

## File identification

Resolution of sanctioning procedure no. PS 59/2022, referring to TÜV Rheinland Certio, SL.

## Background

1. On 06/15/2021, the Catalan Data Protection Authority received a letter from a person who filed a complaint against the entity TÜV Rheinland Certio, SL (hereinafter, Certio) , with reason for an alleged breach of the regulations on the protection of personal data .

The complainant explained that he went to a certain vehicle technical inspection station (henceforth, ITV) managed by Certio with his vehicle. He added that the station staff gave the technical inspection card of his vehicle to the owner of another vehicle that was also in the premises. The person making the claim also stated that said card "*carries sensitive data (among others, the chassis number of my vehicle)*".

The reporting person provided various documentation relating to the events reported, among others, the certificate of validity according to which the reporting person's vehicle had passed the MOT, but did not have the technical data sheet, given that there had been an incident of "*crossing of documentation*".

2. The Authority opened a preliminary information phase (no. IP 256/2021), in accordance with the provisions of article 7 of Decree 278/1993, of November 9, on the sanctioning procedure applied 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 06/24/2021 the reported entity was required to report on whether the technical inspection card, corresponding to the reporting person's vehicle, was given to a third person.

4. On 07/05/2021, Certio responded to the aforementioned request through a letter in which it stated the following:

- technical inspection card of the complainant's vehicle was handed over to a third person.
- That in order to be able to recover the documentation delivered by mistake, corresponding to the reporting person's vehicle, several arrangements were made by phone and email.
- That the documentation was recovered on 06/22/2021 and was incorporated into the file of the complainant's vehicle.
- technical inspection card of the reporting person's vehicle was given by mistake , nor any other third party has accessed the reporting person's data.
- That the technical inspection card of the reporting person's vehicle contained the registration number of the reporting person's vehicle, but no other personal information.

The reported entity attached various documentation to the letter.

5. On 22/09/2022, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against Certio for an alleged infringement provided for in article 83.5.a), in relation to article 5.1 .f); both of Regulation (EU) 2016/679 of the European

Parliament and of the Council, of April 27, relating to the protection of natural persons with regard to the processing of personal data and the free movement thereof (hereinafter, RGPD).

6 . On 6/02/2023 , the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority admonish Certio as responsible for an infringement provided for in article 83.5.a) in relation to article 5.1.f); both of the RGPD.

This resolution proposal was notified on the same date 6/02/2023 and a period of 10 days was granted to formulate allegations.

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

### **proven facts**

On 11/06/2021, Certio delivered the technical inspection card corresponding to the complainant's vehicle to a third party. This card contained the registration and chassis number of the reporting person's vehicle, as well as information regarding a previous technical inspection.

### **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. The accused entity has not made allegations in the resolution proposal, but it did so in the initiation agreement. Regarding this, it is considered appropriate to reiterate below the reasoned response of the instructing person to these allegations.

2.1. On the allegation regarding the lack of competence of this Authority.

The first section of the statement of objections to the initiation agreement focuses on arguing the lack of competence of this Authority. The accused entity claims that this Authority is not competent to process the present sanctioning procedure since, in literal terms, Certio "*does not provide public service, through direct or indirect management, to the extent that it carries out its activities in a private capacity without exercising public power and because it does not comply with the defining notes of 'public service' "*. Based on this, he considers that his entity cannot be included in the assumption of article 3.1.f) of Law 32/2010, which provides "*Other private law entities that provide public services through any form of direct or indirect management, if it concerns files and treatments linked to the provision of these services"*.

To defend his argument, he quotes the judgment of the Supreme Court, no. 983/2016, of 4 May 2016, alleging that the activity provided by the ITV stations is carried out by private bodies in a private capacity and that, despite this activity, it is subject to the control and supervision of an authority public, is not linked to the exercise of public authority.

For what is of interest here, it should be noted that the judgment invoked, in summary, maintains that Directive 2006/123/EC, of the European Parliament and of the Council, of December 12, 2006, relating to services in the internal market (hereinafter, Services Directive), is not applicable to the vehicle technical inspection service (henceforth, ITV) given that article 2, relating to the scope of application of the rule, provides in section 2, the exclusion of " *d.) services in the field of transport (...)*". The accused entity considers that the exclusion of ITV's activity by way of letter d) implies that the ITV service is not a public service, given that if it were, the exclusion would be based on the letter i), which provides for " ***the activities linked to the exercise of public authority in accordance with art. 45 of the treaty*** ".

Well, the fact that ITV's activities must be considered as ' *services in the field of transport*' for the purposes of article 2.2.d) of the Services Directive, it does not imply that it is a service provided in a private capacity. This provision only confirms that services in the field of transport and, more specifically, the vehicle technical inspection service, cannot fit into a 'full' liberalization model, as regulated by *that* directive, but must be provided in accordance with the sectoral regulation in order to guarantee public safety.

On whether the provision of the ITV service is a public service, jurisprudence has been pronounced on repeated occasions. Among others, the Judgment of the Supreme Court of April 21, 2016 which, like the judgment invoked by the accused entity, refers to a judgment of October 15, 2015, issued by the Court of Justice of the European Union, which holds (fifth legal basis):

*"The authorization regime for technical vehicle inspection stations has explicit coverage in European Union law, because article 2 of directive 2009/40/EC of the European Parliament and of the Council, of May 6, 2009, relating to the technical inspection of motor vehicles and their trailers, prescribes that ' the **technical inspection provided for in this Directive will be carried out by the State or by a public body entrusted by the State with this task or by organisms or establishments designated by the State and which act under its direct supervision, which may be private organizations duly authorized for it . (...)**. As stated by the Court of Justice of the European Union in the aforementioned judgment of October 15, 2015, since the European regulations do not contain any harmonizing provision of the legal regime of access to the activity of technical inspection of vehicles, the Member States can establish **the legal regime that they consider relevant, then it can be carried out by public organizations or establishments or private operators under the supervision and vigilance of the State, being able to subject the exercise of this activity to obtaining a prior authorization (...)** "*

Thus, in the 7th legal basis of the same sentence, it refers to the ITV service as a public service, textual:

*" the established regulation cannot result in the exercise of said activity in said territory being hindered or made less attractive by operators from other Member States, or making access to this market difficult for the companies of said State, which determines that we declare that the basis of the contested resolution does not comply with the Law of the European Union, which is limited to confirming the fact that the validity of an administrative concession **for the provision of the public service of technical inspection of vehicles** prevents the establishment of new stations in the territorial scope included in the concession (...)*".

The previous pronouncements must be put in relation to the regulations on industrial security. Specifically, Law 12/2008, of July 31, on industrial security, as well as the subsequent Law 9/2014, of July 31, also on industrial security, which define this as a public service of general interest and foresee that the technical inspection regime of vehicles is part of the scope of industrial security.

Law 9/2014, of July 31, on the industrial safety of establishments, installations and products, defines industrial safety as "*the public service of general interest that aims to prevent industrial risks, limit them to a socially acceptable level and mitigate the consequences of accidents, if they occur, that may cause damage or harm to people, property or the environment as a result of the use, operation and maintenance of the facilities or of the production, use, consumption, storage or rejection of the products.*" Article 3 defines as "control body" "*the natural or legal persons constituted with the purpose of verifying, through certification, testing or **inspection activities**, compliance with the mandatory safety conditions (...)*".

In accordance with the aforementioned forecasts, ITV stations are considered to provide an inspection service aimed at verifying whether vehicles in circulation meet a series of minimum requirements in order to guarantee industrial safety. Having said that, it is necessary to observe the legal regime provided for by the control bodies in the field of industrial safety (article 12) which provides: "*Regime for the provision of inspection services. 1. The inspection services of the regulatory control of industrial safety are provided by the control bodies in the field of industrial safety, in a legal regime of responsible declaration. 2. The Government must ensure the universality of the inspection service by means of subsidiary provision in the event that it is necessary due to a lack of private initiative or because the service ceases to be provided. In this case, the Government can provide the service through direct management or use any other indirect management system, in accordance with the public sector contract regulations.*"

In short, we are dealing with a service that the Government can provide through direct management or use any other indirect management system. This same regime is contemplated in the specific regulations that regulate the ITV service, article 14 of Royal Decree 920/2017, of October 23, when it provides that the service can be provided "by the autonomous communities directly, or **through mixed economy companies, or by private companies, under an administrative concession or authorization regime**". And it is that we are dealing with a service of public interest aimed at "**verifying that a vehicle is suitable for use on public roads because it complies with the required and mandatory safety and environmental protection characteristics**". Therefore, it must be concluded that even if the service is provided by the ITV stations - which, remember, have previously been authorized by the competent body of the autonomous community in order to ensure a "*regime designed to ensure that vehicles are in good condition from the point of view of safety and the environment during their use*" – this is a service in the public interest.

For all the above, it is necessary to conclude the competence of this Authority in accordance with article 3.1.f) of Law 32/2010, and this without prejudice to highlight that section h) of the same legal precept it also includes within its scope of action, the processing of data carried out by legal entities that fulfill public functions in matters that are the competence of the Generalitat.

2.2. On the allegation that the registration number of a vehicle is not personal data.

The accused entity alleges that the registration number, by itself, cannot be considered personal data.

This allegation cannot succeed either given that, as this Authority has stated on several occasions, the registration number is personal data. Therefore, the delivery to a third party of the technical inspection card corresponding to the reporting person's vehicle, with a registration number included there, entails the disclosure of personal data, given that it allows the identification of the owner of the vehicle, without disproportionate efforts, and any treatment that is carried out (Article 5 RGPD) must respect the principles and guarantees provided for in the data protection regulations. In addition, in the specific case at hand, the technical inspection card also contained information relating to the chassis number of the vehicle in question and a previous technical inspection.

In this regard, it is necessary to bear in mind the definition of personal data established by the RGPD: "*all information about an identified or identifiable natural person (<<the interested party>> )*"; ". In the specific case that concerns us, the definition of 'identifiable' person deserves special attention, defined in the RGPD as "*any person whose identity can be determined, directly or indirectly, in particular through an identifier como por ejemplo, will be considered an identifiable physical person a number, an identification number, location data, an online identifier or one or more elements of the physical, physiological, genetic, psychological, economic, cultural or social identity of said person* ; (Article 4.1 GDPR).

On the question of whether the license plate is personal data, this Authority has pronounced in an Opinion on a query made by a public company in relation to the incorporation of cameras as a substitute or complement to the rear-view mirror in some buses (CNS – 10 /2015), which concludes:

*"It should also be taken into account that, apart from the graphic image of the people, it is given*

*personal any information that allows them to be identified, even if it is in form indirectly or through the link with other personal data, as long as this identification does not require the use of disproportionate means or terms. This one identification may occur, for example, **by collecting and processing one's registration number***

***vehicle Although this registration number, alone, would not allow in all cases identify a specific person, to the extent that this information can combine or associate with other data available to the Administration, such as data that is collected and processed in a vehicle register, identification would be possible without disproportionate effort, so that the vehicle registration should be considered as personal data ."***

In the same sense, the AEPD, in report no. 425/2006, of January 1, 2006, maintains that the disclosure of the registration data included in the technical data sheet of the vehicle (physical support) delivered to a third party, must be considered subject to the regulations for the protection of data literal:

*" From the provisions of article 2.1., already cited, it follows that in order for the personal data of the registration to be considered subject to the Organic Law, it must be incorporated into a **physical support** that makes it susceptible to treatment."*

Based on the above, it is estimated that the allegation of the imputed entity cannot succeed.

### 2.3. About the particular circumstances of the case .

The accused entity invokes a set of circumstances to justify that, in the event that its previous allegations are not taken into account, the imposition of a reprimand would proceed instead of an administrative fine.

In this regard, this Authority considers that, indeed, the incident reported was caused by human error, that the personal data was revealed on a physical medium that did not contain the identification data of the owner of the vehicle (neither his name, nor his surnames, or their ID), in an environment (ITV station) in which the third party to whom the vehicle's technical data sheet was given by mistake could also have seen some of the disclosed data (license plate and chassis no. vehicle), and that there is no evidence that this third party has been able to identify its owner. Likewise, it is true that Certio adopted measures to correct the reported situation; and that, prior to the present sanctioning procedure, she had never been accused of breaching data protection regulations.

All of these circumstances lead this Authority to take into account the provisions of article 58.2.b) of the RGPD:

*" Each control authority will have all the following corrective powers indicated below :*

*" b) **send a notice to all persons responsible or in charge of the treatment** when the treatment operations have infringed the provisions of this Regulation;  
(...)"*

These same circumstances, as proposed by the instructor of the procedure, lead to discard the imposition of an administrative fine with an additional or alternative nature, provided for in letter i) of the same precept ("i) impose an administrative fine pursuant to article 83 , *in addition to or instead of the measures mentioned in this section, according to the circumstances of each particular case;*")

**3.** In relation to the fact described in the section on proven facts, relating to the principle of confidentiality, it is necessary to go to article 5.1.f) of the RGPD, which provides that personal data will be "treated in such a way as to *guarantee a security data adequacy\_ personal , including the protection against unauthorized or illegal treatment and against its loss , destruction or accidental damage , through the application of measures technical or organizational appropriate "*

For its part, article 5 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (hereinafter LOPDGDD) regulates the duty of confidentiality in the following terms:

*"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 its 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."*

During the processing of this procedure, the fact described in the proven facts section, which is considered constitutive of the violation provided for in article 83.5.a) of the RGPD, which typifies the violation of " *the basic treatment principles, including the conditions for consent in accordance with articles 5, 6, 7 and 9* ", which includes the principle of integrity and confidentiality (art. 5.1.f RGPD).

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

*"i) The violation of the duty of confidentiality established in article 5 of this Organic Law."*

4. When Certio does not fit in 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 that the infractions provided for there are 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 to a maximum of the global total annual business volume of the previous financial year, opting for the greater 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.

Article 58.2 of the RGPD provides that " *Each control authority will have the following corrective powers:*

*(...)*

*b) send a notice to all persons responsible or in charge of the treatment when the treatment operations have infringed the provisions of this Regulation;"*

On the other hand, article 83.2 of the RGPD provides that " *Administrative fines will be imposed, depending on the circumstances of each individual case, as an additional or substitute for the measures contemplated in article 58, section 2, letters a) ah) yj).*"

In this case, taking into account the circumstances invoked by the reported entity and analyzed in section 2.3 of this resolution, and in accordance with the provisions of article 83.2 RGPD and 76.2 LOPDGDD, and also in accordance with the principle of proportionality enshrined in article 29 of Law 40/2015, it is appropriate to replace the sanction of an administrative fine with a sanction of reprimand provided for in article 58.2.b) RGPD.

5. 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 for the resolution declaring the infringement to establish the appropriate measures so that its effects cease or are corrected.

In the present case, Certio should not be required to adopt corrective measures in order to correct the effects of the infringement, since it is a timely and accomplished fact.

For all this, I resolve:

**1.** Admonish TÜV Rheinland Certio, SL 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 5th legal basis.

**2.** Notify this resolution to TÜV Rheinland Certio, SL .

**3.** 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,