

968-150719

Procedure No.: PS/00401/2018

RESOLUTION R/00411/2019 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00401/2018, instructed by the Agency

Spanish Data Protection Agency to SANTI 3000, S.L. (THE OLIVE RESTAURANT),

In view of the claim presented by A.A.A., and based on the following,

BACKGROUND

FIRST: On April 1, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate sanction proceedings against SANTI 3000, S.L.

(THE OLIVE RESTAURANT). Once the start agreement was notified and after analyzing the

arguments presented, on July 22, 2019, the proposal for

resolution transcribed below:

<<

Procedure no.: PS/00401/2018

926-160419

Of the procedure instructed by the Spanish Agency for Data Protection and in

based on the following:

BACKGROUND

On 05/14/2018, a claim was received from A.A.A. (claimant),

FIRST:

stating "I work as a waiter at Santi 3000, S.L. in Rambla de Santa Monica, 22

of Barcelona", restaurant in which "apparently video cameras have been installed

surveillance" and "I have been recorded and those recordings have been used inside and outside the

to impose disciplinary sanction in the workplace."

He adds that "I have not been informed of their existence and although they are visible, the truth is that the businessman said that they do not work, but he has provided those

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recordings to disciplinary file.", "in any case there is no informative label some despite being installed in a center open to the public."

Provides letter delivered by SANTI 3000 SL, dated 04/30/2018, in which in application of the disciplinary power is informed that "it has decided to sanction him for the commission of different facts that constitute violations of their obligations, which will be qualified as stated in this document" The letter indicates "The past 04/23 was communicated by the staff of the premises to the direction of the company the commission of a series of acts..." First: Video of 02/8/2018 around 12 noon in the who is talking on a mobile phone organizing documents outside the company... Second: Video of 02/14/2018 around 12:30 in which he is out of their place of work, carrying out in the middle of the street and in front of the door of the premises repair and/or modification of the rear-view mirror of a motorcycle..."follow videos from 02/15/2018 outside his workplace, on the terrace and not the living room, fourth video of 02/22/2018...eating on the terrace, 01/18/2018 (could be 2 not 1) doing bodybuilding, video from 03/29/2018 at 12:15 "you transport drinks to another place that is not where he is working. In another video of the same day and time, you continue transporting in this case, cardboard boxes to a third-party location where he works" "video from 02/22/2018 at 2:00 p.m. finds himself outside his workplace again, on the terrace being his workstation in the classroom"

The letter communicates the imposition of a sanction of 45 days of suspension of employment and salary, with effect from 04/30 to 06/13/2018.

SECOND: On 06/19/2018, the AEPD transfers the claimed SANTI 3000, S.L.

(LA OLIVA RESTAURANT) a writing with the literal:

“This Agency has received a communication in which it is shown the existence of a video surveillance installation of its ownership, which presents some deficiencies in compliance with the requirements set forth in the regulations for the protection of data, which can be consulted on the website [www.aepd.es](http://www.aepd.es), through the section Areas of action (video surveillance).

So that the Agency can assess the actions carried out by you for the adequacy of the system to the aforementioned requirements, I require that, within the maximum period of one month from receipt of this notification, send to this Agency detailed documentation that can prove that the aforementioned installation is in accordance with the data protection regulations and that, in particular, is duly marked and has been limited the capturing of images of adjoining land and houses or of any other foreign space, providing recent graphic documents duly dated. “

On 07/30/2018, the claimed SANTI 3000, Restaurante la Oliva contributes in its response:

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a) Photograph of video surveillance zone information in which Zone appears

LOPD video surveillance, you can exercise your rights before "La Rambla 22", and a CIF. the photo is at the entrance door of the bar called “La Oliva”. The image is undated.

a)

Image taken with camera 3, from inside the establishment in which panoramic form includes the dining room where the tables are located. The image is dated 05/07/2018.

THIRD: On 08/27/2018, the AEPD requests the respondent, on the same establishment:

“You must provide images that reproduce the field of view of all the cameras that make up your video surveillance system (including outdoor cameras), as well as must certify the inclusion of the name of the person in charge of the system in the posters that has exhibits in which it warns of the existence of a video surveillance area and finally You must provide the documentation that proves that you have informed your workers of the purpose of labor control through the processing of data carried out through the cameras of your video surveillance system.”

On 09/17/2018, the respondent contributes

-Copy of the sheet called "consent for data processing" "Video surveillance and/or labor control" in which as of 04/09/2018 they appear on individual sheets, the form signed by employees (18) among them is not the claimant. The document indicates:

“SANTI 3000 is responsible for processing the personal data of the interested party and

The following information is provided on the processing of images obtained by the video recording implanting in the organization. Purposes of the treatment: activity control internal for reasons of security and/or labor control. Rights that assist you “You can exercise the rights of access, rectification, portability and deletion of data and those of limitation and opposition” , indicating the address Rambla 66. If you consider that the treatment does not conform to current regulations may file a claim with the control authority.

“By signing this informative clause, the undersigned person is considered informed and consents to the aforementioned treatment in the terms set forth”

It is not identified in which establishment the employees who sign the form provide services.

document, if the one at Rambla de Santa Mónica 22, Restaurante la Oliva, or the one at Ramblas 66

nor is the establishment that records the images and the indication of the provision of the service identified.

consent exceeds the legitimacy in the implementation of the system

-Photo from camera 1 (rte. la Oliva) that collects images from 08/30/2018, interior space, of the kitchen.

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-Photo from camera 2 (arte. la Oliva) that collects images from 08/30/2018, interior space of employee traffic.

-Photo from camera 3 (arte. la Oliva) that collects the image of the interior space, of the public, tables in the existing common area as soon as you enter the establishment.

-Poster photo (arte. la Oliva) different from the one provided above. Now there is SANTI SL,

Rambla 66, and allusion to the new RGPD for the purpose of protecting the facilities

as well as the people who are in them, headquarters before which to exercise rights:

Rambla 66, and the availability of the information sheet.

FOURTH: The AEPD sends the requested letter on 10/31/2018 with the literal:

“You must provide images that reproduce the field of view of all the cameras

OUTDOORS that make up your video surveillance system, you must also provide the

documentation that proves that you have informed the claimant (who worked in your company) of

the purpose of labor control through the processing of data carried out through the

cameras of your video surveillance system.”

The respondent sends a letter dated 11/5/2018 stating:

“This company has never had video surveillance cameras (or any kind) installed outside the establishment. In previous answers, they were already attached the captures of images of the cameras that this company has installed in the establishment. You cannot contribute more images because you do not have more cameras installed and never had them.”

Regarding the information to the employees of the use of the purpose of labor control through the processing of data they state that they have provided the "communications made to all active workers in the company and some of the workers who are no longer in the company (we don't change staff much). We do not know who the "claimant" is (who worked in your company)", since in none of the communications that have been sent identifies him.”

FIFTH: The axexor-monitoriza website is accessed, which gathers information on companies, and data from the commercial register, knowing that the claimed company is an SL, with corporate purpose of Restaurants and food stalls, SME size, "small", type “autonomous” (that company that is completely independent or that has one or more minority shareholdings, each of less than 25% in other companies, according to defines the Commission's recommendation of 05/06/2003 on the definition of micro-enterprises, small and medium enterprises (Official Gazette of the European Union 20/5/2003). It has 31 employees and a profit for the year 2016 of €378,666, in 2017: €176,260 and a figure of business of €2,588,431 in 2016 and €2,393,428 in 2017.

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SIXTH: It can be seen on GOOGLE maps, that in front of La Oliva bar, on Rambla Santa Mónica

22, there is a large terrace. On the other hand, consulted the background management database of procedures, the respondent does not have any.

SEVENTH: On 04/1/2019 it was agreed by the director of the AEPD: "START SANTITION PROCEDURE to SANTI 3000 S.L., for the alleged infringement of the article 5.1 a) of the RGPD punishable in accordance with the provisions of art. 83.5 of the cited RGPD", and "for the purposes provided in art. 64.2 b) of Law 39/2015, of 1/10, of the Common Administrative Procedure of the Public Administrations, the sanction that could correspond would be 5,500 euros, without prejudice to what results from the investigation."

EIGHTH: On 04/29/2019, allegations were received from the respondent indicating:

On the date indicated in the sanction letter, February 2018, the chambers

1)  
they were mounted in the same current location, but they weren't installed, they didn't pick up any image because they did not have the necessary software or hardware for that function.

Due to technical problems it was not possible at the time of its assembly.

They began to be operational on 04/09/2018. He states that he provides as evidence a report of the technician who made the physical connection of the cameras and configuration of the software. This is a report issued on 04/15/2019 by the "technical installer of video surveillance systems according to law 25/2009 of 12/22/2009", stating about the installation of the La Oliva bar on Rambla 22, which "the technician visited on 04/09/2018 for the configuration of the recordings and the internet visualization of the video surveillance system because it was disconnected and misconfigured.

It adds that the recordings to which the claimant refers were not made

1)  
by the video surveillance cameras of the bar but with the private mobile phone of a employee, B.B.B., "tired of having to make up for the claimant's resignation and his continuous absences from his job", the images not being known

by the company up to two months after the events occurred, when the employee

informed the company of the facts and delivered the recordings.

Attached is a copy of document 2, dated 04/02/2008 of the aforementioned employee in which he indicates that

“as responsible for the service, the behavior of the worker is intolerable

during the working day” “during the same one is answering calls

phone calls, fixing your motorcycle or transporting merchandise for other

restaurants in the area. The letter indicates that it makes available to the

company the recordings made with your mobile. The respondent indicates that these

are those “used by SANTI 3000 as the basis for the labor sanction imposed on the

claimant”, and recordings 1, 2 and 3 are attached as more

identification, being able if required to provide the rest. Provide a copy of a cd in the

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It contains four files. The first one is reproduced and it is observed that in

landscape image and it may be that obtained with a mobile, since it moves

a bit, you see in the video a person dressed as a waiter in the

door of the bar, outside, manipulating, dismantling the mirror of a

motorcycle with a tool, and entering inside. When he walks in, and leaves

zooming in, the device moves more and stops capturing the image. in the second

image obtained from the same place and also possibly with a mobile, is seen

the same person laden with drink cans walking past the door of the bar,

without entering.

In the third, in the part of the kitchen in a corner was the same



person who appears in file 1 writing in a notebook and talking on the mobile.

These three video shots are reported in the disciplinary sanction letter provided by the claimant.

File 4 is dated 2019, April 12, it is a still image from another point of view collecting the panorama of the dining room, being one of the images that gets with the camera inside the bar.

They attach as a contrast to recordings 1 to 3 the recordings identified

1)  
as "video camera recording" in order to determine that they do not come from the same device.

It states that they have two work centers as indicated in the agreement,

1)  
which is why the Rambla 66 headquarters, which is the administrative headquarters, appears on the poster.

Clarifies that the photograph provided on 07/30/2018 of the "video surveillance zone" sign was

1)  
taken one or two days after mounting the cameras in February 2018 with a mobile phone that does not record the date, but since the cameras are not operational until afterward, the warning was not necessary.

When the cameras were connected and started to operate, the installer noticed that the poster was not suitable, replacing it with the photo that was provided on 09/17/2018, being the poster replaced on April 20, 22, although they cannot prove it irrefutably.

The "consent" document signed by the employees and sent to the

1)  
AEPD was delivered to all active employees in the company, including the claimant, who refused to sign, with another employee being a witness (they can provide testimony with their statement). It states that although there are no security cameras in the Ramblas 66 establishment,

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video surveillance, the document was given to all employees, since sometimes employees from this they move to the restaurant La Oliva.

The legal basis for the implementation of the system was the security of installations and

1)

goods and labor control considering the application of article 20.3 of the Statute of the Workers.

NINTH: Of the actions carried out in this proceeding, they have been

accredited the following proven facts:

1) The defendant's corporate purpose is the operation of bars and restaurants, having two establishments in Barcelona. The claimant, waiter lends services at the La Oliva bar, at c Rambla de Santa Mónica, 22 in Barcelona", and states who has been subject to a disciplinary sanction using "apparently" some images of videos, without being informed.

1) In the sanction letter provided by the claimant and which was delivered by the claimed 04/30/2018, you are informed that "it has decided to sanction you for the commission of different facts that constitute breaches of their obligations" "On 04/23 it was communicated by the staff of the premises to the management of the company the commission of a series of events

..."First: Video from 02/09/2018 around 12 noon in which finds himself talking on a mobile phone organizing documents outside the company.

Second: Video of 02/14/2018 around 12:30 in which he is outside his place of

work, carrying out in the middle of the street and in front of the door of the premises repair tasks and/or modification of the rear view mirror of a motorcycle...”

The letter in the third to seventh points (reaches until 02/22/2018) continues to analyze videos, relating them to the position in which the employee is located, indicating that you are outside your workplace, or on the terrace being your workstation in the living room, that transports drinks to another place that is not where you are working, or that you are eating on the terrace, at a time that is not authorized to enjoy rest.

The letter communicates the imposition of a sanction of 45 days of suspension of employment and salary, effective from 04/30 to 06/13/2018.

1) As the first response that the respondent gave to the AEPD, on 07/30/2018, it provides:

-Photograph of video surveillance zone information in which the video surveillance zone appears LOPD, you can exercise your rights before “La Rambla 22”, and a CIF. The photo is on the door entrance of the bar called "La Oliva". The image is undated.

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-Image collected with camera 3, from inside the establishment in which

Panoramic view includes the dining room where the tables are located. The image is dated

05/07/2018, date on which the video surveillance system in the bar was already working, which according to the claimed one was launched on 04/09/2018.

1) Requested from the respondent to certify having reported the imaging system used to sanction the claimant, dated 09/17/2018, the respondent contributes information documents called “consent to data processing”

“Video surveillance and/or labor control” in which on 04/09/2018 (after the dates of the

images that appear in the letter of sanction) appear in individual sheets, signed

by employees (18) among them is not the claimant communicated information about the

system installed in the bar la oliva de rambla 22. The forms indicate:

“SANTI 3000 is responsible for processing the personal data of the interested party and is

provides the following information on the processing of images obtained by the

video recording implanting in the organization. Purposes of the treatment: activity control

internal for reasons of security and/or labor control. Rights that assist you “You can exercise

the rights of access, rectification, portability and deletion of data and those of limitation and

opposition”, indicating the address Rambla 66. If you consider that the treatment does not conform to

current regulations may file a claim with the control authority.

“By signing this informative clause, the undersigned person is considered

informed and consents to the aforementioned treatment in the terms set forth”

the employees who sign the document usually provide services in both premises of the

claimed, at Rambla de Santa Mónica 22, Restaurante la Oliva, or at Ramblas 66.

Also on 09/17/2018 the respondent provides:

Photo from camera 1 (arte. la Oliva) that collects an image from 08/30/2018, interior space, from the kitchen.

Photo from camera 2 (arte. la Oliva) that collects an image from 08/30/2018, interior space employee transit.

Camera photo 3 (arte. la Oliva) that collects the image of the interior space, of the public, tables in the existing common dining area as soon as you enter the establishment.

Photo poster (arte. la Oliva) different from the one provided above. Now there is SANTI

SL, Rambla 66, and allusion to the new RGPD for the purpose of protecting the

facilities as well as the people who are in them, headquarters before which to exercise

the rights: Rambla 66, and the availability of the information sheet.

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1) The respondent alleges to the initiation agreement that on the date indicated in the letter of sanction, and in which the obtaining of the images is related, from 9 to 02/22/2018. the cameras were mounted in the same current location of the bar, but they were not installed, they did not capture any image, installing and starting up according to the certificate of the installer technician on 04/09/2018.

1) The respondent reports in pleadings to the agreement that the recordings she makes referenced by the claimant and that appear in the letter of disciplinary sanction, were not made by the video surveillance cameras of the bar that in 2/2018 did not work, but with the private mobile phone of an employee who delivers them to the person claimed. attached copy of the document of 04/02/2018 of the aforementioned employee in which it is indicated that he puts disposal of the company the recordings made with your mobile. The claim indicates that these are the ones "used by SANTI 3000 as the basis for the labor sanction imposed to the claimant", and recordings 1, 2 and 3 are sent on a CD as an example. in said CD will contain four files. The three images provided-by way of example, not contribute more - correspond to those reported in the sanction letter. Plays the first file, and it is observed in a landscape image, perhaps obtained with a mobile, since it moves a little, a person dressed as a waiter is seen in the bar door, outside, manipulating, dismantling the mirror of a motorcycle with a tool, and entering inside, moment in which as the device moves more and stops capturing the image. In the second image obtained from the same place and also possibly with a cell phone, the same person is seen carrying cans of drinks walk past the door of the bar, without entering.

In the third, in the kitchen area in a corner, is the same person who appears in file 1, writing down in a notebook and talking on the mobile.

## FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 04/27/2016 on the protection of people regarding the processing of personal data and the free circulation of these data (hereinafter GDPR); recognizes each control authority, and as established in art. 47 of Organic Law 3/2018, of 5/12, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD), the director of the Agency Spanish Data Protection is competent to initiate and resolve this process.

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II

For the installation of a video surveillance system for the purpose of controlling the Compliance with labor obligations does not require the consent of the employees. employees nor does it constitute per se a legitimate legal basis for it. The legal basis for monitoring compliance with the obligations entrusted to employees through said system is not that of consent, since this is not obtained or lends freely, nor can it be freely withdrawn without any negative consequence, given the scope of subjection and bonding of employees.

Workers are almost never in a position to give, deny, or revoke

consent freely, taking into account the dependency resulting from the relationship employer/worker. Given the imbalance of power, workers can only give their free consent in exceptional circumstances, when the acceptance or rejection of an offer has no consequences.

Article 20.3 of the Workers' Statute provides:

The employer may adopt the measures he deems most appropriate for surveillance and control to verify the fulfillment by the worker of his obligations and duties labor, keeping in its adoption and application the consideration due to their dignity and taking into account the real capacity of disabled workers.

The installation for these purposes must be proportional in terms of the

Weighting of the power of direction and control of business activity, with the right to privacy and the right to know and know by its owner, the use of their data

they are going to do in the employment relationship, as well as predetermining the use and purpose of the data and the headquarters before which to exercise the rights derived from said collection.

In the present case, it is observed that on the date on which the account of the facts exposed in the letter of sanction, 9 to 22/02/2018, had not been offered to the claimant information on the use and purpose of collecting data obtained through the video surveillance system or similar (in this case since a mobile phone is used and individual title, only images captured of the claimant.) that have resulted in a loss

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to the claimant, it has produced the effect of the sanction imposed. Also, the letter of

sanction details that images of the exterior of the establishment, public thoroughfare have been captured

where the claimant has circulated, by detailing in several days and several hours of the day the movements of the claimant that objectified the sanction.

Although it can be said that the images that objectify the disciplinary sanction are not obtained with the video surveillance system, which was not implemented, if it can be seen that come from a mobile phone, of which the claimant did not know its origin, since he indicates in the claim that they have captured him "it seems to be with cameras that they have installed" in the bar, because as of 04/09/2018 they began to operate and the letter is delivered after of that date, in that month.

The Spanish Constitution states in its article 18.1 and 4:

- "1. The right to honour, to personal and family privacy and to one's own image is guaranteed.
- 4. The law will limit the use of information technology to guarantee the honor and personal privacy and family of citizens and the full exercise of their rights."

The doctrine of the Constitutional Court, maintains that the execution of the contract of work does not imply in any way the deprivation for one of the parties, the worker, of the rights that the Constitution recognizes as a citizen, even though the exercise of such rights within the productive organization can admit certain modulations or restrictions, provided that these modulations are based on reasons of necessity strictly duly justified by the employer, and without sufficient reason to exclude «a priori» that possible damages to the right to privacy of workers in the places where the work activity itself is carried out.

For our constitutional jurisprudence, if the right to privacy acts as barrier against interference or meddling by others (STC 142/1993, of April 22), the

The right to data protection "consists of a power of disposal and control over the personal data» (SSTC 290 and 292/2000, of November 30); If the right to privacy prohibits the knowledge by third parties of certain aspects of the person (aspects intimate or related to their private and family life), the right to data protection



provides guarantees of disposition and control regarding personal data that may belong or not to the area of intimacy and that can be the object of knowledge and management by others; if the right to privacy is the right of abstention of others regarding of our personal sphere, the right to data protection implies above all self-determination on our data.

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As to whether the system of images used by the respondent constitutes data processing, and as to whether the responsibility is attributable to the claimed, it is should point out:

As of the date on which the events occur, instruction 1/2006 specifies the scope of application of the regulations states in its article 1:

"1. This Instruction applies to the processing of personal data from images of identified or identifiable natural persons, for surveillance purposes through surveillance systems cameras and camcorders.

The treatment object of this Instruction includes the recording, capturing, transmission, conservation, and storage of images, including their reproduction or broadcast in time real, as well as the treatment that results from the personal data related to them.

A person is considered identifiable when his identity can be determined through the treatments referred to in this Instruction, without this requiring disproportionate deadlines or activities.

The references contained in this Instruction to video cameras and cameras will be understood also made to any analogous technical means and, in general, to any system that

allow the treatments provided for in it.”

On the other hand, if it is not about installing any system, but the purpose is the labor control, through data collection with another similar system, such as those obtained with a mobile device, the data protection regulations apply, since intended to have effects on the claimed-claimant relationship.

Article 1 of the GDPR states:

1. This Regulation establishes the rules relating to the protection of persons with regard to the processing of personal data and the rules relating to the free movement of such data.
2. This Regulation protects the fundamental rights and freedoms of natural persons and, in particular, their right to the protection of personal data.

Article 4 defines:

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- 1) "personal data": any information about an identified natural person or identifiable ("the interested party"); An identifiable natural person shall be deemed to be any person whose identity can be determined, directly or indirectly, in particular by means of a identifier, such as a name, an identification number, location, an online identifier or one or more elements of physical identity, physiological, genetic, psychic, economic, cultural or social of said person;
- 2) "processing": any operation or set of operations performed on data personal data or sets of personal data, whether by automated procedures or not, such as the collection, registration, organization, structuring, conservation, adaptation or

modification, extraction, consultation, use, communication by transmission, diffusion or any other form of authorization of access, collation or interconnection, limitation, suppression or destruction;

7) “data controller” or “controller”: the natural or legal person, authority, service or other body which, alone or jointly with others, determines the ends and means of the treatment; if the law of the Union or of the Member States determines the purposes and means of treatment, the person responsible for treatment or the specific criteria for its appointment may be established by the Law of the Union or of the Member States;”

A mobile recording that collects images of a person that can be identify falls within that scope. The respondent decides on the purpose and use of those images obtained by an employee, has carried out data processing of which it is responsible for having used them, received them, kept them and used them without The claimant did not know or expect that he was being monitored on a daily basis in several moments of each day. If those images are used by the claimed in this case, to produce legal effects within a labor control, with disciplinary sanction, the data protection regulations and their guarantees are fully applicable, considering In addition, he neither informed of the data collection nor of the rights associated with said data. pickup.

In the present case, the images obtained and used reproduced the image of the claimant and allowed the control of their actions through their image, which constitutes personal data, and they were used to monitor the fulfillment of your contract. From the proven facts it can be deduced that the legal entity owner of the establishment where the claimant provides services was the one who finally used described the recordings, being responsible for data processing without having informed the worker about this usefulness of labor supervision associated with the captures of your image. In this way, he violated art. 18.4 of the Constitution, and specifically its article

## 5.1 a of the GDPR

1. The personal data will be:

a) processed in a lawful, loyal and transparent manner in relation to the interested party ("lawfulness,

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loyalty and transparency»);

In the case at hand of the use of the videos transferred by an employee, it does not appear

in justified origin the daily follow-up by another employee of the movements in

the workplace of another worker. Statement by the employee that

"I was fed up with his behavior" and that is why he obtained the images and put them to

disposition of the employer supposes an individualized, personalized, daily and

aimed at recording you when you are apparently not working, when you are outside or

doing other activities that is disproportionate and arbitrary. Isn't that another employee the

who must decide who makes videos or not, to put them in the power of the claimed, because

Apart from assuming an interference in their privacy and image, it is not considered a means

suitable for proving that the defendant had prepared for its operation a system

that it had installed, ready to work and that it postponed, and that it had applied not only to the

claimant but to all employees.

In the present case, the lack of prior information on the use of images, the use of

these obtained from an employee who performs almost daily monitoring in February 2018, the

willingness to use and destination of the video images expressed in the sanction letter

delivered to the employee assumes that there was no legitimate basis at that time

for data processing that occurred with the processing employed. holding back on

the information systems of the claimed party to provide evidence for their actions,  
concludes that your personal data has been processed without a legitimate basis by the claimed party,  
proving the commission of an infringement of article 5.1 a of the RGPD

It is also applicable for the purpose of use of labor control, article 13 of the  
RGPD on information to be provided to the interested party if the data is obtained from it,  
as in this case that has labor control purposes in the establishment of performance of  
functions, and this even if the worker's consent is not required.

Various sentences of the social order on the use of video surveillance or control of  
positioning related to the performance and control of job functions have  
indicated that these systems can be used if there is proportionality and  
guarantee the rights of employees, beginning with express, clear information  
and detailed information on the use, purposes of the system and exercise of employee rights.

Article 72 of the LOPDGDD indicates: "Infringements considered very serious

1. Based on the provisions of article 83.5 of Regulation (EU) 2016/679,  
considered very serious and will prescribe after three years the infractions that suppose a  
substantial violation of the articles mentioned therein and, in particular, the following:

a) The processing of personal data violating the principles and guarantees established  
in article 5 of Regulation (EU) 2016/679."

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Article 58. 2d) and 2.i) of the RGPD indicates:

2. Each supervisory authority will have all of the following corrective powers

listed below:

d) order the person in charge or in charge of the treatment that the operations of treatment comply with the provisions of this Regulation, where appropriate, in accordance with a certain way and within a specified period;

Yo)

impose an administrative fine under article 83, in addition to or instead of the measures mentioned in this section, according to the circumstances of each case particular;

Article 83.5 a) of the RGPD, considers that the infringement of “the basic principles for processing, including the conditions for consent under the articles 5, 6, 7 and 9” is punishable, in accordance with section 5 of the aforementioned article 83 of the aforementioned Regulation, with administrative fines of a maximum of €20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the volume of total annual global business of the previous financial year, opting for the one with the highest amount”

III

Article 83 of the RGPD indicates: “General conditions for the imposition of fines administrative:

"1. Each control authority will guarantee that the imposition of administrative fines in accordance with this article for the infringements of this Regulation indicated in paragraphs 4, 5 and 6 are in each individual case effective, proportionate and dissuasive.

2. Administrative fines will be imposed, depending on the circumstances of each case individually, in addition to or as a substitute for the measures referred to in article 58, section 2, letters a) to h) and j). When deciding to impose an administrative fine and its amount in each individual case shall be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the nature, scope or purpose of the treatment operation in question as well as the number of

affected parties and the level of damages they have suffered;

It is valued in this case that it affects only one employee, the claimant who was of the recordings, differently from the rest of the employees who were not subject to any recording, proceeding the recordings of an employee, for several days, being the level of damages the equivalent of the sanction of 45 days of employment and salary.

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a)

the intentionality or negligence in the infringement;

c) any measure taken by the person responsible or in charge of the treatment to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the treatment, account of the technical or organizational measures they have applied under articles

25 and 32;

e) any previous infringement committed by the person in charge or the person in charge of the treatment;

f) the degree of cooperation with the supervisory authority in order to remedy the infringement and mitigate the possible adverse effects of the infringement;

g) the categories of personal data affected by the infringement;

h) the way in which the supervisory authority became aware of the infringement, in particular whether the controller or processor reported the breach and, if so, to what extent;

i) when the measures indicated in article 58, section 2, have been ordered previously against the person in charge or the person in charge in question in relation to the same matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or mechanisms of certification approved in accordance with article 42, and

k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits obtained or losses avoided, directly or indirectly, through the infringement.”

The LOPDGDD indicates in its article 76: "Sanctions and corrective measures

1. The penalties provided for in sections 4, 5 and 6 of article 83 of the Regulation (EU)

2016/679 will be applied taking into account the graduation criteria established in the section 2 of the aforementioned article.

2. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679, also may be taken into account:

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of data processing personal.

c) The profits obtained as a result of committing the offence.

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d) The possibility that the conduct of the affected party could have led to the commission of the infringement.

e) The existence of a merger by absorption process subsequent to the commission of the infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when not mandatory, a data protection officer.



h) Submission by the person in charge or person in charge, on a voluntary basis, to alternative conflict resolution mechanisms, in those cases in which there are controversies between them and any interested party.”

Usually, the purpose of the surveillance system with labor control is that by being operative can be used for it. In this case, the respondent acknowledges that it was not and yet used footage obtained by one employee to punish another employee.

These elements that were unknown at the beginning have to be valued in their fair term in these moments.

It must be taken into account:

-Affects only one employee, the claimant, who was the subject of the recordings, differently from the rest of the employees who were not subject to any recording, proceeding the recordings of an employee, for several days, being the level of damage the equivalent to the sanction of 45 days of employment and salary. The claimant has been sanctioned without knowing the use of the system, nor prior to its use, the purpose for which intended the data collected, their reasonable expectations of use of images or capturing did not exist, seeing himself injured with a sanction letter that is based exclusively on the images, being a considerable damage derived from 45 days without pay, although the nature and scope of the treatment is admitted by law prior to the information specific to those affected (83.2.a).

-It must be considered that the use of images for a sanction coming from a performance whose objective was an individualized person and whose images were collected by an employee should have raised usage issues to the errand, so there is a lack of qualified diligence. (83.2.c).

-The defendant is an SME, with 31 employees.

-Due to the activity of the defendant, there was no special connection or direct link by the type of activity with the processing of personal data

habitually, systematically or professionally, and continuously. With the installation now of the system that also has the purpose of labor control, has to implement mechanisms adequate and proportionate to the treatment that does not appear to have been used with the claimant.

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For the reasons stated, a penalty of 12,000 euros is proposed.

In view of the foregoing, the following is issued

#### MOTION FOR A RESOLUTION

That by the Director of the Spanish Agency for Data Protection

sanctions SANTI 3000, S.L. (LA OLIVA RESTAURANT), with NIF B63354682, by

an infringement of article 5.1.a) of the RGD, typified in article 83.5 of the RGD,

with a fine of €12,000.00 (TWELVE THOUSAND euros).

Likewise, in accordance with the provisions of article 85.2 of the LPACAP,

You are informed that you may, at any time prior to the resolution of this

procedure, carry out the voluntary payment of the proposed sanction, which

will mean a reduction of 20% of the amount of the same (2,400.00 euros). With the

application of this reduction, the penalty would be established at 9,600.00 euros and its

payment will imply the termination of the procedure. The effectiveness of this reduction

will be conditioned to the withdrawal or renunciation of any action or resource in via

administrative against the sanction.

In case you chose to proceed with the voluntary payment of the amount

specified above, in accordance with the provisions of article 85.2 cited,

You must make it effective by depositing it in the restricted account number ES00 0000

0000 0000 0000 0000 opened in the name of the Spanish Agency for the Protection of Data in Banco CAIXABANK, S.A., indicating in the concept the number of reference of the procedure that appears in the heading of this document and the cause, by voluntary payment, of reduction of the amount of the sanction. Also, you must send proof of entry to the General Subdirectorate of Inspection for proceed to close the file.

By virtue thereof, the foregoing is notified, and the procedure so that within a period of TEN DAYS you can allege whatever you consider

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in his defense and present the documents and information that he considers pertinent, in accordance with article 89.2 in relation to art. 73.1 of the LPACAP).

RRR

INSPECTOR/INSTRUCTOR

>>

: On August 13, 2019, SANTI 3000, S.L. (THE RESTAURANT

SECOND

OLIVA) has proceeded to pay the penalty in the amount of 9,600 euros using of the reduction envisaged in the motion for a resolution transcribed above.

THIRD: The payment made entails the waiver of any action or resource in via against the sanction, in relation to the facts referred to in the resolution proposal.

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, and as established in art. 47 of the Organic Law 3/2018, of 5 December, of Protection of Personal Data and guarantee of digital rights (in hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection is competent to sanction the infractions that are committed against said Regulation; infractions of article 48 of Law 9/2014, of May 9, General Telecommunications (hereinafter LGT), in accordance with the provisions of the article 84.3 of the LGT, and the infractions typified in articles 38.3 c), d) and i) and 38.4 d), g) and h) of Law 34/2002, of July 11, on services of the society of the information and electronic commerce (hereinafter LSSI), as provided in article 43.1 of said Law.

II

Article 85 of Law 39/2015, of October 1, on the Procedure Common Administrative of Public Administrations (hereinafter LPACAP), under the heading "Termination in sanctioning procedures" provides the following:

"1. A sanctioning procedure has been initiated, if the offender acknowledges his responsibility, the procedure may be resolved with the imposition of the sanction to proceed.

2. When the sanction is solely pecuniary in nature or fits impose a pecuniary sanction and another of a non-pecuniary nature but it has been justified

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the inadmissibility of the second, the voluntary payment by the alleged perpetrator, in any time prior to the resolution, will imply the termination of the procedure, except in relation to the replacement of the altered situation or the determination of the compensation for damages caused by the commission of the infringement.

3. In both cases, when the sanction is solely pecuniary in nature, the competent body to resolve the procedure will apply reductions of, at least 20% of the amount of the proposed sanction, these being cumulative each. The aforementioned reductions must be determined in the notification of initiation of the procedure and its effectiveness will be conditioned to the withdrawal or Waiver of any administrative action or recourse against the sanction.

The reduction percentage provided for in this section may be increased regulations."

According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00401/2018, of in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to SANTI 3000, S.L. (RESTAURANT THE OLIVE).

In accordance with the provisions of article 50 of the LOPDGDD, the

This Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative process as prescribed by art. 114.1.c) of Law 39/2015, of October 1, on Procedure

Common Administrative of Public Administrations, interested parties may

file a contentious-administrative appeal before the Contentious Chamber

of the National High Court, in accordance with the provisions of article 25 and

in section 5 of the fourth additional provision of Law 29/1998, of July 13,

regulation of the Contentious-Administrative Jurisdiction, within a period of two months to count from the day following the notification of this act, as provided in the Article 46.1 of the aforementioned Law.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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