

## File identification

Resolution of sanctioning procedure no. PS 93/2022, referring to the City Council of Bolvir

## Background

1. On 10/19/2021, the Catalan Data Protection Authority received a letter of complaint against the Cerdanya-Ripollès Collection Service Consortium (Consorti), due to an alleged breach of the protection regulations of personal data. 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 prove the facts he was reporting, he provided copies of several emails that the aforementioned collector would have sent him from the address (...) to his private email address, on several dates (25/05/2021, 03/06/2021, 04/06/2021 and 10/09/2021), some of which contained personal data of third parties. Specifically, in two emails sent on 25/05/2021 at 9:09 a.m. and 9:39 a.m., 6 files were identified, the first and last names of 4 natural persons and various amounts and dates.

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 reported facts and, specifically, that the information had been sent to an incorrect email address, and explained which is now of interest, 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 June 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 [of the complainant here] (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)."

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

- In response to whether the Consortium acted as data controller in relation to the processing of the management, liquidation and collection files corresponding to the persons identified in the controversial emails, 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 capital gain (...)"

"(...) 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 06/25/2021, it was agreed to delegate to the Cerdanya Regional Council (Regional Council) the powers of management, settlement and collection of taxes and other revenues under public law, in accordance with the content of the Agreement on the delegation of powers of management, settlement and collection of local taxes and its annex, which forms an integral part thereof, with effect from 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 County Council 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.

Finally, from the consultation carried out on the Consortium's website, it was found that the website indicated 20/01/2022 as the date of signature of the above-mentioned delegation of powers agreement.

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

6. On 20/12/2022, the director of the Catalan Data Protection Authority agreed to initiate disciplinary proceedings against Bolvir City Council for two alleged infringements: an infringement provided for in article 83.5. a in relation to article 5.1. to \_ and a second violation of article 83.4. a in relation to article 28; 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 of such data (RGPD). Likewise, he appointed Mrs. (...), an employee of the Catalan Data Protection Authority, as the person instructing the file. This initiation agreement was notified to the imputed entity on 12/22/2022.

On the same date (12/20/2022), disciplinary proceedings were initiated against the Consortium for an alleged violation of the RGPD, linked to the sending of emails from the corporate address (...) to the e-mail address of the reporting person, which included information and personal data of third party taxpayers in the municipality of Bolvir.

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 12/29/2022, Bolvir City Council requested an extension of the deadline to submit objections to the agreement to initiate this sanctioning procedure, pursuant to the article 32.1 of the LPAC.
9. On 29/12/2022, the Authority agreed to extend the deadline referred to in the previous 7th, by five more days.
10. On 16/01/2023, Bolvir City Council made objections to the initiation agreement .

With its letter, the accused entity provided various documentation.

11. On 04/11/2023, the director of this Authority, for reasons of internal order, issued a resolution appointing Ms. (...) instructor of the present sanctioning procedure, replacing Ms. (...). This resolution was notified to the imputed entity on 04/12/2023.
12. On 04/13/2023, the Authority's Inspection Area incorporated into this file the documentation that the Consortium sent to the Authority on 12/30/2022, as part of the sanctioning procedure initiated in this entity. In particular, the data controller contract

signed between Bolvir City Council and the County Council, dated 12/29/2022 - which would comply with the provisions required by article 28 of the RGPD - was incorporated . In this contract, the authorization of the person in charge of the treatment (the City Council) is included in this contract so that the person in charge of the treatment (the County Council) can turn to the Consorci Servei de Recaptació Cerdanya-Ripollès as sub-in charge of the treatment .

13. On 04/19/2023, the person instructing this procedure formulated a resolution proposal whereby, in view of the allegations made by the City Council, he proposed that the director of the Catalan Authority of Data Protection admonishes the City Council of Bolvir, as responsible for an infringement provided for in article 83.4. a in relation to article 28, both of the RGPD.

This resolution proposal was notified on 04/20/2023 and a period of 10 days was granted to formulate allegations.

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

#### **proven facts**

1. On 06/25/2021, 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 Collection Consortium Cerdanya-Ripollès, as well as making it effective on 01/01/2022. The County Council accepted the delegation of powers on 13/10/2021 and the delegation of powers agreement was signed on 20/01/2022.

In order to comply with the obligations arising from the assumption of delegated powers, from a few months of 2021 the aforementioned Consortium collected, on behalf of Bolvir City Council, tax information from taxpayers of the municipality of Bolvir through, at the very least, the sending and receiving of e-mails by its collection staff. These messages contained data related to taxpayers on the tax on the increase in the value of urban land (IIVTNU, plusvalua), the real estate tax (IBI), the tax on economic activities (IAE) and the tax on vehicles with mechanical traction, among others.

This fact is proven since the Consortium sent several emails from the address (...) to the personal email address [of the person making the complaint] on the following dates: 05/25/2021, 03/ 06/2021, 04/06/2021 and 10/09/2021, in order to manage the collection of the IIVTNU to Bolvir taxpayers. In the case of the mails sent by this collector on 25/05/2021 at 9:09 a.m. and 9:39 a.m., 6 files were identified, the first and last names of 4 natural persons and various amounts and dates, corresponding to installment payments of the IIVTNU. On the other hand, in the mail that this collector sent on 04/06/2021, reference was also made to certain documents, in reference to the tax documentation collected for the management and collection of the IIVTNU.

2. The set of treatments of personal data of taxpayers in the municipality of Bolvir, carried out by the Consortium by virtue of the delegation of powers mentioned in the previous point, was carried out without the City Council of Bolvir having previously formalized the

commission contract of the treatment derived from the aforementioned delegation of powers.

The Consortium would have processed data from the taxpayers of the municipality of Bolvir without a contractor contract for an indeterminate period of time in the year 2021. But, in any case, this period includes from 05/25/2021 (date on which a collector sent e-mails with taxpayers' personal data to the reporting person), until 12/29/2022 (the date on which the City Council formalized the processing contract with the Cerdanya County Council, in which authorizes the sub-commissioning of the treatment to the Consortium - precedent 12th).

### **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.

The first section of the City Council's statement of objections stated that, at the ordinary plenary session of the Bolvir City Council, held on 06/25/2021, it was agreed by an absolute majority of the councilors the change of the collecting body. Thus, the powers granted by the regulatory agreement dated 01/01/2015 to the Provincial Council of Girona were revoked and the Regional Council of Cerdanya (Consorti Servei de Recaptació Cerdanya-Ripollès) was empowered, with effect from 01/01/2022.

The reported entity also pointed out that, in accordance with the second paragraph of the eighth pact of the regulatory agreement of the powers of management, liquidation, inspection and revenue collection in favor of the Diputació de Girona - local autonomous body XALOC -, the revocation had to be carried out 6 months before the end of the calendar year. On this, he indicated that "prior to the adoption of the plenary agreement (June 25, 2021), the economic and management conditions had to be negotiated to assess the change in the collection of taxes from Bolvir City Council, which is why the emails subject to this file were exchanged, among other actions." In relation to the above, he emphasized that the negotiation and change of collection body was done in favor of the public interest, given, among other things, the proximity and the best economic consideration offered by the County Council of Cerdanya (Consorti Servei de Recaptació Cerdanya – Ripollès), compared to the Diputació de Girona (local autonomous body XALOC). The statement of allegations of the denounced entity was accompanied, among other documents, by the certificate of the Plenum of June 25, 2021, which agrees the revocation of powers of the Diputació de Girona (XALOC) in favor of the Regional Council of Cerdanya (Collection Consortium Cerdanya-Ripollès), "with effect from January 1, 2022."

Having established the above, the City Council of Bolvir defended that, given the link between the two infractions that were attributed to the agreement initiating this procedure, "the breach of the obligations of the person in charge and the person in charge, should be subsumed in the offense related to the violation of the principle of legality, either entirely or with regard to the facts of a date prior to the acceptance of the delegation of powers by the Consortium, or prior to the signing of the agreement of delegation of powers." Regarding this, he added that the City Council, in addition to having a data protection delegate, regularly trains its employees in the field of data protection and, by way of example, indicated that it had registered all administrative staff to a specific course on data protection.

It is not a disputed fact that Bolvir City Council had not signed the data processor contract before the Consortium processed the data, as required by the personal data protection regulations. In fact, in the letter of allegations that it presented in the agreement to initiate this sanctioning procedure, the City Council acknowledges this imputed fact.

Having established this, in view of the allegations made by the accused entity, the instructor of this procedure considered it appropriate to modify the legal classification of the proven facts, which in the initiation agreement were considered to violate, on the one hand, article 5.1 a, relating to the principle of legality, and on the other hand, article 28, relating to the contract of data controller, both of the RGPD. Certainly, each of the two facts considered proven can be included in the same infringement, that is, the data processing carried out by the Consortium on behalf of the City Council, without having signed the mandatory data processor contract. This infringement would have the character of a continuation from May 2021 until the date on which the contractor contract was formalized, on 12/29/2022.

In relation to the modification of the legal classification of the proven facts, as pointed out by the instructor of this procedure, it is appropriate to bring up article 89.3 of the LPAC, which establishes that it is in the resolution proposal where must establish in a motivated manner "the facts that are considered proven and their exact legal classification, the offense that, if applicable, they constitute, the person or persons responsible and the proposed penalty must be determined, the evaluation of the tests carried out, especially those that constitute the basic foundations of the decision, as well as the provisional measures that, if applicable, have been adopted (...)."

3. In relation to the facts described in the proven facts section, relating to the lack of a data processor contract, it is necessary to refer to article 28 of the RGPD, which provides for the following:

- "1. When a treatment is to be carried out on behalf of a person responsible for the treatment, he will only choose a person in charge who offers sufficient guarantees to apply appropriate technical and organizational measures, so that the treatment complies with the requirements of this Regulation and guarantees the protection of the rights of the interested party.

2. (...)

3. The treatment by the manager will be governed by a contract or other legal act in accordance with the Law of the Union or the Member States, which binds the

manager with respect to the manager and establishes the object, duration, nature and purpose of the treatment, the type of personal data and categories of interested parties, and the obligations and rights of the person in charge. Said contract or legal act will stipulate, in particular, that the manager:

a) will treat personal data solely following the documented instructions of the person in charge, including with respect to the transfer of personal data to a third country or an international organization, unless it is obliged to do so by virtue of the Law of the Union or of the Member States that applies to the person in charge; in such a case, the manager will inform the person in charge of that legal requirement prior to the treatment, unless such Law prohibits it for important reasons of public interest;

b) will guarantee that the persons authorized to treat personal data have committed to respect confidentiality or are subject to a confidentiality obligation of a statutory nature;

c) will take all the necessary measures in accordance with article 32;

d) will respect the conditions indicated in sections 2 and 4 to resort to another treatment manager;

e) will assist the person in charge, taking into account the nature of the treatment, through appropriate technical and organizational measures, whenever possible, so that he can comply with his obligation to respond to requests aimed at the exercise of the rights of the interested parties established in chapter III;

f) will help the manager to ensure compliance with the obligations established in articles 32 to 36, taking into account the nature of the treatment and the information available to the manager;

g) at the choice of the person responsible, will delete or return all personal data, once the provision of the treatment services is finished, and will delete the existing copies unless the conservation of personal data is required under Union Law or of the Member States;

h) will make available to the person in charge all the information necessary to demonstrate compliance with the obligations established in this article, as well as to allow and contribute to the performance of audits, including inspections, by the person in charge or another auditor authorized by said responsible

In relation to what is provided in letter h) of the first paragraph, the person in charge will immediately inform the person in charge if, in his opinion, an instruction infringes the present Regulation or other provisions in the area of data protection of the Union or the Member States. (...)

(...)

9. The contract or other legal act referred to in sections 3 and 4 will be in writing, including in electronic format.”

During the processing of this procedure, the fact described in the proven facts section, which constitutes the offense provided for in article 83.4, has been proven. to the RCPD,

which typifies the violation of "the obligations of the person in charge and the person in charge pursuant to articles 8, 11, 25 to 39, 42 and 43", among which there is that provided for in article 28 of the 'RGPD.

The conduct addressed here has been included as a serious violation in article 73. k of the LOPDGDD, in the following form:

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

4. 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 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 the present case, it is not considered pertinent to propose that corrective measures be adopted given that, as can be seen from the 12th antecedent of this resolution, the City Council of Bolvir has already formalized the contract for the person in charge of the treatment.

## **resolution**

For all this, I resolve:

1. Warn the City Council of Bolvir as responsible for an infringement provided for in article 83.4. a in relation to article 28, 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 City Council of Bolvir.
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 Law 29/1998, of July 13 , regulator of 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