are partly reproduced in the second ones. Then they analyze the

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set of allegations made by the accused entity, although, for argumentative clarity, they will be analyzed without following the expository order of the writings presented by this entity.

2.1. About the subject responsible for the treatment of the wrong ID number of the person violating the traffic regulations.

In the third allegation of the statement of objections to the initiation agreement, the IMH stated the following: *"the erroneous action of the Municipal Institute of Finance in compliance with the sanctioning regulations in terms of traffic, it has been induced by the action of Poblenu Cars SL, who has incorrectly communicated the personal data of the driver of the vehicle at the time of the infringement"*.

In this regard, it should be noted that the IMH does not accredit, or even specify, what would have been the inaccuracy that, according to it, would have been committed by the company Poblenu Cars when it communicated the personal data of the driver of the offending vehicle, and that would have caused the error in their performance.

On the contrary, in the preliminary information phase, the IMH provided the Authority with a copy of the letter that the company Poblenu Cars SL presented to the IMH on 04/04/2017, in which note that in the identification data of the driver he provided, the DNI (...)7L appears, and not the DNI of the reporting person ((...)7H), that is to say, that there was no mistake in the communication of this data, and no inaccuracy is inferred with respect to any other personal data.

On the other hand, during the processing of the present procedure, the IMH has recognized the mistake it made in the transcription of the ID number provided by the company. Specifically:

- In preamble 1 of the statement of objections to the initiation agreement, the IMH stated that: *"on April 4, 2017, Poblenu Cars SL complied with the request made and identified the driver of the vehicle with the name of (...)Vásquez (...) with DNI (...)7L."*, and then pointed out that: *"Then there was a material and specific error in the mechanization of the NIF facilitated by the owner of the vehicle, specifically in its letter ((...)7H)"*.

- In antecedent 4 of the same letter, the IMH transcribed part of its written response to the Authority's request for information that it presented in the preliminary information phase, where it stated the following:

*"At the request of the IMH, on April 4, 2017, the aforementioned company presented a letter to this corporation, entry register (...), by virtue of which it replied that on the day of the offense the driver of the vehicle was: "DRIVER DATA: NUMBER: J (...) VASQUEZ (...) DNI: (...)7L*

*ADDRESS: (...)  
PROVINCE: BARCELONA"*

- In the First allegation of the same letter, the IMH stated that: *"(...) Poblenou Cars SL communicated that the driver was Mr. (...)Vásquez (...), with DNI (...)617L (...) subsequently a typographical error occurred in the transcription of the tax identification number, specifically between the letter H and the letter L (...)"*.

- In the first allegation of the statement of objections to the proposed resolution, the IMH has stated that: *"For this reason, although a typographical error subsequently occurred in the transcription of the tax identification number, specifically between the letter H and the letter L (...)"*.

In accordance with the above, it is considered proven that the inclusion of the DNI number corresponding to the person reporting here in the IMH database in the framework of the sanctioning procedure in the aforementioned traffic matter, is due to an imputable error at the IMH.

## 2.2. On the absence of culpability regarding the mistake committed.

In the first allegation of the statement of objections to the initiation agreement, the IMH referred to the imputability of the infringement due to the absence of fault. Specifically, it indicated the following: *"(...) although a typographical error subsequently occurred in the transcription of the tax identification number, specifically between the letter H and the letter L, we can affirm that the publication of the 4 announcements made in the BOE, in which the NIF (...)7H is linked, with Mr. "Vásquez J" and the vehicle registration (...) is due to an involuntary error committed by the Municipal Tax Institute and which has its origin in the communication made by Poblenou Cars SL. For this reason, we can conclude that, despite the error committed, there has been no intentionality or negligence in the treatment of the personal data of Mr. (...). We are faced with a simple, clear, patent and indisputable material error or in fact the result of an involuntary error in the typing of a letter."*

Subsequently, in the first allegation of the statement of objections to the proposed resolution, the IMH has reiterated these statements, referring to the lack of grief or guilt in its action, and the consequent lack of responsibility, which is based on what is provided for in article 28.1 of Law 40/2015, of October 1, as well as in several judgments referring to the requirement of the subjective element being present in the infringing conduct, to end by noting that: *"the Administration acting at no time has proven that at the time of the events the Barcelona City Council (Municipal Finance Institute) acted with malice or guilt and therefore has not proven in any case a possible responsibility for the same"*.

These allegations cannot be favorably received, since, contrary to what the accused entity states, it is considered that the IMH did not act with due diligence or that was required of it, and this for the following reasons.

After unsuccessful attempts to notify the alleged infringer, it was necessary to publish in the BOE the announcements containing the acts to be notified, as was done. Well, the IMH's lack of diligence lies in the fact that, prior to the first publication, it did not review whether the personal data of the allegedly infringing person that would be published were correct and corresponded to the data that facilitated by the company Poblenu Cars SL. The review of the DNI number of the alleged infringer is particularly important when it comes to the publication of an advertisement in the TEU, since an incorrect DNI, in addition to being able to cause damage to third parties, prevents the person concerned from being able to identify -se as such in the procedure, and even access the announcements through your citizen folder. This highlights the relevance of the accuracy of this data to achieve the purpose of the treatment carried out, which was the notification of the acts. A simple comparison of the data provided by the entity that owns the vehicle with those entered in the database or databases (hereinafter, DB) of the IMH, would have been sufficient to identify the error in the introduction of the ID number .

If the introduction of the information in the IMH DB is manual, it is foreseeable that transcription errors may occur, which is why, in the case of several unsuccessful notifications and before making the publications in the BOE, what proceeded was to check whether the personal data entered in the IMH database were correct. This was a necessary and basic measure, and its omission shows that it was not acted with the necessary diligence. More if we take into account the object of the notification (acts dictated in a sanctioning procedure) and the issuing body.

On the other hand, in the first allegation of the statement of objections to the proposed resolution, the IMH would come to question the reprehensibility of the imputed conduct, and therefore the qualification of the facts as constitutive of an infringement, when it refers to the present sanctioning procedure as a disproportionate action, and points out, among others, the following: *"If we take into account the restrictive and never expansive character that must preside over all sanctioning action, as at the last resort of the administrative action, in the matter of data protection, the disproportionate conclusion cannot be reached that an error such as this can be considered an infringement"*. And then he refers to articles 109 of the LPAC and 74.2 of Law 26/2010, to end by pointing out that: *"it is totally contradictory what these legal rules provide, that at any time, ex officio or part , allow the Administration to correct its factual errors and, on the other hand, that in the present file, the ACPD proposes to reprimand this Institute precisely for having committed a factual error in the transcription of the letter of a DNI (...) is totally contrary to what these rules of legal and disproportionate rank provide (...)*.

These allegations cannot be favorably received either, considering that article 109.2 of the LPAC alludes to a special procedure for reviewing administrative acts, which allows public administrations to rectify a simple material, factual or arithmetical error that appears in an administrative act, which in no way affects the controversy that is the subject of the present sanctioning procedure.

And this because the present case cannot be limited to the scope of an error that can be corrected by a mere material rectification of the DNI number that appears in the IMH DB or in the



successive administrative acts dictated by this Institute in the traffic penalty procedure, bearing in mind that this is an error likely to affect the validity of these acts, if it is considered that such a defect has caused the alleged infringer to be defenseless ( due to the fact that the mistake made may have prevented their identification and the possibility of making allegations), apart from affecting a fundamental right such as the right to the protection of personal data.

Therefore, the fact that, in application of the precept indicated by the IMH, a material error contained in an administrative act can be rectified, does not prevent the publication of this same act from being considered a violation of the regulations of data protection, if that published act contains inaccurate data (art. 5.1.d RGPD) and the inaccuracy is attributable to the data controller. The legal asset or value protected in one and the other rule are different (principles of conservation of acts and effectiveness of the Public Administration, on the one hand, and fundamental right to data protection, on the other).

On the other hand, the imputation to the IMH of the infringement provided for in article 83.5.a) of the RGPD, in relation to article 5.1.d) of the RGPD, cannot be considered disproportionate as maintains the IMH, since the Institute is responsible for the processing of inaccurate data, and from the proven facts it is clear that it has acted without due diligence. In the assessment of this last point, and in response to certain allegations of the IMH, it has been taken into account that the inaccuracy committed has occurred within the framework of a sanctioning procedure, that its processing is 'frames within one of the main functions assigned to this institute, and that for almost 5 years minutes of the same sanctioning procedure have been published, persisting in the inaccuracy of no. ID of the person allegedly infringing.

### 2.3. On the allegations regarding the graduation of the sanction.

Finally, in the statement of objections to the proposed resolution, the IMH has reiterated the allegations made before the initiation agreement regarding the graduation of the sanction, referring to the article 83.2 of the RGPD, and noting that: *"the erroneous action of the Municipal Institute of Finance in compliance with the penal regulations in the matter of transit has been induced by the action of Poblenu Cars SL, who has communicated incorrectly the personal data of the driver of the vehicle at the time of the infringement"*. And then he referred to the actions carried out by the IMH following knowledge of the mistake committed, *"in order to alleviate the damages suffered"* by the person making the complaint.

In this regard, as the instructor already pointed out in the proposed resolution, it is unnecessary to make any pronouncement, since in the present case the sanction to be imposed does not consist of an administrative fine, as set out in the legal basis 4 of this proposal. Therefore, the aforementioned article 83.2 of the RGPD does not apply to the present case.



3. With regard to the applicable regulations, article 26 of Law 40/2015, of October 1, on the legal regime of the public sector, provides for the application of the sanctioning provisions in force at the time of producing - the facts, unless the subsequent modification of these provisions favors the alleged infringer. In accordance with this rule, given that part of the acts charged here were committed before 25/05/2018, the LOPD would apply with regard to the processing of inaccurate data carried out since 04/04/2017 (or a date subsequent but close to this one) and 05/25/2018, the latter date when the RGPD became fully applicable. And the RGPD should apply it to the alleged events of date equal to or later than 05/25/2018.

However, given that these are the same facts maintained over time, once the RGPD was applicable, together with the fact that both rules (LOPD and RGPD) qualify the facts as an infringement due to the violation of an equivalent core principle and none of them provide for the imposition of a pecuniary penalty, in the present imputation the current RGPD is applied, without ignoring the equivalent invocation of the previous regulations.

Regarding the legal classification of the facts described in the proven facts section, it is necessary to go to article 5.1.d) of the RGPD, which establishes that the personal data will be *"accurate and, if necessary, updated; all reasonable measures will be taken to delete or rectify without delay the personal data that are inaccurate with respect to the purposes for which they are processed"*.

During the processing of this procedure, the fact described in the proven facts section has been duly proven, both by the documentation that the person making the complaint provided together with his letter of complaint, and by the IMH's own statements, who has recognized his responsibility for the mistake made, for having erroneously entered the DNI number of the person making the complaint in his DB, instead of the DNI number provided by the company that owns the vehicle.

Therefore, these proven facts are constitutive of an infringement provided for in article 83.5.a) RGPD in relation to article 5.1.d) RGPD, which 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 the principle of accuracy is contemplated.

For its part, this conduct has also been included as a very serious infringement in article 72.1.a) of the LOPDGDD, in the following form: *"a) The processing of personal data that violates the principles and guarantees which establishes article 5 of Regulation (EU) 2016/679 (...)."*

Regarding the same infringing facts, the repealed LOPD provided as a serious infringement in article 44.3.c) the processing of personal data in violation of the principles and guarantees established in article 4, relating to the principle of data quality.

4. 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 the preceding previous information phase, the IMH stated that in its databases (BBDD) the ID number of the person making the complaint was no longer listed, and in order to prove this, he provided various documentation. On the other hand, with regard to the publication of acts in the TEU of the BOE, which contain the inaccurate data, the IMH expressed the intention to publish an "announcement of amendment".

In this regard, it is considered that, in order to correct all the effects of the offense committed, the reporting person should not be able to access, through the citizen folder of the BOE's electronic headquarters, the administrative acts corresponding to a third person, in addition to the fact that these acts should not be linked to the person here reporting.

That is why, in relation to the acts published in the TEU of the BOE that erroneously contain the DNI number of the person making the complaint, the IMH is required so that as soon as possible, and in any case within a maximum period of 10 days from the day after the notification of the resolution issued in this procedure, carry out the action indicated by the IMH itself ("an amendment announcement"), and in addition, request the BOE to carry out the necessary measures to make this amendment effective in your citizen folder at the BOE's electronic headquarters.

Once the two corrective measures described have been adopted, within the specified period, the Barcelona Municipal Institute of Finance must inform the Authority within the following 10 days. This, without prejudice to the inspection faculty of this Authority to carry out the corresponding checks.

For all this, I resolve:

1. Admonish the Municipal Institute of Finance of Barcelona as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.d), both of the RGPD.
2. Request the Municipal Institute of Finance of Barcelona to adopt the corrective measures indicated in the 4th legal basis and accredit before this Authority the actions carried out to comply with them.
3. Notify this resolution to the Municipal Finance Institute of Barcelona.
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 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,