

□ Procedure No.: PS/00257/2020

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claimant) dated January 20, 2020
filed a claim with the Spanish Data Protection Agency. The
claim is directed against the City Council of Arroyomolinos with NIF P2801500F
(hereinafter, the claimed).

The claimant states that he received a notice in his name from the
City Council, and it contains the data and facts that motivate the imposition
of a sanction to another person.

On the other hand, it indicates that the consistory does not have a Delegate for the Protection of
Data.

Together with the claim, provide the notification that you have been sent.

SECOND: In view of the facts denounced in the claim and the
documents provided by the claimant, the claim is transferred to the claimed party.

On July 24, 2020, the respondent states: "that on January 20,
2020, the claimant was informed that on the day of notification of the Resolution there was
a computer failure, and in the notification of its procedure the body of the
resolution of the previous notification. The department proceeded to review
notifications generated, not finding any more erroneous, likewise
proceeded to add more revision controls of the generated documents so that
this situation will not be repeated.

Likewise, you were informed that your data has not been transferred to third parties,

have only been used for the notification of the procedure between the claimant and this City Council”.

THIRD: On September 25, 2020, the Director of the Spanish Agency of Data Protection agreed to initiate sanctioning procedure to the claimed, 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 violation of Article 37 of the RGPD, typified in Article 83.4 of the GDPR.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations in which, in summary, it stated: “that on September 28, 2020 was awarded by Decree No. 2497/2020 technical assistance services contract for support and updating in information security (ENS) and

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protection of personal data (RGPD-LOPDGDD) and Delegate Service of Data Protection, for a period of 12 months.

Sufficiently in advance of the termination date of the contract and taking based on the work carried out by the DPO during that time, it is already planned to tender publicly for a maximum of 4 years the Data Protection Delegate, with in order for this City Council to have this figure permanently.

In compliance with the duty of communication of the appointment of the DPD by this City Council to the AEPD in accordance with the provisions of article 34.3 LOPDGDD,

Below are the details of the same: START UP, S.L. CIF B33667494

Attached to this document: Decree No. 2497/2020 for the award of service contract and technical-economic proposal of the company Start up CDF S.L. detailing the content of the services to be performed”.

FIFTH: On October 13, 2020, the instructor of the procedure agreed to the opening of a period of practice tests, considering incorporated the previous investigation actions, E/02287/2020, as well as the documents provided by the respondent on October 8, 2020.

SIXTH: On November 18, 2020, a resolution proposal was formulated, proposing that the City Council of Arroyomolinos be sanctioned with NIF P2801500F, for an infringement of Article 37 of the RGPD, typified in Article 83.4 of the GDPR.

SEVENTH: Once the proposed resolution was notified, the respondent submitted a written pleadings in which, in summary, it stated:

“FIRST.- That on September 28, 2020 it was awarded by Decree No. 2497/2020 technical assistance service contract for support and updating in information security (ENS) and personal data protection (RGPD-LOPDGDD) and Data Protection Delegate Service, for a period of 12 months to the company Start up CDF S.L.

SECOND.- The duty of communication of the appointment of the DPD by this City Council to the AEPD in accordance with the provisions of article 34.3 LOPDGDD.

THIRD.- In the proposed resolution of the AEPD it is indicated that “In this case Specifically, it has been accredited by virtue of the documents provided with its allegations to the initial agreement that the respondent has appointed Delegate of Data Protection: START UP, S.L. CIF B33667494.”

FOURTH.- Taking into consideration the Judgment of the National High Court of

11/29/2013, (Rec. 455/2011), Sixth Legal Basis, which on the

warning regulated in article 45.6 of the LOPD and regarding its nature

Legal notice warns that "it does not constitute a sanction" and that it is "measures

corrections of cessation of the activity constituting the infraction" that replace the

sanction. The Judgment understands that article 45.6 of the LOPD grants the AEPD

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a "power" different from the sanctioning one whose exercise is conditioned to the

concurrence of the special circumstances described in the precept. In

consistency with the nature attributed to warning as an alternative to

sanction when, taking into account the circumstances of the case, the subject of the infraction is not

deserving of that, and considering that the object of the warning is the

imposition of corrective measures, the cited SAN concludes that when these already

had been adopted, what is appropriate in law is to agree on the file of the

performances".

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

In this proceeding, the following are considered proven facts:

FACTS

FIRST: The respondent lacks the figure of data protection delegate.

SECOND: The

sanctioning procedure the measures it has adopted, including:

City Council of Arroyomolinos, has contributed in the present

Contract for technical assistance services for support and updating in

information security (ENS) and personal data protection

(RGPD-LOPDGDD) and Data Protection Delegate Service, for a period of

12 months.

Communication of the appointment of the Data Protection Delegate: START

UP, S.L. CIF B33667494

Decree No. 2497/2020 awarding a service contract and proposal

technical-economic of the company START UP CDF S.L.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of

control, and as established in arts. 47 and 48.1 of the LOPDGDD, the Director of

The Spanish Agency for Data Protection is competent to resolve this

process.

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

AEPD

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

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

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

Article 37.3 and 4 of the RGPD indicates about the appointment 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 delegate of Data Protection "

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.

The infringement is considered as such in article 83.4.a of the RGPD, which states: "4. The 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 of the person in charge pursuant to articles 8, 11, 25 a 39, 42 and 43;"

Article 83.7 of the RGPD indicates:

"Without prejudice to the corrective powers of the control authorities by virtue of art.

Article 58(2), each Member State may lay down rules on whether

of, and to what extent, impose administrative fines on authorities and public bodies public authorities established in that Member State.

Article 58.2 of the RGPD indicates: "Each control authority will have all the

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following corrective powers indicated below:

b) sanction any person responsible or in charge of the treatment with a warning when

When the treatment operations have infringed the provisions of this Regulation-
mint;

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.

In this sense, article 77.1 c) and 2, 4 and 5 of the LOPGDD, indicates:

1. The regime established in this article will be applicable to the treatment of

who are responsible or in charge:

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

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.

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

of interested, in his case."

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."

III

Article 73 of the LOPDDG indicates: Infractions considered serious:

"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.”

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By means of a pleadings letter, the respondent has stated that he has already designated Data Protection Delegate.

Despite this, the Spanish Agency for Data Protection sanctions the claimant with a sanction of warning since it should have had a delegate of data protection in accordance with the provisions of article 37 of the RGPD, since May 25, 2018, when the GDPR came into force.

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of the sanctions whose existence has been proven, the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE ARROYOMOLINOS CITY COUNCIL, with NIF P2801500F, 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 CITY COUNCIL OF ARROYOMOLINOS.

THIRD

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

: COMMUNICATE this resolution to the Ombudsman,

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

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

Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the

LOPDGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the

Director of the Spanish Agency for Data Protection within a month from

counting from the day following the notification of this resolution or directly

contentious-administrative appeal before the Contentious-Administrative Chamber of the

National Court, in accordance with the provisions of article 25 and section 5 of

the fourth additional provision of Law 29/1998, of July 13, regulating the

Contentious-administrative jurisdiction, within a period of two months from the

day following the notification of this act, as provided in article 46.1 of the

aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP,

may provisionally suspend the firm resolution in administrative proceedings if the

The interested party expresses his intention to file a contentious-administrative appeal.

If this is the case, the interested party must formally communicate this fact by

writing addressed to the Spanish Agency for Data Protection, presenting it through

Electronic Register of the Agency [[https://sedeagpd.gob.es/sede-electronica-](https://sedeagpd.gob.es/sede-electronica-web/)

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-

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administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative within a period of two months from the day following the

notification of this resolution would end the precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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