 File No.: PS/00267/2021

RESOLUTION OF PUNISHMENT PROCEDURE

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

to the following

BACKGROUND

FIRST: A.A.A. (hereinafter, the claimant), dated 12/31/2020, filed

claim before the Spanish Data Protection Agency. The claim is

directed against MERCADONA S.A., with NIF A46103834 (hereinafter, MERCADONA or

the one claimed), due to the lack of attention to the right of access to personal data

of the claimant, as the request was not answered within a period of one month. The

The grounds on which the claim is based are as follows:

The claimant states that on ***DATE.1 she suffered an accident in an establishment

of the entity located at ***ADDRESS.1, and that, for the purpose of claiming damages,

exercised the right of access to the images of the security cameras, using

for this, the application form available on the website of the claimed party, the one established

in the Privacy Policy, receiving a message about the approval of the shipment,

which took place on ***DATE.2.

He adds that, after a month without receiving a response, he sent an email to

DPD of the entity, which responded by denying receipt of the request for access and

informing the claimant that the images had been deleted. With that reason,

The claimant sent the proof of sending the request for access, without receiving

no other answer.

Likewise, the claimant indicates that on ***DATE.3 she filed a complaint with the

MERCADONA entity itself for the accident that occurred, through its website,

receiving a reference for the case, so he does not understand why they deleted the

images, which were the only proof of the facts.

Together with the claim, it provides the following documentation, which is outlined in the

Proven facts:

. Printing of the right of access request form completed through

of the website of the claimed party, dated ***DATE.2.

. Screen print of the response message to the previous request.

. Copy of the email sent on ***DATE.4 by the representative of the

claimant to the DPD of MERCADONA, claiming the images.

. Screen print of the email addressed by the claimant to the address

“conducta@mercadona.es”, dated ***DATE.3, with the subject “Denuncia D201…”, and

MERCADONA's response of ***DATE.5.

SECOND: In accordance with article 65.4 of Organic Law 3/2018, of 5

December, of Protection of Personal Data and guarantee of digital rights (in

hereinafter LOPDGDD), said claim was transferred to the claimant on

02/03/2021, to proceed with its analysis and inform this Agency within the deadline

of a month, of the actions carried out to adapt to the foreseen requirements

in data protection regulations.

In response to said transfer, the respondent entity reported as follows:

. MERCADONA begins its response by presenting the facts that are the subject of the proceedings,

confirming that sending the request through the form available on the web does not

generates an acknowledgment of receipt and simply displays a response message indicating

"The message has been sent successfully". It also refers to the mail that was

sent by the representative of the claimant to the DPD of the entity on the date

***DATE.6, and indicates that said e-mail was answered informing “that the request is not

had been received and that the images were no longer available (they had been deleted

when more than 30 days have elapsed since collection).

It adds that, once it became aware of the claimant's request through the

aforementioned email sent to the DPD, reviewed the material and human processes involved,

both technical and management, without observing any deviation. This check

gave rise to the above answer.

Likewise, once the claim was known, on 02/09/2021 it sent the claimant a

burofax in the same terms.

Next, it informs about some details related to the procedure that follows

so that the interested parties exercise their rights in terms of data protection

personal, which are outlined in the First Proven Fact, and indicates that at

Through the form, a total of 229 applications for

rights regarding the protection of personal data during the year 2020.

On the other hand, MERCADONA highlights that, on ***DATE.7, the representative

of the claimant addressed the entity for the first time with the sole purpose of

report the incident and communicate your intention to request compensation for it,

without any reference to the access request made on ***DATE.2, which is

reason for this claim.

The respondent understands, on the other hand, that the communication made by the

complainant through the complaints channel, it cannot be deduced that it was

a request to exercise the right of access.

Based on the foregoing, the defendant concludes that she acted at all times in accordance with

current regulations, according to the scheme established to comply with the

exercise of customer rights. In this particular case, at the time he had

knowledge, for the first time, of the request for access last ***DATE.4,

responded to said request on ***DATE.8, responding to the only known address

of the applicant.

With your answer, provide a copy of the following documentation, which is outlined

in the proven facts.

. Copy of an email sent by MERCADONA to the representative of the claimant,

of ***DATE.9, with the subject “Right of access”.

. Copy of the mail sent by the representative of the claimant to MERCADONA, of

***DATE.7, cited above.

THIRD: On 04/16/2021, the Director of the AEPD agrees to the admission to

claim processing.

FOURTH: Dated 07/05/2021, by the General Subdirectorate for Data Inspection

access to the information available on the claimed entity in “Axesor”. consists

that this entity belongs to the “Commerce” sector (…).

FIFTH: On 07/19/2021, the Director of the Spanish Agency for the Protection of

Data agreed to initiate sanctioning proceedings against the entity MERCADONA, with

in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the

Common Administrative Procedure of Public Administrations (hereinafter,

LPACAP), for the alleged infringement of articles 12 and 6 of the RGPD, typified in

Articles 83.5.b) and 83.5.a) of the aforementioned Regulation, respectively; and qualified

as minor and very serious for prescription purposes in articles 74.c) and 72.1.b) of the LOPDGDD.

In the opening agreement it was determined that the sanctions that could correspond, attended the existing evidence at the time of opening and without prejudice to what resulting from the investigation, would amount to a total of 170,000 euros (70,000 euros for the infringement of article 12 and 100,000 euros for the infringement of article 6, both of the GDPR).

Likewise, it was warned that the imputed infractions, if confirmed, may entail the imposition of measures, in accordance with the provisions of the aforementioned article 58.2 d) of the GDPR.

SIXTH: Notification of the aforementioned initial agreement and extension of the term granted for make allegations, the respondent entity filed a document dated 08/02/2021, in which requesting the filing of the sanctioning procedure in accordance with the considerations following:

1. First, it refers to the accident suffered by the claimant, which, according to indicates, it was communicated to him by complaint of ***DATE.3 made through its website, and points out that the internal investigation carried out by the claimed entity itself with After the transfer process, a human error was detected in the management of the civil claim filed by the claimant, which caused it not to become known of the Data Protection Delegate (DPD) or his team and the lack of attention of the access request made.

As a result of this, the claimant was contacted, through her representative, and a to an agreement that repairs the damages suffered by the accident and the derived from the non-attention of your right of access to your personal data, of way that the error in the attention of the right has not caused any damage and/or damage.

In addition, it states that disciplinary measures were adopted internally; as well as technical and organizational measures, to prevent an error from occurring in the future similar and that ensure the sending to the DPD of the requests that are formulated through the web form.

2. Considers the opening of sanctioning proceedings inadmissible in a case referred exclusively to the lack of attention to a request to exercise the rights established in articles 15 to 22 of the RGPD, and highlights the nature exception of said procedure, which has been revealed by the AEPD in various actions (E/10485/2019, TD/00120/2021 and RR/00506/2021), indicating that "whenever possible, the prevalence of mechanisms should be chosen alternatives in the event that they are protected by current regulations..." and that they must There are elements that justify the initiation of the sanctioning procedure. To this In this regard, MERCADONA adds that, in the present case, the agreement to initiate the procedure does not specify what are the specific aspects that justify the opening of the sanctioning procedure, nor how through the imposition of a sanction on the entity, the guarantees and rights of the claimant may be restored, which through of the procedure of article 64.1 of the LOPDGDD, according to the Authority, there would be no duly restored.

In this case, the facts refer exclusively to the lack of attention of a request for the right of access, without any breach of other provisions that justify the opening of a sanctioning procedure, taking into account

to the factual circumstances set out in the previous point, and the

guarantees and rights of the interested party.

Thus, it considers that the initiation agreement has not duly motivated the opening of the

procedure, contrary to the provisions of article 35.8 of Law 39/2015, letters

h) and i), which can invalidate the administrative act in accordance with the doctrine of

Supreme Court to the extent that it can deprive the interested party of the means of

necessary defense or hinder jurisdictional control (STS 5701/1998, STS

1935/2003 or STS 8046/1999).

It emphasizes that, in the case of a discretionary act, said motivation must be more

intense, expressing the logical process that leads the Administration to make the decision

(STS 7626/1998 which in turn cites the SSTS, among others of 06/15/1984, 07/13/1984 and

02/07/1987).

Finally, MERCADONA indicates that, if the purpose of opening the procedure

sanction is that the guarantees and rights of the

interested parties" as indicated in the Basis of Law II of the Agreement itself

of initiation of the Sanctioning Procedure, that entity has carried out actions to

repair and alleviate the damages suffered by the interested party, for not having attended

in time the right of access due to human error detected, therefore they have

The guarantees and rights of the claimant have been duly restored.

Therefore, it understands that the opening of a sanctioning procedure is not appropriate and that,

moreover, said decision has not been justified.

3. Considering the alleged human error, invokes the principle of culpability,

pointing out that there are no errors in the past.

He cites article 28.1 of Law 40/2015, which establishes the Principle of responsibility

of the sanctioning power, and several precedents in which the AEPD has declared

that the principle of culpability constitutes an essential note in sanctioning matters and that

the so-called strict liability has no place in administrative law

sanctioning, so the mere commission of an administrative offense is not

sufficient when proceeding to impose an administrative sanction, and must

concurring willful or negligent conduct, whether gross or slight or simple negligence,

according to the degree of neglect, not existing negligence, nor therefore infringement

guilty and punishable, "when the necessary diligence has been exercised in complying

of the obligations required in terms of the LOPD" (PS/00724/2014).

Since human error is involuntary, there is no culpability, since it could never reach

require diligence of such a caliber that, in terms of results, it would be immune to

any human or technical error, since this would completely empty the content

to the aforementioned principle of guilt, not being different from a mere imputation by way of

of objective causality. This is reflected in several resolutions of the Authority as

those dictated in the files indicated with the numbers E/03468/2009, in which the

AEPD brings up the jurisprudential doctrine of the AN and the TS on the error and

relation to guilt ("…no system is indefectible or immune from the existence of

possible errors, so that, once they have occurred, the importance and

scope of the same, to avoid an objective responsibility of the subject of the

custody obligation of the same"); E/00546/2010; E/01795/2011 ("…In the

The present case does not meet the requirement of intent or negligence with respect to the action of

the companies denounced, but that we would be facing an assumption of error with

allegedly infringing result, to the extent that there could be an eventual

unlawful result, but not a will around said result... In this

sense has been manifested, before similar situations, the National High Court itself, in

judgments such as those issued on March 16, 2004 and March 2, 2005, in which

which respectively declares the following… We must bear in mind that, as

reveals the National High Court, and to the extent that it does not attend

voluntariness in the act, that there has not been a particularly harmful result in

what happened, and that there is no evidence of lack of care in the generalized action of the

company denounced in its communications, would be contrary to the nature of the

administrative sanctioning scope, subject to the principles of minimum intervention and

proportionality, impose a sanction with respect to the act produced, which can

be summed up in a mere error not deserving of sanctioning action").

In the present case, the entity has exercised the necessary diligence in complying with

the obligations established in the data protection regulations and acts in all

its processes with the utmost diligence, and always within its commitment to the

transparency and respect for regulatory compliance with regard to the treatment of

your customer data. Thus, you have established an intuitive and simple procedure in

in relation to the exercise of rights in terms of Data Protection, in which

The requirements contained in the RGPD and the LOPDGDD are established.

Regarding the information provided to customers on how to exercise the

rights, has established a simple and straightforward process on which the entity reports

through different channels (posters at store entrances; phone calls

toll-free Customer Service; or the Privacy Policy published in the

website, which includes a link that leads to the exercise of rights form).

In this case, the claimant opted for the web form, whose requests

are received by the Customer Service Department.

And it details the processing process followed by the request, which is outlined in the

Fact Tested First.

This process contemplates that requests for the exercise of protection rights

of data are communicated by the manager to the Data Protection Delegate, to

through a non-automated procedure. It is the only non-automated step within

of the entire rights management procedure and to date, there had never been

occurred any error, neither technical nor human, in the management of the

requests regarding data protection, the system working perfectly

established, thanks to the special and constant training that the entity imparts to the

professionals in charge of managing this type of request, through which

conveys the great importance of the fundamental right to data protection and

especially, the rights of the interested parties.

In relation to the exercises of right received through the web form,

satisfactorily received and processed a total of 229 requests for rights

ARSOPL during the year 2020 (January – September: 188 and October – December: 41).

The entity can state that it has not been sanctioned previously by the AEPD in

matter of rights of the interested parties, and internally, it is not recorded until the day of

today no claim before the DPD, or claim sheet, about the non-

response or non-receipt of requests from interested parties.

However, in addition, the entity has proceeded to reinforce the instructions to the

personnel in charge of managing the requests of the interested parties in terms of

data protection, especially those that the interested parties send through the

Customer Service form and that the managers assigned for its processing

receive in their folders, with special emphasis on their communication to the DPO in

as long as the procedure is not fully automated, through a communication

sent by the Data Protection Delegate on August 02/08/2021.

In view of the established procedure, MERCADONA concludes that it has observed in

at all times the diligence and duty of care that were required of him, establishing

the necessary procedures to manage the requests of the interested parties and

providing specific training to the workers in charge of managing

said requests and communicate them to the Data Protection Delegate. Also I know

implement preventive measures such as periodic checks carried out by the

coordinators, in order to avoid incidents.

The opposite would be to assume an objective responsibility of the subject of the obligation to

custody of the same, despite the fact that there is no lack of care in the performance

generalized, having shown the entity the diligence and duty of care that it

are required, through the implementation of training and preventive measures of

control. In addition, the importance and scope of the error must be taken into account, which is not

has produced a particularly harmful result in what happened since the damages and

damages have been repaired to the claimant, and the nature of the error, which given the

large amount of data processed by the entity, no system is indefectible or immune to

the existence of possible errors as has been the present case, and that on the other hand,

have adopted (technical) measures to prevent it from occurring in the future.

4. MERCADONA considers that the principle of typicity has been violated due to the circumstances following:

. When it is stated in the agreement to open the procedure that the article 6 of the RGPD and that this could lead to the commission of the typified infringement, in section 5.a) of article 83 of the RGPD, the conduct is not specified at all offending

. It is also indicated in the opening agreement that the facts could suppose a violation of the provisions of article 6 of the RGPD, in relation to article 22 of the LOPDGDD. Article 6 of the GDPR has four paragraphs, which in turn they have different subsections, and it is not specified which paragraph and letter of the article 6 is the one that could have been allegedly violated.

The same in relation to article 22 of the LOPDGDD, which has eight paragraphs and it is not specified which specific paragraph and section is/are the one(s) that could/would have been violated.

Furthermore, the relationship between article 6 of the RGPD and Article 22 LOPDGDD.

. It is not explained in detail or it is not adequately substantiated why the fact of having deleted some images in compliance with the legally established term, for not having responded to an access right due to human error, supposes a breach of the conditions of legality and specifically, of which of they.

According to MERCADONA, all this causes defenselessness and contributes to the legal uncertainty (article 9.3 Constitution).

He cites the resolution issued by the AEPD in file E/02434/2020, in which declares:

“Ultimately, this principle implies, in the first place, that sanctioning laws only

can be applied to those behaviors that meet all the elements of the type described, that is,

That is, a behavior can be defined as "typical" when there is an identity or

homogeneity between the act committed and the circumstances described in the norm. The

Prohibition of analogy, meanwhile, implies that a sanction cannot be imposed for a

fact that it does not fit the literal nature of the type of infraction, although it keeps with it some type

of similarity or conceptual proximity".

For all of the above, the respondent entity understands that in the start-up agreement

sanctioning procedure does not comply at all with the principle of typicity since

that, in the first place, the precepts allegedly violated have not been specified,

nor has the relationship between them been explained; second, there is no identity

between the act committed and the circumstances described in the norm, since it is not

has at no time produced illicit data processing (art 6 RGPD) nor has it been

violated the provisions of article 22 of the LOPDGDD, and thirdly, it is not

can impose a sanction for an act that does not fit the literal nature of the type of the

infraction, even though it bears some kind of similarity or conceptual proximity to it

(prohibition of analogy).

5. MERCADONA scrupulously complies with the provisions of article 22.3 of the

LOPDGDD on the obligation to preserve the images captured by

video surveillance systems, since these images are permanently deleted when

more than 30 days have elapsed since collection.

In the case object of this claim, due to a human error, it was not processed

the claimant's request for access correctly, but this does not in any way imply

a breach of the provisions of article 22.3 LOPDGDD, which provides the

Next:

"3. The data will be deleted within a maximum period of one month from its collection, except

when they had to be kept to prove the commission of acts that violate the

integrity of people, goods or facilities. In such a case, the images should be placed

available to the competent authority within a maximum period of seventy-two hours from

knowledge of the existence of the recording. It will not apply to these

treatments the blocking obligation provided for in article 32 of this organic law".

In the "General information video surveillance practical files" of the AEPD,

updated in 2021, the following is indicated (provides screen printing):

"The images will be kept for a maximum period of one month from their capture,

after which it will be deleted.

When there is a recording of a crime or administrative infraction that must be placed

to the knowledge of an authority, the images will be attached to the complaint and must

kept for the sole purpose of making them available to the aforementioned authority without

be used for any other purpose".

Therefore, regarding the obligation of general deletion after a maximum of one month has elapsed since

capturing the images, the exception is given by the recording of a crime or

administrative infraction that must be brought to the attention of the authorities, without

that we can include other assumptions within said exception to the general rule,

because the LOPDGDD itself does not include them.

Article 22.3 LOPDGDD speaks of "(...) except when they should be preserved

to prove the commission of acts that threaten the integrity of persons,

goods or installations", so it is not referring to any act, but to

those that involve conduct by a third party (committing an act) against

persons, goods or facilities, that is, an act must be committed by a

person, that threatens the integrity of people, property or facilities.

Let us remember that any exception must be interpreted restrictively and hold what

Otherwise, it would violate both the principle of typicity and the prohibition of analogy, since

that a sanction cannot be imposed for an act that does not fit the literal meaning of the

type of infraction, even if it had some kind of similarity or proximity to it

conceptual.

In a similar case (Procedure E/02434/2020) in which the Civil Guard requested

images to a hotel establishment “because these are determining factors for the

clarification of the facts”, and these had already been deleted, the AEPD indicates that

it is necessary to analyze whether the behavior described constitutes an infraction and affirms that "The

cited article 22.3 LOPDGDD, it must be put in connection with what is established in the

article 32 LOPDGG, “Data blocking” and concludes that “the obligation to “block”

in terms of images obtained through video-surveillance systems is one of the

the exceptions determined by the Legislator, so that it would not be possible to impute the

denounced an administrative infraction in the terms of art. 72n) LOPDGDD”, by

what files the complaint:

“According to the foregoing, it can be concluded that there is no obligation to block

in the case of the images obtained through the system, nor does the Legislator require that the

They must necessarily be kept for a period of one month, lacking this

agency of a greater knowledge of the circumstances that gave rise to the elimination of

the images (eg intentionality or simple human error), reasons all of them that advise order the file of this procedure".

If in the case discussed in which the images were requested by the Civil Guard to clarification of allegedly criminal acts, the Authority concluded that there was no obligation on the part of the establishment to block the images, even less in the present case in which we are not facing the commission of a crime or administrative infraction, which would justify the "making available of the images to the competent authority within a maximum period of seventy-two hours from the date of had knowledge of the existence of the recording", which is what really establishes article 22.3 of the LOPDGDD, and not an obligation of conservation, nor even partial.

In conclusion, there has been no breach of any provision that establishes a obligation to preserve the images, since art 22.3 LOPDGDD does not establishes said obligation, but only establishes the obligation to communicate certain recordings to the authorities, and punishing them for it would mean a violation of the Principle of Typicity and the prohibition of analogy.

A different matter is that, due to not having received or correctly processed the right of access request, possible damage has been caused to the claimant, which have already been repaired through the agreement reached with the claimant as explained above, but in no way can be linked to the fact that the claimant makes a complaint to the establishment for some facts for the purposes of claiming damages for civil liability (remember, without properly exercise a right of access to the images in said complaint and that did not refer to the exercise of the right of access exercised previously) with a legal obligation to conserve the images that in addition the art 22.3 does not establish, since that said precept is limited to establishing the obligation to make available to the

competent authority within a maximum period of seventy-two hours those images

that serve to "prove the commission of acts that threaten the integrity of

persons, property or facilities" and not of any event that does not involve the

recording of a crime or administrative infraction.

Therefore, it is clear that article 22.3 does not establish an obligation to preserve

images that the entity has not respected. To accept the opposite would suppose the

obligation of data controllers to review all recordings

daily to preserve any recording in which a person could

having fallen, passed out, etc. in addition to notifying the competent authorities

said events that would not fall within its competence as is the present case,

and sanction for it, would suppose a violation of the Principle of Typicity and prohibition

of analogy.

With your arguments, you provide the following documentation:

. Specification agreement addressed to the Systems Department to carry out a

new development in the corporate website that implies the automation of the

Sending any exercise of rights to the Data Protection Delegate.

In order to facilitate the exercise of rights, this document contemplates including

a "FAQ" to explain how to exercise the right and with a link to a form,

"that completing it will arrive" to the legal team to manage the request.

. "Certification" from the Department of Human Resources in relation to the taxation

of internal disciplinary action. It is said that the investigation carried out detected that

an employee of the Civil Responsibility Area in charge of managing the

The claim that is the object of these proceedings “had incurred in the lack of

diligence in their duties and that have caused the lack of attention to the right of

access in terms of video surveillance", for which "the measures

internal disciplinary actions for negligently failing to execute the methods

established by the company, having been duly trained to

they".

. Communication from the DPD of the entity claimed addressed to the "processing managers"

Customer Service Department”, sent by email from

08/02/2021. It lists the ways to exercise rights and reports the following:

“How do you know if the interested party uses the web form to exercise a right, through

In an automated procedure, the system assigns the request to a manager and sends it to his

binder.

IMPORTANT: Those requests for the exercise of rights regarding the protection of

data, as you know and have been doing to date, must be sent immediately

to the Data Protection Delegate ***EMAIL.1, so that they can proceed to respond in

time and form to the Boss (client) who requests it. Currently it is a process that is carried out

manually, for which the Department of Informatics has been requested to study and

assessment of the automation project in order to avoid any human error in

management”.

. Documentation on a training aimed at the "Line 900 Area", carried out in May

of 2021, which includes a section dedicated to the protection of personal data.

SEVENTH: On 07/29/2021, this Agency entered a document submitted

by the representative of the claimant, in relation to the opening of the proceeding

sanctioning, through which it communicates "that an agreement has been reached with Mercadona, through which the damages and damages suffered by my client, both material and immaterial in the field of civil liability, as well as in terms of data protection for the non-attention of the right of access, reason for the filed claim". Based on this, finish noting that the damages have been compensated and the right of the claimant and requests "my claim be considered attended and, therefore, the file of the proceedings".

EIGHTH: On 03/02/2022, a resolution proposal was formulated in the sense Next:

1. That the MERCADONA entity be sanctioned for an infraction of article 12, in relation to article 15, both of the RGPD, typified in article 83.5.b) and classified as minor for prescription purposes in article 74.c) of the LOPDGDD, with a fine of 70,000 euros (seventy thousand euros).

2. That the MERCADONA entity be sanctioned for an infraction of Article 6 of the RGPD, typified in article 83.5.a) and classified as very serious for the purposes of prescription in article 72.1.b) of the LOPDGDD, with a fine of 100,000 euros (one hundred thousand euros).

3. That the MERCADONA entity be imposed, within the period determined, the adoption of the necessary measures to adapt its actions to the regulations of protection of personal data, with the scope expressed in the Foundation of Right IX of the proposed resolution.

NINTH: On 03/16/2022, a letter is received from the entity claimed in which

formulates allegations to the resolution proposal, requesting again the file

of the procedure and that the following requests be taken into account.

indicate. He bases his request on the following considerations:

1. Reiterates the same previous allegations about the admissibility of following a

procedure for lack of attention to a request for the exercise of rights, which is the

which, in his opinion, corresponds by legal imperative, instead of a procedure

sanctioning; and points out that it has a duration of six months from the

admission for processing on 04/16/2021, which passed without any pronouncement.

He understands that the responsibilities must also be cleared within the framework of this

procedure regulated in article 64.1 of the LOPDGDD; and that should be followed

itself even if it is not possible to attend to the right, as in this case when

having eliminated the data, as resolved by the Agency in precedents that qualifies

as similar, in which the AEPD has formally estimated the claim of the

interested party within the rights protection procedure, urging the claimed party to

respond but without appreciating "lack" of object and without clarifying responsibilities

(TD/00955/2018, TD/00830/2017 and TD/01272/2017). He adds that this is how he understands it.

European Committee for Data Protection (CEPD) in its Guidelines 3/2019, on the

processing of personal data through video devices:

“Example: If the data controller automatically deletes all images by

example within two days, you cannot provide the images to the interested party after

those two days. If the person in charge receives a request after those two days, it must be

inform the interested party accordingly.

It also cites the actions followed by the AEPD with number E/02434/2020, which

refers to a request from the State Security Forces and Bodies of

decisive images for the clarification of the alleged commission of a crime

or administrative infraction, which the Agency filed concluding that there was no

obligation on the part of the establishment to block the images and did not sanction for

it.

In addition, MERCADONA considers that there has been no breach of other

provisions other than article 12, paragraphs 2 and 3, in conjunction with article 15

RGPD, which justify the opening of a sanctioning procedure and argues that

the alleged imputed infraction is typified as "Not responding to requests for

exercise of the rights established in articles 15 to 22 of the Regulation".

Finally, it states that the same conduct is being sanctioned with two sanctions;

and that the guarantees and rights of the interested party have been restored due to the possible

damages derived from the facts, as established in article 82.1 of the RGPD.

2. MERCADONA insists on the allegations already made about the character

exceptional sanctioning procedure; the actions carried out to

restore the guarantees and rights of the interested party and repair the damages, which are not

they achieve with the imposition of a sanction; as well as in the lack of motivation, in the

present case, of the opening agreement, unlike other cases in which

justified in a general action of the person in charge that would affect all the people

that they were in the same situation, and not a one-off error (PS/00003/2021), which neither

It does not even specify the paragraphs of articles 12 and 6 of the RGPD infringed.

As in the previous section, this section 2 also discusses MERCADONA

the appropriateness of resolving the issues raised through a procedure

sanctioning party, arguing to the contrary the volume of requests for rights that

processed in recent years; that has not been sanctioned previously for this

cause and there is no record of any claim before the DPD; and measures have been taken

necessary to prevent similar errors, having fully automated the

request management process, which have been valued as mitigating factors together with

with the fact that in this case the anomaly only affects the claimant.

It understands that it is not enough to support the opening of the procedure

sanctioning with indicating that by deleting the images another infraction has occurred

other than the violation of articles 15 to 22 of the RGPD, or that the procedure

for the non-attention of a right "lacked object" since the images do not

they existed.

On the other hand, it mentions the possibility of resorting to other corrective powers

established in article 58.2 of the RGPD (warning, reprimand or others), in

depending on the circumstances of each individual case.

It was only in the motion for a resolution, when it was argued for the first time

time by the AEPD what specific paragraphs of articles 12 and 6 of the RGPD are

allegedly considered violated. And, with regard to the alleged infringement

of article 6 and its relationship with article 22 of the LOPDGDD, is also in the

motion for a resolution when, despite acknowledging the non-application of article 22

LOPDGDD, the AEPD explains the legal reasoning and ratifies the proposal of

sanction.

3. Reiterates that the claimant's request for access was not processed because

did not come to the attention of the DPD due to human error, already explained, in his opinion, in their arguments at the opening of the procedure.

Again invokes the principle of culpability and the prohibition of liability objective in the sanctioning administrative law, which are considered in various resolutions of the Agency itself such as those indicated in its brief of allegations above and in Judgments of the National High Court (such as those issued on 03/16/2004 and 03/02/2005, referring to an error in the movements of a bank account or a error in sending correspondence to a person's address, when there is no voluntariness and there is no evidence of lack of care).

In such cases, the AEPD has assessed the specific circumstances, taking into account that the mere commission of an administrative infraction -objective type- is not enough to when proceeding to impose an administrative sanction (PS/00724/2014); that no system is indefectible or immune to the existence of possible errors, therefore, Once they have been produced, their importance and scope must be analyzed in order to avoid an objective responsibility of the subject of the obligation of custody of the same (E/01795/2011); whether or not there is voluntariness in the act, if there has been a particularly harmful result or evidence of lack of care in the action widespread (E/03468/2009); or proportionality (SAN of 03/16/2004 and 03/02/2005).

As for the statements contained on this issue in the proposal for resolution, MERCADONA indicates that the Agency does not substantiate what the lack of diligence. The only argument is that "it cannot be admitted that the actions of the claimed entity, not giving effect to the request for access to personal data, has been diligent", which would have as a corollary the strict liability derived of any mistake, oversight, forgetfulness etc. of the worker who should redirect the request to the DPD, without considering the specific circumstances of the case and the fact recognized by the

Authority itself that the “adequate” procedures were in place to

manage this type of request and that there had been no errors in the

past that motivated the change of procedure by the person in charge, based on

at your diligence.

As an example of the existence in this case of generalized due diligence, the

The AEPD itself values as a mitigating circumstance the implementation of procedures

adequate action in the management of requests for the exercise of rights, of

so that the infringement is the consequence of an anomaly in the functioning of

said procedures that only affects the claimed party. Being so, understand

MERCADONA that it is not possible to see intentionality in the error, and adds that it is not

has produced a harmful result, since the entity has proceeded to avoid the possible

damages that could have been derived.

Finally, regarding the importance and scope of the error, the entity has highlighted

manifest that to date there had been no error in the management of the

requests for rights of the interested parties, neither technical nor human, despite

of the high number of requests received, nor has it been sanctioned previously

by the AEPD in terms of the rights of the interested parties and at the internal level, there is no

To date, no claim has been filed with the DPD, or a claim sheet, regarding

non-response or non-receipt of requests from interested parties.

Despite being a "functioning anomaly", as defined by the

AEPD, the entity has modified the management procedure by eliminating the only step

not automated. Thus, it has implemented a development, through a system of rules of

mail flow on the Exchange Server (also known as transport rules).

These rules contain a set of conditions and actions, with which

guarantee the notification to the recipients of Customer Service (L900) and Delegate

Data Protection, automatically, of those requests for the exercise of

rights that are made through the web page form (automatic forwarding

of a copy of the original message to the mailbox ***EMAIL.1).

Regarding its scope, it is evidenced by the AEPD that it only affects the

claimed, which is taken into account as a mitigating sanction. In this point,

It must be taken into account that there has been no harmful result in what happened,

since no damages have been derived from extrajudicial satisfaction of the

claim for compensation based on facts whose accreditation they sought

serve the images requested by the claimant.

In addition, it has shown the diligence and duty of care that are required of it, through

of the implementation of training and preventive control measures, as

It shows the lack of errors in the past.

It also points out that it has not supported the failure to pay attention to the law in the suppression of the

images, but on the indicated human error. The passing of the term was only

consequence of not having received the request to the DPD. Proof of this is that it occurred

response to the claimant on date ***DATE.9, before the request of the AEPD.

Regarding the term of conservation of the images, in the rest of European countries,

or there are no retention periods, or they are less than 30 days, so the situation

proposed by the AEPD is even more evident and possible to materialize if the

The interested party does not exercise his right of access before the deletion of

the images. Thus, the European Committee for Data Protection, CEPD, in the

Guidelines 3/2019, in relation to storage periods and obligation to

deleted, states that:

“Personal data may not be kept for longer than is necessary for the

purpose for which they are processed [article 5, section 1, letters c) and e) of the RGPD]. In some

Member States, there may be specific provisions for retention periods

regarding video surveillance pursuant to Article 6(2) GDPR.

Whether or not it is necessary to retain personal data should be checked in a short

space of time. In general, the legitimate purposes of video surveillance are normally the

protection of property or preservation of evidence. Usually the damage caused

can recognize a one or two days. To facilitate the demonstration of compliance with the

data protection framework, it is in the interest of the data controller to enter into agreements

organizational arrangements in advance (e.g. appoint, if necessary, a representative to

examine and secure the video material). Bearing in mind the principles of article 5,

section 1, letters c) and e) of the RGPD, specifically the minimization of data and the limitation of the

retention period, personal data must be deleted in most cases (eg.

g., to detect vandalism), preferably automatically, after

few days. The longer the retention period lasts (especially when it exceeds

72 hours), more arguments must be provided for the legitimacy of the purpose and the

conservation need”.

Even the CEPD gives the following example regarding a store:

“Example: The owner of a small store would normally notice any

sign of vandalism the same day. Consequently, a normal period of

24 hour storage. The weekends that it is closed or the holidays more

Prolonged storage may however be grounds for a longer shelf life. Whether

If damage is detected, it may also be necessary to preserve the video images for a period of time.

longer period for the purpose of filing lawsuits against the offender.

4. The AEPD understands two different and independent conducts, when in fact

one is a consequence of the other, because if the images were erased it was because

precisely there was no record of the access request due to the error

happened. And concludes that the concurrent circumstances prevail over the

obligation to eliminate the images within a maximum period of one month from when they were

captured, violating the provisions of article 6 of the RGPD.

In this regard, it states, first, that when the complainant inquired about her

request was answered, as it was the first time it came to our attention, and already

the maximum retention period of 30 days had elapsed, as in the cases

similar to those mentioned above.

On the other hand, MERCADONA alleges that the deletion of the data when they have left

if necessary, it does not need a legitimate basis. The deletion occurs

precisely because there is no longer any basis for legitimacy to continue conserving those

data because the maximum legal period of one month has elapsed, requiring a

basis of legitimacy for its subsequent conservation, not for its deletion as indicated

the AEPD. In other words, it is the "expiration" of the legal term of conservation, the

own compliance with the applicable standard, which entails the suppression of

images, without the need to go to any legal basis to carry out said

suppression. If the argument of the AEPD is admitted, it should exist in every Registry of

Treatment Activities (including that of the AEPD itself), a treatment

called "suppression of images" with its corresponding basis of legitimation, which

which doesn't make any sense.

Thirdly, it highlights that we are facing a maximum conservation period, such as the

The AEPD itself indicates in its "practical video surveillance files" ("after which the

will proceed to erasure"), in the proposed resolution and in multiple resolutions.

Such as the one issued in procedure PS/00261/2020, in which the following is stated:

"On the obligation to preserve images for a period not exceeding 30 days, the

(RGPD), in its recital 39, announces the need to "guarantee that it is limited to a minimum

strict" the term of conservation of personal data, which in turn must be

"adequate, relevant and limited to what is necessary for the purposes for which they are processed". The

article 22.3 of the specific LOPDGDD – in terms of processing for the purpose of

video surveillance – that "the data will be deleted within a maximum period of one month from its

catchment".

The exception is given for the recording of a crime or administrative infraction that

must be brought to the attention of the authorities ex article 22.3 LOPDGDD, without

that we can include other assumptions within said exception to the general rule,

because the LOPDGDD itself does not include them.

Let us remember that any exception must be interpreted restrictively and hold what

Otherwise, it would violate both the principle of typicity and the prohibition of analogy, since

that a sanction cannot be imposed for an act that does not fit the literal meaning of the

type of infraction, even if it had some kind of similarity or proximity to it

conceptual.

In the Agreement to initiate the sanctioning procedure, the AEPD stated that

considered that the facts exposed could fail to comply with the provisions of article 6

of the Regulation, in relation to article 22 of the LOPDGDD; and in the proposal

acknowledges that it is not applicable to the present case.

Therefore, it is not understood what is the assumption analyzed in these proceedings and

why said entity is considered responsible for an alleged infringement of art 6

of RGPD with respect to it (attached extract from the Activity Log of the

Treatment corresponding to the Video surveillance treatment).

The AEPD understands that "there are other circumstances that must be considered

in the analysis of the legality or illegality of that deletion or deletion of data

personal", directly linked to the particular situation of the claimant, but

in no way can it be maintained that, due to those particular circumstances, that

the entity does not have to know, MERCADONA had a conservation duty. Y

This entity warns that for the exercise of rights, justification or

any motivation on the part of the interested party and that the entity must not carry out any

assessment regarding whether there may be a legitimate interest of the interested party that may

justify the conservation of the images beyond the legal term. In the case of having

received the request, the entity would have delivered a copy of the images to the

interested, but not because the basis of legitimation had changed, but because the

The interested party has the right to request the images through the right of access with

regardless of their motivation. In other words, MERCADONA did not have to do

no weighting or evaluation as far as legitimacy is concerned.

Reproduces again what is indicated on the periods of conservation and suppression of

images in CEPD Guidelines 3/2019, transcribed above, adding the

next paragraph:

"If the data controller uses video surveillance not only to control their

facilities but also to retain data, you must ensure that retention is

actually necessary to achieve the goal. If so, the retention period should

be clearly defined and set individually for each particular purpose. It is the responsibility of

data controller define the retention period in accordance with the

principles of necessity and proportionality and prove compliance with the provisions of the

GDPR".

On the other hand, if you need a legal basis to proceed with the deletion of the

data, at no time does the AEPD specify what it is or what it should be, of the

listed in article 6 RGPD.

According to the respondent, the proposed resolution confuses the concepts of "base of

legitimation" with the "reasons" or reasons that justified the conservation of the

images. That the claimant had an interest in the images, and the right to obtain them,

is out of the question, but the AEPD seems to ignore that, if in the present case

the images were not preserved, it was not because it had been valued that the claimant

was not entitled to them or because it was considered that in any case he should

the retention period of one month apply, but simply because there was a

punctual error in the management of your request that prevented your response in time and

form. The interest that the interested party may have in the images cannot be confused,

with the term of conservation of the images determined by the person in charge or with the

concept of legal basis. If an interested party exercises the right of access

During the period in which the person in charge keeps the images, it must be attended to, and

The images must be kept, even if there was a formal defect in the request,

precisely so that when this is corrected, satisfy the right. But in this

In this case, the request was not brought to the attention of the person in charge, so they could not

keep.

Nor is the right of the entity to keep the images if it deems it so

opportune, for example, because it was sued by the claimant, in the example that

puts the AEPD itself, but this shows the confusion of the AEPD regarding

to the need for a legal basis to preserve the images beyond the

established legal term, with the supposed need for a basis of legitimacy to

delete these images.

In fact, in the aforementioned Guidelines 3/2019, in relation to the right of access in

Regarding video surveillance, it is stated that:

“The interested party has the right to obtain confirmation from the data controller regarding

to whether or not your personal data is subject to treatment… If, however, the data is still

processing at the time of the request (that is, if the data is kept or processed

continuously in any other way), the data subject must obtain access and information from

in accordance with article 15”.

“Example: If the data controller automatically deletes all images by

example within two days, you cannot provide the images to the interested party after

those two days. If the person in charge receives a request after those two days, it must be

inform the interested party accordingly.

In the present case we are not facing a conflict of rights that must weigh the

responsible, but simply before a request for the right of access that was not

attended because the person in charge was not aware of the request of the interested party

due to an isolated and punctual error in the procedure.

If MERCADONA suppressed the images, it was because it was not aware of the

request for access by the interested party, not because she negatively assessed her request and

not grant such access.

The AEPD has considered that there is a prevalence of the right to judicial protection
effectiveness of judges and courts. But it is not necessary to argue that
The images must have been kept for a period of more than 30 days. Yes
had the request been received, the interested party would have had a response in time and
form, without the need to keep the images longer than the established
nor seek any additional legal basis.

Since the DPD did not receive the original request, it was deleted in
compliance with established procedures. In other words, MERCADONA never
found and never would have been found (had the error not occurred
happened) in the dilemma of whether or not to keep the data beyond the term
legal, so no consideration can be required before a
alleged conflict of rights that has not existed and will not exist. For the case that the
request had been processed satisfactorily, the images would have been delivered
without further evaluation.

But it is that, in addition, if we accept that the person in charge must analyze and assess the
causes for which the interested party requests the data, we are arrogating the person in charge
of powers that the law does not grant.

In addition, when affirming the AEPD that "there is a legal authorization for the treatment of
the data of the images once the period established for its deletion has passed,
that brings its coverage of article 24 of the Constitution and its rules of

development" seems to introduce, for those cases in which a

right in terms of data protection, an obligation to supervise all

images by those responsible for treatment, daily, to assess whether it is

necessary to preserve any recording in which a person could have

fallen, fainted etc. and needed them to exercise their right to judicial protection

effective, even in the absence of a request from the interested party. East

reasoning cannot be shared or legally supported, since it implies demanding

obligations to data controllers that are not in the law and that go beyond

beyond the purposes of a video surveillance system installed to guarantee the

preserve the safety of people and property, as well as its facilities.

A different matter is that the interested party can request the images through the

right of access and use them as you see fit (for example, contribute them to a

judicial procedure), but in no way can an obligation

general conservation for the person in charge, contradicting the maximum legal term of

conservation of the images, to safeguard a possible right of access to the

effective judicial protection of a person who has not exercised a right of access in

Data Protection.

It is clear that these purposes go beyond the purpose of the

video surveillance to preserve the safety of people and property, as well as their

facilities (Art 22.1 LOPDGDD).

However, the entity has proceeded to repair the possible damages

that the error that occurred and, therefore, the non-availability of the images could have

cause the claimant.

For all the reasons stated, at no time has a treatment been carried out

of data without the concurrence of a legal basis.

Nor has there been a breach of any provision that establishes an obligation to

conservation of the images, since article 22.3 LOPDGDD does not establish said

obligation, so punishing for it would be a violation of the principle of

typicity and the prohibition of analogy.

5. Invokes the principles of legal certainty, which requires that the ius puniendi of the

State submits to the principle of Legality - Lex previa- and to the principle of Typicity-

Lex certa-.

Based on this, it expressly opposes the consideration of the facts imputed

as constituting the factual assumption of article 6 of the RGPD and article 72.1.b) of

the LOPDGDD, because, precisely, having kept them beyond the legal term

of conservation would have supposed a treatment without base of legitimacy.

The infraction consisting of suppressing images without a basis of legitimacy does not

exists, it is not typified in the regulations, since all the bases of legality

detailed in article 6 suppose a treatment of data in positive, active, (treat

data for a specific purpose, to execute a contract, to comply with a legal obligation,

etc.), non-negative (delete).

6. Regarding the graduation of sanctions, it states the following:

a) In relation to the infraction for non-compliance with the provisions of article 12, in

In relation to article 15, both of the RGPD, the complainant considers that the

The following circumstances should be considered as mitigating and not aggravating:

. There is only one person affected, the duration of the infraction does not last over time and

existed on a general or structural basis, it is not a serious infringement and the

damages that the interested party could have suffered have been repaired by placing the

claimant in the same situation in which he would find himself if he had used the

images to present demand.

. It is not possible to appreciate intentionality or negligence in the infringement, since the

infraction has been “a consequence of an anomaly in the functioning of the

procedures” that, according to the AEPD, the entity has implemented and are adequate; the

claimed has not been sanctioned previously for not paying attention to a right and

there are not even claims at the level of DPD or claim forms, which

evidence that no errors had occurred to date, thanks to the training

imparted to its staff (provides documentation on training actions

imparted); and preventive measures have been implemented such as controls

newspapers and the automation of the process.

. The respondent has collaborated with the Agency and has not waited for the formal request

to modify your procedure.

. The affected data categories are data related to images, not constituting

special categories of data, since they are only processed for the purpose of

ensure the safety of people, goods and facilities.

This is how the CEPD understands it in its Guidelines 3/2019:

“Video surveillance systems typically collect massive amounts of data

data that can reveal data of a very personal nature and even categories

data specials. Indeed, the apparently insignificant data collected in a

principle through the video can be used to infer other information aimed at achieving a different purpose (eg, to track a person's habits). Nevertheless, video surveillance is not always considered as a treatment of special categories of personal information".

The category called “particularly sensitive in nature” does not exist. A “ordinary” video surveillance system does not allow the prompt identification of the interested parties, basically because there is no other data that could allow such identification, nor does it use the data for purposes other than preserve the safety of people, goods and facilities.

On the other hand, in relation to the aggravating circumstances considered, it states that the data processing that it performs are the minimum essential to develop its main activity, which is the sale of food products, not being possible discriminate the capture of images of clients. Regarding the professionalism In relation to the processing of the data, it warns again that to date it has not been sanctioned for a lack of attention to the rights of the interested parties, nor has raised any internal complaint.

b) On the aggravating circumstances considered to determine the sanction for the non-compliance with the provisions of article 6 of the RGPD, MERCADONA reiterates the expressed in relation to the previous infringement and adds, in relation to the seriousness of the infraction and intentionality or negligence, that the complaint cannot be linked from the claimant to the establishment for the purpose of claiming damages for liability civil with a legal obligation to conserve the images that in addition the art 22.3 does not establishes. MERCADONA is not obliged to save the images of each event occurred, without the person requesting the images, only for the eventuality of who could request them. It cannot be affirmed that “MERCADONA abolished the images despite knowing that the claimant reported to said entity the

accident and the damages suffered, and requested, for this reason, access to said images”

because the entity was not aware of the access request made.

On the other hand, it invokes the principle of proportionality and requests, alternatively, that

a sanction of warning or reprimand is imposed, or, in any case, that a

reconsider the proposed amount, as it is not proportionate; finally pointing

that the same behavior and facts are being punished (not attending an exercise of

law) through two different sanctions, which result in a total amount

disproportionate if we consider that the error has been an "anomaly in the

operation of said procedures” that has affected a single person.

7. MERCADONA considers that the reduction due to acknowledgment of liability

provided for in article 85 of Law 39/2015, which the Agency limits to the period granted

to formulate allegations at the opening of the procedure, can be applied in

any time prior to resolution.

According to MERCADONA, it should be considered that the aforementioned article regulates the termination

of the procedure voluntarily and unilaterally by the "block" administrator,

determining the options, conditions and their consequences; and said precept admits

that the second form of voluntary termination of the procedure, the voluntary payment,

can be done at “any time before resolution”.

He understands that the proposed resolution is the "natural" moment for the assumption of

responsibility for the administered without violation or affectation of their right

defense, contradiction and effective judicial protection. It is this proposal that

determines the proven facts, their framing in the offending type and the sanction,

after the interested party asserts his allegations and evidence, without being subject to

start agreement.

Such conclusion is supported by the recent STS 232/2021, of February 18, (appeal

of cassation 2201/2020) that addresses the possibility of challenging before the Courts

sanctions relapsed in administrative files in which the company has

recognized their responsibility and, in order to benefit from the reductions that

points out the art. 85 LPAC, desists or waives the exercise of any action or resource in

administrative route against the sanction.

In the Third Legal Basis it establishes:

"Now, one thing is that in such cases there remains the possibility of challenging

contentious-administrative jurisdictional decision sanctioning, and a different one that...

increase the difficulty to challenge successfully in the contentious-administrative court the

sanctioning resolution, because this will be the natural consequence of having recognized its

responsibility in application of the principles of good faith and link to the acts themselves

(...) for said challenge to be successful, it will have to provide the judge with a

solid explanation that fully justifies the reason why, having assumed

Firstly, its responsibility for the infraction committed -which entails the recognition of

the concurrence of the objective and subjective elements of the infringement, that is, its

participation in the typified facts and his guilt- later in court he maintains the

inexistence of the infraction (…)".

In MERCADONA's opinion, it follows from said pronouncement that the

acknowledgment of responsibility does not imply that the typification of the facts is the

correct; that it be in consideration of the modifying circumstances of the

recognized responsibility, the exact scope of the participation, whether negligent, intentional or

by way of mere slight non-observance, the seriousness of the facts and their concrete

graduation, which may be settled before the contentious-administrative jurisdiction without increased difficulty in contesting them.

Hold that liability can only be recognized during the term for formulating allegations would imply, de facto, that the administered assume it for benefit from the discount, even if they are satisfied with the initial agreement only partially, transferring the dispute over the aspects in question to the courts.

On the contrary, admitting that acknowledgment at any time prior to the resolution, when the instruction has already finished and the elements have been fixed taken into consideration, eliminates litigation without undermining judicial protection effectiveness and the right of defence.

In addition, the respondent understands that there is no legal basis whatsoever that allows affirm that the term is that of allegations to the initial agreement, because nothing says the legal text and because there are different "milestones" prior to the resolution, namely, allegations to the initial agreement, hearing procedure, and proposed resolution, can be any of them.

This interpretation is endorsed by the public administrations themselves in different sanctioning procedures, such as the Catalan Agency for the Protection of Data (PS8/2019 procedure). It also cites the report SSPI00043/17, of the Cabinet Juridical of the Junta de Andalucía, in relation to Report HPPI00035/17, of 5 July 2017, from the Legal Department of the Ministry of Finance and Administration Public that admits this possibility:

“(…) this interpretation allows us to consider that in that case we will not be in a vice disabling since no harm exists for the Administration, which must continue to instruct the procedure without being able to have the possibility that it ends early.

Likewise, it will always be more beneficial for the company to be able to take advantage of this possibility, than having no option for it. Also because, as we have commented, it seems that the wording at least leaves doubts when it establishes in art. 85.2 that can be done “in any time prior to resolution. For all this, it really seems that the tenor of the art. 85 what is required is that the percentage of reduction be determined in the Initial Agreement, more than the amount, for this reason the Start-up Agreement must always establish the percentage and in the assumptions in which it is possible, the amount, given that the latter will not always be possible”.

Also by the Courts. The Judgment of the Superior Court of Justice of Madrid, Contentious-administrative Chamber, no. 79/2020, of February 6, in which denounces the non-application of art. 85.1 LPACAP, declares:

“Finally, it should be remembered that art. 85 of Law 39/2015, provides that "initiated a sanctioning procedure, if the offender acknowledges his responsibility, the procedure with the imposition of the appropriate sanction”. Establishing, its section 3 that,

“When the sanction is solely pecuniary in nature, the competent body to resolve the procedure will apply reductions of at least 20% on the amount of the sanction proposal".

The plaintiff considers that, despite having recognized in the pleadings brief formulated with the resolution proposal the responsibility of the same in the lack of declaration of the intervened money, and even proposed a penalty of €100,000 the resolution sanctioning circumstance ignores such circumstance and imposes a fine totally disproportionate

Faced with this allegation, the State Attorney defends that the circumstances necessary for its application to proceed, since in the pleadings brief dated 13

November 2017, no express reference is made to acknowledgment of responsibility, which

must be prior to the resolution of the file once the proposal is received (...)".

Especially illuminating is the Judgment of the National High Court no.

625/2017, dated 03/22/2019, which establishes;

"The sanctioning resolution of December 21, 2018 did not take into account that through

two separate writings of December 4 – (arguments to the agreement to initiate the file

sanctioning)- and December 11, 2018 – (allegations to the Resolution Proposal)- the

The plaintiff acknowledged responsibility for the facts, requested payment charged to the amount

seized, and twice waived the filing of administrative appeals. These

written evidence of a clear will to put an end to the procedure, under the terms of art.

85.1 of Law 39/2015, and to waive the administrative appeal, proceeding to the payment, with

guarantee charge. Hence, once all the conditions required in paragraph

second and in the third of article 85, it was appropriate to accumulate two reductions of 20%".

MERCADONA adds that other regulations governing procedures

administrative sanctions establish the possibility of recognizing the

liability at any time prior to resolution, citing the following:

. Law 16/1987, of July 30, on Land Transport Planning (LOTT), which in

its article 146.3 establishes:

"The payment of the pecuniary sanction prior to the sanctioning resolution being issued

will imply agreement with the facts denounced and the waiver of making allegations for

part of the interested party and the termination of the procedure, however, it must be issued

express resolution.

. Law 13/2017, of November 8, on the Taxi of the Valencian Community, which in its

article 38.4 establishes;

“Once the sanctioning procedure has been initiated, if the offender acknowledges his or her responsibility

prior to the resolution being issued, the amount of the financial penalty initially

proposal will be reduced by fifty percent.

. Law 7/2014, of July 23, on the Protection of consumers and users

de les Illes Balears, which in its article 84 graduates the discount percentage in

function of the procedural moment in which the recognition of

responsibility. And so:

"1. A reduction of fifty percent of the amount of the sanction will be applied

corresponding to serious or minor infractions if the presumed responsible lends his

accordance with the content of the initial resolution and justifies the payment of the aforementioned amount

during the fifteen days following its notification. In this case, it is understood that the person

The interested party waives the possibility of making allegations and presenting any type of further appeal.

2. A reduction of twenty percent of the amount of the sanction corresponding to

serious or minor infractions if the presumed responsible agrees with the

content of the Resolution Proposal and justifies the payment of said amount during the

fifteen days after notification. In this case, it is understood that the person concerned

renounces to formulate allegations and to present any type of subsequent appeal”.

. Municipal Consumption Ordinance of the Madrid City Council, ANM 2011/17, which

in its article 59.1 it establishes:

"1. A disciplinary proceeding has been initiated, if the offender explicitly acknowledges his

responsibility before the resolution, the file may be resolved without further formalities with the

imposition of the appropriate sanction. In this case, a reduction of 30% will be applied

on the total amount of the fine, which must be paid by the interested party in the voluntary period of

payment".

Finally, the interpretation of art. 85 LPACAP exposed, we find it in the

Article 3 of the recent Royal Decree 137/2021, of March 2, 2021, which raises it to

normative range by establishing:

“In accordance with the provisions of art. 85.3 of Law 39/2015, of October 1, in the

sanctioning procedures contemplated in art. 2 yes, started a procedure

sanctioning party, at any time prior to the resolution, the presumed responsible recognizes

their responsibility, the procedure may be resolved with the imposition of the sanction that

appropriate, and when the sanction is solely pecuniary in nature, the competent body

to resolve and notify the resolution of the procedure will apply reductions of up to 30%

on the amount of the proposed penalty.

Therefore, if the AEPD maintains a sanction or economic sanctions, if

proceeds to voluntary payment and acknowledgment of responsibility in any

moment before the resolution that implies the termination of the procedure

sanctioning party, the 40% discount must be made.

Of the actions carried out in this procedure and the documentation

in the file, the following have been accredited:

PROVEN FACTS

1. The MERCADONA entity has stated that it reports on the procedure that

follows for the interested parties to exercise their rights regarding the protection of

personal data through different channels, such as the posters displayed in the

stores warning that they are in a “Video Surveillance Zone” (indicated below).

contact address of the DPD of the entity); by free call to the Service

Customer Service, which sends an SMS informed about this procedure; and from the

Privacy Policy available on the web, which includes a link that directs

to the form enabled for said exercise of rights. According to the information

provided, the Privacy Policy informs the following:

“You can send us a letter to MERCADONA, S.A. (Process Legal Advice) C/…

or if you have a digital signature issued by the National Currency and Stamp Factory, to

through the customer service form (“https://infor.mercadona.es/es/atencion-al-

client#highlightsForm”)”.

Once the form is completed and sent, the text automatically appears

"Thank you, your comment has been sent successfully."

MERCADONA also reports that the interested party, in turn, receives an email to the

email address provided, indicating: “MERCADONA. Your opinion helps us

further improve. Dear... (name of recipient). thank you for contacting with

us at our Customer Service. Inform you that we have received your

mail. We invite you to consult our frequently asked questions in case you have more

Doubts").

According to the information provided by MERCADONA, the process of processing

The application follows the following phases:

"Yo. The form is registered in the management system (Contact Center). system managed by

processing managers.

ii. Once the form is received, the system assigns the request to the manager, based on certain criteria (typology, workload, productivity…of the manager).

iii. Once the request (form) is assigned, it is sent to the folder of the assigned manager, to which you access through username and password, including all the information and documents sent by the Client, for processing.

He adds that "there are periodic controls carried out by the coordinators, with the purpose of avoiding incidents" and that "the system (Contact Center) leaves traces and evidence of all the movements that pass through the system, not allowing the accidental or voluntary deletion of system entries.

2. On date ***DATE.1, the claimant suffered an accident at the establishment of the entity located at ***ADDRESS.1.

3. On ***DATE.3, through the MERCADONA website, the claimant filed complaint before the aforementioned entity for the accident that occurred, receiving a reference for the case. This complaint is made by email addressed to the address "conducta@mercadona.es", with the subject "Denuncia D201…". In this mail contain the data of the claimant regarding name, surnames, address of email and phone. The comment included gives an account of the accident suffered (...), the damage caused by it to the person of the claimant (....) and the lack care of the claim by the insurer of the claimed party (….).

4. On ***DATE.5, the entity claimed responds to the complaint outlined in the previous Proven Fact by the same means, indicating that the complaint has been forwarded to MERCADONA's Customer Service, to which you should address the future communications (a contact telephone number with this department and a link to the entity's website).

5. On date ***DATE.2, the claimant exercised the right of access to the images

security cameras, using the application form available

on the MERCADONA website, in the "Customer Service" tab, cited in Fact

Tested First. This request contains the name and surname of the claimant,

zip code and email address of the claimant, and the following text in

the field called “How can we help you?” (url: “https://infor.mercadona.es/

en/customer-service#highlightsForm”):

“I am attaching a request for the right of access to the video surveillance recordings of the

MERCADONA ***ADDRESS.1 establishment, due to the accident that occurred

(…)”.

As "Attached files" is indicated "DNI" of the claimant and "Request of right of

access” (in this writing it is indicated that the request is motivated by the accident

occurred on ***DATE.1).

6. In response to the request for the right of access presented by the claimant,

she received a reply message, also dated ***DATE.2, with the text

Next:

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

"Thank you! Your comment has been sent successfully."

7. On ***DATE.7, the claimant's representative sent an email

email to MERCADONA with the following text:

“I am writing to you to establish a first communication, in order to put in your

knowledge of the documentation that I have at the moment, in relation to the incident...

from which my client was injured... Also in order to inform you

our will to request the compensation that according to the corresponding scale".

8. On ***DATE.4, the claimant's representative sent an email

email addressed to the DPD of MERCADONA, with the following text:

"More than a month ago, my client exercised her right of access to the images of

video surveillance, through the channel established in its privacy policy (through the

care form

https://info.mercadona.es/es/atencion-al-

client#featuredForm), and has not yet received a response.

I beg you to send these images as they correspond to (…)".

client:

9. On ***DATE.9, MERCADONA sent an email to the claimant

with the subject "Right of access" and the following text:

"After checking internally, we inform you that we are not aware that any information has been received.

request for access to images, nor of the documentation that according to the protection regulations

of data is necessary to manage any right of access, nor by your client (the

Mrs…) nor on your part.

We must add that we no longer have any of the images of the requested date

(***DATE.1), all in accordance with art. 6 of the Instruction 1/2006, of 8 of

November, of the AEPD, which establishes that "The data will be canceled within the maximum period

one month from the time it was picked up.

Sincerely.

Legal Div. MERCADONA Processes".

10. On 02/09/2021, MERCADONA sent the claimant a burofax in the

same terms of the e-mail outlined in the Ninth Proven Fact.

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, 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 resolve this procedure.

Article 63.2 of the LOPDGDD determines that: "The procedures processed by the Spanish Agency for Data Protection will be governed by the provisions of the RGPD, in this organic law, by the regulatory provisions issued in its development and, in so far as they are not contradicted, on a subsidiary basis, by the rules general administrative procedures.

II

During the investigation of the procedure, the claimant has informed this Agency that has reached an agreement with the claimed entity by which they have been compensated for the damages suffered in the field of civil liability and for the non-attention of the right of access, requesting that your request be considered claim and file this sanctioning procedure.

In this regard, article 63.1 of Law 39/2015, of October 1, on the Procedure Common Administrative Law of Public Administrations (LPACAP) establishes that "the sanctioning procedures will always be initiated ex officio by agreement of the competent body". In the same sense, article 64.2 of the LOPDGDD provides that the procedures whose purpose is to determine the possible existence of an infringement of the provisions of the RGPD "will be initiated by agreement

of start adopted on its own initiative or as a result of a claim".

Thus, the fact that the claimant withdraws her claim does not imply the filing of the

sanctioning procedure initiated, since it is initiated and processed in

all its phases ex officio, being the competence of this Agency to determine if it has been

violated the personal data protection regulations and the scope that must be

be awarded for such non-compliance.

It is irrelevant, for such purposes, the agreement that may have been signed by the

claimant and the entity claimed to repair the damages suffered by

that, as well as the internal disciplinary measures that the respondent claims to have

adopted.

In accordance with the foregoing, the position defended by

MERCADONA in his allegations when he points out that with the aforementioned agreement between the

parties have restored the guarantees and rights of the interested party. The "repair" of

the damages suffered to which MERCADONA refers cannot exonerate it

of the responsibility derived from the breaches of the regulations that have been

produced, whose application, obviously, is not conditioned by the agreements that

can occur between individuals. Only when the data controller

proves that "it is not in any way responsible for the fact that caused the

damages" will be exempt from liability, in accordance with the provisions of the

article 82.3 of the RGPD.

This compensation can compensate for the damages suffered by the claimant,

but it does not restore your guarantees and rights in a case that originates from the exercise

of the right of access, which cannot be met as the data has been deleted

personal to which the request referred.

On the other hand, when the verified facts give rise to some responsibility

attributable, nor the fact that the entity in question has not been

sanctioned previously for infractions of the same nature, or the adoption of

measures aimed at avoiding future breaches, can serve as an argument for the

non-opening of the sanctioning procedure that assesses those responsibilities and

determine the applicable consequences, that is, the corrective powers that proceed

apply in each case.

The same can be said when the alleged infringement affects only one

interested. Carrying out sanctioning actions is not reserved for

cases, such as the one cited by MERCADONA in its allegations, in which the

conduct of the responsible entity is configured as a general action that

affects a plurality of subjects who are in the same situation.

III

The MERCADONA entity considers that the start-up agreement has not motivated

sufficiently opened the procedure nor specified the aspects that justify

said opening, limiting their right of defence.

For the same reasons, it considers that the principle of typicity has been violated. In this regard,

MERCADONA alleges that the agreement to open the procedure does not specify the

infringing conduct, does not specify which paragraphs and letters of articles 6 and 22 are

they understand violated, nor does it explain why the fact of having deleted some images in

compliance with the legally established deadline and not having responded to a

right of access due to human error supposes a breach of the

legal conditions. In his last allegations, he states that the infractions and the

legal reasoning has not materialized until the motion for a resolution.

This Agency does not share the position expressed by the respondent in relation to the

content of the opening agreement of this sanctioning procedure.

In the opinion of this Agency, the start-up agreement issued is in accordance with the provisions of the

Article 68.1 of the LOPDGDD, which establishes the minimum required content, the

elements that must be detailed in the aforementioned agreement to determine its validity.

According to this article, it will suffice for the agreement to initiate the procedure to specify

the facts that motivate the opening, identify the person or entity against which

directs the procedure, the infraction that could have been committed and its possible sanction

(in this case, of the different corrective powers contemplated in article 58.2 of the

RGPD, the Agency considered the imposition of a fine to be appropriate, in addition to the adoption

of measures to adjust their actions to the regulations, without prejudice to what could

result from the instruction of the procedure).

In the same sense, article 64.2 of the LPACAP is expressed, which establishes

expressly the minimum content of initiation agreement. According to this precept,

among other details, it must contain “the facts that motivate the initiation of the

procedure, its possible legal qualification and the sanctions that could

correspond, without prejudice to what results from the investigation”.

In this case, not only are the requirements mentioned amply fulfilled, but

that goes further by offering reasoning that justifies the possible qualification

of the facts valued at the beginning and, even, the circumstances are mentioned

that can influence the determination of the sanction, which undoubtedly results in

benefit of the interested party, who sees his right of defense reinforced and favored.

In relation to the request for the right of access made by the claimant,
outlined the rules that regulate the formal aspects related to the exercise of
rights and it was highlighted that the period established to meet that request had elapsed
without the claimant obtaining the due response from MERCADONA,
concluding that such facts could entail the commission of an offense typified
in article 83.5.b) of the RGPD and article 74.c) of the LOPDGDD, for the violation of
the provisions of article 12, sections 2 and 3, of the RGPD, in relation to article 15
of the aforementioned Regulation, without prejudice to what results from the investigation.

On the other hand, the agreement to open the procedure, after reproducing the
Article 6 of the RGPD, referring to the "legality of the treatment", highlights that the elimination or
“suppression” of the images referred to in the right of access exercised by the
claimant constitutes a processing of personal data.

Regarding the elimination of the images captured by video surveillance systems,
below reproduce sections 1 to 3 of article 22 of the LOPDGDD.

The circumstances and purposes that determined the
action of the complainant and it was highlighted that, despite this, MERCADONA proceeded
to the deletion of the images requested by it, to conclude that these facts
could entail a breach of the provisions of article 6 of the RGPD, in
relation to article 22 of the LOPDGDD, constituting an infraction typified in
Article 83.5.a) of the RGPD and 72.1.b) of the LOPDGDD (“Data processing
without the concurrence of any of the conditions of legality of the treatment
established in article 6 of Regulation (EU) 2016/679”).

In short, this Agency understands that the opening agreement has allowed
MERCADONA know the facts that gave rise to the initiation of the procedure and its

possible legal qualification. Proof of this are the allegations raised by said

entity, which are directly related to the above.

Therefore, it is not possible to estimate the defenselessness alleged. Helplessness with transcendence

legal action occurs only when the interested party is seen, unjustifiably,

unable to impetrate the protection of their rights and legitimate interests or

when the violation of procedural or procedural rules carries with it the

deprivation of the right to defense, with the consequent real and effective damage to the

interests of the affected party by being deprived of their right to plead, prove and, where appropriate,

to replicate the contrary arguments (STC 31/1984, of March 7, STC

48/1984, of April 4, STC 70/1984, of June 11, STC 48/1986, of April 23, STC

155/1988, of July 22, and STC 58/1989, of March 16, among many others).

It is convenient to bring up STC 78/1999, of April 26, which in its

Legal Basis 2, says:

“In order to estimate a defenselessness with constitutional relevance, which places the

concerned regardless of any possibility of claiming and defending their rights in the process, not

a merely formal infringement is sufficient, it being necessary that this formal infringement

derives a material effect of defenselessness, an effective and real impairment of the right of defense

(STC 149/1998, legal basis 3), with the consequent real and effective damage to the

interested parties affected (SSTC 155/1988, legal basis 4th, and 112/1989, legal basis

2nd legal)".

In any case, as MERCADONA rightly points out in its arguments, it is the proposal of

resolution that is issued once the procedure is instructed, which establishes the facts that are
consider proven and its exact legal qualification, determines the infraction that, in
their case, those they constitute, the person or persons responsible and the sanction that is applied.
propose. This proposal must be notified to the interested party, granting
term to formulate allegations and present the documents and information that are
they deem relevant. In no case will resolution be adopted without the interested party
have the opportunity to express themselves on all the extremes considered.
Therefore, the pleadings submitted by MERCADONA do not contain
no argument that modifies that approach and the conclusion drawn.
MERCADONA, in this case, has respected all the guarantees of the interested party
that provides for the procedural regulations
IV
In accordance with the provisions of article 55 of the RGPD, the Spanish Agency for
Data Protection is competent to perform the functions assigned to it
in its article 57, among them, that of enforcing the Regulation and promoting the
awareness of controllers and data processors about the
obligations incumbent on them, as well as dealing with the claims presented by a
concerned and investigate the reason for them.
Correlatively, article 31 of the RGPD establishes the obligation of those responsible
and those in charge of the treatment to cooperate with the control authority that requests it in
the performance of their duties. In the event that they have appointed a
data protection delegate, article 39 of the RGPD attributes to it the function of
cooperate with that authority.
Similarly, the domestic legal system, in article 65.4 of the LOPDGDD, has
foreseen a mechanism prior to the admission to processing of the claims that are
formulated before the Spanish Agency for Data Protection, which consists of giving

transfer of the same to the data protection delegates designated by the

responsible or in charge of the treatment, for the purposes provided in article 37 of

the aforementioned norm, or to these when they have not been designated, so that they proceed to the

analysis of said claims and to respond to them within a month.

In accordance with this regulation, prior to the admission for processing of the

claim that gives rise to this procedure, it was transferred to the

responsible entity to proceed with its analysis, respond to this Agency

within a month and prove that they have provided the claimant with the due response,

in the event of exercising the rights regulated in articles 15 to 22 of the

GDPR.

The result of said transfer was not satisfactory. Consequently, on date

04/16/2021, for the purposes provided in article 64.2 of the LOPDGDD, the Agency

Spanish Data Protection Agency agreed to admit the claim that gives rise to

to this procedure.

In the case of a claim for lack of attention to a request to exercise

The rights established in articles 15 to 22 of the RGPD, in general, are

follows the procedure regulated in article 64.1 of the LOPDGDD, according to which:

"1. When the procedure refers exclusively to the lack of attention to a request for

exercise of the rights established in articles 15 to 22 of Regulation (EU) 2016/679,

will be initiated by agreement of admission to processing, which will be adopted in accordance with the provisions of the

next article.

In this case, the term to resolve the procedure will be six months from the

date on which the claimant was notified of the agreement for admission to processing.

After this period, the interested party may consider their claim upheld."

On the contrary, when the procedure does not refer exclusively to the

attention to a request for the exercise of rights, the purging of

administrative responsibilities in the framework of a sanctioning procedure,

being the exclusive competence of this Agency to assess whether there are responsibilities

administrative that must be purged in a procedure of this nature and, in

consequently, the decision on its opening. This purge of responsibilities,

Contrary to what was indicated by MERCADONA in its allegations, it cannot agree

in a procedure for lack of attention to rights.

This specific regime regarding procedures before the authorities of

Control in terms of data protection is also contemplated in the RGPD. The

Chapter VIII of the RGPD is entitled "Remedies, responsibility and sanctions", and the

The first of the articles of said Chapter VIII, article 77.1, establishes the right to

file a claim with a supervisory authority:

"Notwithstanding any other administrative recourse or judicial action, all interested parties shall have

right to file a claim with a supervisory authority, in particular in the State

member in which he has his habitual residence, place of work or place of the alleged

infringement, if you consider that the processing of personal data that concerns you violates the

this Regulation".

In turn, Article 79 of the same Regulation establishes that "[i]n spite of the

available administrative or extrajudicial remedies, including the right to present

a claim before a supervisory authority under article 77, all

The interested party shall have the right to effective judicial protection when he considers that his

rights under this Regulation have been infringed as a result

of a treatment of your personal data".

Therefore, a "claim" from an individual can give rise to two types of

procedures, one of them related to infractions of the RGPD, in general, and

another for violation of their rights.

This distinction has also been reflected in Title VIII of the LOPDGDD, which regulates

jointly the "procedures in case of possible violation of the regulations of

Data Protection". Thus, its article 63.1, "Legal Regime", includes (a) the

procedures in case of infringement of the RGPD and the LOPDGDD itself and (b) the

derived from a possible violation of the rights of the interested parties. does not foresee the

LOPDGDD no additional type of procedure in case of possible violation of

the data protection regulations, so that all the functions and powers that

the RGPD grants the control authorities in arts. 57 and 58 GDPR must

be exercised through said procedures in case of possible violation of the

data protection regulations. There are no others.

It follows, also taking into account art. 64 LOPDGDD, which

when the procedure is directed exclusively to the lack of attention to a request

of the rights articles 15 to 22 RGPD a claim will be necessary, but that

(art. 64.2 LOPDGDD) "[w]hen the purpose of the procedure is to determine the

the possible existence of a violation of the provisions of the Regulation (EU)

2016/679 and in the present organic law, it will be initiated by means of an initial agreement

adopted on its own initiative or as a result of a claim". That is, both the

RGPD as the LOPDGDD consider that a claim from an affected party can be

the way or means of bringing to the knowledge of the control authority a possible

violation of data protection regulations, but in no case restricts the

action of the control authority to the specific and concrete complaint of those affected.

To do otherwise would be inconsistent with the purpose and will of the Community legislator,

expressly embodied in the RGPD, that the control authorities control and

enforce the RGPD, and with the provisions of the RGPD that they can dispute

I manifest "infractions" of the data protection regulations through

“claims” that may transcend the individual claims themselves

formulated.

In relation to this matter, MERCADONA has argued that in a case referred to

exclusively to the lack of attention to a request to exercise the rights

The procedure regulated in article 64.1 of the Law must be followed by legal imperative.

LOPDGDD, not proceeding the opening of a sanctioning procedure, whose

exceptional nature has been revealed by the AEPD in various

actions that it cites, indicating that “whenever possible, the option should be

prevalence of alternative mechanisms in the event that they have protection in the

regulations in force...” and that there must be elements that justify the start of the

penalty procedure.

In this case, in the opinion of this Agency, as indicated in the opening agreement,

there are elements that justify the start of the sanctioning activity, considering

that with the procedure provided for in article 64.1 of the LOPDGDD cited,

the guarantees and rights of the interested parties would be duly restored. In

In this case, the right exercised had the purpose of accessing images that the

responsible entity deleted before the claim was made, so

The processing of a procedure due to lack of attention of a

exercise of the rights regulated in articles 15 to 22 of the RGPD, whose ultimate purpose is to resolve whether or not to attend to the right exercised, in this case, the delivery or not to the claimant of some images that no longer existed.

In addition, considering the circumstances revealed, it turns out that the MERCADONA's action goes beyond the non-attention in time of the request for access of the respondent, and it was deemed appropriate to analyze in this proceeding the scope, from the point of view of personal data protection, which must granted to data processing consisting of the deletion of images claimed by the claimant, its possible illegality and the responsibility that this fact

may lead to the claimed entity. Extreme this that in any way can be carried out within the framework of the procedure regulated in article 64.1 of the LOPDGDD.

The respondent has also argued that there are similar precedents in which the AEPD has followed the procedure regulated in article 64.1 of the LOPDGDD and that the CEPD itself, in its Guidelines 3/2019, pronounces in the same sense. Without However, both the CEPD statement outlined by MERCADONA and the cited precedents, two of them refer to requests to exercise rights formulated when the images had already been suppressed. in the procedure indicated with the number TD/01272/2017 the request for access is made on the date 04/14/2017 and requires images captured on 11/14/2016 (the claim was dismissed); and file number TD/00955/2018 analyzes a request for

03/20/2018 through which the interested party requests images captured on 11/25/2017 (the

The claim was upheld because the request for access was not answered by the

responsible). The third cited precedent, the one indicated with the number TD/00830/2017,

is resolved positively due to lack of response and, although the claim makes

reference to access to images captured by a video surveillance system, the

access request that prompted the claim did not specify this object or make

reference to the date on which the alleged images were captured.

Thus, in those precedents there was no responsibility for the suppression of the

data, one of the cases being rejected and in two of them only the

lack of response in time, giving rise to a resolution that formally estimates the

claim and obliges the claimed entity to duly respond to the claimant

informing you in the sense expressed by the CEPD in those Guidelines

(there are no data).

Regarding the actions followed with number E/02434/2020, also cited

by the claimed party, it should be noted that the archive agreement adopted took into account

that the facts transmitted were accommodated in an alleged criminal conduct,

for which there was a judicial case sub iudice, and that the circumstances were not known

which resulted in the deletion of the images.

Finally, MERCADONA alleges that the opening of a procedure is not justified

sanctioning because article 12 has only been breached in relation to the

exercised right of access, and argues that the alleged alleged infringement is

typified as "Not responding to requests to exercise the rights established in

Articles 15 to 22 of the Regulation". As the defendant says, that

Non-compliance constitutes an infringement and gives rise to the purging of

responsibilities. Understand that in the face of such non-compliance, action can only be taken

through the procedure of disregard of rights is as much as understanding that

said offending rate is not applied in any case.

Finally, it is interesting to highlight that no rule prevents the body that

exercises the sanctioning power, when it determines the opening of a procedure

punisher, always ex officio (art. 63.1 law 39/2015, of October 1), determine its

scope according to the circumstances revealed, although they do not

strictly conform to the claims and claims of the claimant. It is

In other words, the agreement to initiate the sanctioning procedure is not constrained by the

claim filed by the individual. This is not the case in procedures

processed at the request of the interested party, in which article 88.2 of the LPACAP requires

that the resolution is consistent with the requests made by it. Even in

In this case, the authority of the Administration to initiate ex officio a new

process.

This same article 88 of the LPACAP, referring to the content of the resolution, in its

Paragraph 1 establishes the obligation to decide all the issues raised by the

interested parties and those others that derive from the procedure, including questions

related not raised by the interested parties. This article expressly establishes

Next:

"1. The resolution that puts an end to the procedure will decide all the issues raised by

the interested parties and those others derived from it.

In the case of related issues that have not been raised by the interested parties, the

competent body may rule on them, making it clear to

those for a period not exceeding fifteen days, so that they formulate the allegations that

they deem pertinent and provide, where appropriate, the means of proof.

In the sanctioning procedure, even the facts that are

reveal during their instruction, which will be determined in the

resolution proposal, and may motivate the modification of the imputations

contained in the agreement to initiate the procedure or its legal qualification.

In this sense, when referring to the specialties of the resolution in the

sanctioning procedures, article 90 of the LPACAP establishes:

"two. In the resolution, facts other than those determined in the course of the trial may not be accepted.

procedure, regardless of its different legal assessment…".

v

The rights of individuals regarding the protection of personal data are

regulated in articles 15 to 22 of the RGPD and 13 to 18 of the LOPDGDD. I know

contemplate the rights of access, rectification, deletion, opposition, right to

limitation of treatment and right to portability.

The formal aspects related to the exercise of these rights are established in the

articles 12 of the RGPD and 12 of the LOPDGDD.

Article 12 “Transparency of information, communication and modalities of

exercise of rights” of the RGPD establishes the following:

"1. The person responsible for the treatment will take the appropriate measures to facilitate the interested party

all information indicated in articles 13 and 14, as well as any communication with

in accordance with articles 15 to 22 and 34 regarding the treatment, in a concise, transparent,

intelligible and easily accessible, in clear and simple language, in particular any information

specifically targeted at a child. The information will be provided in writing or by other

means, including, if applicable, by electronic means. When requested by the interested party, the

Information may be provided verbally as long as the identity of the interested party is proven.

By other means.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

35/61

2. The person responsible for the treatment will facilitate the interested party in the exercise of their rights under of articles 15 to 22. In the cases referred to in article 11, paragraph 2, the person responsible will not refuse to act at the request of the data subject in order to exercise their rights under Articles 15 to 22, unless you can show that you are unable to identify the interested.

3. The data controller will provide the interested party with information regarding their actions on the basis of a request under articles 15 to 22, without undue delay and, in in any case, within one month from receipt of the request. This term may be extended for a further two months if necessary, taking into account the complexity and number of requests. The person in charge will inform the interested party of any of said extensions in the period of one month from receipt of the request, indicating the reasons for the delay.

When the interested party submits the request by electronic means, the information will be provided by electronic means whenever possible, unless the interested party requests that it be provided else."

4. If the person in charge of the treatment does not process the request of the interested party, he will inform him without delay, and no later than one month after receipt of the request, of the reasons for its non-action and the possibility of presenting a claim before a control authority and to exercise legal actions.

5. The information provided under articles 13 and 14 as well as all communication and any action carried out under articles 15 to 22 and 34 will be free of charge.

When the requests are manifestly unfounded or excessive, especially due to
its repetitive nature, the data controller may: a) charge a reasonable fee in
depending on the administrative costs incurred to facilitate the information or communication
or perform the requested action, or b) refuse to act on the request. The responsible
of the treatment will bear the burden of demonstrating the manifestly unfounded or
excessive request.

6. Without prejudice to the provisions of article 11, when the data controller has
reasonable doubts in relation to the identity of the natural person who makes the request to which
referred to in articles 15 to 21, you may request that additional information be provided
necessary to confirm the identity of the interested party.

7. The information that must be provided to the interested parties under articles 13 and 14
may be transmitted in combination with standardized icons that allow the provision of
easily visible, intelligible and clearly legible form an adequate overview of the
planned treatment. The icons that are presented in electronic format will be legible
mechanically.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 92
in order to specify the information to be presented through icons and the
procedures for providing standardized icons".

For its part, article 12 "General provisions on the exercise of rights"
of the LOPDGDD, in sections 2 and 4, adds the following:

"two. The person responsible for the treatment will be obliged to inform the affected party about the means at its disposal.
disposition to exercise the corresponding rights. Media should be easily
accessible to the affected. The exercise of the right may not be denied for the sole reason
for the affected party to opt for another means".

"4. Proof of compliance with the duty to respond to the request to exercise their
rights formulated by the affected party will fall on the person responsible".

It also takes into account what is expressed in Considerations 59 and following of the

GDPR.

In accordance with the provisions of these rules, the data controller

must arbitrate formulas and mechanisms to facilitate the interested party in the exercise of their

rights, which will be free (without prejudice to the provisions of articles 12.5 and 15.3

of the GDPR); is obliged to respond to requests made no later than one

month, unless you can show that you are unable to identify the

interested; as well as to express their reasons in case they do not respond to the request.

From the foregoing, it follows that the request for the exercise of rights made by the

The interested party must be answered in any case, falling on the person in charge

proof of compliance with this duty.

This obligation to act is not enforceable when the data controller

can demonstrate that it is not in a position to identify the interested party (in cases

referred to in article 11.2 of the RGPD). In cases other than those provided for in this

article, in which the data controller has reasonable doubts in relation to

with the identity of the applicant, may require additional information necessary to

confirm that identity.

In this regard, Recital 64 of the RGPD is expressed in the following terms:

“(64) The controller must use all reasonable measures to verify the

identity of data subjects requesting access, in particular in the context of services

online and online identifiers. The person in charge must not keep personal data with

the sole purpose of being able to respond to possible requests".

Regarding the right of access, the RGPD stipulates in its article 15 what

Next:

"1. The interested party shall have the right to obtain confirmation from the data controller as to whether

Personal data concerning you is being processed or not and, in such a case, the right of access to

personal data and the following information:

a) the purposes of the treatment;

b) the categories of personal data in question;

c) the recipients or categories of recipients to whom they were communicated or will be

communicated the personal data, in particular recipients in third countries or

international organizations;

d) if possible, the expected term of conservation of the personal data or, if not

possible, the criteria used to determine this period;

e) the existence of the right to request from the controller the rectification or deletion of data

or the limitation of the processing of personal data relating to the interested party, or to

object to such processing;

f) the right to file a claim with a supervisory authority;

g) when the personal data has not been obtained from the interested party, any information

available on its origin;

h) the existence of automated decisions, including profiling, to which

refers to article 22, sections 1 and 4, and, at least in such cases, significant information

on the logic applied, as well as the importance and the foreseen consequences of said

treatment for the interested party.

2.When personal data is transferred to a third country or an international organization,
the interested party shall have the right to be informed of the appropriate guarantees under article
46 relating to the transfer.

3. The data controller will provide a copy of the personal data subject to
treatment. The person in charge may receive for any other copy requested by the interested party
a reasonable fee based on administrative costs. When the interested party submits the
request by electronic means, and unless he requests that it be provided in another way, the
Information will be provided in a commonly used electronic format.

4. The right to obtain a copy mentioned in section 3 will not negatively affect the
rights and freedoms of others".

Like the rest of the rights of the interested party, the right of access is a
personal right. Allows the citizen to obtain information about the treatment
what is being done with your data, the possibility of obtaining a copy of the data
that concern you and that are being processed, as well as the
information listed in the article cited above.

In the present case, the claimant is a client of the entity claimed. consists
declared that, on date ***DATE.1, he visited the establishment of the entity
responsible located at ***ADDRESS.1, so your image was captured by the system
video surveillance installed in that center.

Subsequently, following the procedure established by MERCADONA for the
exercise of rights regarding the protection of personal data, the claimant
exercised the right of access to their personal data, requesting, specifically, the
images captured by security cameras (the text of the request is the

"I am attaching a request for the right of access to the recordings of

Next:

video surveillance of the MERCADONA establishment ***DIRECCION.1, (...)"). East

right was exercised on date ***DATE.2, using the form available

on the website of the claimed party, inserted in the "Customer Service" tab, attaching

a file corresponding to the request for access and a copy of the DNI.

In response to sending the aforementioned form, the information system sent

the complainant a message with the text "Thank you! Your comment has been sent

correctly".

After the established period, said request did not obtain the legal response.

required, which motivated the claim that gives rise to this procedure,

filed on 12/31/2020.

They are undisputed facts (i) that the claimant exercised before MERCADONA the

right of access to your personal data, using one of the

mechanisms enabled by the claimant herself, such as the form available at

the entity's website, which is also accessed through a link inserted in the

Privacy Policy; and (ii) that this request for access to personal data was not

answered by the person in charge within the established term.

The aforementioned regulations do not allow the request to be ignored as if it were not

would have raised, leaving it without the answer that must necessarily be issued by the

responsible, even in the event that there is no data of the interested party in the

files of the entity or even in those cases in which it does not meet the

foreseen requirements, in which case the addressee of said request is also
obliged to require the correction of the deficiencies observed or, where appropriate,
deny the request with reasons indicating the reasons why it is not appropriate
consider the law in question.

Therefore, the request that is formulated obliges the person in charge, in any case, to give
express response to the interested party informing him about the decision he has adopted to
purpose of the request for the exercise of rights, using any means
that justifies receipt of the reply.

MERCADONA has not disputed that it received the right of access request
made by the claimant. It alleges, however, an involuntary human error in the
management of the request, which caused it not to reach the knowledge of the DPD or its
team and the consequent lack of attention from it. Based on this, invoke the
principle of culpability pointing out that the so-called strict liability has no
no place in the sanctioning administrative law, so that the mere commission of a
administrative infraction is not sufficient when proceeding to impose a sanction
administrative, must attend fraudulent or negligent conduct.

In this regard, it adds that it acts with the utmost diligence in all processes, that
has a simple procedure for the exercise of rights by various means,
about which it duly informs customers, and that it applies a procedure for
processing of applications that has not had errors so far and on which
offers constant training to the people in charge, and that it will be adjusted to avoid
similar incidents.

According to the management process designed by MERCADONA, requests to exercise
of rights are received by the Customer Service Department, which transmits them
subsequently to the DPO through a manual process. In this case, he alleges that for a
involuntary human error the claimant's request did not reach the DPD, preventing

was attended to, and that this has given rise to the appropriate disciplinary actions.

However, MERCADONA has not even explained what the error consisted of

alleged human. Although it seems to be clear from her pleadings brief that the

attention to the claimant's request was due to the fact that one of the managers of the

Customer Service department ("manager" in the terms of the entity itself

claimed) did not forward the request to the DPD. This Agency understands that this is equivalent to

not to process the request, not to process it according to the internal channels designed by the

itself, which cannot be admitted as an inadvertent error.

The incident occurs within MERCADONA's area of responsibility and this

entity must answer for it. In no way can it be considered that the error that

alleges having committed excludes his responsibility, since, according to repeated

jurisprudence, the existence of such an error cannot be estimated when it is attributable

who suffers from it or could be avoided with the use of greater diligence. In this

case, the alleged error is incompatible with the diligence that the claimed one comes

forced to watch.

This diligence must be manifested in the specific case that is analyzed, with respect to which

error is alleged, and not in the general circumstances that MERCADONA alleges for

justify their diligent action, such as having procedures for managing

requests to exercise rights or the absence of errors in the past, nor the

the fact of having taken measures to avoid future incidents. The actions

training sessions given to the employees of the respondent cannot be taken

as a circumstance that prevents demanding the responsibilities that derive from the

specific irregular action.

In the specific case of the complainant, it cannot be admitted that the actions of the

claimed entity, not giving effect to the request for access to personal data,

have been diligent. Admit that it is not appropriate to demand responsibility from MERCADONA for

not respond to an exercise of rights in terms of data protection, based on

an alleged involuntary error consisting of not processing the request, would be both

how to admit that the application of the RGPD and the LOPDGDD can be ignored,

undermining the entire system for the exercise of rights that it establishes, in which

expressly contemplates the obligation to respond to those requests in any case

and the consequences of not complying with this normative requirement.

In this regard, it should be remembered that when the error is a sign of a lack of

due diligence type is applicable. The National High Court in Judgment of 21

September 2004 (RCA 937/2003), pronounces in the following terms:

“Furthermore, regarding the application of the principle of culpability, it results (following the criterion of

this Chamber in other Judgments such as the one dated January 21, 2004 issued in the appeal

1139/2001) that the commission of the infraction foreseen in article 44.3.d) can be both

malicious as guilty. And in this sense, if the error is a sign of a lack of diligence, the type

is applicable, because although in sanctioning matters the principle of culpability governs, as

inferred from the simple reading of Art. 130 of Law 30/1992, the truth is that the expression “simple

non-observance” of Art. 130.1 of Law 30/1992, allows the imposition of the sanction, without a doubt

in intentional cases, and also in negligent cases, sufficing the non-observance of the duty

of care”.

In this line, it is worth mentioning the SAN of January 21, 2010, in which the Court

exposes:

“The appellant also maintains that there is no guilt in her actions. It is

true that the principle of culpability prevents the admission in administrative law sanctioning objective liability, it is also true that the absence of Intentionality is secondary since this type of infraction is normally committed for a culpable or negligent action, which is sufficient to integrate the subjective element of guilt XXX's action is clearly negligent because... he must know... the obligations imposed by the LOPD to all those who handle personal data of third parties. XXX is obliged to guarantee the fundamental right to the protection of personal data of its clients and hypothetical clients with the intensity required by the content of the law".

The principle of culpability is required in the sanctioning procedure and thus the STC 246/1991 considers inadmissible in the field of sanctioning administrative law a liability without fault. But the principle of fault does not imply that it can only punish an intentional or voluntary action, and in this regard article 28 of Law 40/2015 on the Legal Regime of the Public Sector, under the rubric

"Responsibility" provides the following:

"1. They may only be sanctioned for acts constituting an administrative infraction natural and legal persons, as well as, when a Law recognizes them capacity to act, affected groups, unions and entities without legal personality and estates independent or autonomous, who are responsible for them by way of fraud or fault".

The facts set forth in the preceding Basis show that

MERCADONA did not act with the diligence to which MERCADONA was obliged, which acted with a lack of diligence. The Supreme Court (Sentences of 04/16 and 04/22/1991) considers that from the element of culpability it follows "...that the action or omission, classified as an offense punishable administratively, it must be, in any case, attributable to its author, due to intent or recklessness, negligence or inexcusable ignorance. The The same Court reasons that "it is not enough... for the exoneration before a typically unlawful behavior the invocation of the absence of guilt" but that it is necessary "that the due diligence has been used by the person who alleges his inexistence" (STS January 23, 1998).

Also connected with the degree of diligence that the data controller is obliged to deploy in the fulfillment of the obligations imposed by the data protection regulations can be cited the SAN of 10/17/2007 (Rec. 63/2006), which specified: "(...) the Supreme Court has been understanding that there is imprudence whenever a legal duty of care is disregarded, that is, when the offender fails to behaves with due diligence."

Furthermore, the National Court in matters of data protection of personal character, has declared that "simple negligence or breach of the duties that the Law imposes on the persons responsible for files or the data processing of extreme diligence..." (SAN 06/29/2001).

It is concluded, therefore, contrary to what was objected by the claimed entity, that the subjective element is present in the declared infraction.

Consequently, in accordance with the exposed evidence, the aforementioned facts represent a violation of the provisions of article 12, sections 2 and 3, of the RGPD, in relation to article 15 of the aforementioned Regulation, which gives rise to the application of the corrective powers that article 58 of the aforementioned Regulation grants to the Spanish Data Protection Agency.

Not demanding responsibility from MERCADONA for these facts would be the same as emptying of content the rules that regulate the exercise of rights in terms of protection of personal data.

It is relevant that the images captured by a video surveillance system must be deleted within a maximum period of one month, in accordance with article 6 of the Instruction 1/2006, of November 8, of the Spanish Agency for the Protection of Data, on the processing of personal data for surveillance purposes through camera or video camera systems. It is the same term foreseen for the responsible for the treatment resolves the request to exercise the right of access to such images.

If we consider that the exercise of the right is subsequent to the capture of the images, the end date of the term to meet the right will always be after the deadline for deleting the images. Therefore, if it were admitted that MERCADONA bears no responsibility for failure to comply with the right of access exercised by the claimant, would be equivalent to admitting that anyone responsible for the treatment can circumvent the right of access of the interested parties alleging that the images have been removed.

As for the precedents cited by the respondent, it should be noted that the two assumptions in which the existence of an involuntary error was appreciated do not keep similarity with the present case, insofar as they refer to annotation errors (E/01795/2011 and E/03468/2009). The third of those precedents (PS/00724/2014) was

resolved by this Agency, in relation to the aspects highlighted by

MERCADONA, according to the scheme followed in this act.

SAW

The MERCADONA entity, in addition to not facilitating access to the images of the

security cameras requested by the claimant, proceeded to eliminate them by the

Over the period of 30 days from its collection, according to said entity, it informed the

claimant through an email addressed to its representative, who previously

had warned about the lack of response to the right of access (“We must add

none of the images of the requested date are no longer available (***DATE.1),

all in accordance with art. 6 of Instruction 1/2006, of November 8, of

the AEPD, which establishes that "The data will be canceled within a maximum period of one

month from its acquisition").

This deletion of the images constitutes a treatment of personal data, of

in accordance with article 4 of the RGPD that, under the heading "Definitions", provides the

Next:

“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".

In short, we are faced with a "data processing" ("deletion or

destruction” of the images) subject to the legitimation regime that regulates article 6

of the RGPD “Legality of the treatment”, which establishes the following:

"1. The treatment will only be lawful if at least one of the following conditions is met:

a) the interested party gave his consent for the treatment of his personal data for one or

various specific purposes;

b) the treatment is necessary for the execution of a contract in which the interested party is a party

or for the application at the request of the latter of pre-contractual measures;

c) the treatment is necessary for the fulfillment of a legal obligation applicable to the

data controller;

d) the processing is necessary to protect the vital interests of the data subject or another person

physical;

e) the treatment is necessary for the fulfillment of a mission carried out in the public interest

or in the exercise of public powers conferred on the data controller;

f) the treatment is necessary for the satisfaction of legitimate interests pursued by the

responsible for the treatment or by a third party, provided that said interests are not

prevail the interests or the fundamental rights and freedoms of the interested party that

require the protection of personal data, in particular when the interested party is a child.

The provisions of letter f) of the first paragraph shall not apply to the treatment carried out by

public authorities in the exercise of their functions.

2. Member States may maintain or introduce more specific provisions in order to

adapt the application of the rules of this Regulation with regard to the treatment in

compliance with section 1, letters c) and e), establishing more precise requirements

specific treatment and other measures that guarantee lawful and fair treatment, with

inclusion of other specific situations of treatment under chapter IX.

3. The basis of the treatment indicated in section 1, letters c) and e), must be established by:

a) Union law, or

b) the law of the Member States that applies to the data controller.

The purpose of the treatment must be determined in said legal basis or, as regards

to the treatment referred to in section 1, letter e), will be necessary for the fulfillment of

a mission carried out in the public interest or in the exercise of public powers vested in the

responsible for the treatment. Said legal basis may contain specific provisions for

adapt the application of the rules of this Regulation, among others: the conditions

general that govern the legality of the treatment by the person in charge; data types

object of treatment; affected stakeholders; the entities to which they can be communicated

personal data and the purposes of such communication; purpose limitation; the terms of

data conservation, as well as the operations and procedures of the treatment,

including measures to ensure fair and lawful treatment, such as those relating to

other specific situations of treatment under chapter IX. Union law or

of the Member States shall fulfill a public interest objective and shall be proportionate to the end

legitimate persecuted.

4. When the treatment for another purpose other than that for which the data was collected

personal information is not based on the consent of the interested party or on Union Law or

of the Member States which constitutes a necessary and proportionate measure in a society

democracy to safeguard the objectives indicated in article 23, paragraph 1, the

data controller, in order to determine whether processing for another purpose is

compatible with the purpose for which the personal data was initially collected, will take into account

account, among other things:

a) any relationship between the purposes for which the personal data was collected and

the purposes of the intended further processing;

b) the context in which the personal data were collected, in particular with regard to

to the relationship between the interested parties and the data controller;

c) the nature of the personal data, specifically when dealing with special categories

of personal data, in accordance with article 9, or personal data relating to convictions

and criminal offenses, in accordance with article 10;

d) the possible consequences for data subjects of the envisaged further processing;

e) the existence of adequate guarantees, which may include encryption or pseudonymization".

In relation to the conservation of the images captured by

video surveillance, it is necessary to take into account the provisions of Instruction 1/2006, of 8

of November, of the Spanish Agency for Data Protection, on the treatment of

personal data for surveillance purposes through camera systems or

camcorders.

With the application of the RGPD, it must be considered that most of the Instruction

1/2006 has been displaced, since its content, such as the

legitimacy or the rights of people, is displaced by what is established to the

respect to the European standard.

However, it can be considered that the provisions of article 6 of the

aforementioned Instruction, which regulates the retention period and refers to the obligation to

"cancel" personal data (images) within a maximum period of one month from

its uptake. An interpretation in accordance with the RGPD, which does not contemplate the

cancellation but the deletion of personal data, means that this maximum period

conservation of one month will not be cancellation but deletion, except in

those cases in which they must be kept to prove the commission of acts

that threaten the integrity of people, goods or facilities.

Also article 22 of the LOPDGDD, in its section 3, to which reference was made in

the agreement to open the procedure establishes some rules regarding the

elimination of images captured by video surveillance systems. Nevertheless,

As the MERCADONA entity points out in its pleadings brief, this

precept regulates assumptions other than the one analyzed in these proceedings,

related to "the treatment of images through camera systems or

video cameras in order to preserve the safety of people and property, as well as

as well as its facilities. This precept regulates video surveillance processing whose

legitimation is found in the existence of a purpose of public interest

incardinable in article 6.1.e) of the Regulations, and not in mere legitimate interests of

A particular.

As indicated, the suppression by MERCADONA of the images

requested by the claimant could be understood as adjusted to the provisions of the aforementioned

Instruction 1/2006, having been carried out within a maximum period of one month

since they were captured, this is from ***DATE.1.

However, in the present case, there are other circumstances that must be

considered in the analysis of the legality or illegality of that deletion or erasure of

personal information.

The claimant suffered an accident in one of the establishments of the entity

MERCADONA on ***DATE.1 and, four days later, on ***DATE.3, reported

this fact before said entity, communicating the responsibility of the same in the

incident (...), the damage caused by it to the person of the claimant (...) and

his protest for the lack of attention to the claim by the insurer of

MARKET (...). The claimant's intent to be compensated for the accident

suffered is made clear in the complaint, which is recorded as received by MERCADONA, that

responded to it on ***DATE.5 acknowledging receipt and informing about its transfer to the Customer Service Department.

Such circumstances gave rise to the claimant's interest in having a copy of the images captured by the security camera system installed in the establishment in question, for which he exercised the right of access outlined above, on date ***DATE.2, also received by the Department of

Customer service. In this request for access right to system images of video surveillance, the claimant once again informs the entity claimed that its presentation is motivated by the accident that occurred in the center in question and in the indicated date.

All these circumstances were known to MERCADONA. Also, dated ***DATE.7, the claimant's representative sent an email to this entity, in relation to the aforementioned incident, warning about its "willingness to request the compensation that corresponds by scale.

These acts are deemed sufficiently indicative of the need to conserve the images, especially since they were not made available to the claimant in response to the right of access exercised. However, despite everything Therefore, MERCADONA proceeded to delete the images requested by the claimant.

It is understood that there was an interest of the claimant that justified the treatment of the repeated images beyond the period of one month set by Instruction 1/2006, by least until the delivery of the images to the claimant and for this sole purpose.

The same would be said if the claimant had filed a claim and MERCADONA

had decided to keep the images for the defense of their rights, in which

In this case, it would be understood that the data processing would comply with those established in the

article 6.1.f) of the RGPD (the treatment is considered lawful when “it is necessary to

the satisfaction of legitimate interests pursued by the person in charge”).

It is necessary to take into account the doctrine of the Constitutional Court regarding the

restrictions on the fundamental right to data protection, analyzed in its

Judgment 292/2000, of November 30. In this Sentence, after configuring the

fundamental right to the protection of personal data as an autonomous right

and independent that consists of a power of disposition and control over the data

personal, which empowers the person to decide which of these data to provide to

a third party or which can be collected by this third party, and that also allows the individual

know who owns that personal data and for what, being able to oppose that

possession or use, analyzes its limits, pointing out the following:

“More specifically, in the aforementioned Judgments relating to data protection, this

Court has declared that the right to data protection is not unlimited, and although the

Constitution does not expressly impose specific limits, nor does it refer to the Public Powers

for its determination as it has done with other fundamental rights, there is no doubt that

that they have to find in the remaining fundamental rights and legal goods

constitutionally protected, as required by the principle of unity of the Constitution

(SSTC 11/1981, of April 8, F. 7; 196/1987, of December 11 [RTC 1987, 196], F.

6; and regarding art. 18, STC 110/1984, F. 5)”.

In relation to this issue, it must be considered that the ultimate goal pursued

with the non-elimination of the images required by the claimant, owner of the data

in question, is to obtain proof of the causation of damage on your own

person, as a consequence of an accident that occurred in a MERCADONA center

in which it was harmed by a possible negligence of said entity.

In this case, a collision arises between two fundamental rights: the right to

protection of personal data, derived from article 18 of the Constitution and

enshrined as an autonomous right and informer of the constitutional text by the aforementioned

Judgment of the Constitutional Court 292/2000, of November 30; and the right to

effective judicial protection of judges and courts, contained in article 24.1 of the

Spanish Constitution (“All persons have the right to obtain effective guardianship

judges and courts in the exercise of their rights and legitimate interests, without

that, in no case, defenselessness can occur"), which guarantees access to all

people to judges and courts to defend their rights.

The right to personal data protection yields in those cases in which

may imply a decrease in the possibility of contribution by the interested party of the

pertinent means of proof for its defense, violating the guarantees derived

of the aforementioned right to effective protection and restricting the possibility of obtaining full

development of the latter right.

For all these reasons, from the point of view of this Agency, there is a legal authorization

for the treatment of the data of the images once the term has passed

established for its suppression, which brings its coverage of article 24 of the

Constitution and its implementing regulations.

Following this premise, a prevalence must be given to the right enshrined in the

Article 24 of the Constitution, which guarantees citizens effective judicial protection

of judges and courts, in the terms set forth.

As the reiterated jurisprudence of the Constitutional Court maintains (for all,

STC 186/2000, of July 10, citing many others) "the right to privacy does not

is absolute, as none of the fundamental rights is, being able to cede

before constitutionally relevant interests, provided that the cut that he has

to experiment is revealed to be necessary to achieve the intended legitimate purpose,

provided to achieve it and, in any case, be respectful of the content

essence of the law".

The Constitutional Court has been demanding that any restrictive measure of

rights is proportional. This is stated in the judgment of the Constitutional Court

14/2003, of January 28:

"In other words, in accordance with a reiterated doctrine of this Court, the

constitutionality of any restrictive measure of fundamental rights comes

determined by strict observance of the principle of proportionality. For the purposes that

matter here, it is enough to remember that, in order to check whether a restrictive measure of a right

fundamental exceeds the judgment of proportionality, it is necessary to verify if it meets the three

following requirements or conditions: if the measure is capable of achieving the objective

proposed (judgment of suitability); if, in addition, it is necessary, in the sense that there is no other

more moderate measure to achieve such purpose with equal effectiveness (judgment of

need); and, finally, if it is weighted or balanced, because it derives from it more

benefits or advantages for the general interest than damages on other goods or values in

conflict (judgment of proportionality in the strict sense; SSTC 66/1995, of May 8 [RTC

1995, 66], F. 5; 55/1996, of March 28 [RTC 1996, 55], FF. 7, 8 and 9; 270/1996, dated 16

December [RTC 1996, 270], F. 4.e; 37/1998, of February 17 [RTC 1998, 37], F. 8; 186/2000,

of July 10 [RTC 2000, 186], F. 6)".

This principle of proportionality is respected in this case, in which the images

captured by MERCADONA's video surveillance cameras constitute proof

valid and adequate to defend the interests of the claimant.

In this regard, Law 1/2000, of January 7, on Civil Procedure, states in the

article 299 what are the means of proof that can be used in court,

establishing in its number 2 the following:

“In accordance with the provisions of this Law, the means of reproduction of the

word, sound and image, as well as the instruments that allow archiving and knowing or

reproduce words, data, figures and mathematical operations carried out for purposes

accounting or other, relevant to the process.

For its part, article 265 determines the moment in which said documents must be

be filed with the following:

1. All claims or responses must be accompanied by:

1st. The documents on which the parties base their right to the judicial protection they seek.

2nd. The means and instruments referred to in section 2 of article 299, if they are

founded the claims for guardianship formulated by the parties.

(…)”.

In this case, the proof of the causation of the damages, as well as the determination of the

person against whom the lawsuit will be directed are found in the images captured

by the chambers, whose contribution to the process with the demand seems necessary, therefore

that the right to effective protection must prevail in this case over the right to

Data Protection.

The scope of the right to judicial protection in relation to evidence has been addressed, among others, in the STC 212/2013, of December 16, in which reference is made, citing the STC 88/2014, of May 28 to "the intimate relations of the right to test with other rights guaranteed in art. 24 CE. Specifically, in our constitutional doctrine we have emphasized the connection of this specific constitutional right with the right to effective judicial protection (art. 24.1 CE), whose scope includes issues related to evidence (SSTC 89/1986, of July 1, FJ two; 50/1988, of March 22, FJ 3; 110/1995, of July 4, FJ 4; 189/1996, dated 25 November, FJ 3; and 221/1998, of November 24, FJ 3), and with the right of defense (Art. 24.2 CE), from which it is inseparable (SSTC 131/1995, of September 11, FJ 2; 1/1996, of January 15, FJ 2; and 26/2000, of January 31, FJ 2)'' (STC 19/2001, of 29 January, FJ 4; and, in the same sense, STC 133/2003, of June 30, FJ 3)". In the reviewed SSTC 19/2001 and 133/2003, the Constitutional Court pointed out that "it has been precisely this inseparable connection (with the other fundamental rights mentioned, in particular the right to obtain effective judicial protection), which has allowed to affirm that the essential content of the right to use the means of evidence pertinent is integrated by the legal power that is recognized to whoever intervenes as litigant in a process of provoking the procedural activity necessary to achieve the conviction of the judicial body on the existence or non-existence of the facts relevant to the decision of the conflict object of the process (for all, STC 37/2000, of February 14, FJ 3)".

The arguments put forward by MERCADONA in its allegations to the proposal for resolution have an erroneous budget, such as considering that said entity

“he had no record of the request for access”, a circumstance to which he refers in repeatedly. However, as has been stated, the request for exercise of the right of access was correctly received by the aforementioned entity.

And not only that. It is also proven that MERCADONA received the complaint for the accident suffered by the claimant, addressed to the same department in which she had input the request for access to the images captured by the system video surveillance.

Addressing both initiatives of the claimant entailed the conservation of the images, although that would have meant exceeding the legal term, resulting in this conservation in accordance with the principles of necessity and proportionality in this case concrete.

Therefore, this does not impose on the responsible entity a general obligation to conservation and supervision of all the images to assess the need for conservation, which is given in this case in response to the circumstances exposed.

It is taken into account that the claimant's request for access and complaint was presented to the responsible entity itself before the images were erased, unlike the case analyzed in CEPD Guidelines 3/2019 when that MERCADONA refers to in its allegations, which speaks of a request for access formulated when the images had already been deleted. Thus, it is not understood that MERCADONA alleges that the Agency relies on circumstances that “the entity he does not have to know”, given that said circumstances were known to him.

Yes, it is true what MERCADONA indicated when pointing out that it would have been different if Delivered the images to the claimant before the expiration of the legal deadline for conservation, but it was not so because of the defendant's own conduct, and

precisely for not having received the request.

This same entity states in its allegations that “If an interested party exercises the

right of access during the period in which the person in charge keeps the images,

must be addressed, and the images must be preserved, even if there is a defect

formal in the request, precisely so that when it is corrected, satisfy the

law".

He then adds, once again, “But in this case it did not come to the knowledge of the

responsible for the request, so they could not be preserved”, when we already know that

if the request for access came to your attention.

The claimed party also understands its right to keep the images beyond the

term established for the defense of their own rights.

On the other hand, it denies that there is a conflict of rights in this case (protection of

personal data and effective judicial protection) that could be weighed by the person in charge and

does arguing again that it would not have occurred if it had had

knowledge of the request of the interested party. It says that “If the

request, the interested party would have had a response in a timely manner, without the need for

having to keep the images longer than the established time or search for any database

of additional legitimacy”, without considering that he did receive the request, that the fact that

internally not transferred to the unit in charge of its processing is not equivalent to

not having received the request and that all this occurs in its exclusive sphere of

responsibility.

The conclusion set forth here does not imply any modification with respect to the obligation
that the regulations impose on those responsible for data processing
to delete them when they are no longer necessary for the purpose for which
motivated its collection or, in the case of images captured by systems of
video surveillance, when the established term elapses.
The stated reasons prevail over the obligation to remove the images in the
maximum period of one month from when they were captured, resulting in the conclusion of the
need to preserve and proportionality of preserving the images, the treatment
of personal data consisting of the deletion or deletion of such images is carried
carried out without a legal basis that legitimizes it, in clear violation of what is established in
Article 6 of the GDPR. This breach gives rise to the application of the powers
corrective measures that article 58 of the aforementioned Regulation grants to the Spanish Agency for
Data Protection.
The violation of the provisions of article 6 of the RGPD occurs with
independence of the lack of attention of the right of access exercised by the
claimant. Both offenses result from separate conduct that must be
sanctioned separately.
7th
In the event that there is an infringement of the provisions of the RGPD, between the
corrective powers available to the Spanish Data Protection Agency,
as a control authority, article 58.2 of said Regulation contemplates the
following:
“2 Each control authority will have all the following corrective powers indicated below:
continuation:
(…)
b) send a warning to any person responsible or in charge of the treatment when the

treatment operations have violated the provisions of this Regulation;”

(...)

d) order the person responsible or in charge of the treatment that the treatment operations be

comply with the provisions of this Regulation, where appropriate, of a given

manner and within a specified time;

(…)

i) 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;".

According to the provisions of article 83.2 of the RGPD, the measure provided for in letter d)

above is compatible with the sanction consisting of an administrative fine.

In accordance with the exposed evidence, it is considered that the exposed facts

do not comply with the provisions of articles 12, in relation to article 15, both of the

GDPR; and what is established in article 6 of the same Regulation; what the

Commission of offenses classified, respectively, in sections 5.a) and

5.b) of article 83 of the RGPD.

Article 83.5, a) and b), of the RGPD, under the heading “General conditions for the

imposition of administrative fines” provides the following:

"5. Violations of the following provisions will be sanctioned, in accordance with the

section 2, with administrative fines of a maximum of EUR 20,000,000 or, in the case of a

company, of an amount equivalent to a maximum of 4% of the total annual turnover

of the previous financial year, opting for the highest amount:

a) the basic principles for the treatment, including the conditions for the consent to

tenor of articles 5, 6, 7 and 9;

b) the rights of the interested parties according to articles 12 to 22".

On the other hand, article 71 of the LOPDGDD considers any infringement

breach of this Organic Law:

"The acts and behaviors referred to in sections 4, 5 and 6 of the Law constitute infractions.

Article 83 of Regulation (EU) 2016/679, as well as those that are contrary to this

organic Law".

Section 1.b) of article 72 of the LOPDGDD considers, as "very serious",

prescription effects:

"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:

b) The processing of personal data without the concurrence of any of the conditions of legality of the

treatment established in article 6 of Regulation (EU) 2016/679".

And section c) of article 74 of the LOPDGDD, considers a "minor" infraction to

effects of prescription the infractions of a merely formal nature of the articles

mentioned in article 83.5 of the RGPD and, specifically:

"c) Failure to respond to requests to exercise the rights established in articles 15 to 22

of Regulation (EU) 2016/679, unless the provisions of article

72.1.k) of this Organic Law".

In order to determine the administrative fine to be imposed, the

provisions of articles 83.1 and 83.2 of the RGPD, precepts that indicate:

"1. Each control authority will guarantee that the imposition of administrative fines with

in accordance with this article for the infringements of this Regulation indicated in the

sections 4, 9 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, due account shall be taken of:

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;

b) 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 data controller or processor, taking into account

of the technical or organizational measures that they have applied by virtue of 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 if the

The person responsible or the person in charge notified the infringement 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 certification mechanisms

approved under 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 infraction".

For its part, article 76 "Sanctions and corrective measures" of the LOPDGDD

has:

"1. The sanctions 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.

d) The possibility that the conduct of the affected party could have induced the commission of the crime.

infringement.

e) The existence of a merger by absorption process subsequent to the commission of the infraction,

that 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".

In addition to the above, the provisions of article 83.1 of the

RGPD, according to which "Each control authority will guarantee that the imposition of the

administrative fines under this article for violations of the

this Regulation indicated in paragraphs 4, 5 and 6 are in each individual case

effective, proportionate and dissuasive".

In accordance with the precepts indicated, in order to set the amount of the penalty to

impose in the present case, it is considered appropriate to graduate the sanction to be imposed

in accordance with the following criteria established by the transcribed precepts:

1. Violation of article 12, in relation to article 15, both of the RGPD, typified

in article 83.5.b) and qualified as minor for prescription purposes in article

74.c) of the LOPDGDD:

The following graduation criteria are considered concurrent as aggravating:

. Article 83.2.a) of the RGPD: "a) the nature, seriousness and duration of the

infringement, taking into account the nature, scope or purpose of the operation

of treatment in question as well as the number of interested parties affected and the

level of damages they have suffered.

. The nature of the infraction, since the lack of attention to the right of

access, due to its content, affects the ability of the claimant to exercise

true control over your personal data.

In relation to the right of access and its configuration as a gateway

access for other rights, the CJEU, in Judgment of 05/07/2009, issued in

Case C-553/07, then analyzing the Directive and equally valid

now for GDPR, state the following:

“51 The aforementioned right of access is essential so that the interested party can

exercise the rights contemplated in article 12, letters b) and c), of the

Directive, namely, where appropriate, when the treatment does not comply with the provisions

of the same, obtain from the data controller, the rectification, the

deletion or blocking of data [letter b)], or to notify third parties at

who have communicated the data, any rectification, deletion or blocking

carried out, if it is not impossible or involves a disproportionate effort [letter c)].

52 The right of access is, likewise, a necessary condition for the exercise by the

Interested party of the right to oppose the processing of their personal data,

referred to in article 14 of the Directive, as it is for the right to appeal

for the damages suffered, provided for in articles 22 and 23 of this law”.

. The level of damages suffered by the interested parties, to the extent

that the non-fulfilment of the right of access entailed the non-delivery of the

images requested by the claimant, which impaired her ability to

defense in relation to the accident suffered by the same in a center of the

claimed.

. Article 83.2.b) of the RGPD: "b) the intention or negligence in the infringement".

The negligence found in the commission of the offence, taking into account that

MERCADONA, not only did not comply with the right exercised by the claimant, but also

that it did not even give any response to the request made by the claimant

within the scheduled time. This response did not occur until a moment

after the removal of the images in question, so that the

attention of the right has supposed a loss of the disposition and control on the

data.

This circumstance reveals the negligent action of MERCADONA.

In this regard, what was declared in the Judgment of the High Court is taken into account.
National of 10/17/2007 (rec. 63/2006) that, based on the fact that they are entities
whose activity involves continuous data processing, indicates that "... the
The Supreme Court has understood that there is imprudence whenever
disregards a legal duty of care, that is, when the offender fails to
behave with due diligence. And in assessing the degree of diligence,
of weighing especially the professionalism or not of the subject, and there is no doubt
that, in the case now examined, when the activity of the appellant is of
constant and abundant handling of personal data, it must be insisted on the
rigor and exquisite care to adjust to the legal provisions in this regard.

It is a company that processes personal data in a
systematic and continuous and that it must take extreme care in the fulfillment of its
data protection obligations.

This Agency understands that diligence must be deduced from facts
conclusive, duly accredited and directly related
with the elements that make up the infraction, in such a way that it can be deduced
that it has occurred despite all the means provided by the
responsible to avoid it. In this case, MERCADONA's actions have no
this character.

. Article 83.2.g) of the RGPD: “g) the categories of personal data

affected by the infringement.

Although “Special categories of personal data” have not been affected,

as defined by the RGPD in article 9, the personal data to which they refer

the proceedings (image of the claimant) has a particularly

sensitive, since it allows the prompt identification of the interested parties and increases

risks to your privacy.

. Article 76.2.b) of the LOPDGDD: “b) The link between the activity of the offender

with the processing of personal data”.

The high link between the activity of the offender and the performance of treatment

of personal data, especially with regard to capturing images of

customers for the video surveillance systems installed in their establishments,

which is done indiscriminately. The level of implementation of the

entity and the activity it develops, in which data is involved

personal data of thousands of interested parties. This circumstance determines a greater degree

of demand and professionalism and, consequently, of the responsibility of the

entity claimed in relation to the processing of the data.

. Article 83.2.k) of the RGPD: “k) any other aggravating or mitigating factor

applicable to the circumstances of the case, such as the financial benefits obtained

or losses avoided, directly or indirectly, through the infringement”.

. MERCADONA's status as a large company and volume of business.

It is recorded in the actions that said entity has (...).

It is also considered that there are extenuating circumstances

following:

. Article 83.2.d) of the RGPD: “d) the degree of responsibility of the person in charge or of the

data processor, taking into account the technical or organizational measures

that they have applied by virtue of articles 25 and 32”.

The imputed entity has implemented appropriate action procedures

in the management of requests for the exercise of rights, so that the infringement is

consequence of an anomaly in the operation of said procedures

that affects only the claimed.

Considering the exposed factors, the valuation reached by the fine, for the

Violation of article 12 of the RGPD, it is 70,000 euros (seventy thousand euros).

2. Infraction due to non-compliance with the provisions of article 6 of the RGPD, typified

in article 83.5.a) and classified as very serious for the purposes of prescription in the

Article 72.1.b) of the LOPDGDD:

The following graduation criteria are considered concurrent as aggravating:

. Article 83.2.a) of the RGPD: “a) the nature, seriousness and duration of the

infringement, taking into account the nature, scope or purpose of the operation

of treatment in question as well as the number of interested parties affected and the

level of damages they have suffered.

. The nature and seriousness of the infraction, since the definitive deletion of

the images captured by the video surveillance system, in this case, affects

on the claimant's ability to exercise real control over her

personal data to the extent that it limits your ability to act in the

defense of their rights; and limits any subsequent intervention of this

Agency in order to repair the lack of attention to the right of access or

the courts regarding the actions that the claimant could exercise

against MERCADONA for a possible repair of damages.

. The level of damages suffered by the interested claimant, in the

extent to which the suppression of the images has impaired their ability to

defense, as stated in the previous section.

MERCADONA alleges that the claimant's complaint cannot be linked to

a legal obligation to preserve the images and that it is not the obligation of the

responsible to save the images of each event that occurred, without

requested the person the images, only for the eventuality that he could

request them. However, this is not the present case, in which the claimant did

had requested the images on the occasion of the accident that occurred in a center of the

said entity.

. Article 83.2.b) of the RGPD: "b) the intention or negligence in the infringement".

The negligence found in the commission of the offence, taking into account that

MERCADONA suppressed the images despite knowing that the claimant

denounced the accident and the damages suffered before said entity, and requested, with such

reason, access to said images.

According to the respondent, the foregoing cannot be affirmed because "the entity does not

was aware of the access request made". Once again, MARKET

poses the question as if the request for access had not existed, despite

that it is not disputed that MERCADONA received said request. The fact of

that its processing was not adequate, as it had not been transferred internally

said request to the person or unit in charge of managing it, cannot be treated

as something foreign to the responsible entity itself.

To assess this negligence, the circumstances are also taken into account.

indicated in this regard in section 1 above.

. Article 83.2.g) of the RGPD: “g) the categories of personal data

affected by the infringement.

As already indicated, the personal data referred to in the

proceedings (image of the claimant) has a particularly

sensitive.

. Article 76.2.b) of the LOPDGDD: “b) The link between the activity of the offender

with the processing of personal data”.

The high link between the activity of the offender and the performance of treatment

of personal data, already justified in relation to the previous infringement.

. Article 83.2.k) of the RGPD: “k) any other aggravating or mitigating factor

applicable to the circumstances of the case, such as the financial benefits obtained

or losses avoided, directly or indirectly, through the infringement”.

. MERCADONA's status as a large company and volume of business,

according to the details already exposed.

It is also considered that there are extenuating circumstances

following:

. Article 83.2.d) of the RGPD: “d) the degree of responsibility of the person in charge or of the

data processor, taking into account the technical or organizational measures

that they have applied by virtue of articles 25 and 32”.

The infraction is an anomaly that only affects the one claimed.

Considering the factors exposed in this second part, the valuation that reaches

the fine for the infringement of article 6 of the RGPD is 100,000 euros (one hundred thousand euros).

MERCADONA did not make any allegation regarding the graduation factors of the sanctions in their allegations at the opening of the procedure. However, in his The brief highlighted that he contacted the claimant, through her representative, and arrived to an agreement that repairs the damages suffered by the accident and the derived from the non-attention of your right of access to your personal data.

In addition, it states that disciplinary measures were adopted internally; as well as technical and organizational measures, to prevent an error from occurring in the future similar and that ensure the sending to the DPD of the requests that are formulated through the web form.

These measures are insufficient to "remedy the infraction and mitigate the possible adverse effects of the infraction", according to the terms of article 83.2.f) of the RGPD, or "to alleviate the damages suffered by the interested parties" as consequence of the infraction, according to section 2.c) of the same article. Mitigate the adverse effects or mitigate the damages caused by the infractions implies restore the rights of the interested parties, which in this case is not possible because deletion of images.

Nor can it be understood as mitigating, in any case, the cessation of the conduct that violates the legal system.

On the other hand, it cannot be admitted that an out-of-court settlement between the claimant and the claimed may avoid the application of the rule and the requirement of the

responsibilities resulting from the proven facts. It would be as much as emptying

of content the regulation of protection of personal data.

If we add to this that the sanctions must be effective "in each individual case",

proportionate and dissuasive, in accordance with the provisions of article 83.1 of the RGPD, do not

It is possible to admit that agreement as a mitigating factor. It would be an artificial lowering of the

sanction that can lead to understand that breaking the norm will not produce an effect

negative proportional to the seriousness of the offending act.

On this question of the reparation of the damages alleged by the claimed party, it is

refer to what is indicated in the Basis of Law II.

Subsequently, in the allegations to the proposed resolution, MERCADONA

questions the aggravating circumstances considered and argues that these same circumstances

aggravating factors must be valued as mitigating factors.

Thus, it alleges that there is only one person affected and that it is not an infringement of a

structural that lasts over time, despite the fact that these graduation factors have already

been considered by this Agency as extenuating; and insists on the “repair” of

damages carried out and the measures adopted, on which it has already been pronounced

this Agency, without MERCADONA contributing any argument that distorts what

indicated in this resolution in this regard.

On the other hand, he denies the appreciated negligence and his professionalism in the treatment of

personal data, but also in this respect does not provide arguments to the contrary

enough to save the above.

In relation to the degree of diligence that should be required of MERCADONA, given its level of professionalism and high connection with the processing of personal data, it is highlight that the entity itself in its allegations at the opening of the procedure, as an argument to justify the scope of the alleged inadvertent error, he highlighted I manifest the large amount of personal data that it processes.

On the other hand, none of the considered graduation factors is attenuated by the fact that the claimed entity has not been the subject of a procedure punisher previously, a circumstance that has been alleged by the entity claimed to be considered as a mitigating factor.

In this regard, the AN Judgment of 05/05/2021, rec. 1437/2020, indicates:

“Considers, on the other hand, that the non-commission of a crime should be considered as mitigating previous offense. Well, article 83.2 of the RGPD establishes that it must be taken into account for the imposition of the administrative fine, among others, the circumstance "e) any infraction committed by the person in charge or the person in charge of the treatment". This is a aggravating circumstance, the fact that the budget for its application does not concur entails that it cannot be taken into consideration, but does not imply or allow, as intended the plaintiff, its application as a mitigating factor”.

According to the aforementioned article 83.2 of the RGPD, when deciding to impose a fine administrative and its amount must take into account "all previous infractions committed by the person responsible”. It is a normative provision that does not include the inexistence of previous infractions as a grading factor of the fine, which must be understood as a criterion close to recidivism, although broader.

Likewise, the claimed entity states that the personal data related to the images do not constitute special categories of data, which is already considered in this act, because otherwise the proven facts would give would be constitutive of a offense other than the one charged. Although this does not imply that it is considered when graduating the

infringement that the personal image increases the risks on privacy.

IX

The infractions in the matter that concerns us can give rise to the imposition of

responsible for the obligation to adopt adequate measures to adjust its performance

to the regulations mentioned in this act, in accordance with the provisions of the aforementioned

article 58.2.d) of the RGPD, according to which each control authority may “order the

responsible or in charge of the treatment that the treatment operations are

comply with the provisions of this Regulation, where appropriate, in a

certain manner and within a specified period…”.

In this case, it is appropriate to require the responsible entity so that, within the term

indicates in the operative part, adapts to the personal data protection regulations

the treatment operations it performs and the mechanisms and procedures that

continues to attend to the requests for the exercise of rights made by the

interested parties, with the scope expressed in the Legal Foundations of this

agreement. Thus, it must establish mechanisms to ensure that requests for

exercise of rights are answered in any case and avoid, in case of requests

of access to the images captured by their video surveillance systems, which

images to which these requests refer are deleted before attention

of the law and before the competent bodies can review, where appropriate, the

decisions that MERCADONA adopts in this regard.

It is warned that not meeting the requirements of this organization may be

considered as a serious administrative infraction by “not cooperating with the Authority of control” before the requirements made, being able to be valued such behavior to the time of the opening of an administrative sanctioning procedure with a fine pecuniary

X

MERCADONA, in its pleadings brief on the proposed resolution, for the case of proceeding to voluntary payment and acknowledgment of responsibility in any time before the resolution, request the application of a discount on the 40% penalty. However, to this date there is no evidence that said entity has proceeded to the voluntary payment nor has it entered this Agency in writing in the that that entity recognizes its responsibility for the events that have given rise to to the performances.

In any case, this Agency does not share the interpretation of article 85 of the Law 39/2015 (LPACPA) that MERCADONA exposes in its pleadings brief, in relation to the moment in which responsibility must be recognized so that the planned reduction can be applied.

In the opinion of this Agency, said acknowledgment, as stated in the agreement of beginning, the procedure must be declared initiated, during the term to formulate arguments at the opening of the procedure. This is in accordance with the provisions of the aforementioned article 85 of Law 39/2015, according to which the recognition of the responsibility must occur "initiated the procedure" for the application of the expected reduction of 20% on the sanction, unlike what is established expressly in relation to the discount for voluntary payment of the sanction, which may be applied when said payment occurs at any time prior to the resolution. If the aforementioned precept has distinguished the conditions in the two modes of voluntary termination of the indicated procedure, no interpretation shall

match these conditions as if there were no differences in their regulation.

Article 85.2 of the LPACAP refers expressly and solely to voluntary payment,

and not to the acknowledgment of responsibility, determining that such payment may be

occur at any time prior to resolution. Thus, it is not possible to distinguish

obligate where the Law does not distinguish or obligate. Furthermore, article 85.3

indicates that “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”, which

assumes that both must be in the initial agreement (reference from article 85.1 to 64

of the LPACAP), so it does not contemplate that both reductions are in the

proposed resolution or that can be paid cumulatively at any

time prior to resolution.

This is also understood by the National High Court, Contentious-Administrative Chamber,

Section 1, which in its Judgment of 02/05/2021, Rec. 41/2019, indicates that the payment

voluntary can occur at any time prior to resolution, while

that the reduction by acknowledgment of responsibility is linked to the agreement of

beginning and the provision of article 64.2.d) of Law 39/2015:

“Regarding the infringement of the provisions of articles 64 and 85 of Law 39/2015, which

contemplate the possibility of acknowledging responsibility at the time of notification of
the resolution to initiate the procedure (art. 64.2.d) and benefit from the reductions provided for in
Article 85, in the agreement to initiate the procedure there is an express reference to those
articles, indicating that sections 2 and 3 of article 85 are not applicable; what's more,
at no time has the plaintiff shown his willingness to acknowledge responsibility
for the sanctioned infraction and take advantage of the possibility established in said articles (the payment
voluntary can be done at any time prior to the resolution), so it is appropriate
also reject this allegation.

Also the purpose is different for each of those modes of termination of the
process. In the case of acknowledgment of responsibility (article 85.1),
pursues the achievement of greater efficiency in administrative action with a
rapid completion of the procedure that is associated, in addition, the renunciation of
administrative appeal. This implies a saving of time, effort and, therefore,
of costs that reward this acknowledgment of responsibility with a reduction of
twenty%. With the position defended by MERCADONA, this purpose is not achieved, for
how much the procedure would be instructed in its entirety, and that is why this
reduction.

In the case of voluntary payment (article 85.2) the purpose is different, since in this
case we speak of “at any time prior to the resolution”.

On this issue, what is established in other sanctioning regimes, such as the
indicated by MERCADONA in its allegations, does not condition the regulation
applicable to this procedure nor prevails over it. some of the
regulations cited by MERCADONA in this regard, moreover, do not establish that the
acknowledgment of responsibility entails the application of a discount, although
occurs at a time after the motion for a resolution and before the
resolution, as in the case of Law 16/1987, of July 30, on the Organization of

Land Transport (LOTT), which in its article 146.3 only refers to the payment

volunteer:

“The payment of the pecuniary sanction prior to the sanctioning resolution being issued

will imply agreement with the facts denounced and the waiver of making allegations for

part of the interested party and the termination of the procedure, however, it must be issued

express resolution.

The case of Law 7/2014, of July 23, on the Protection of Consumers

and users of the Balearic Islands, is no different when establishing the application of a

reduction “if the alleged perpetrator agrees to the content of the

start resolution and justifies the payment of the aforementioned amount during the fifteen days

following its notification”; although it expressly contemplates the application of a

lower reduction if compliance is given in relation to the content of the

resolution proposal, which Law 39/2015 does not do.

Likewise, MERCADONA understands that its interpretation of the aforementioned provision comes

endorsed by the Courts, and cites three sentences. Two of them, STS 232/2021, of

February 18, (cassation appeal 2201/2020), and the one issued by the Superior Court

of Justice of Madrid, Contentious-Administrative Chamber, no. 79/2020, of 6 of

February, do not contain the pronouncement expressed by the respondent (the STS sets

as a doctrine “the waiver or withdrawal required in article 85 of the Law

39/2015, in order to benefit from the reduction in the amount of the penalty,

projected solely and exclusively on the actions or resources against the sanction to

exercise in the administrative and not in the judicial way"); and the third refers to a course in which the appellant acknowledged his responsibility in the writ of allegations to the agreement to initiate the disciplinary proceedings.

In another order, it should be noted that the Report of the Legal Office of the Board of Andalusia that is cited in the arguments to the motion for a resolution refers to the voluntary payment of the sanction (article 85.2 of Law 39/2015) and not recognition of responsibility.

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 entity MERCADONA, S.A., with NIF A46103834, for a infringement of article 12, in relation to article 15, both of the RGPD, typified in article 83.5.b) and qualified as minor for prescription purposes in article 74.c) of the LOPDGDD, a fine of 70,000 euros (seventy thousand euros).

SECOND: TO IMPOSE MERCADONA, S.A., for an infraction of the Article 6 of the RGPD, typified in article 83.5.a) and classified as very serious to effects of prescription in article 72.1.b) of the LOPDGDD, a fine of 100,000 euros (one hundred thousand euros).

THIRD: REQUEST MERCADONA, S.A. so that, within a month, counted from the notification of this resolution, adapt their actions to the personal data protection regulations, with the scope expressed in the Foundation of Law IX, and justify before this Spanish Agency for the Protection of Data attention to this requirement. In the text of the resolution establish what the infractions have been committed and the facts that have given give rise to the violation of the data protection regulations, from what is inferred with clarity about the measures to be adopted, without prejudice to the type of

specific procedures, mechanisms or instruments to implement them

corresponds to the sanctioned party, since it is the data controller who

fully knows your organization and has to decide, based on the responsibility

proactive and risk-focused, how to comply with the RGPD and the LOPDGDD.

FOURTH: NOTIFY this resolution to the entity MERCADONA S.A.

FIFTH: Warn the sanctioned party that he must make the imposed sanction effective once

Once this resolution is enforceable, in accordance with the provisions of the

art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common Public Administrations (hereinafter LPACAP), within the payment term

voluntary established in art. 68 of the General Collection Regulations, approved

by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003,

of December 17, through its entry, indicating the NIF of the sanctioned and the number

of procedure that appears in the heading of this document, in the account

restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency

Spanish Department of Data Protection in the banking entity CAIXABANK, S.A.. In case

Otherwise, it will be collected in the executive period.

Received the notification and once executed, if the date of execution is

between the 1st and 15th of each month, both inclusive, the term to make the payment

voluntary will be until the 20th day of the following month or immediately after, and if

between the 16th and last day of each month, both inclusive, the payment term

It will be until the 5th of the second following month or immediately after.

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-

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.

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