

File identification

Resolution of sanctioning procedure no. PS 72/2022, referring to the Osona Urban Waste Management Consortium.

Background

1. The Catalan Data Protection Authority (APDCAT) has launched an audit plan in 2022 with the aim of to verify whether certain entities included within their jurisdiction, which have the obligation to designate a data protection delegate (DPD) and to communicate this designation to the APDCAT, had fulfilled these obligations, in accordance with what is provided for in the articles 37 of Regulation (EU) 2016/696 of the Parliament and of the Council, of April 26, 2016, relating to the protection of natural persons with regard to the processing of personal data and the free movement of such data (I 'RGPD'), and 34 of Organic Law 3/2018, of December 5, on the protection of personal data and the guarantee of digital rights (LOPDGDD).

This audit is part of the exercise of the powers of investigation that the RGPD attributes to the control authorities, specifically article 58.1. *b* , which provides that they can carry out investigations in the form of data protection audits. Likewise, article 5.1 of Law 32/2010, of October 1, of the APDCAT, includes among the functions of the Authority that of preparing audit plans.

2 . Among the entities that made up the sample of this audit, several regional and local consortia from Catalonia were selected, in accordance with the criteria approved by the Advisory Council at the session of 12/14/2021. Among these entities, the Osona Urban Waste Management Consortium was selected.

3 . On 03/03/2022, checks were made on the internal DPD register of the APDCAT and it was found that the Consortium for Urban Waste Management of Osona had not communicated the designation of the data protection delegate to the Authority.

For this reason, and in accordance with what is established in article 20.1. *b* of Law 32/2010, of the Catalan Data Protection Authority, a first request was made to this Consortium on 03/10/2022, so that within one month a delegate of data protection, if they had not yet designated it, and that in any case this designation was communicated to the APDCAT.

The Osona Urban Waste Management Consortium did not respond to this request within the deadline.

4 . On 09/06/2022, the Authority made a new request to the Consortium for the Management of Urban Waste of Osona so that, within a maximum period of 15 days, it communicated to the Authority the designation of the DPD.

In this second request, the Consortium was warned that, in accordance with the provisions of paragraph 6 of article 20 of Law 32/2010, if, once the deadline granted had passed, the request had not been complied with, they could initiate punitive actions.

The deadline granted to communicate the appointment of the DPD to the APDCAT was exceeded by far, without having received a response.

5. On the basis of the antecedents that have been related so far, the actions carried out as part of the audit were incorporated into the file (IP 374/2022).
6. On 03/11/2022, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the Consortium for the Management of Urban Waste of Osona for an infringement provided for in article 83.4. a in relation to article 37.7, both of the RGPD, and article 34.3 of the LOPDGDD. This initiation agreement was notified to the imputed entity on 08/11/2022.
7. 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.
8. On 20/12/2022, the Consortium for the Management of Urban Waste of Osona presented a letter to the Authority by which, without making any allegation tending to distort the fact imputed to the agreement of initiation, informed that, on 12/19/2022, he communicated the designation of his DPD and provided a copy of the evidence of said communication.
9. On 02/01/2023, the person instructing this procedure formulated a resolution proposal, for which he proposed that the director of the Catalan Data Protection Authority admonish the Consortium for the Management of Urban Waste d'Osona as responsible, in the first place, for an infringement provided for in article 83.4. a in relation to article 37.7, both of the RGPD, and article 34.3 of the LOPDGDD.

This resolution proposal was notified on 09/01/2023 and a period of 10 days was granted to formulate allegations.

10. The deadline has passed and no objections have been submitted.

proven facts

On the date of the dictation of the agreement to initiate this sanctioning procedure, the Osona Urban Waste Management Consortium had not notified the Catalan Data Protection Authority of the appointment of a delegate of data protection which, in accordance with article 37.1 of the RGPD, is a mandatory designation for consortia. The Consortium did not make said communication effective until 12/19/2022.

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 Consortium has not made any objections to the resolution proposal, but, as stated in the previous 8th, on 12/20/2022, after the dictation of the initiation agreement, the entity submit a letter to the Authority in which it informed that, on 19/12/2022, it had made effective the communication of the data of the designated data protection delegate and requested that this disciplinary procedure be "resolved".

Regarding this, in the proposed resolution it was emphasized that article 89 of the LPAC and article 20.1 of Decree 278/1993, of November 9, on the sanctioning procedure applied to the areas of competence of the Generalitat, only foresees the dismissal of the sanctioning procedure in the following cases: *"a) When the facts do not constitute an administrative infraction. b) When there are no rational indications that the facts that have been the cause of the initiation of the procedure have occurred. c) When the existence of liability has not been proven, or its termination has occurred."*

Consequently, none of these cases apply to the present case because, despite the fact that, within the framework of this sanctioning procedure, the accused entity has certified that, on 12/19/2022, it communicated to this Authority the designation of the person delegated for data protection, the truth is that at the time of issuing the initiation agreement the Consortium for the Management of Urban Waste of Osona had not made said communication effective, and this obligation provided for in the RGPD was fully applicable, and payable to the Consortium, from 05/25/2018. That being the case, as concluded in the proposed resolution, this subsequent communication does not distort the fact imputed to the initiation agreement regarding the breach of the obligation to notify the Authority of the appointment of a delegate / data protection act, nor its legal qualification.

However, as the instructing person pointed out, the fact that the Consortium has subsequently notified the Authority of the designation of DPD, does have effects when determining that it is not appropriate to require corrective measures, an issue that is addressed in section 4 of the fundamentals of law.

3. In relation to the facts described in the section on proven facts, relative to the obligation of the Osona Urban Waste Management Consortium to notify the Catalan Data Protection Authority of the appointment of a data protection officer, refer to article 37.7 of RGPD and article 34.3 of the LOPDGDD, according to which the entities included in the scope of action of the APDCAT legally obliged to designate a DPD must notify this designation to the Catalan Authority for the Protection of data

During the processing of this procedure, the fact described in the proven facts section, which constitutes the offense provided for in article 83.4, has been duly proven. *a* of the RGPD, which typifies as such the violation of *"the obligations of the responsible and of the manager pursuant to articles 8, 11, 25 to 39, 42 and 43."*, among which there is the provision in Article 37.7 of the RGPD.

In turn, this conduct has been included as a minor infraction in article 74. *p* of the LOPDGDD:

"The rest of the purely formal violations of the articles mentioned in paragraphs 4 and 5 of article 83 of Regulation (EU) 2016/679 and, in particular, the following are considered minor and prescribed for the year:) Not to publish the contact details of the data protection delegate, or not to communicate them to the data protection authority, when their appointment is required in accordance with article 37 of Regulation (EU) 2016/679 and article 34 of this Organic Law."

4. Article 77.2 LOPDGDD provides that, in the case of infractions committed by those in charge or in charge listed in art. 77.1 LOPDGDD, the competent data protection authority:

"(...) must issue a resolution that sanctions them with a warning. The resolution must also establish the measures to be adopted so that the conduct ceases or the effects of the offense committed are corrected. The resolution must be notified to the person in charge or in charge of the treatment, to the body to which it depends hierarchically, if applicable, and to those affected who have the status of interested party, if applicable."

In terms similar to the LOPDGDD, article 21.2 of Law 32/2010 , determines the following:

"2. In the case of violations committed in relation to publicly owned files, the director of the Catalan Data Protection Authority must issue a resolution declaring the violation and establishing the measures to be taken to correct its effects . In addition, it can propose, where appropriate, the initiation of disciplinary actions in accordance with what is established by current legislation on the disciplinary regime for personnel in the service of public administrations. This resolution must be notified to the person responsible for the file or the treatment, to the person in charge of the treatment, if applicable, to the body to which they depend and to the affected persons, if any".

In this regard, as indicated in the proposed resolution, in this case it is not appropriate to establish any corrective measure, since it is proven that, on 19/12/2022, the Consortium for the Management of Urban Waste d 'Osona notified the Authority of the designation of the delegated person for data protection.

For all this, I resolve:

1. Admonish the Consortium for the Management of Urban Waste of Osona as responsible for an infringement provided for in article 83.4. a in relation to article 37.7, both of the RGPD, and article 34.3 of the LOPDGDD.

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 legal basis 4rt.

2. Notify this resolution to the Consortium for Urban Waste Management of Osona.

3. Communicate the resolution to the Ombudsman, in accordance with the provisions of article 77.5 of the LOPDGDD.

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,

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