File identification

Resolution of sanctioning procedure no. PS 25/2022, referring to Excellence and Guarantee for Health at Work, SLU (EGARSAT).

Background

1. On 11/12/2020, the Catalan Data Protection Authority received a letter in which a person filed a complaint against Excelencia y Garantía para la Salud en el Trabajo, SLU (hereafter EGARSAT), on the grounds of an alleged breach of the regulations on personal data protection.

Specifically, the person reporting stated that he worked in the Department of the Interior of the Generalitat, and that as part of the medical examination of the Department's workers scheduled for 2020, on 16/10/2020 he received an email electronic with the title *"EGARSATSP-Exàmens de Salut-communication of appointments for health exams- 12-11-2020"* , but from the address (...)@icese.es, in which the Next:

> *"Dear client, We hereby inform you of the appointments for the health examinations of the workers in your center at the following address: (...)[Ref - Int DEPARTMENT OF THE INTERIOR - LOT (...) BARCELONA DGP]"* .

In this email, there was a table that contained the name and surname of the person making the complaint, along with their ID number, the identification or the administrative unit of their workplace ("(...)" *)* , the day (12/11/2020), the time (9:30 a.m.) and the address of the center where he had to go for the medical examination.

Following this table, the following was indicated: *"Remember that these appointments are in addition to those previously planned",* and immediately afterwards there was a second table with the same type of personal data, but referring to two other employees of the Department, who had been assigned medical appointments on the same day as the one assigned to the reporting person (12/11/2020), but at an earlier time than his (9:00 a.m. 9:15 a.m.). So the working person who received the mail (here the complainant) accessed the personal data of these two workers listed in this second table.

The email then included the following reminder about a form that workers had to hand in to the medical center on the day of the visit, to prevent the spread of the coronavirus:

"Important: Remember to distribute the following questionnaire to your workers so that they can print it, fill it out and hand it in to the healthcare staff on the day of the health examination."

The complainant stated that on the day of the medical visit she reported this incident to the assigned center, and that they confirmed to her that the incident had affected numerous workers, as well as that it had occurred due to the incorporation of new workers.

In the email sent, Mrs (...), who corresponded to the user who sent the email ((...) @icese.es) appeared as the person who signed it.

On the other hand, at the foot of the mail were the logos of the Preving Group and of EGARSAT, and two informative captions, the first of which pointed out that the mail had been issued by EGARSAT, as follows:

> *"This email has been issued by "EXCELENCIA Y GARANTÍA PARA LA SALUD EN EL TRABAJO, SLU". The information contained is CONFIDENTIAL, and its only recipients are the people designated in it (...)"*

In the second informative legend that appeared in the mail, it was pointed out that the person responsible for the contact data was the Preving Group , as follows:

> *"EXCELLENCE AND GUARANTEE FOR HEALTH AT WORK, SLU, C/ Victor Hugo, 2-4 ground floor 08174 SANT CUGAT DEL VALLES (BARCELONA)*
>
> *privacy Your personal data is included in the processing activity "Contacts" for which "Group Preving " is responsible, the purpose of which is to maintain contact with our interest groups. Purpose based on the legitimate interest to carry out this communication, as well as in its case the execution of a contract (...)"*

2. The Authority opened a preliminary information phase (no. IP 341/2020), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure for application to 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 susceptible to motivate the initiation of a sanctioning procedure.

3. In this information phase, on 10/13/2021, EGARSAT was required to report on several points related to the events reported.

4. On 10/27/2021, EGARSAT responded to the aforementioned request in writing, in which it stated the following:

- As for whether EGARSAT was the entity in charge of the treatment: *"at the time of the events Egarsat was the Entity in charge of data processing relating to the monitoring of the health of workers of the Department of the Interior of the Administration of the Generalitat, and which is thus established in the "Chart of Contract Characteristics" from which the relationship with the Department of the Interior is derived, which is provided as Annex I, and which was formalized in the "Administrative Contract", which is provided as Annex II."*

- Regarding the participation of ICESE in the sending of e-mails summoning the workers of the Department of the Interior for the periodic medical examination, and the legal basis that would legitimize the communication to ICESE of the data of these workers:

  "Regarding the sender address of the mail, we confirm that it belongs to ICESE Prevención, SLU (ICESE) with CIF B-61271672, which is an Alien Prevention Service accredited by the Labor Authority, 100% involved on the date indicated by Egarsat , forming a "business group" in the terms established in recital (37) of the European Data Protection Regulation (...) the personal data were transmitted within the business group, by virtue of a legitimate interest to transmit personal data for internal administrative

purposes, including the processing of personal data of customers or employees as established in recital (48) of the aforementioned European Regulation."

- Regarding the reasons why the mail was sent with data of third-party workers:

  "The summonses were made by telephone directly to the interested person, but in some specific cases it was requested if the appointment information could be sent by e-mail. Due to an isolated human error, identification data of other employees of the Department of the Interior were included, making the cited staff aware of data reserved for the knowledge of the contact person, organizer, in the Department.

- Regarding the number of subpoena emails for the medical review that were sent with data from third-party workers, he stated that these emails were sent: "Only *in specific cases where the information was requested by email. "*

- Regarding the actions carried out by EGARSAT when it became aware of the facts reported here: *"Immediately, the error was detected, so no more emails were sent and the person concerned was only summoned by telephone (. ..) Given the nature of the error: individual human failure. The measures adopted are aimed at preventing new errors by requiring the worker to be more diligent and familiar with the Department's protocols, including those relating to confidentiality."*

EGARSAT accompanied its letter with two appendices with the following documentation:

- As APPENDIX I, he provided the document entitled *Table of contract characteristics* (file no. IT-2020-283), which had as its object the "carrying out of the health examinations of workers attached to the Department of the Interior of the Generalitat of Catalonia for in the year 2020."

  In section N, entitled "essential contractual obligations", the following was indicated:

  > *"confidentiality. The contractor(s) must respect the confidential nature of that information to which he/she has access during the execution of the contract.*
  > *The awarded company/companies must sign the confidentiality agreement at the time of formalizing the contract (Annex 5 of the PCAP) and comply with the obligations provided for.*
  > *It is also an essential contractual obligation to indicate in the responsible statement of Annex 1 of the PCAP and subsequent accreditation, if applicable, on the provision of subcontracting associated servers or services, the name or business profile, in accordance with the conditions of the professional or technical solvency of the sub-contractors to whom they will entrust it."*

  In section V, entitled "confidentiality and protection of personal data", the following was indicated:

  > *"The contracting company, in relation to the personal data to which it has access on the occasion of the contract, undertakes to comply with everything established by Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights, to the development regulations and to what is established by 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 treatment of personal data and the free movement of such data and which repeals Directive 95/46/EC".

With regard to the section corresponding to "the obligation of the awarded company in matters of data protection" (annex 6), the following was noted:

"In accordance with the provisions of letters C and D of section 2 of article 122 of Law 9/2017, on Public Sector contracts (...) the awarded company must notify the Service of Contracting and Heritage of the Department of the Interior the following data:
(...)
Obligation to communicate any change that occurs throughout the life of the contract of the information provided in the declaration referred to in the previous section.
(...) the obligations provided for in this annex will also have the character of essential obligations."

Regarding the documents entitled "responsible declaration" (annex 1) and "confidentiality agreement" (annex 5), the completed and signed documents were not provided.

- As ANNEX II, he provided the document entitled *Administrative Contract,* which stated the following (fourth section of the statements section):

"That the 4 lots of the aforementioned service contract, of ordinary processing, have been awarded by the procedure based on the Framework Agreement for Services for the Prevention of Foreign Labor Risks (file CCS 2019 2) to the company EXCELENCIA Y GARANTÍA PARA HEALTH AT WORK, SLU, in accordance with the characteristics and conditions established in the set of particular administrative clauses of the Framework Agreement, in the table of characteristics of this tender and in the set of technical prescriptions (...)."

5. Following EGARSAT's response and the documentation sent, on 01/26/2022 EGARSAT was again required to provide certain documentation and to report on various aspects related to the events reported.

6. On 08/02/2022, EGARSAT responded to the aforementioned request in writing, in which it stated the following:

- Regarding the number of emails sent by ICESE Prevención , SL (hereafter, ICESE) to employees of the Department of the Interior, with data from other employees: *"we have evidence of 4 e-mails sent in error, all of them on 16 of October 2020."*

- Regarding the sending by ICSE, instead of EGARSAT, of these summons mails for the periodic medical check-up:

" Excelencia y Garantía para la Salud en el Trabajo (Egarsat) did NOT entrust Icese Prevención SLU (hereafter ICESE) with the provision of the health examination service. It should be clarified at this point that both Egarsat and Icese are third-party prevention services duly accredited before the Labor Authority and that both are part of the same business group, which may occasionally have a legitimate interest in transmitting

personal data within the group business for internal administrative purposes (.sic) *, including the processing of personal data of customers or employees.*
In any case, between Egarsat and ICESE there is a confidentiality agreement for data processing."

- Regarding the authorization to subcontract the service: *" Egarsat did not request from the Department of the Interior authorization to subcontract the treatments entrusted following the award to Egarsat of the contract for medical check-up services for the year 2020. "*

- Regarding the communication to the Department of the Interior of the access by ICSE to workers' data: *" Egarsat did not communicate to the Department of the Interior the access by ICSE to the data of the workers of the Department of "Interior".*

EGARSAT accompanied its letter of 3 annexes with the following documentation:

- As ANNEX I, he provided a document entitled "list of erroneous e-mails", which contained a table containing information on the 4 employees of the Department of the Interior regarding those who stated that their information had been sent to other employees . In particular, it emerged that on 16/10/2020, the same person from ICSE who sent the mail to the person making the complaint, also sent a mail to 3 other workers, and called them for a medical check-up on the 12th /11/2020 at 9:00 a.m., at 09:15 a.m., at 9:30 a.m. and at 09:45 a.m., respectively; the worker summoned for 09:45 hours received the information regarding him, together with the information regarding the 3 workers summoned in the hours preceding his (9:30 a.m., 9:15 a.m. and 9:00 a.m.); the worker summoned at 9:30 a.m. received the information regarding him, together with the information regarding the 2 workers summoned in the hours preceding his (9:15 a.m. to 9:00 a.m.); and the worker cited at 09:15 hours, received the information regarding him, together with the information regarding the worker cited at an hour before his (9:00 a.m.).

- As ANNEX II, he provided a copy of the document entitled "responsible declaration", dated 06/03/2020, of which the following sections should be highlighted:

  In section c), EGARSAT declared that it "belongs to the Grupo *Preving business group , composed of companies*

  PREVING CONSULTORES, SL (...)
  PREVING INVESTMENT, SL (...)
  FORMALIA HEALTH, SLU (...)
  EXCELLENCE AND GUARANTEE FOR HEALTH AT WORK, SLU (...)
  ICESE PREVENTIÓ, SL (...)
  PREVENNA, SL (...)
  ASEM VISIONES COMPETITIVAS, SL (...)
  OFFICE OF PREVENTIVE MEDICINE AND OCCUPATIONAL HEALTH, SLU (...)
  TOTAL.DAT, SLU (...)
  ASIFOR INGENIERIA, SL (...)"

  In section h), corresponding to the "plan to subcontract servers or associated services for the processing of personal data", EGARSAT declared that *"no".*

- As ANNEX III, I provided a copy of the document entitled "confidentiality agreement", dated 01/09/2020, through which EGARSAT committed itself, as the processor, to the fulfillment of the obligations stipulated by the Department of the Interior , among which were the following:

  (Clause two)

  "The contracting company is obliged to:
  1. *That the confidential information obtained for the presentation of the offer and the execution of the contract by the contracting company or by natural persons, acting directly or indirectly under their responsibility, is not supplied or communicated to another person who is not involved in the execution of the services subject to the contract.*
  2. *That the previously mentioned confidential information obtained by the contracting company or by the persons involved in the execution of the contract does not come to the attention of third parties due to negligence and to inform, as soon as possible, of this circumstance."*

  (Clause three)

  "The contracting company is obliged to comply with Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), and Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, (RGPD) and the remaining regulations on the protection of personal data that are applicable.
  (...)
  In particular, and for the purposes of article 33 of the LOPDGDD, the contracting company will be considered for all purposes as the PROCESSOR of the personal data to which it has access by virtue of the provision of services" .

  (Clause four)

  "The subcontractor company will adopt the necessary technical and organizational measures that guarantee the security of personal data and prevent its alteration or loss, treatment or unauthorized access (...)"

7. On 04/05/2022, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against EGARSAT for two alleged violations provided for in article 83.4.a) , in relation to article 28 , 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 circulation thereof (hereinafter , RGPD). This initiation agreement was notified to the imputed entity on 05/05/2022.

On the same date, the Authority also agreed to initiate disciplinary proceedings against ICESE, for having sent, on behalf of EGARSAT, several e-mails to employees of the Department of the Interior which, by mistake, contained data from other employees.

8. In the initiation agreement, EGARSAT was granted a period of 10 working days to formulate allegations and propose the practice of evidence that it considered appropriate to defend its interests.

9 . On 05/20/2022, EGARSAT made objections to the initiation agreement , providing various documentation that was incorporated into the administrative file.

10. In the test phase, on 07/15/2022, the instructing person agreed to admit the documentary evidence provided by EGARSAT and incorporate it into the file, as well as, ex officio, the following documentary evidence, coming from the file of the sanctioning procedure PS 26/2022 initiated against ICESE and consisting of:

10.1) The Announcement published on 27/04/2021 in the Official Bulletin of the Mercantile Registry (BORME), which makes public the absorption of ICSE by PREVING CONSULTORES SLU.

10.2) Copy of the public deed granted on 05/28/2021 regarding the merger agreement by absorption and dissolution of ICSE, as well as a copy of the note from the Mercantile Registry of Badajoz, indicating its registration in said Registration on 06/29/2021.

11. On 09/13/2022 the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority impose two sanctions on EGARSAT consisting of a fine of 6,000 .- euros (six thousand euros), and a fine of 6,000.- euros (six thousand euros), as responsible for two violations provided for in article 83.4.a) in relation to article 28 - sections 2 and 4 -, both of the RGPD.

This resolution proposal was notified on 09/19/2022 and a period of 10 days was granted to formulate allegations.

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

13. On 09/28/2022 EGARSAT paid in advance nine thousand two hundred euros (9,200 euros), corresponding to the pecuniary penalty proposed by the investigating person in the resolution proposal, once one of the reductions provided for in article 85 of Law 39/2015.

proven facts

1. As part of the provision of the health monitoring service for the workers of the Department of the Interior of the Generalitat awarded to EGARSAT for the year 2020 (service contract no. IT-2020-283), EGARSAT entrusted ICESE the performance of tasks for managing the appointments for the medical check-up of these workers, without signing the corresponding contract of sub-responsible for the treatment.

2. In the framework of the provision of the aforementioned service, EGARSAT did not request from the Department of the Interior the authorization to subcontract the processing of data deriving from the tasks entrusted to ICESE, taking into account, moreover, that in the *responsible declaration document* , EGARSAT stated that it did not plan to subcontract the provision of the service.

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

Although EGARSAT submitted allegations to the initiation agreement, it has not formulated any before the resolution proposal, and has made the voluntary payment of the amount of the sanctions, applying a 20% reduction, before of the dictation of this resolution, thereby accepting one of the options to reduce the amount of the penalty (advance payment). However, it is considered appropriate to reiterate below the most relevant of the reasoned response that the instructing person gave to the allegations before the initiation agreement.

2.1.- Allegations referring to PROVED FACT 1, relating to the lack of formalization of a subcontractor contract between EGARSAT and ICESE.

In essence, EGARSAT stated that it had not entrusted ICESE with the provision of the service of carrying out the health examinations of workers attached to the Department of the Interior of the Generalitat de Catalunya for the year 2020, which EGARSAT had to carry out as in charge of the treatment, by virtue of the awarded contract. But he admitted (Second and Third allegations, pp. 2 and 6) that ICESE acted as sub-processor of the treatment, that there was a sub-processor contract, that ICESE only carried out reinforcement tasks, and that its participation would correspond to a 1% of the total tasks derived from the execution of the contract awarded to EGARSAT (page 22).

As indicated in the proposed resolution, these allegations cannot be favorably received, for the reasons set out below.

2.1.1.- First of all, it should be noted that EGARSAT has admitted that, as part of the provision of the aforementioned service contract awarded to EGARSAT, ICESE sent e-mails summoning medical visits to employees of the Department of the Interior , which contained personal data of these workers. He acknowledged this during the preliminary information phase - through letters dated 27/10/2021 and 08/02/2022-, and he has also acknowledged it in the present sanctioning procedure, in the Second allegations (p. 2) and Fourth (page 7) of the pleadings. Therefore, there is no doubt that when ICESE (that is to say, its staff) made summonses for medical visits of the workers of the Department of the Interior, it acted as sub-in charge of the treatment, so its action within the framework of the The execution of said public contract was subject to data protection regulations, and in particular or as far as it is concerned, to the obligations provided for in article 28 of the RGPD.

Whether or not ICSE's participation corresponded to 1% of the total tasks derived from the execution of the public contract, is something that the Authority does not know, but which, if true, would not prevent sustaining the imputation of the infringement relating to the failure to sign a contract regulating the above-mentioned subcontract, since the status of subprocessor does not depend on the amount of tasks or treatments carried out, but for this purpose it is

sufficient to verify that, in the execution of the contract awarded to EGARSAT, ICESE processed personal data on behalf of the data controller (Department of the Interior), a matter which, as has been said, has been proven.

2.1.2.- Secondly, EGARSAT stated that the access by ICSE to the aforementioned personal data was protected by a subcontractor contract, of which it would not have mentioned in the previous phase due to the fact that it it lacked the prior consent of the signatory companies, which the contract itself requires in order to disseminate it.

The contract to which EGARSAT was referring is Title *II framework contract of Grupo Preving ,* and it would have been signed on 09/30/2019 by some companies of this business group, among which EGARSAT and ICESE would appear.

EGARSAT provided a copy of this framework contract, which in its explanatory part indicates the following (point second): *"the present Framework Agreement has as its object the collaboration and the realization of reciprocal benefits between all the companies that make up the PREVING Business Group (...)".* On the other hand, in the eighth clause, *in fine* , it is pointed out that: *"the nature of the provision of the service constitutes an activity solely of a commercial nature, so there will be notable independence in the (.sic) provision of its services, subject only to what is agreed in this Contract".*

EGARSAT stated that the sending of e-mails by ICSE with summonses for the medical examination of the workers of the Department of the Interior, was covered by the provisions of the first clause of this framework contract. Specifically, he cited, on the one hand, section 1.2 of this first clause, referring to the activities that can be subject to reciprocal provision between the signatory companies, among which it appears: b) the provision of IT services *and communications of all kinds, for the purposes of the development of its social object and the collaboration between y si (.sic) and against third parties".* And on the other hand, section 1.5 of this clause, which refers to subcontracting in the following terms:

> *"The present Framework Contract also serves as legal support to carry out any kind of subcontracting between Companies of the PREVING Business Group for the provision of third-party prevention services.*
> *In this case, the company in charge of treatment will always impose on the sub-in charge of treatment at least the same data protection obligations as stipulated in the contract signed between the person responsible for the treatment and the person in charge of the same ."*

EGARSAT considered that it complied with the obligations provided for in article 28 of the RGPD, " *even though in the present case there is a Framework Contract that binds EGARSAT and ICESE Prevención SL, to carry out subcontracting between encargado and subencargado of treatment, signed in writing, and the same existing obligations as in the Contract signed between the Generalitat as responsible for the Treatment, and EGARSAT in its capacity as Responsible for the treatment, have been determined on the basis of the same for the sub-contractor of the treatment".*
As indicated in the proposed resolution, this Authority does not share this statement. Article 28.4 of the RGPD requires that when a processor uses another processor to carry out certain processing activities on behalf of the controller, this other processor must be subject to the same data protection obligations as those stipulated in the contract signed between the person in charge and the person in charge, and that this sub-task must be formalized

through *"a contract or other legal act established in accordance with the Law of the Union or of the States of the Member States"* . And article 28.9 of RGPD specifies that this contract or legal act *"will be in writing"* .

The framework contract provided by EGARSAT refers to the possibility that any of the signatory companies can act as a subcontractor of another regarding the provision of the services indicated in the framework contract, but it does not contain the specific subcontract with the its particular regulation, which is what is required by article 28.4 of the RGPD, according to which the contract will stipulate, in particular, that the subcontractor (art. 28.3 RGPD):

"a) will treat personal data only following documented instructions from responsible, including with respect to transfers of personal data to a third party country or an international organization, unless it is obliged to do so by virtue of Law of the Union or Member States that applies to the person in charge; in such case, the manager will inform the manager of that legal requirement prior to treatment, unless such Law prohibits it for important reasons of interest public
b) will guarantee that the persons authorized to treat personal data are there committed to respect confidentiality or are subject to an obligation of confidentiality of a legal nature
c) will take all the necessary measures in accordance with article 32;
d) will respect the conditions indicated in sections 2 and 4 to resort to another treatment manager;
e) will assist the responsible, taking into account the nature of the treatment, through appropriate technical and organizational measures, whenever possible, for this pueda cumplir con su obligation to respond to the requests they have for object the exercise of the rights of the interested parties established in chapter III;
f) will help the person in charge to guarantee compliance with the established obligations in articles 32 to 36, taking into account the nature of the treatment and the information available to the manager;
g) at the choice of the person in charge, delete or return all personal data once end the provision of treatment services, and delete the existing copies unless the retention of personal data is required by law of the Union or of the Member States;
h) will make available to the person in charge all the information necessary to demonstrate the fulfillment of the obligations established in this article, as well as para allow and contribute to the realization of audits, including inspections, por parte of the person in charge or another auditor authorized by said person in charge."

On the other hand, article 28.4 of RGPD emphasizes the inclusion in the subcontractor contract of a clause that provides for the provision, by the subcontracted entity, of sufficient guarantees of the application of appropriate technical and organizational measures , so that the treatment is in accordance with the RGPD.

Thus, EGARSAT should have signed a subcontract with ICESE, in which it was established, among others, the object, duration, nature and purpose of the treatment, the type of personal data and the categories of interested parties, as well as the obligations and rights of the person in charge. It should also have clearly and specifically identified the data processing that ICESE had to carry out, taking into account the type of service provided and the manner

in which it was provided. The contract should also have determined the way in which ICESE would guarantee that the persons authorized to process personal data would expressly undertake to respect confidentiality. Likewise, there should be the obligation of ICSE to adopt all the necessary security measures, in accordance with what is established in article 32 of the RGPD, with an indication of the specific security measures, or with a referral to a recognized national or international standard or framework. And in this subcontractor contract, the obligations included in the confidentiality agreement (Annex 5 of the set of particular administrative clauses -PCAP-) that EGARSAT signed on 01/09/2020 should also be included.

The omission in the framework contract of the indicated information, shows that it cannot protect the subcontract that ICESE carried out, on behalf of EGARSAT, in the framework of the execution of the contract awarded to this second entity, which is constitutive of the offense corresponding to the proven fact 1.

Finally, for the purpose of assessing the contravention of the RGPD, and therefore the assessment of the facts as constitutive of an infringement, it cannot be overlooked that in the public contract that EGARSAT signed, it was expressly pointed out that confidentiality was an essential contractual obligation. Omitting the formalization of a subcontract with the indicated content, compromises the security of the data when they are the subject of treatment by the subcontracted entity that has not subscribed to the specific obligations that in terms of data protection are provided for in the RGPD .

In accordance with the above, the allegations made by EGARSAT referring to proven fact 1 were dismissed.

2.2.- Allegations referring to the 2nd PROVED FACT, relating to the lack of authorization from the Department of the Interior to subcontract the data processing entrusted to EGARSAT.

EGARSAT expressed its disagreement with the imputation of proven fact 2, relating to the lack of authorization from the Department of the Interior for EGARSAT to subcontract the data processing of the employees of the Department of the Interior.

In essence, EGARSAT came to state (allegations Fifth, Eighth and Tenth, pp. 9 to 15) that the wording of the public contract referring to subcontracting was confusing (it even referred to the existence of a loophole) , that this clause had to be interpreted in the light of article 1255 of the Civil Code, according to which it was necessary to understand that the subcontracting of the service was not prohibited, and that its adoption was left to the will of 'EGARSAT, who during the execution of the contract could modify its initial will and choose to subcontract the service, and that in any case this was a matter unrelated to data protection:

> *(p. 13)*
> *"It must be stated and reiterated that it was the Generalitat itself that, before expressly regulating the subcontracting conditions in the public contract that linked it with me represented, limited itself to consulting whether it had foreseen (.sic) that possibility initially in the contract , but it has not limited said faculty, nor has it expressly prohibited said subcontracting, so that in the face of said situation of indeterminacy,*

leaving the initiative of said provision to me represented, it is understood that it authorizes it at a certain moment to modify the criterion that determines the possibility of carrying it out at the instance, precisely represented by me!"

(p . 14)
"...this representation understands that there is also no violation of section 2, of article 28 of the RGPD, even though said regulation is always subject to the autonomy of the will in the terms provided for in article 1255 of the Civil Code, in the sense of that the signed Contract must be interpreted as a whole, and according to the agreements or conditions imposed by the contracting parties."

(p . 15)
"Subcontracting, therefore, before the interpretative gap in the contract, can never be unauthorized access, when there is sufficient contractual support that allows the outsourcing of such services."

As it was pointed out in the proposed resolution, these allegations also cannot be favorably received in order to distort the proven fact 2, since in this case it is not discussed whether or not EGARSAT could subcontract the entrusted service , but if EGARSAT requested prior authorization from the Department of the Interior to subcontract certain treatments to ICESE, in accordance with the obligation provided for in article 28.2 of the RGPD, which establishes that the person in charge of treatment - in this case, EGARSAT - that wants to use another person in charge - in this case, ICESE -, must have the prior written authorization of the person in charge of the treatment - in this case, the Department of the Interior -.

In this respect, within the framework of the present procedure, EGARSAT has not proven that it communicated to the Department of the Interior its willingness to entrust ICESE with the performance of tasks that entailed the processing of personal data on behalf of EGARSAT, nor has it consequently proven that the Department had authorized it, in writing. There is only the document entitled *declaration of responsibility* (Annex 1 of the PCAP) that EGARSAT signed on 06/03/2020, in which it clearly indicated that it did not plan to subcontract the awarded service, from which indication it is obvious that it cannot be detached no authorization from the Department of the Interior for EGARSAT to subcontract various treatments to ICESE.

From the above it is concluded that EGARSAT turned to ICESE so that this entity carried out certain data treatments of the employees of the Department of the Interior - among which would be the sending of e-mails summoning medical visits - without the mandatory prior authorization and in writing from this Department.

Finally, the allegations made by EGARSAT on the proportionality of the eventual sanctions to be imposed (Eleventh to Catorzena allegations, pp. 15 to 26), and more specifically on the application of certain mitigation criteria in the graduation of these sanctions will be analyzed in the 5th legal basis.

3.- In relation to the conduct described in point 1 of the proven facts, relating to the lack of a subcontractor of the treatment, it is necessary to refer to article 28 of the RGPD, which provides in section 4 the following: *"4. When a treatment manager _ turn to another manager to carry out certain processing activities on behalf of the person in charge, the same data*

protection obligations will be imposed on this other manager, by means of a contract or another legal act established in accordance with the Law of the Union or of the Member States stipulated in the contract or other legal act between the person in charge and the person in charge referred to in section 3 (…)". And section 9 of this same precept establishes that: *"9. The contract or other legal act referred to in sections 3 and 4 will be in writing, including in electronic format."*

During the processing of this procedure, the fact described in point 1 of the proven facts section, which is considered constitutive of the violation provided for in article 83.4.a) of the RGPD, which typifies as 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."*

The conduct addressed here has been included as a serious infringement in article 73.k) of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LOPDGDD), in the following form:

> *"k) Entrust data processing to a third party without the prior formalization of a contract or other written legal act with the content required by article 28.3 of Regulation (EU) 2016/679."*

4.- In relation to the conduct described in point 2 of the proven facts, relating to the lack of authorization to subcontract the treatment, it is necessary to refer to article 28 of the RGPD, which provides in section 2 the following: *" 2. The person in charge of the treatment will not resort to another person without the prior written authorization, specific or general, of the person in charge. In this last case, the person in charge will inform the person in charge of any change envisaged in the incorporation or substitution of other persons in charge, thus giving the person in charge the opportunity to oppose said changes. "*

Article 29 of the RGPD establishes the following: *" The person in charge of the treatment and any person who acts under the authority of the person in charge or of the person in charge and has access to personal data may only treat said data following the instructions of the person in charge, unless are obliged to do so by virtue of the Law of the Union or of the Member States. "*

As noted, EGARSAT has not stated or provided any document proving that it requested prior authorization from the Department of the Interior to subcontract certain treatments to ICESE. Therefore, the fact described in point 2 of the proven facts section (lack of authorization to subcontract the treatment) must be considered as proven, which is considered constitutive of the offense 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."*

The conduct addressed here has been included as a serious infraction in article 73.l) of the LOPDGDD in the following form:

> *"The contracting by a manager of the treatment of other managers without the prior authorization of the manager, or without having informed him about the changes produced in the subcontracting when they were legally required."*

5.- As EGARSAT is a private law entity, the general penalty regime provided for in article 83 of the RGPD applies.

Article 83 of the RGPD foresees that the infractions provided for in its section 4, are sanctioned with an administrative fine of 10,000,000 euros at most , or in the case of a company, an amount equivalent to 2% as a maximum of the global total annual business volume of the previous financial year, opting for the higher amount . This, without prejudice to the fact that, as an additional or substitute, the measures provided for in clauses a) ah) ij) of Article 58.2 RGPD may be applied.

Having said that, the amount of the administrative fine to be imposed must be determined. According to what is established in articles 83.2 RGPD and 76.2 LOPDGDD, and also in accordance with the principle of proportionality enshrined in article 29 of Law 40/2015, as indicated by the investigating person in the resolution proposal, the sanctions should be imposed next:

- Regarding the commission of the proven fact 1st: the penalty of 6,000 euros (six thousand euros). This quantification of the fine is based on the weighting between the aggravating and mitigating criteria indicated below.

- Regarding the commission of the 2nd proven fact: the penalty of 6,000 euros (six thousand euros). This quantification of the fine is based on the weighting between the aggravating and mitigating criteria indicated below.

As mitigating criteria, in both cases the concurrence of the following causes is observed:

- The number of interested persons affected and the level of damages caused (art. 83.2.a RGPD).

- The previous infringements committed (art. 83.2.e RGPD), since it is not known that EGARSAT has been previously sanctioned for violations of the personal data protection regulations.

- The ISO 27001:2013 certification, relating to information security management systems (ISMS) (art. 83.2.j RGPD).

On the contrary, as aggravating criteria, in both cases the concurrence of the following elements is observed :

- Negligence in the offenses committed (art. 83.2.b RGPD).

- Linking the activity of EGARSAT with the processing of personal data (art. 83.2.k of the RGPD and 76.2.b of the LOPDGDD).

With regard to the allegations made by EGARSAT related to the criteria for grading the sanctions, as stated by the instructing person in the resolution proposal, they cannot be taken into consideration - for the purpose of mitigating the sanctions - , the lack of personalization of the Administration of the Generalitat in the present sanctioning procedure, given that the personation of the entities affected by the sanctioned facts is not provided for

in the regulatory regulations of the procedure, in not having the consideration of interested persons.

On the other hand, the lack of adoption by this Authority of precautionary measures together with the initiation agreement that was issued on 04/05/2022, cannot be interpreted in the sense that its non - adoption highlights the absence of damage or prejudice, given that the imputed facts refer to treatments carried out in 2020, which, in principle, and except for what is indicated in the 7th FD, would have exhausted their effects with the execution of the public contract awarded to EGARSAT, which is why it was not considered necessary to adopt precautionary measures. In addition, it is necessary to insist on the fact that EGARSAT's failure to comply with the obligations provided for in Article 28 of the RGPD compromised the security of the personal data of the affected workers, and in certain cases, with the action of ICSE - with whom it did not formalize any subcontract where its obligations in terms of data protection were stated - workers' data was revealed, with the consequent damage.

On the other hand, in the statement of objections before the initiation agreement, EGARSAT pointed out that: *" EGARSAT's reaction to the facts produced, consists in the direct performance by it of all the services subject to the Public contract subscribed, which determines the adoption of the appropriate measures taken by me represented as treatment manager to alleviate the damages and losses that the interested parties could suffer" .* These manifestations refer fundamentally to the disclosure by ICSE of data from the employees of the Department of the Interior, and therefore have a limited virtuality in the assessment of the graduation of the sanctions imposed on EGARSAT. Having said that, it must be made clear that said allegations do not enjoy plausibility, since during the preliminary information phase EGARSAT stated (written date 10/27/2021) that the measures it adopted when it became aware of the facts , was: "to require the (ICESE) *worker to be more diligent and aware of the Department's protocols, including those relating to confidentiality"* , with which statement he made it clear that, with posterity after the sending of the controversial emails with data of third-party workers, outsourced ICSE staff continued to carry out medical appointments for Home Department workers. On the other hand, in the evaluation of EGARSAT's actions once it became aware of the facts, the fact that EGARSAT recognized (written date 02/078/2022) that it did not communicate to the Department of the Interior becomes relevant access by ICSE to the data of the employees of this Department.

EGARSAT also pointed out, as a mitigating circumstance, the fact that the Preving Group has appointed a data protection delegate (DPD), although it is not mandatory. This circumstance cannot be considered mitigating. If it is taken into account that EGARSAT has among its main functions the provision of services for the prevention of external occupational risks, among which the functions of monitoring the health of workers are included, and that these functions entail the management of histories labor clinics, the appointment of a DPD would be somewhat mandatory for EGARSAT as the person in charge of the treatment, in accordance with the provisions of article 34.1.l of the LOPDGDD.

EGARSAT also argued, as a mitigating circumstance, that " *the conduct of those affected could induce the commission of the facts on which the present proceedings are based, by requesting that the emails sent by ICESE Prevención, SL be sent".* This circumstance cannot be assessed as mitigating either, given that it refers to the action of ICSE, which is not the subject of the present procedure, which refers to the action of EGARSAT. In other words, the disclosure of data of third-party workers resulting from the sending of those emails is not disputed, but rather the lack of a subcontractor's contract and the Department's lack of

authorization to subcontract certain treatments. Therefore, the eventual request that the affected workers would have made is something that has no bearing on the facts that are imputed in the present procedure.

Finally, EGARSAT's statements regarding the fact that ICESE has been absorbed by Preving Consultores, SL is something that does not affect the mitigation of the sanctions imposed on EGARSAT, even though in the present sanctioning procedure the sanctioned entity is EGARSAT, and not ICESE, and the facts that are imputed respond to actions of EGARSAT.

6.- In accordance with article 85.3 of the LPAC and as it was advanced in the initiation agreement and the proposal, if before the resolution of the sanctioning procedure EGARSAT acknowledges its responsibility or makes the voluntary payment of the pecuniary penalty, a 20% reduction should be applied on the amount of the proposed penalty (therefore, the amount of the two penalties would be 9,200 euros). If the two aforementioned cases occur, the reduction is applied cumulatively (40%, therefore, the amount of the two penalties would be 7,200 euros).

Well, as indicated in the antecedents, on 28/09/2022 EGARSAT has paid in advance nine thousand two hundred euros (9,200 euros), corresponding to the amount of the penalty resulting once the reduction has been applied of 20%, from which it can be seen that he has chosen to make the voluntary payment of the pecuniary penalty, without, however, acknowledging his responsibility for the facts that have been imputed to him.

7.- Given the findings of the violations provided for in art. 83 of the RGPD in relation to privately owned files or treatments, article 21.3 of Law 32/2010, of October 1, of the Catalan Data Protection Authority empowers the Director of the Authority so that the resolution declaring the infringement establishes the appropriate measures so that its effects cease or are corrected.

In the present case, and taking into account that, according to the announcement published on 04/27/2021 in the BORME (background 10), ICESE was absorbed by the entity Preving Consultores , SLU on 04/22 /2021 , it is necessary to require EGARSAT so that, within the maximum period of 10 days from the day after the notification of the sanctioning resolution, it requires PREVING CONSULTORES SLU to accredit within the maximum period of the following 10 days (and if , if applicable, before carrying out) the deletion of personal data of the employees of the Department of the Interior who were the subject of the contract awarded to EGARSAT for the year 2020 (service contract no. IT-2020-283).

EGARSAT must certify to the Authority the compliance with this corrective measure, within 10 days following the end of the second 10-day period indicated.

For all this, I resolve:

1. To impose on EGARSAT two sanctions consisting of a fine of 6,000.- euros (six thousand euros), and a fine of 6,000.- euros (six thousand euros), as responsible for two violations provided for in article 83.4.a) in relation to article 28 -sections 2 and 4-, both of the RGPD.

2. Declare that EGARSAT has made effective the advance payment of nine thousand two hundred euros (9,200 euros), which corresponds to the total amount of the two sanctions

imposed, once the percentage of deduction of 20% corresponding to the reductions foreseen in article 85 of the LPAC.

3. Require EGARSAT to adopt the corrective measures indicated in the 7th legal basis and certify to this Authority the actions taken to comply with them.

4. Notify this resolution to EGARSAT.

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,