

□ File No.: PS/00132/2021

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: On April 29, 2020, the Director of the Spanish Agency for  
Data Protection, agrees to initiate investigation actions in relation to the  
possible app that allows to monitor and track the stay of tourists in  
Canary Islands, framed in the potential tourism plan for security guarantees that  
is proposed by the Ministry of Tourism, Industry and Commerce of the Government of  
Canary Islands, for the tourist reopening in the aforementioned Autonomous Community after the crisis  
health of COVID-19, in case of such events there are indications of  
infraction in the area of competence of the Spanish Agency for Data Protection.

### SECOND:

The General Subdirectorate for Data Inspection proceeded to  
carrying out preliminary investigation actions to clarify the  
facts, requesting information from the Ministry of Tourism, Industry and Commerce of the  
Government of the Canary Islands, having knowledge of the following extremes:

On May 12, 2020, a response is received from the Ministry of Tourism  
Industry and Commerce in which it declares not having ordered the start-up of the app  
one that allows to monitor and track the stay of tourists in  
Canary Islands, as well as claiming to have no record of the implementation of a project  
for the development of an app for this purpose.

THIRD: Through an inspection continuation procedure, dated June 9,  
2020, various press releases and news are incorporated into the file,

referring to the possibility of developing the so-called “digital health passport”, through the hi+Card mobile application, with health data (COVID-19 infection) from tourists visiting the Canary Islands during the summer of 2020, in collaboration with the UNWTO (world tourism organization).

FOURTH: On June 15, 2020, information is requested from the Ministry of Health of the Government of the Canary Islands regarding the app classified as health and called “hi+Card”, which would allow the monitoring of tourists arriving by air to Canary Islands, with processing of personal data related to the monitoring of the crisis COVID-19 health. Said request for information was reiterated on the 8th of July 2020.

By diligence of October 23, 2020 in order to verify the communication to this control authority of a Data Protection Delegate designated by the Ministry of Health of the Government of the Canary Islands, position said Delegate did not appear in the official exchange of documentation

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maintained with the aforementioned body as a result of the ongoing investigation, it is found that

The Spanish Agency for Data Protection has not been notified of the Delegate for Data Protection of the Ministry of Health of the Government of Canary Islands..

FIFTH: On April 27, 2021, the Director of the Spanish Agency for Data Protection agreed to initiate sanctioning proceedings against the Ministry of Health of the Government of the Canary Islands (hereinafter Ministry of Health), by the

alleged infringement of the article of article 37.1 of the RGPD, typified in article 83.4

of the RGPD, declaring that the sanction that could correspond would be

warning, without prejudice to what resulted from the investigation.

SIXTH: Electronic notification of the aforementioned start-up agreement, the Ministry of

On May 12, 2021, the Ministry of Health presented a brief of allegations in which it requests the

archive of the proceedings, basing your request on the allegations that are exposed to

continuation:

“The Administration of the Autonomous Community of the Canary Islands has been working

to unify criteria regarding the protection of personal data. one of the lines

of action has been the designation of Data Protection Delegates.

In this sense, on March 25, 2021, it is published in the Official Gazette of

Canary Islands Decree 14/2021, of March 18, which approves the Regulation

Organic of the Ministry of Public Administrations, Justice and Security.

By means of said regulation, the Commission for the Protection of Personal Data is created as

Collegiate body for the promotion, analysis and preparation of proposals for the coordination of

the protection of personal data in the Public Administration of the Community

Autonomous Community of the Canary Islands and its autonomous bodies, attached to the Ministry of

Public Administrations, Justice and Security (art. 147 and following).

The functions of the Commission are the following (art. 149):

a) Exercise the promotion, analysis and coordination proposals of data protection

personnel in the Public Administration of the Autonomous Community of the Canary Islands.

b) Exercise the function of Data Protection Delegate in the departments or

organisms of the Public Administration of the Autonomous Community of the Canary Islands that

they have not designated them.

c) Supervise compliance with personal data protection regulations and the

establishment of elements and common interpretative criteria of the elements of the

personal data protection system.

d) Inform and advise the data protection delegates of the obligations incumbent on them by virtue of current regulations on the subject of personal data protection.

e) Cooperate with the control authority.

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f) Formulate compliance recommendations regarding data protection personal.

g) Promote the actions corresponding to the training of personnel in matters of personal data protection.

h) Approve its internal operating rules. Its composition provides that the DPD of the different departments form part of it (fourth indent of the section c of article 148).

Its seventh additional provision establishes a series of supplementary rules so that as of its entry into force, no department lacks a Protection Delegate of data. In this sense, it provides that those departments that, for whatever circumstances, on April 30, 2020 they had not appointed him, they will assume the functions of data protection delegates the Technical General Secretariats, General Secretariats or equivalent bodies.

Consequently, from May 1, the Data Protection Delegate of this Ministry is its General Technical Secretariat, and thus it has proceeded to communicate it on May 5 (the receipt of the communication is attached)

effected).”

On May 13, 2021, a receipt of presentation in the Registry is provided

General of the Spanish Agency for Data Protection, on May 5, 2021, of the

Communication of registration of the Data Protection Delegate of the Ministry of

Health.

SEVENTH: On October 1, 2021, a resolution proposal was issued in the

following sense:

"That by the Director of the Spanish Agency for Data Protection is sanctioned with

warning to the MINISTRY OF HEALTH OF THE GOVERNMENT OF THE CANARY ISLANDS, with

NIF S3511001D, for an infringement of article 37 of the RGPD, typified in article

83.4 of the GDPR. “

EIGHTH: The proposed resolution was notified electronically, as

required by article 14.2 of Law 39/2015 of Common Administrative Procedure of the

Public Administrations (LPACAP), in the same way in which the

Agreement to initiate this sanctioning procedure. Work on file

certificate issued by the Notification Service Support service

Emails and Enabled Electronic Address, in which the sending of the

notification with Reference: 54189506156e494cc4f7, Subject “Proposal of

Resolution” and Acting Administration Spanish Agency for Data Protection,

being the date of availability of 01/10/2021 at 12:37:06 and the date of

automatic rejection: 10/12/2021 at 00:00:00.

Article 43.2. of the LPACAP establishes that when the notification by means

electronic devices is mandatory -as is the case in this case- "it is

shall be understood as rejected when ten calendar days have elapsed since the

disposition of the notice without accessing its content.”

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Article 41.5 of the LPACAP provides that "When the interested party or his representative rejects the notification of an administrative action, it will be recorded in the file specifying the circumstances of the notification attempt and the means, considering the procedure completed and following the procedure."

For its part, article 73, numbers 1 and 5 of the same regulation establishes that "1. The Procedures that must be completed by the interested parties must be carried out in the period of ten days from the day following the notification of the corresponding act, except in the event that the corresponding rule sets a different term.

3. Interested parties who do not comply with the provisions of the preceding sections will be may declare decayed in their right to the corresponding procedure. However, it will admit the action of the interested party and will produce its legal effects, if before or within the day that the resolution is notified in which it is considered term has elapsed."

No objections have been received to the proposed resolution of this process.

## PROVEN FACTS

FIRST: The record shows that the designation of Protection Delegate of Data from the Ministry of Health was produced on May 1, 2021.

Such designation is carried out by virtue of the provisions of the additional provision seventh of Decree 14/2021, of March 18, which approves the Regulation body of the Ministry of Public Administrations, Justice and Security, which ordered the appointment of data protection delegate to the departments of the

Public Administration of the Autonomous Community of the Canary Islands and its organizations

self-employed before April 30, 2021, providing that, in the event that the expiration

said period had not been designated, the Secretaries would assume said function.

Technical Generals, General Secretariats or equivalent bodies.

SECOND: Said designation was communicated to the Spanish Protection Agency

of Data on May 5, 2021.

FOUNDATIONS OF LAW

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The Director of the Spanish Agency is competent to resolve this procedure.

Data Protection, in accordance with the provisions of art. 58.2 of the

Regulation (EU) 2016/679, of the European Parliament and of the Council, of April 27,

2016, regarding the Protection of Natural Persons with regard to the

Treatment of Personal Data and the Free Circulation of these Data and for which

Directive 95/46/CE (General Data Protection Regulation, in

hereinafter RGPD) and in articles 47 and 48.1 of Organic Law 3/2018, of 5

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December, Protection of Personal Data and Guarantee of Digital Rights

(hereinafter LOPDGD.

II

The Public Administrations act as data controllers of

personal character and, on some occasions, they exercise functions of those in charge of

treatment, for what corresponds to them, following the principle of responsibility

proactively, meet the obligations that the RGPD details, among which is included, the obligation to appoint a data protection delegate and communicate it to this Agency.

The obligation is imposed by article 37 of the RGPD, which establishes the following:

"1. The person in charge and the person in charge of the treatment will designate a delegate of data protection provided that:

the treatment is carried out by a public authority or body, except

a)

the courts acting in the exercise of their judicial function;"

Article 37.3 and 4 of the RGPD indicates about the designation of the DPD "When the

The person responsible or the person in charge of the treatment is a public authority or body,

may designate a single data protection delegate for several of these

authorities or bodies, taking into account their organizational structure and size.

4. In cases other than those referred to in section 1, the person in charge or the

in charge of the treatment or the associations and other organisms that represent

categories of managers or managers may designate a protection delegate

of data or they must designate it if so required by the Law of the Union or of the States

members. The data protection delegate may act on behalf of these

associations and other organizations that represent those responsible or in charge."

The LOPDGDD determines in its article 34.1 and 3:

"Appointment of a data protection delegate

1. Those responsible and in charge of the treatment must designate a delegate of

data protection in the cases provided for in article 37.1 of the Regulation

(EU) 2016/679 and, in any case, in the case of the following entities:

3. Those responsible and in charge of the treatment will communicate within a period of ten

days to the Spanish Agency for Data Protection or, where appropriate, to the authorities



regional authorities for data protection, appointments, appointments and dismissals of the data protection delegates both in the cases in which they are obliged to their designation as in the case in which it is voluntary.”

It is alleged by the Ministry of Health that the appointment of the protection delegate of data has been made on May 1, 2021, however, the RGPD, as provided in its article 99, it is applicable from May 25, 2018, so

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during the period between the date on which the RGPD begins its application and the date of appointment of the data protection delegate has not been fulfilled to the obligation set forth in article 37.1 of said regulation.

Consequently, in accordance with the exposed evidence, the aforementioned facts constitute a violation of the provisions of article 37 of the RGPD, typified as such an infringement in section 4.a) of article 83 of the RGPD, which under the rubric "General conditions for the imposition of administrative fines", establishes the

Next:

"4. Violations of the following provisions will be sanctioned, in accordance with the paragraph 2, with administrative fines of a maximum of EUR 10,000,000 or, in the case of a company, an amount equivalent to a maximum of 2% of the global total annual turnover of the previous financial year, opting for the largest amount:

a)

the obligations of the person in charge and the person in charge in accordance with articles 8, 11,

25 to 39, 42 and 43;”

For the purposes of the statute of limitations, the LOPDGDD in its article 73.v), “Infringements considered serious”, provides the following:

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

v) Failure to comply with the obligation to appoint a data protection delegate when his appointment is required in accordance with article 37 of the Regulation (EU) 2016/679 and article 34 of this organic law.”

III

In the event that there is an infringement of the provisions of the RGPD, between the corrective powers available to the Spanish Agency for the Protection of Data, as a control authority, article 58.2 of said Regulation contemplates the following:

“2 Each supervisory authority shall have all of the following corrective powers listed below:

(...)

b) send a warning to any controller or processor when treatment operations have violated the provisions of this Regulation”. (correction of errors in Regulation (EU) 2016/679, DOUE number 74, of March 4, 2021

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

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

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 or warning.

#### IV

Notwithstanding what is stated in the previous Legal Foundations, article 83.7 of the RGPD provides that, without prejudice to the corrective powers of the authorities of control under Article 58(2), each Member State may establish rules on whether and to what extent administrative fines can be imposed on public authorities and bodies established in that Member State

The LOPDGDD in its article 77, Regime applicable to certain categories of responsible or in charge of the treatment, establishes the following:

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

a) The constitutional bodies or those with constitutional relevance and the institutions of autonomous communities analogous to them.

b) The jurisdictional bodies.

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

- d) Public bodies and public law entities linked or dependent on the Public Administrations.
- e) The independent administrative authorities.
- f) The Bank of Spain.
- g) Public law corporations when the purposes of the treatment are related to the exercise of powers of public law.
- h) Public sector foundations.
- I) Public Universities.
- j) The consortiums.
- k) The parliamentary groups of the Cortes Generales and the Legislative Assemblies autonomous, as well as the political groups of the Local Corporations.

2. When those responsible or in charge listed in section 1 committed any of the infractions referred to in articles 72 to 74 of this law organic, the data protection authority that is competent will dictate resolution sanctioning them with a warning. The resolution will establish also the measures that should be adopted to stop the behavior or correct it. the effects of the infraction that had been committed.

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The resolution will be notified to the person in charge or in charge of the treatment, to the body of the that depends hierarchically, where appropriate, and to those affected who had the condition interested party, if any.

3. Without prejudice to what is established in the previous section, the data protection authority

data will also propose the initiation of disciplinary actions when there are sufficient evidence for it. In this case, the procedure and the sanctions to be applied will be those established in the legislation on disciplinary or sanctioning regime that result of application.

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

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

4. The data protection authority must be notified of the resolutions that fall in relation to the measures and actions referred to in the sections previous.

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

6. When the competent authority is the Spanish Data Protection Agency, this will publish on its website with due separation the resolutions referring to the entities of section 1 of this article, with express indication of the identity of the person in charge or in charge of the treatment that had committed the infraction.

When the competence corresponds to a regional authority for the protection of data will be, in terms of the publicity of these resolutions, to what your specific regulations”.

It is not possible to comply with what was requested by the Ministry of Health in the sense that file the proceedings, since non-compliance with the provisions has been verified.

provided for in article 37 of the RGPD during the period between the 25th of

May 2018, the date from which the GDPR is applicable, and May 1, 2021,  
date on which the appointment of a data protection delegate is made by  
part of that entity.

Therefore, in accordance with the applicable legislation,  
the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE THE MINISTRY OF HEALTH OF THE GOVERNMENT OF  
CANARIAS, with NIF S3511001D, for an infringement of Article 37 of the RGPD,  
typified in Article 83.4 of the RGPD, a sanction of warning.

SECOND: NOTIFY this resolution to the MINISTRY OF HEALTH OF THE  
GOVERNMENT OF THE CANARY ISLANDS.

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THIRD: COMMUNICATE this resolution to the Ombudsman,  
in accordance with the provisions of article 77.5 of the LOPDGDD.

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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