File identification

Resolution of sanctioning procedure no. PS 92/2022, referring to the Cerdanya-Ripollès Collection Service Consortium .

Background

1. On 10/19/2021, the Catalan Data Protection Authority received a letter of complaint against the Cerdanya-Ripollès Collection Service Consortium (henceforth, the Consortium), on the grounds of an alleged non-compliance with the regulations on personal data protection. Specifically, the complainant stated the following: "From May to September 2021, Mr. (...), collector of Ripollès and Cerdanya, has been sending me emails that did not correspond to me, with personal data, names, and amounts of outstanding debts."

   In order to substantiate the facts he was reporting, he provided copies of several emails that the aforementioned collector would have sent him the address recaptació@cerdanyaripolles.cat to his private email address ((...)), on various dates (25/05/2021, 03/06/2021, 04/06/2021 and 10/09/2021). Some of these emails contained personal data of third parties. Specifically, in two emails sent on 25/05/2021, 6 files were identified, the first and last names of 3 natural persons and various amounts.

2. The Authority opened a preliminary information phase (no. IP 422/2021), 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 (LPAC), to determine whether the facts were likely to motivate the initiation of 'a sanctioning procedure.

3. In this information phase, on 07/11/2022 the Consortium was required to report on several issues relating to the events reported.

4. On 11/16/2022, the Consortium responded to the aforementioned request through a letter in which it acknowledged the facts reported and, specifically, that the information had been sent to an incorrect email address. He explained, for what is now interesting, the following:

   - Regarding shipping _ of the post controversial :

     "The Consortium has been able to verify that these events took place between 05/25/2021 and 6/22/2022."
     "The Consortium has repeatedly warned the person who sent the emails; the collector, of the incorrect practice he was carrying out and as a result of these efforts, on June 22, 2022 communicated that he had deleted the mail (...) (mail is attached)."
     "The Consortium periodically trains its staff in data protection and this person in question, like all the others, has also received training in the matter (proof is attached)."

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The Consortium did not provide the email or the proof it mentioned.

- In response to whether the Consortium was acting as the person in charge of the treatment in relation with the processing of the management , liquidation and collection files _ corresponding to the people identified in the post electronic controversial , with identification of those responsible for the treatment , the Consortium stated the following :

  "The Ripollès-Cerdanya Collection Service Consortium has a delegation of powers agreement formalized on 01/20/2022 with Bolvir Town Council.

  The effective exercise of the delegated powers began in the 2022 financial year (01/01/2022). Even so, in order to be able to exercise the powers in the 2022 financial year, during the year 2021 all the necessary information and documentation had to be obtained so that on January 1, 2022, the Consortium could collect the delegated taxes."

The Consortium did not provide a copy of the contracts or legal documents that would contain the regulation of the assignment carried out in each case, despite the express request of the Authority.

- In relation to the content of the controversial emails sent, the Consortium stated that:

  "It is necessary to obtain this data in order to settle the surplus value (...)."

  "(...) all the mails refer to surplus value liquidations. The collector, for the functions he performs, takes care of transferring the information and documentation of capital gains that he receives from the municipalities (delegating us) to our servers and software (delegating us), in order to be able to perform the functions delegated to 1/1 /22 in the area of the tax on the increase in the value of urban land (known as capital gain or IIVTNU).

  With regard to the other delegated powers (management and collection of tax revenues such as IBI, IAE, tax on mechanical traction vehicles, etc.), this information was requested by other (.sic) Consortium personnel, also with the goal of being able to effectively collect on 1/1/22. However, this information was not requested through an erroneous email.

  Despite the proactive attitude of the Consortium, the practices of some workers are beyond the scope and control of the organization."

5. On 12/12/2022, the Authority carried out several checks on the internet in relation to the regulation of the order.

Specifically, based on the minutes of the municipal meetings published on the website of the Bolvir City Council, it was found that in the Meeting no. 5/2021, held on 25/06/2021, it was agreed to delegate to the Regional Council of Cerdanya the powers of management, settlement and collection of taxes and other revenues under public law, in accordance with the content of the Agreement of delegation of local tax management, settlement and collection powers and its annex, which forms an integral part thereof, with effect from

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01/01/2022. And it was also agreed to "Extend the delegation of powers (...) to the Cerdanya-Ripollès Collection Service Consortium (...)". The aforementioned agreement did not contain the regulation of the processing order.

On the other hand, from the consultation carried out in several official newspapers, it was found that in the Official Bulletin of the Province of Girona no. 2017, dated 12/11/2021, included the announcement published by the Regional Council of Cerdanya of the agreement dated 13/10/2021 accepting the delegation. The delegation of powers agreement published in this announcement also did not contain the regulation of the processing order.

From the result obtained, a due diligence was carried out.

6. On 12/20/2022, the director of the Catalan Data Protection Authority agreed to initiate a sanctioning procedure against the Cerdanya-Ripollès Collection Service Consortium, for an alleged violation 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 of such data (RGPD) .

   On the same date (20/12/2022), disciplinary proceedings were initiated against Bolvir City Council for alleged violations of the RGPD, linked to the processing of Bolvir taxpayers' data.

7. On 04/19/2023, the person instructing this procedure formulated a resolution proposal, by which he proposed that the director of the Catalan Data Protection Authority admonish the Cerdanya-Ripollès Collection Service Consortium, 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, 04/19/2023, and a period of 10 days was granted to formulate allegations.

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

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proven facts

On 25/06/2021, Bolvir City Council agreed to delegate to the Regional Council of Cerdanya the powers of management, settlement and collection of taxes and other revenues under public law and to extend this delegation of powers to the Service Consortium of Cerdanya-Ripollès Collection , as well as making it effective on 1/01/2022. The County Council accepted the delegation of powers on 13/10/2021. The Powers Delegation Agreement was signed on 01/20/2022.

In order to comply with the obligations derived from the assumption of the delegated powers, from a few months of 2021, the Consortium collected tax information from taxpayers in the municipality of Bolvir through, at the very least, of the sending and receiving of e-mails from your collecting staff.

In the context indicated, a collector of the Consortium erroneously sent emails from the corporate address (recaptació@cerdanyaripolles.cat *)* to the email address of a private individual (...) - the person making the complaint. Some of these emails contained personal data of taxpayers from the municipality of Bolvir, with the consequent disclosure of these people's personal data to the complainant.

Regarding the number of mails sent and the dates of sending, already during the preliminary information phase that preceded this sanctioning procedure, the Consortium recognized that the collector sent this type of mail by mistake to the aforementioned address electronic, during a period between 05/25/2021 and 06/22/2022. In addition, the proceedings contain the copy of the emails that the person making the complaint provided and which had been sent to their email address by the aforementioned collector on the following dates: 25/05/2021, 03/06/2021, 04/06 /2021 and 10/09/2021. In two of these emails, sent on 05/25/2021 at 9:09 a.m. and 9:39 a.m., there is the numerical reference of 6 files, the first and last names of 3 natural persons and various amounts and dates, corresponding to installment payments of the tax on the increase in the value of urban land (capital gain).

Fundamentals of law

1. LPAC and article 15 of Decree 278/1993 apply to this procedure , according to the provisions of DT 2a of Law 32/2010, of October 1, of the Authority 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 most relevant part of the motivated response of the instructing person to these allegations.

   In the statement of objections to the initiation agreement, the Consortium acknowledged that a collector of its entity mistakenly sent the disputed emails to the complainant, but emphasized that these mailings did not derive from 'an attitude of " negligence " on the part of the Consortium in fulfilling its obligations in terms of data protection. In relation to this, he maintained that the entity "has not actively and voluntarily violated the principle of confidentiality but rather that the lack of due diligence on the part of one of its workers has resulted in the sending of information to a person other than the holder". For this reason, he considered that the suspension of the procedure was appropriate. In short, he focused his allegations on the entity's lack of fault, since the fact that gave rise to this sanctioning procedure would be attributable to an error committed by a person employed by the entity.

   With regard to the concurrence of guilt, this Authority agrees with the Consortium that the commission of the imputed infraction would be materially attributable to the person employed by the entity who made the mistake of sending the person making the complaint documentation that contained data from third parties It should be noted that, in accordance with the system of responsibility provided for in the RGPD and particularly in article 70 of Organic Law 3/2018, of December 5, on the protection of personal data and guarantee of digital rights (LOPDGDD), the responsibility for breaches of the data protection regulations falls, among others, on those responsible for the treatments, and not on their staff. Specifically, the mentioned article 70 of the LOPDGDD establishes that:

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"Responsible subjects.
1. They are subject to the sanctioning regime established by Regulation (EU) 2016/679
and this Organic Law:
a) Those responsible for the treatments."

In accordance with the liability regime provided for in the data protection regulations and from the point of view of the right to the protection of personal data, the person responsible for the facts that are considered proven is the Consortium, given its status as responsible for the treatment in relation to which the offense charged here has been committed.

Certainly, the principle of culpability, that is to say, the need for there to be intent or fault in the punitive action, is fully applicable to administrative sanctioning law, in accordance with what is provided for in article 28 of Law 40/2015 , of October 1, of the legal regime of the public sector. This need for culpability as a constitutive element of the administrative offense has been expressly recognized by the Constitutional Court, in its ruling 76/1990. However, it should also be noted that in this sentence the Constitutional Court recognizes that the reception of the constitutional principles of the criminal order in the penal administrative law cannot be done mechanically and without nuances; that is to say, without weighting the aspects that differentiate one and another sector of the legal system. Starting, therefore, from this premise, the responsibility of legal entities will be analyzed next; specifically, their responsibility towards the actions of their employees.

The Supreme Court has established the responsibility of the legal person in these cases, depending on the existence of a fault *in eligendo* or *in vigilando* . And, in relation to this, it is worth highlighting the judgment of the Supreme Court of 28/11/1989, relating to a penalty imposed for violating a municipal regulation in the matter of central markets, in which the Supreme Court argued:

"For this, the aforementioned article 68 of the Regulation establishes the direct administrative responsibility of the user or concessionaire for faults of this nature (contrary to the Regulation) committed by employees or family members in their service; precept that has its coverage in the municipal faculties to organize the operation of the public service of the market and to which the penal principles that are improperly applied by the appealed sentence to proclaim its ineffectiveness are not applicable; residing the correct basis of the administrative responsibility of the employer for the faults of the employees or family members in his service and committed on the occasion of providing it, in the fault "in eligendo" or /and in the "in vigilando", with millennial roots in the common law, as stated in the Judgment of the former 3rd Chamber of this High Court of April 29, 1988; in the same way that, and with the same foundation, **the jurisprudence declares with a general character in the field of penal administrative law, the responsibility of legal persons for the actions of their dependents and employees** ."

Regarding the administrative responsibility of legal entities, the judgment of the Constitutional Court no. 276/1991, in which the highest interpreter of the Constitution pronounced in the following terms:

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> "In this respect, we must remember now that although it is true that this Constitutional Court has repeatedly declared that the principles inspiring the criminal order are applicable, with certain nuances, to the sanctioning administrative law, given that both are manifestations of the punitive order of the State - STC 18/1987 por todas-, it is not least that we have also alluded to the caution with which it is advisable to operate when it comes to transferring constitutional guarantees extracted from the criminal order to the sanctioning administrative law. This operation cannot be done automatically, because the application of these guarantees to the administrative procedure is only possible to the extent that they are compatible with their nature - STC 22/1990)-. Specifically, on guilt, this Court has declared that, in effect, the Spanish Constitution undoubtedly enshrines the principle of guilt as a basic structural principle of criminal law and has added that, however, the constitutional enshrining of this principle does not imply in any way that the Constitution has converted into a norm a certain way of understanding it -STC 150/1991-. **This principle of culpability also governs matters of administrative infractions, because to the extent that the sanction of said infraction is one of the manifestations of the ius puniendi of the State, a regime of objective or no fault liability is inadmissible in our system - STC 76/ 1990** - Even this Court has qualified as "correct" the principle of personal responsibility for own actions -principle of the personality of the penalty or sanction- (STC 219/1988). All this, however, does not prevent our Administrative Law from admitting the direct responsibility of legal persons, recognizing them, pues, infringing capacity. This does not mean, at all, that for the case of administrative offenses committed by legal persons the subjective element of guilt has been suppressed, but simply that this principle must necessarily be applied in a different way to how it is done with respect to persons physical This different construction of the imputability of the authorship of the infringement to the legal person is born from the very nature of legal fiction to which these subjects respond. They lack the volitional element in the strict sense, but not the ability to infringe the rules to which they are subject.

So, with regard to the responsibility of legal entities in relation to the actions of their employees, it is necessary to adjust to what has been resolved by the Constitutional Court, which in these cases has leaned towards the thesis of the existence of a fault *in eligendo* or *in vigilando* of the legal person.

Collecting the doctrine of the Constitutional Court in relation to the culpability of legal entities, the Supreme Court ruled in the following terms in the judgment dated 04/15/1996:

> "According to this latest jurisprudential doctrine, banking and credit institutions are administratively responsible for the negligence of their employees in the use of the security measures mandatorily installed in compliance with the current provisions, except when such action is not the result of inattention but of circumstances or situations of serious personal risk for the own employees or third parties. Neither the principle of typicality of the infraction nor that of the personality of the sanction are violated with such an interpretation because, in the scope of the sanctioning Administrative Law, legal persons can incur liability for the actions of their dependents, without being able to excuse themselves, as rule, in the behavior observed by them.

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> The art. 9 of the Royal Decree Law 3/1979 refers to the non-compliance with the security rules to the companies, that is to say, to the owner of the same , not to their dependents or employees, which in the case of not attending to the instructions given by him on the compliance of the security rules could incur liability, but not in front of the Administration, but in front of its principal. The above-mentioned sentences express that the exposed doctrine does not suppose a preterition of the principles of culpability or imputability but its adaptation to the effectiveness of the legal obligation to comply with the security measures imposed on companies, a duty that entails, in case of non-compliance , the corresponding **responsibility for the owner of the same, although it has its origin in the action of the employees to whom the employer had entrusted its effective implementation, direct responsibility that takes on greater meaning when the owner of the company is a legal person** , constrained, by the demands of its own nature, to act through natural persons, a solution also advocated by the Constitutional Court Sentence 246/1991, of December 19, whose doctrine has been, to a large extent, determinant of the change in orientation of the jurisprudence of this Supreme Court, breaking with the thesis supported by the appealed sentence based on the previous jurisprudence that the same quote, just as the procedural representation of the appealed banking entity does in its brief of pleadings.

Judgment no. is also of interest. 339/2010, of 26/11/2010 (RCA no. 52/10, ordinary procedure) issued by the administrative contentious court no. 1 of Barcelona. In this sentence, the sanctioning resolution issued by this Authority on 26/11/2009, in which a public administration was declared responsible for the serious infringement provided for in article 44.3, is confirmed. *g* , in relation to article 10, both of the currently repealed Organic Law 15/1999, of December 13, on the protection of personal data, due to the fact that an employee had disclosed information on traffic violations that contained in the fines management system.

> "The person responsible for the file is the City Council, an organization that is required to maintain secrecy pursuant to art. 10 of the LOPD. This Administration imposes traffic sanctions, through its agents and bodies, collects the information to be able to process the files.
> In the present case, therefore, the breach of the duty of secrecy on the part of the City Council is sanctioned, for not having guaranteed confidentiality in a matter processed by the City Council, allowing personal information to pass to unauthorized third parties."

The sentence of the National Court of 02/22/2019 is also illustrative. In this case, the appellant entity - which had been sanctioned by the Spanish Data Protection Agency - based its appeal, among other things, on the violation of the principle of culpability. Regarding this, he argued that "the people who were going to make the visits were trained and materials were provided on how they should behave. At all times the objective was to comply with the LOPD, and the collection of any personal data was prohibited, unless the affected person so consented, and the only data that had to be collected were those contained in the Form. The AEPD, without motivating the concurrence of culpability, imputes the infringing conduct to the (…) and (…)."

The National Court considered that in this case there was culpable conduct on the part of the entity that had been sanctioned by the AEPD , "conduct that constitutes an

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administrative offense - article 44.4.b) of the LOPD in relation to article 7 of the same- which requires the existence of guilt, and is specified, in the present case, in the collection of personal data related to ideology with respect to persons who denied their consent for said data treatment, or with respect to persons who did not even know that said collection of personal data was taking place.

Lack of diligence constitutes the culpability element of the administrative offense and is imputable to the appellant entity, and, which does not require the concurrence of intent."

Finally, it is necessary to bring together the judgment of the Supreme Court no. 188/2022, of 02/15/2022, which is pronounced in the following terms:

> "Finally, it is appropriate to remember that legal entities are responsible for the actions of their employees or workers. An objective responsibility is therefore not established, but if the lack of diligence of its employees is transferable to the legal entity, in this sense STC 246/1991, of December 19 fj 2.
>
> This Supreme Court in its STS nº 196/2020, of February 15, 2021 (rec. 1916/2020) has had the opportunity to address the responsibility of an Administration for breach of the duty of security of personal data by acts of employees. In it, the opinion of the Trial Chamber was shared when it affirmed that "[...] the responsibility of the Administration holding and in charge of the file [City Council of San Sebastián] cannot be excused in its diligent action, separately from the action of its employees or positions, but it is the "culpable" action of these, as a result of the violation of the aforementioned obligations to protect the reserved character of personal data that grounds the responsibility of the former in the sanctioning scope of whose application it is; by acts "own" by their employees or positions, not by third parties[...]". Adding further that "The above does not mean, of course, that we are projecting on the recurring City Council a principle of objective responsibility, nor that the principle of presumption of innocence is violated, nor that we give a lucky chance of inversion of the burden of prueba. It simply happens that, being admitted in our Administrative Law, the direct responsibility of legal entities, which are recognized, therefore, as infringing capacity, the subjective element of the infringement is embodied in these cases in a different way to how it happens regarding of natural persons so that, as indicated by the constitutional doctrine that we have previously reviewed - SsTC STC 246/1991, of December 19 (FJ 2) and 129/2003, of June 30 (FJ 8) - direct blameworthiness derives of the legal good protected by the rule that is infringed and the need for said protection to be really effective and for the risk that, consequently, must be assumed by the legal entity that is subject to compliance with said rule."

In accordance with the rules invoked above and the jurisprudence cited, it must be concluded that the responsibility of the Consortium is linked to the actions of its employees. Therefore, it is the culpable action of these, as a result of the violation of their obligations of reservation and confidentiality of personal data, which grounds the responsibility of the Consortium in this sanctioning procedure for the acts materially committed by its staff. In this sense, it should be noted that the Consortium has recognized that on repeated occasions it alerted its employee about its incorrect practice , a fact that allows the said entity to be attributing a fault *in vigilando* .

This is why the allegations made by the Consortium in this procedure cannot succeed.

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3. In relation to the fact described in the proven facts section, relating to the principle of integrity and confidentiality, it is necessary to go to article 5.1. *f* of the RGPD, which provides for the following:

"1. The personal data will be:
(...)
f) processed 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")."

During the processing of this procedure, the fact described in the proven facts section, which is considered constitutive of the offense provided for in article 83.5, has been duly proven. *a* of the RGPD, which thus typifies the violation of: " the basic principles for treatment, including the conditions for consent pursuant to articles 5, 6, 7 and 9."

The conduct addressed here has been included as a very serious offense in article 72.1. *and* of the LOPDGDD, as follows:

"The violation of the duty of confidentiality established in article 5 of this organic law."

4. Article 77.2 of the LOPDGDD provides that, in the case of infractions committed by those responsible or in charge listed in article 77.1 of the same law, 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 similar terms 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 case, the Consortium should not be required to adopt corrective measures to correct the effects of the infringement, since it is a one-time event that has already been completed.

resolution

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For all this, I resolve:

1. Warn the Cerdanya-Ripollès Collection Service Consortium 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 4th legal basis.

2. Notify this resolution to the Cerdanya-Ripollès Collection Service Consortium.

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 and 14.3 of Decree 48/2003, of February 20, which approves the Statute of the Catalan Agency of Data Protection, the accused entity can file an appeal before the director of the Catalan Data Protection Authority, within one month from the day after its notification , in accordance with the provisions of article 123 et seq. of Law 39/2015. An administrative contentious appeal can also be filed directly before the administrative contentious courts of Barcelona, within two months from the day after its notification, in accordance with articles 8, 14 and 46 of the Law 29/1998, of July 13, regulating 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 under 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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