

File identification

Resolution of sanctioning procedure no. PS 39/2022, referring to Viandvi SL

Background

1. On 01/09/2021, the Catalan Data Protection Authority received a letter from a person who filed a complaint against Alella City Council, on the grounds of an alleged breach of the regulations on the protection of personal data, and attached various documentation on the facts reported.

In particular, the complainant stated that, on 31/08/2021, he received an email from the Tourism Office of Alella Town Council (alella.ofiturisme@alella.cat), with the subject "Cancellation – guided tour of the winery (...)", sent to a total of eleven other people, without using the blind copy option, and therefore, the personal address of all of them being legible. Likewise, all the recipients of the message were also able to learn that the rest of the recipients had booked the reference guided tour, scheduled for September 4, 2021 at 11am, and that they would be reimbursed the financial amount paid as input.

2. The Authority opened a preliminary information phase (no. IP 343/2021), 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. In this information phase, on 03/16/2022 the reported entity was required to report on the reasons why the hidden copy option was not used in the aforementioned electronic submission.

4. On 03/23/2022, the Alella City Council responded to the aforementioned request in writing in which it stated the following:

- That " *The Alella Tourism Office is managed by the Wine Tourism Promotion Consortium of the Do Alella Territory and is carried out through a service contract with the Viandvi company. The staff who provide their services are committed to data protection regulations and compliance and have received information on the regulations applicable to the processing of personal data.*
- That " *The Alella Tourist Office has a Staff Welcome Manual. In this manual which is accessible to its staff, it is established in point 6 Rules of action; section Using e-mail: When you send a mass e-mail to different recipients, it is mandatory to use the BCC field so that the addresses are hidden from the rest.*
- That " *It can be understood that in this case it was a one-off error by the person in charge of sending the e-mails from the tourism office since normally in those shipments with more than one person it is used prefer the hidden copy option. In any case, measures have already been taken to prevent this circumstance from happening again by recalling the application of the data protection regulations and the aforementioned manual.*

5. On 30/03/2022 this Authority required the Alella City Council to inform, among other issues, about who is the entity responsible for the processing of personal data relating to the electronic addresses of the people who were recipients of the said email. Likewise, a copy of the contractual document under which the entity in question assumed the role of data processor was also required.

6. On 11/04/2021 the Alella Town Council informed the Authority that the Alella Office is managed by the Wine Tourism Promotion Consortium of the DO Alella Territory (hereinafter, Consortium), which has signed a service contract with the company Viandvi SL. The City Council provided the collaboration agreement concluded with the Consortium, as well as the Welcome Manual, mentioned in the previous quarter.

In this agreement, formalized between the Consortium and Alella City Council, whose validity extends from 12/31/2020 to 12/31/2021, the following text is included:

*" II. That the Wine Tourism Promotion Consortium of the DO Alella Territory has as its purpose the promotion and economic and especially touristic dynamism of the territorial scope of the DO Alella, the empowerment within and outside its territorial scope of the wines of the denomination of origin, as well as the promotion and coordination of policies in the field of tourism of the members of the consortium in order to jointly value the different historical, cultural, landscape, sports and economic assets.
(...)*

7. On 04/27/2022, the Authority required the Consortium to, within a period of ten working days, present the allegations it deems appropriate, in relation to the alleged infringement reported.

8. On 05/05/2022 the Consortium informs the Authority that: *" The Alella Tourist Office is managed by this Consortium through a service contract awarded to the company Viandvi , SL, the aforementioned company has explicit knowledge that when emails are sent to a plurality of recipients, it has the obligation to do so using the blind copy option. This obligation is contained in the "Welcome Manual", in its section 6 "Usage of email" . (...) The company Viandvi , SL, tells us that the action by which this Authority has opened this previous information IP 343/2021, was a one-off mistake made by the person who sent the mail, without evidence that on other occasions e-mails have been sent to several recipients without having used the blind copy option ."*

9. On 06/05/2022 this Authority requested from the Consortium a copy of the service contract concluded with Viandvi SL

10. On 10/05/2022 the Consortium sent the Authority the administrative contract concluded with the company Viandvi SL, as well as the set of particular administrative clauses and the set of particular technical prescriptions. In the mentioned contract, signed on 03/29/2019 and whose duration is one year extendable, it is stipulated that the object of the same *" is the information, dissemination, promotion and tourist service of the "Tourism office of the municipality of Alella, supporting the promotion of the DO Alella territory and the promotional actions of the entities affiliated to the Wine Tourism Promotion Consortium of the DO Alella*

Territory" . Also, in the Special Administrative Clauses Schedule, it is determined that the contractor will have the status of data controller (section 2.20 "*Protection of personal data*").

11. That in accordance with the statutes of the Consortium published in the Official Gazette of the Province of Barcelona dated 03/12/2014, the Consortium has among its purposes, the economic and especially touristic promotion of the territorial scope of the DO Allele; the leadership, creation, promotion and/or dissemination of wine events, products and/or equipment, as resources wine tourism and the promotion and coordination of policies in the field of tourism of the members of the Consortium, in order to value together the different historical, cultural, landscape, sports and economic assets.

This Consortium, as stipulated in article 2 of the aforementioned statutes, is made up of several City Councils together with the Regulatory Council of the Alella Denomination of Origin.

For its part, article 8.1 of Law 14/2003, of June 13, on agri-food quality, determines that "*the regulatory councils are constituted as public law corporations to which the management of the denominations is attributed Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI) with the functions determined by this Law and the regulations that develop it*".

12. On 07/06/2022, the director of the Catalan Data Protection Authority agreed to initiate a disciplinary procedure against Viandvi SL, for an alleged infringement provided for in article 83.5.a), in relation to article 5.1.f) of the RGPD; all of them from 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 (hereinafter, RGPD). This initiation agreement was notified to the imputed entity on 06/09/2022.

13. In the initiation agreement, the accused entity 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.

14. On 06/22/2022, Viandvi SL filed objections to the initiation agreement .

15. On 09/22/2022, the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority impose on Viandvi SL the penalty consisting of a fine of 1,500.- euros (one thousand five hundred euros), as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1 f), all of them of the RGPD.

This resolution proposal was notified on 09/23/2022 and a period of 10 days was granted to formulate allegations.

16 . On 30/09/2022, the accused entity paid in advance 900 euros (nine hundred euros), corresponding to the monetary penalty proposed by the investigating person in the resolution proposal, once the reductions provided for in article 85 of Law 39/2015.

proven facts

On 31/08/2021, from the corporate address alella.ofiturisme@alella.cat, managed by the company Viandvi, SL, as responsible for the treatment of the Consorci de Promoció Enoturística del Territori DO Alella - under contract held on 29/03/2019 -, an email was sent with the subject " *Cancellation - guided tour of the winery (...)*" to a total of twelve people, without using the blind copy option, which allowed the recipients of the message to access the email address of the other recipients. Likewise, all the recipients of the message were also able to learn that the rest of the recipients had booked the guided tour of reference, scheduled for September 4 at 11 a.m., and that they would be reimbursed the financial amount paid in input concept.

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.

The reported data processing falls within the competence of the Authority under the provisions of article 156 b) of the Statute of Autonomy of Catalonia (EAC) and article 3 h) of Law 32/2010, to the extent that this treatment would have been carried out within the framework of the powers attributed to local bodies, taking into account that Viandvi SL provided the service on behalf of the Wine Tourism Promotion Consortium of the Do Alella Territory which, in turn, has signed a collaboration agreement with Alella City Council.

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 it submitted objections to the initiation agreement, the accused entity has not made objections to the resolution proposal, since it has accepted to both options to reduce the penalty amount. 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.

The company Viandvi SL, in its pleadings signed on 06/22/2022, stated that the reference email was sent without using the blind copy option as a result of a material error, punctual and " *absolutely fortuitous*" on the part of a Viandvi SL worker, who was carrying out tasks (...). Also, the reported entity argued that, when this worker started the employment relationship with the company on June 26, 2021, in application of the internal protocol of Viandvi SL, she received specific information about the protection regulations of data and

was given a document called "Functions and Obligations", which establishes the internal rules to be complied with by the company's staff.

In this regard, attached to the statement of objections, the company sent the document "Functions and Obligations" which, in its ninth point, refers to the obligations of Viandvi SL staff, in relation to the use of e-mail. Specifically, the aforementioned document includes the obligation of workers to use the "CCO" field, corresponding to the blind copy option, when making a bulk shipment to different recipients of a message, so that their email addresses are hidden from the rest. Likewise, it also contemplated as good practices *"checking the addresses of the recipients, before sending the message; evaluate the use of the blind copy option, to send an email to multiple recipients and when an email is forwarded, delete the addresses of the previous recipients so as not to disseminate, in an unjustified way, third party email addresses"*.

The letter of allegations was also accompanied by an email that (...) from the company Viandvi SL, sent to the worker who carried out the tasks (...), reminding her that, when sending to multiple recipients, you must use the blind copy functionality. The content of this message is transcribed below:

"(...) WHENEVER you send an email to several people at the same time and knowing that they do not know each other, send the contacts hidden by the data protection law (...)".

Ultimately, the reported entity alleged that *"of the 9 recipients included in the PARA field, all the addresses have a generic second-level domain such as gmail.com, yahoo.com or Hotmail.com, that is to say, they are not associated with corporate domains, which does not facilitate the identification of the holders, as is the case with the two recipients in the CC field that have the Consortium's corporate domain associated with them. (...) This email does not include any other personal information except the identification data of the VIANDVI SL employee, who sent the email."*

According to what has been said, the entity recognized the commission of the imputed facts and, in this sense, the allegations made did not tend to distort the reality of the facts that motivated the initiation of the procedure, nor the legal qualification established in the initiation agreement, but they limited themselves to listing a series of circumstances with the object *"to be taken into account in the reference procedure, especially in the resolution thereof"*.

In this regard, it should be pointed out that, even if the reported event occurred as a result of a human and specific error, the lack of intentionality does not allow Viandvi SL to be exonerated from responsibility. In this regard, it is necessary to take into account the consolidated doctrine of the principle of culpability, highlighting that the sanctioning power of the Administration, as a manifestation of the " ius puniendi " of the State, is governed by the principles of criminal law, and one of its principles is that of culpability, which is incompatible with a system of objective responsibility without fault, but for the element of fault to occur, intentional conduct is not required but that it is sufficient that the infringement occurred due to the negligence of its author. In this sense, the Supreme Court in several judgments, including those of 15/04/2016 and 24/11/2011, refers to the doctrine of the Constitutional Court when it quotes verbatim *"objective responsibility does not fit in the scope of administrative sanctions or without fault, doctrine that is reaffirmed in sentence 164/2005, of June 20, 2005, under*

which the possibility of imposing sanctions for the mere result is excluded, without proving a minimum of culpability, even for mere negligence ".

Also the National Court, in the Judgment of 30/10/2017, in matters of data protection indicated, citing what it had already declared in previous judgments (for all, the judgment of 12/11/2010), the following : *But, as we have repeatedly affirmed in this matter, the sanctions do not require intentional intent but mere carelessness or lack of diligence is sufficient; in the words of this Court, the simple negligence or failure to fulfill the duties that the Law imputes to the persons responsible for files or data processing is enough to exercise extreme diligence..." and even if he did not obtain any economic benefit " .*

In short, negligence does not require a clear intent to infringe, but rather lies precisely in carelessness, and in this specific case, in the lack of attention required of the entity in fulfilling the duty of confidentiality referred to article 5.1.f) of the RGPD.

It should be emphasized that the duty of care is maximum when activities are carried out that affect fundamental rights, such as the right to the protection of personal data. Certainly, in the present case, the sending of the controversial e-mail to all the people who had booked a visit to a certain winery, entailed data processing by the Viandvi SL company that violated the confidentiality principle of the personal data of those affected, as it allowed all the recipients of the e-mail to know the e-mail addresses of the people who had booked the visit, to know that they had booked the said visit, and that they would be reimbursed the money paid for the entrance

In accordance with the above, it is considered that the set of allegations made do not distort the imputed facts or their legal qualification.

3. In relation to the facts described in the proven facts section, relating to the sending of an email without using the blind copy option, it is necessary to refer to article 5.1 f) of the RGPD which provides for the following:

"1. The data personal will be :

(...)

f) treated in such a way as to guarantee adequate security for personal data, including protection against unauthorized or illegal processing and against accidental loss, destruction or damage, through the application of appropriate technical and organizational measures ("integrity and confidentiality").

This principle of confidentiality provided for by the RGPD must be supplemented with the duty of secrecy contained in Article 5 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (hereinafter, LOPDGDD), which establishes the following:

"Article 5. Duty of confidentiality

1. Those responsible and in charge of data processing as well as all the people who intervene in any phase thereof are subject to the duty of confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.

2. *The general obligation indicated in the previous section is complementary to the duties of professional secrecy in accordance with the applicable regulations.*

3. *The obligations established in the previous sections remain even if the obligee's relationship with the person in charge or person in charge of the treatment has ended.*

Well, during the processing of this procedure, the imputed facts have been duly proven, which the same denounced entity has also recognized.

These proven facts are constitutive of an infringement, according to the provisions of article 83.5 a) of the RGPD, which typifies as such a violation the "principles *basic para el tratamiento, including the conditions for the consent to the tenor of the articles 5, 6, 7 and 9*", among them which the principle of confidentiality is found there .

The conduct addressed here must be collected as a very serious infraction in article 72.1 i) of the LOPDGDD, in the following form : "*i) The violation of the duty of confidentiality established by article 5 of this Organic Law*".

4. As Viandvi SL does not comply with any of the subjects provided for in article 77.1 of the LOPDGDD , the general sanctioning regime provided for in article 83 of the GDPR applies.

Article 83.5 of the RGPD provides for the infractions provided for there, to be sanctioned with an administrative fine of 20,000,000 euros at most, or in the case of a company, an amount equivalent to 4% as a maximum of the global total annual business volume of the previous financial year, opting for the higher amount.

Having said that, it is necessary to determine the amount of the administrative fine to be imposed. According to what is established in article 83.2 of the RGPD, and also in accordance with the principle of proportionality enshrined in article 29 of Law 40/2015, as indicated by the instructing person in the proposed resolution, the penalty of 1,500 euros (one thousand five hundred euros). This quantification of the fine is based on the weighting between the aggravating and mitigating criteria indicated below.

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

- The lack of intention of the person who sent the message (art. 83.2.b RGPD);
- The notice given to the worker who sent the email in order to prevent a similar incident from happening again (art. 83.2 c RGPD);
- The categories of personal data affected by the breach – email address, as well as customer status and attendance at a guided tour – and the non-existence of special categories of personal data affected (art. 83.2 g RGPD);
- The lack of financial benefits as a result of the commission of the offense (art. 83.2.k RGPD);
- And, finally, the measures adopted by Viandvi SL (art. 83.2.k RGPD).

On the contrary, as aggravating criteria, the nature of the treatment and the seriousness of the offense (art. 83.2 GDPR) must be taken into account, which, in accordance with article 72.1 i) LOPDGDD, is very serious, as well as the linking the activity of the infringer with the usual practice of processing personal data (article 83.2 k RGPD and 76.2.b LOPDGDD).

5. On the other hand, in accordance with article 85.3 of the LPAC and as stated in the initiation agreement, if before the resolution of the sanctioning procedure the accused entity acknowledges its responsibility or does the voluntary payment of the pecuniary penalty, a 20% reduction must be applied on the amount of the provisionally quantified penalty. If the two aforementioned cases occur, the reduction is applied cumulatively (40%).

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

Well, as indicated in the antecedents, on 30/09/2022, the accused entity paid 900 euros (nine hundred euros) in advance, corresponding to the amount of the resulting penalty once the cumulative reduction of 40%.

6. Faced with the finding of the infringement provided for in art. 83 of the RGPD in relation to files or treatment of private ownership, article 21.3 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, empowers the director of the Authority for the resolution declaring the infringement to establish the appropriate measures so that its effects cease or are corrected.

In the present case, however, it becomes unnecessary to require corrective measures for the effects of the infringement since the infringing conduct refers to an isolated and specific event, with which the effects of the infringement would have been consummated.

For all this, I resolve:

1. To impose on Viandvi SL the penalty consisting of a fine of 1,500.- euros (one thousand five hundred euros), as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1 f), both of the RGPD.

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

2. Declare that Viandvi SL has made effective the advance payment of 900 euros (nine hundred euros), which corresponds to the total amount of the penalty imposed, once the percentage of deduction of 40% corresponding to the reductions provided for in the article has been applied 85 of the LPAC.

3. Notify this resolution to Viandvi SL

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

Against this resolution, which puts an end to the administrative process in accordance with articles 26.2 of Law 32/2010, of October 1, of the Catalan Data Protection Authority, and 14.3 of Decree 48/2003 , of February 20, by which the Statute of the Catalan Data Protection Agency is approved, the imputed entity can file, with discretion, an appeal for reinstatement before the director of the Catalan Data Protection Authority Data, within one month from the

day after its notification, in accordance with the provisions of article 123 et seq. of the LPAC. You can also directly file an administrative contentious appeal before the administrative contentious courts, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of Law 29/1998, of July 13, regulating the administrative contentious jurisdiction.

If the imputed entity expresses to the Authority its intention to file an administrative contentious appeal against the final administrative decision, the decision will be provisionally suspended in the terms provided for in article 90.3 of the LPAC.

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

The director,

Machine Translated