

□ Procedure No.: PS/00330/2020

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and based on
to the following

BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claimant) filed on 06/01/2020 a
claim before the Spanish Data Protection Agency (AEPD). the claim
is directed against the CITY COUNCIL OF SAN BARTOLOMÉ DE TIRAJANA, with NIF
P3502000G, (hereinafter, the claimed one). The ground on which the claim is based is that
the respondent lacks a data protection delegate despite being bound by the
regulations in force at their appointment. The complainant states that "...although there is a
e-mail address enabled to send queries or doubts that may
arise regarding data protection, our local entity has not designated a
no Data Protection Delegate thus breaching article 37.1 of the
Regulation (EU) 2016/679 (RGPD)".

The claimant states that he is acting on behalf of "the Unions below
signatories, members of the Company Committee of the City Council of San Bartolomé de
Tirajana", but it does not certify the representation that it claims to hold, so the
Claim is understood to be filed in your own name.

SECOND: In view of the facts set forth in the claim, on 06/03/2020
the list of data protection delegates is consulted, with a negative result
communicated to the AEPD using the NIF of the claimed party as the search criteria.
Within the framework of file E/4780/2020, the AEPD, in a document signed on
06/12/2020, transferred the claim to the respondent so that within a period of
month will provide this Agency with an explanation of the facts denounced, will detail

the measures adopted to prevent situations from occurring in the future similar and also proceed to communicate its decision to the claimant. The writing is notified the claimed electronically. This is confirmed by the FNMT certificate that work in the file in which it appears as the date of making it available at the headquarters electronically on 06/12/2020 and as the date of acceptance of the notification on 06/22/2020.

As of 09/16/2020, the AEPD had not received a response from the claimed to the informative request. In accordance with the provisions of article 65 of Organic Law 3/2018, on Data Protection and Rights Guarantees Digital (LOPDGDD) on that date the agreement is adopted to admit for processing the claim.

The agreement for admission to processing was notified to the claimant electronically. The certificate issued by the FNMT that is in the file certifies that the notification was made available to the claimant on 09/16/2020 and was accepted on 09/20/2020.

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THIRD: On September 29, 2020, the Director of the Spanish Agency of Data Protection agreed to initiate a sanctioning procedure against the claimed, for the alleged infringement of Article 37 of the RGPD, typified in Article 83.4 of the RGPD.

FOURTH: The initiation agreement was electronically notified to the respondent. This is how ge article 14.2 of Law 39/2015 of Common Administrative Procedure of the Public Administrations (LPACAP) according to which “In any case, they will be obliged two to relate through electronic means with the Public Administrations to carry out any procedure of an administrative procedure, at least,

the following subjects: a) Legal persons”.

The Certificate issued by the Electronic Notification Service is in the file.

tronics and Electronic Address Enabled of the FNMT-RCM, which records of the sending of the initiation agreement, notification of the AEPD addressed to the claimed, through of that means being the date of availability in the electronic headquarters of the organization on 10/01/2020 and the rejection date on 10/12/2020.

FIFTH: In accordance with article 73.1 of the LPCAP, the term to formulate allegations to the Home Agreement is ten days computed from the day following the of the notification.

Article 64.2. LPACAP, indicates that the defendant will be informed of the right to form formulate allegations, of the "right to a hearing in the procedure and of the deadlines for its exercise, as well as the indication that in case of not making allegations in the term established on the content of the initiation agreement, it may be considered proposed resolution proposal when it contains a precise pronouncement about the imputed responsibility". (The underlining is from the AEPD)

The agreement to initiate the sanctioning file that concerns us contained a precise statement on the responsibility of the claimed entity: in the aforementioned agreement specified what was infringing conduct, the sanctioning type in which it was subsumable, the circumstances of the responsibility described and the sanction that in the judgment of the AEPD proceeded to impose.

In consideration of the foregoing and in accordance with the provisions of the article 64.2.f) of the LPACAP, the initiation agreement of PS/00330/2020 is considered Resolution Proposal: Once the initiation agreement was notified, the one claimed at the time of the This resolution has not submitted a brief of arguments, so it is application of what is stated in article 64 of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations, which in its

section f) establishes that in the event of not making allegations within the stipulated period on the content of the initiation agreement, it may be considered a proposal for resolution when it contains a precise statement about the responsibility imputed, reason why a Resolution is issued.

In view of everything that has been done, by the Spanish Data Protection Agency

In this proceeding, the following are considered proven facts:

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FACTS

FIRST: A claim was received against the CITY COUNCIL OF SAN BARTOLOMÉ DE TIRAJANA, due to the lack of a data protection delegate, despite being obliged by the regulations in force at their appointment.

SECOND: The list of data protection delegates communicated to the AEPP is not communicated.

THIRD: The CITY COUNCIL OF SAN BARTOLOMÉ DE TIRAJANA has not appointed Data Protection Delegate (DPD).

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each control authority, and according to the provisions of articles 47 and 48 of the LOPDGDD,

The Director of the Spanish Agency for Data Protection is competent to initiate and to solve this procedure.

The Public Administrations act as responsible for the treatment of data of a personal nature and, on occasions, perform functions of those in charge of the treatment for which, following the principle of proactive responsibility, we

It is necessary to meet the obligations that the RGPD details, among which is the to appoint a data protection delegate, make their contact details public and communicate them to the AEPD (article 37 RGPD)

Sections 1 and 7 of article 37 GDPR refer to these obligations and

“The person in charge and the person in charge of the treatment will designate a delegate of establish, respectively:

data protection provided that:

a) the treatment is carried out by a public authority or body, except those courts acting in the exercise of their judicial function;

“The person in charge or the person in charge of treatment will publish the contact details of the data protection delegate and will communicate them to the control authority.”

On the appointment of the data protection delegate, sections 3 and 5 of the Article 37 of the RGPD indicate that “When the person in charge or the person in charge of the treatment is a public authority or body, a single person may be designated data protection officer for several of these authorities or bodies, taking into account its organizational structure and size”. “The delegate of protection of data may be part of the staff of the person in charge or of the person in charge of the treatment or perform their functions within the framework of a service contract.

For its part, the LOPDGDD dedicates article 34 to the “Appointment of a delegate- do of protection of data”, precept that provides:

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"1. Those responsible and in charge of the treatment must designate a delegate data protection in the cases provided for in article 37.1 of the Regulation ment (EU) 2016/679 and (...)"

"3. Those responsible and in charge of the treatment will communicate within the period of ten days to the Spanish Agency for Data Protection or, where appropriate, to the authorities regional laws on data protection, appointments, appointments and dismissals of the data protection delegates both in the cases in which they are train obliged to their designation as in the case in which it is voluntary".

The infringement of the obligation imposed on the claimed party by article 37.1 RGPD

It is typified in article 83.4. GDPR, which states:

"Infractions of the following provisions will be sanctioned, in accordance with section 2, with administrative fines of a maximum of EUR 10,000,000 or, alternatively, being from a company, of an amount equivalent to a maximum of 2% of the volume overall annual total turnover of the previous financial year, opting for the higher amount:

the obligations of the person in charge and the person in charge pursuant to articles (...) 25 to 39,..."

a)

The LOPDGDD indicates in article 73, "Infringements considered serious":

"Based on the provisions of article 83.4 of Regulation (EU) 2016/679 are considered serious and will prescribe after two years the infractions that suppose a substantial violation of the articles mentioned therein and, in particular, the following Followers: (...)

v) Failure to comply with the obligation to appoint a data protection delegate

data when their appointment is required in accordance with article 37 of the Regulations
ment (EU) 2016/679 and article 34 of this organic law.”

III

Regarding the sanction or sanctions that could be imposed on the person claimed in
the present sanctioning procedure, the following have been taken into consideration
provisions:

On the one hand, article 58.2 of the RGPD that establishes that "Each authority of
control will have all the following corrective powers indicated below-
tion:

(...)

b) send a warning to any data controller or data processor when
treatment operations have violated the provisions of this Regulation-
mint;

(...)

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

(...)

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

(...)"

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On the other hand, article 83.7 RGD, which indicates that "Without prejudice to the co-rectives of the supervisory authorities under article 58, paragraph 2, each State member may establish rules on whether, and to what extent, it is possible to impose administrative fines to authorities and public bodies established in said State. member".

In accordance with this authorization granted by the RGD, the LOPDGD has provided in article 77, "Regime applicable to certain categories of liability saberes or in charge of treatment", the following:

"1. The regime established in this article will be applicable to the treatment of those who are responsible or in charge:

(...)

c) The General Administration of the State, the Administrations of the Communities Autonomous Communities and the entities that make up the Local Administration.

(...)

2. When the persons in charge or persons in charge listed in section 1

had any of the infractions referred to in articles 72 to 74 of this law

organic, the data protection authority that is competent will issue resolutions

tion sanctioning them with a warning. The resolution will also establish

as the measures that should be adopted to stop the behavior or correct the effects

cough of the infraction that had been committed. The resolution will be notified to the responsible

responsible or in charge of the treatment, to the body on which it reports hierarchically, in its

case, and to those affected who had the status of interested party, as the case may be.

3. Without prejudice to the provisions of the preceding section, the protection authority

tion of data will also propose the initiation of disciplinary actions when

there are sufficient indications for it. In this case, the procedure and the sanctions to

apply will be those established in the legislation on the disciplinary or sanctioning system.

for that results from application.

Likewise, when the infractions are attributable to authorities and managers, and the existence of technical reports or recommendations for the treatment is accredited that had not been duly attended to, in the resolution imposing the

The sanction will include a reprimand with the name of the responsible position and will order the publication in the corresponding Official State or Autonomous Gazette. gives.

4. The resolutions must be communicated to the data protection authority that fall in relation to the measures and actions referred to in the paragraphs previous two.

5. They will be communicated to the Ombudsman or, where appropriate, to the analogous institutions of the autonomous communities the actions carried out and the resolutions dictated under this article.”

The City Council of San Bartolomé de Tirajana is obliged to appoint a DPD since the treatment is carried out by a public authority or body. The modality of their contracting, appointment and employment relationship is very wide, it can choose the most appropriate for your specific situation.

The RGPD entered into force on May 25, 2016, although it was not applicable until two years later. This period of time was necessary to adapt the treatments to the new regulations. But the City Council mentioned, after more than two

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years after that adaptation period, he had not yet appointed a DPO.

Consequently, the City Council of San Bartolomé de Tirajana has failed to comply the obligation established in article 37 of the RGPD and sanctioned in article 83.4.a) of the same.

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of sanctions whose existence has been proven,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE the CITY COUNCIL OF SAN BARTOLOMÉ DE TIRAJANA, with NIF P3502000G, for an infringement of Article 37 of the RGPD, typified in Article 83.4 of the RGPD, a sanction of warning.

SECOND: REQUEST the CITY COUNCIL OF SAN BARTOLOMÉ DE TIRAJANA, with NIF P3502000G:

1. The appointment of the Data Protection Delegate.

You must inform this Agency within a month from the notification of this Resolution.

THIRD

TIRAJANA LOME.

: NOTIFY this resolution to the CITY COUNCIL OF SAN BARTO-

FOURTH

in accordance with the provisions of article 77.5 of the LOPDGDD.

: COMMUNICATE this resolution to the Ombudsman,

In accordance with the provisions of article 50 of the LOPDGDD, 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 procedure in accordance with art. 48.6 of the LOPDGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the

Director of the Spanish Agency for Data Protection within a month from counting from the day following the notification of this resolution or directly contentious-administrative appeal before the Contentious-Administrative Chamber of the National Court, in accordance with the provisions of article 25 and section 5 of the fourth additional provision of Law 29/1998, of July 13, regulating the Contentious-administrative jurisdiction, within a period of two months from the day following the notification of this act, as provided in article 46.1 of the aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP, may provisionally suspend the firm resolution in administrative proceedings if the The interested party expresses his intention to file a contentious-administrative appeal.

If this is the case, the interested party must formally communicate this fact by writing addressed to the Spanish Agency for Data Protection, presenting it through Electronic Register of the Agency [<https://sedeagpd.gob.es/sede-electronica->

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web/], or through any of the other registers provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the documentation proving the effective filing of the contentious appeal-administrative. If the Agency was not aware of the filing of the appeal contentious-administrative within a period of two months from the day following the notification of this resolution would end the precautionary suspension.

Sea Spain Marti

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