 File No.: PS/00091/2021

RESOLUTION OF PUNISHMENT PROCEDURE

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

to the following

BACKGROUND

FIRST: On August 6, 2020, the director of the AEPD has proof

that on July 24, 2020, the Official Gazette of Cantabria published the

"Resolution approving the second modification of the Resolution of the

Ministry of Health of June 18, 2020, which establishes the measures

health regulations applicable in the Autonomous Community of Cantabria during the period of

new normal" (hereinafter, second amendment of the Resolution).

This resolution incorporates the obligation for certain types of establishments of

have a customer registry available to the General Directorate of Public Health

with the purpose of "facilitating the tracing and follow-up of contacts of positive cases

vos, probable or possible of Covid-19". The resolution itself stipulates that "the collection

of such data will require the consent of the interested party, without prejudice to conditioning

the right of admission for reasons of public health in case of not being able to count on

the same".

In order to clarify this treatment, the director of the AEPD urges the Subdirectorate

General Data Inspection (hereinafter, SGID) to start the preliminary actions

of investigation referred to in article 67 of Organic Law 3/2018, of 6

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

hereinafter, LOPDGDD), in case such facts give rise to indications of infraction

in the sphere of competence of the AEPD.

SECOND: In view of these facts, the SGID proceeds to carry out actions

prior investigation for its clarification, by virtue of the powers of in-

investigation granted to the control authorities in article 58.1 of the Regulation

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

to the protection of natural persons with regard to the processing of personal data

personal data and the free circulation of these data and repealing Directive 95/46/

CE (General Data Protection Regulation, hereinafter RGPD), and in accordance with

accordance with the provisions of Title VII, Chapter I, Second Section, of the LOPDGDD.

Within the framework of the preliminary investigation actions, a first requirement is

collection of information addressed to the HEALTH DEPARTMENT OF THE GOVERNMENT OF

CANTABRIA (hereinafter, the MINISTRY):

Secure Verification Code Requirement

C/ Jorge Juan, 6

28001 – Madrid

Required date Notification date

www.aepd.es

sedeagpd.gob.es

2/38

First

CSV.1

I lie

08/07/2020

tion required

I lie

08/07/2020

In this request, dated August 7, 2020, the following information is requested-

tion:

"1. Purpose of the processing of personal data and legal basis on which it is

sustains.

2. Assessment of the proportionality of the treatment (judgment of suitability, of ne-

cessity, and proportionality in the strict sense).

3. Details of the categories of personal data subject to treatment and evaluation.

tion of compliance with the principle of data minimization.

4. Determination of the categories of establishments required to implement

tion of the measure and explanation of the reason for its choice over others.

5. Description of the process that allows the achievement of the intended purpose

with indication, for each of the participants in it, of:

5.1. Link with the treatment (responsible, jointly responsible, in charge,

third party, interested party) of each participant. Detail of the contract or legal act that

binds the person in charge of the treatment with the person in charge of the same in accordance

with the provisions of article 28 of the RGDP.

5.2. Description of the specific treatment performed (registration, consultation, communication

cation, suppression, etc.) each participant. Specification, where appropriate, of the format

to which you will store personal data (digital / paper).

5.3. Communication procedure of the registry data of each establishment

communication to the health authorities: detail of the communication channel (postal,

email, telephone, etc.) and the events that cause the shipment (frequency

specific frequency and/or at the request of the health authorities).

5.4. Indication of the possibility or not of the participation of “sub-processors” of treatment.

ment (entities contracted by the establishments to carry out parts of the

assigned treatment).

5.5. Periods of conservation of the data of each participant and determination

whether, after the provision of the service, those in charge must delete or de-

return the data to the person in charge. Specify, where appropriate, the regulations that require

Requires those in charge to retain the data once the service has ended.

tion.

5.6. Means used to comply with the duty of information to the interested party-

do.

5.7. Guarantees applied for the fulfillment of the obligations imposed in

Chapter IV of the RGPD in terms of security measures."

Whenever said requirement was not met by the MINISTRY, a

second requirement with the following tenor:

"In compliance with article 14.2 of Law 39/2015 of October 1, of the Procedure

Common Administrative Procedure of Public Administrations (hereinafter,

LPACAP), legal persons and entities without legal personality, as well

as those who represent obligated subjects, among others, will be obliged to

interact with the Public Administrations through electronic means.

The Spanish Data Protection Agency sends its notifications and communications

electronic notifications through the Notific@ platform that sends the notifications

tions to the Citizen Folder and Enabled Electronic Address systems of the

Ministry of Finance and Public Administration.

Having sent the attached document in relation to file E/

06497/2020 through the Notific@ system, and not having received a response

to the request for information carried out, exceptionally and for informative purposes.

vo we proceed to its referral by postal mail.

Finally, I inform you that the person in charge and the person in charge of the treatment of

personal data have the obligation to provide the documents,

information and any other collaboration required to perform the function

inspection tion. Failure to comply with this obligation could lead to the co-

mission of the offense typified in art. 83.5.e) of the RGPD, consisting of not

facilitate access in breach of article 58, section 1."

Secure Verification Code Requirement

Second

CSV.2

Required date

I lie

10/19/2020

Notification date-

tion required

I lie

10/20/2020

The latter was accompanied by an annex that reproduced the first request for certification.

Cha August 7, 2020

THIRD: In response to the requests made, the alleged responsible

provided -on November 2, 2020-, the following information:

"In relation to the request in relation to the obligation to implement a registry

other clients contemplated in the second modification of the resolution of the

Ministry of Health of June 28, 2020, which establishes the me-

applicable health measures in the Autonomous Community of Cantabria, I inform you

that:

The collection of personal data, name, surnames and telephone, is not

compulsory, is voluntary and requires the express consent of the interested party.

The data, (in case of its collection), are only available to the Directorate

General Public Health Commission, with the sole purpose of facilitating the tracing of

are positive, probable or possible of COVID-19. They will only be kept for

for a month

The treatment of the data will be governed in any case by the provisions of the Or-

Law 3/2018, of December 5, on the Protection of Personal Data and Guarantee

of Digital Rights and in Regulation (EU) 2016/679 of the European Parliament

and of the Council of April 27, 2016, regarding the protection of persons

physical entities with regard to the processing of personal data and the free circulation

culation of these."

FOURTH: On December 1, 2020, once the preliminary actions have been carried out,

avenues of investigation in order to achieve a better determination of the facts and circumstances

circumstances that justify the processing of the procedure, the SGID issues a report

in which the following facts are stated:

"RESULT OF THE INVESTIGATION ACTIONS

The following content included in the Resolution of July 24 is underlined (incorporated

porada to the procedure through the corresponding diligence - Diligence Re-

ferences-):

"Article 2 of Decree 2/2020, of June 18, of the President of the Community

Autonomous Region of Cantabria, refers to the application of Royal Decree-Law 21/2020,
of June 9, of urgent measures of prevention, containment and coordination
to deal with the health crisis caused by Covid-19, as well as the
measures adopted by the Minister of Health, as a health authority
in accordance with the provisions of article 59.a) of Law 7/2002, of 10 December
December, of Sanitary Ordinance of Cantabria, or any others that result
apply during this period.
The aforementioned measures were adopted by Resolution of the Ministry of
Health of June 18, 2020 (Official Bulletin of Cantabria extraordinary nº
50, of June 18, 2020; Correction of errors in the Official Bulletin of Canta-
bria extraordinary nº 53 of June 29, 2020), resulting modified by
by Resolution of the Ministry of Health of July 15, 2020 (Bulletin
Extraordinary Official of Cantabria No. 57, of July 15, 2020), which extends the
assumptions of mandatory use of a mask. […]
On the other hand, it has been noted during the investigation of the recent outbreaks
declared in the Autonomous Community of Cantabria the transcendence, for
control of the pandemic, the speed of the response relative to the study of
cases and contacts and their corresponding isolation, as well as the need to
facilitate the task of researchers in order to limit transmission as much as possible and
affectation of citizens by the SARS 2-Covid-19 coronavirus. This results
especially difficult when the study includes a visit to an establishment
open to the public, specifying the adoption of specific measures that facilitate
tracing of said contacts. For this reason, a personal record is introduced.
people who access certain establishments with special conditions
risk of transmission, conditioning for reasons of public health the right
of admission in the same to the identification of clients. […]

By virtue of it, considering article 25.3 of the Statute of Autonomy for Cantabria, the

article 26.1 of Law 14/1986, of April 25, General Health, article 3

of Organic Law 3/1986, of April 14, on Special Measures in matters of

Public Health, and article 54 of Law 33/2011, of October 4, General of

Public Health, at the proposal of the General Directorate of Public Health, and in accordance

conformity with article 59.a) of the Law of Cantabria 7/2002, of December 10,

of Sanitary Ordinance of Cantabria.

I RESOLVE

First. Modification of the Resolution of the Ministry of Health of June 18

2020. […]

2.- A section 2.6 is added with the following wording:

"2.6. Without prejudice to the provisions of its sector regulations, the owners of hotels

hotels and tourist accommodation, hairdressers, beauty centers, beauty cabinets,

ca, manicure, pedicure and waxing salons, saunas and gyms must

have a record of the people who access the corresponding establishment

in which the date and time of access, name and surnames and phone number are collected.

contact phone number. The collection of such data will require the consent

the interested party, without prejudice to conditioning the right of admission by

public health reasons in case of not being able to count on it.

The register will be exclusively available to the General Directorate

of Public Health and will have the sole purpose of facilitating the tracking and follow-up

of contacts of positive, probable or possible cases of Covid-19.

The data must be kept in the registry only for a period of

one month from the access, after which it must be cancelled.

tion.

Both the registration and the processing of the data contained therein are re-

will in any case be governed by the provisions of Organic Law 3/2018, of December 5,

Protection of Personal Data and Guarantee of Digital Rights and in the

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

of 2016, relative to 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/EC is repealed".

[…]

Second. Effects.

This Resolution will take effect at 00:00 hours on July 26,

2020. The provisions of point 2 are excepted by which a new

section 2.6 to the Resolution of the Ministry of Health of June 18,

2020, which will enter into force ten days after its publication in the "Official Gazette

of Cantabria."

On July 31, 2020, the AEPD published on its website the note

press release entitled "Communication on the collection of personal data by

establishments" (incorporated into the procedure through the corresponding

diligence tooth -Diligence References-). The following content is highlighted

the note:

"In this regard, it is necessary to point out that the data that is collected, although

are related to the control of the pandemic and their treatment is for the purpose

to be able to identify possible infected, they are not data cataloged in the RGPD

as "special categories".

To start up the registration of customers who go to entertainment venues, tra-

If you are taking a measure to contain the coronavirus, you must prove your

need by the health authorities and must be mandatory, because if

were voluntary it would lose effectiveness. Additionally, if one went to the judiciary base,

consent, in order to appreciate a free consent, it would be necessary

necessary that no negative consequence be derived, that is, that no

prevented entry to the establishment.

Taking into account that the state of alarm is no longer in force, the mandatory

The right to collect data by the establishments has to be established by

a rule with the force of law. In such a case, the legal basis would be 6.1.c) (“the treat-

training is necessary for compliance with a legal obligation applicable to the

data controller”).

In any case, it should be noted that proper monitoring of the evolution

resolution of contagion and the obligation to collect data and transfer it to the authorities

health authorities is based on the guarantee of a public interest of

control the pandemic, so the legal basis would be, preferably,

article 6.1.e) of the RGPD ("the treatment is necessary for the fulfillment of

a mission carried out in the public interest or in the exercise of public powers

ferred to the data controller”).

For these purposes, special emphasis should be placed on the need to justify

that there are no other more moderate measures to achieve the purpose
pursued just as effectively. Therefore, they should be well identified and limited to
those sites where there is greater difficulty in complying with the
these measures (a nightclub is not the same, in which people want to be
nearby, than a museum, in which adequate spaces can be set up for
that people circulate and limit contacts a lot). To this end, they should be
health authorities who value reasoned in which places it would be obligatory
gatorio identify himself.

On the other hand, the collection and transfer of data should be organized in a
that the registry allows the possible contacts to be identified (that is, that there is a
probability that they coincided, being at the same hour, in the same si-
uncle, etc.). In another case, as might happen in a museum, if there is an infectious
do and the thousands of people who could have visited it that day are notified,
aside from being over-treatment, there could be difficulties or even
a collapse in healthcare. Question that they also have to assess
the health authorities of the Autonomous Communities.

Additionally, the principle of minimization must be complied with, by virtue of the
which could be enough to obtain a phone number, along with the data
of the day and time of assistance to the place. This criterion, together with the anonymization
tion of the holders of the device, has been assumed by the European Committee of
Data Protection in the Recommendation on the use of location data
and contact tracing applications in the context of the pandemic; crite-
river that can be extrapolated to this situation with the pertinent adaptations.

Consequently, it would not be necessary to request the name and surnames, which
would be unnecessary for the purpose of notifying potential contacts, and in no way
In this case, identification by means of the DNI is necessary as it is disproportionate.

Likewise, the principle of purpose limitation must be strictly applied,

so that the data should only be used for the purpose of fighting

against the virus, excluding any other, as well as the principle of limitation of

conservation period.

According to these criteria, establishments would be responsible for the

collection of data by virtue of a legal obligation established by a regulation

with the rank of law and the regional administration would be the assignee of those data.

for reasons of public interest provided for in the law. The autonomous administration

mica must establish criteria on the way in which they are collected and communicated.

can those personal data to the Health Administration.

For their part, citizens must receive clear, simple and accessible information.

possible on the treatment before the collection of personal data. Throughout

In this case, the information must be treated with the appropriate security measures."

On August 7, 2020, a request for information was sent to the investigator

for the purpose of clarifying the details of personal data processing

arising from the registration obligation included in section 2.6 of the Resolution

lution of July 24. On November 2, 2020, a response was received to said

requirement (entry registration number O00007128e2000008619) in the

following terms: (...)

(The full content of the allegations is collected in the third antecedent-

ro).

On November 14, 2020, it was published on the website of the

Ministry of Health the "Consolidated text of the resolution of June 18,

2020" (incorporated into the procedure through the corresponding diligence -

Diligence References-) that consolidates in the original resolution the ten modifications

tions made on it. The wording of section 2.6 remains unchanged.

the same terms in which it was drafted by the Resolution of July 24. So-

same, page 7 of the text includes footnote number 5 that refers to

Refer to section 2.6 as follows:

"Section 2.6 added by Resolution of the Ministry of Health of July 24

of 2020 (BOC extraordinary nº 59, of July 24, 2020). Effects: ten days

since its publication in the BOC (August 10, 2020)""

FIFTH: On July 14, 2021, the director of the AEPD agreed to initiate procedures

penalty against the MINISTRY, in accordance with the provisions of articles

63 and 64 of Law 39/2015, of October 1, of the Common Administrative Procedure

of the Public Administrations (hereinafter, LPACAP), for alleged infringement of

the following precepts of the RGPD and the LOPDGDD:

- Articles: 5.1.c) and 7 of the RGPD, typified in article 83.5.a) of the RGPD and in the

article 72.1. a) and 72.1.c) of the LOPDGDD.

- Article: 5.1.e) of the RGPD, typified in article 83.5.a) of the RGPD and in the ar-

article 72.1. a) of the LOPDGDD.

- Article: 13 of the RGPD, typified in article 83.5.b) of the RGPD and in the article

72.1.h) of the LOPDGDD.

Likewise, it ordered the MINISTRY, in accordance with the provisions of article 58.2

d) of the RGPD, so that within TEN DAYS it proceeded to order the person in charge

or in charge of the treatments, that the treatment operations were adjusted to

the provisions of the RGPD and the LOPDGDD.

It also required it so that within a month it could prove to the AEPD the compliance

lie of:

-

The adoption of all necessary measures so that the investigated entity acts

You are in accordance with the principles of «data minimization» and «limitation of the

term of conservation", of article 5.1 sections c) and e) of the RGPD.

The adoption of the necessary measures to facilitate the information provided for in the

article 13 of the RGPD, and must provide people who access the establishment

corresponding procedure, prior to the collection of personal data

-

of the same, all the information required in the aforementioned precept, for which it is determined

You must take into account the provisions of article 7 of the RGPD in relation to the

conditions for consent and article 6 of the LOPDGDD.

SIXTH: The initiation agreement is notified to the MINISTRY, on July 15,

2021, through the Electronic Notifications Service and Electronic Address Enabling

litada, according to the certificate that appears in the file.

SEVENTH: On July 29, 2021, this Agency received, in due time and form,

ma, writing in which he adduces allegations and after stating what is appropriate to his right

ne, requests that a resolution be issued declaring the non-existence of facts that

could constitute an infraction, with filing of the proceedings.

In summary, he argues that:

FIRST. LEGAL BASIS OF THE TREATMENT.

The inclusion by the second modification of the Resolution of the obligation to carry a registration of clients for certain types of establishments arises from the pre-seen in Royal Decree-Law 21/2020, cited in the statement of reasons for Resolution tion, constituting the purpose of the treatment "the follow-up, vigilance and epi-demiological of COVID-19", taking into account "reasons of essential public interest in the specific field of public health, and for the protection of vital interests of affected and other natural persons", as expressly stated in the aforementioned article.

Article 27.2 of the Royal Decree-Law and, subsequently, Article 27.2 of Law 2/2021, of March 29, of urgent measures of prevention, containment and coordination to address the health crisis caused by COVID-19:

"two. The purpose of treatment will be monitoring, surveillance and epidemiological control. logic of COVID-19 to prevent and avoid exceptional situations of special severity, based on reasons of essential public interest in the specific field of public health, and for the protection of vital interests of those affected and of other natural persons under the provisions of the Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016. Addi-Finally, the data may be used, where appropriate, for the issuance by the competent health authority of certificates of diagnostic tests or vaccination, upon express and unequivocal request of the interested party or his legal representative. The Data collected will be used exclusively for the purposes described."

Invokes Report 17/2020 of the AEPD. Remember that recital 46 of the RGPD recognizes that, in exceptional situations, such as an epidemic, the legal basis for treatments can be multiple, based both on the public interest and on the in-vital interest of the interested party or another natural person.

Likewise, it refers to STS 3609/2020, of November 5, 2020, which confirms that the

Article 6.1 of the RGPD no longer maintains the rule of the need for consent,

as a legitimizing basis to be able to process personal data, but rather for the existence

of an illegality in the treatment, it must be proven that none of the pre-

seen in any of the bases of article 6.

Concur, as stated, the legitimizing bases provided for in sections c),

d) and e) of article 6 of the RGPD for the processing of personal identification data

that access certain public establishments, so the data

could be processed without the need for consent.

Without prejudice to the previous titles of legitimation that fully justify the action

situation adopted by the health authority, also concurs the base of legality prior

seen in article 6.1 a) regarding the consent of the interested party.

Certainly, the General Directorate of Public Health of the Ministry of Health of the

Government of Cantabria, in a letter dated October 27, 2020, indicated that “the re-

The collection of personal data, name, surnames and telephone number, is voluntary and re-

wants the express consent of the interested party”. However, this phrase, with greater

or less successful, intends to express that the data is provided by the interested party.

do, with your express consent. That is, the interested party must consent to transfer

your data, for the sole purpose of "facilitating the tracing and follow-up of contacts of

positive, probable or possible cases of Covid-19”, as indicated in point 2.6 of the resolution.

resolution of June 18, 2020.

In no case can the owner of the establishment collect them by means other than

be the interested party himself and without his consent. In the case of not having the sentiment of the interested party, said point 2.6 is limited to recognizing the right of admission sion that corresponds to public establishments by virtue of Royal Decree 2816/1982, of August 27, approving the General Police Regulations of Public Spectacles and Recreational Activities, either as in this case for reasons public health reasons, or for any of the requirements to which the company had conditioned their right of admission.

SECOND. MEANS FOR COMPLIANCE WITH THE DUTY OF INFORMATION TO THE INTERESTED.

The context in which the collection of personal data is carried out in the event that concerns us, determines the subject that must provide information to people affected. Thus, in the case of the customer registry provided for in section 2.6 of the solution of June 18, 2020, are the owners of the establishments that are related mention in said section 2.6 those who collect the data of the people who access to said establishments and include them in the corresponding registry, available of the General Directorate of Public Health. Therefore, it does not fit, but that they be the titles establishments, in their capacity as treatment managers, those who facilitate provide the interested parties with the information required by article 13 of the RGPD at the time of data collection.

In turn, the owners of the establishments know the information related to the treatment ment of the data that they must provide to their clients at the time of collecting the data because it appears in the resolution of June 18, 2020.

Specifically, it shows:

 Responsible for the treatment: General Directorate of Public Health of the Ministry of Health of the Government of Cantabria.

 Purpose of the treatment: Facilitate the tracing and follow-up of contacts of cases

positive, probable or possible of Covid-19.

 Data category: Name, surnames and mobile phone. Date and time of access.

 Affected group: People who access hotels and tourist accommodation,

hairdressers, beauty centers, beauty cabinets, manicure salons, pedicures

and hair removal, saunas and gyms.

 Conservation period: One month from access, after which the data will be

its cancellation.

 Consequences of not providing the data: It may condition the right of admission

for public health reasons.

 Recipients: Exclusively the General Directorate of Public Health of the Regional

Health Department of the Government of Cantabria.

Thus, the Ministry of Health, responsible for the treatment, cannot be imputed to have

infringed the right of information of the interested parties collected in article 13 of the

GDPR.

However, and notwithstanding the foregoing, in view of the request made by the

Director of the Agency, the Ministry of Health will publish on the website of the Ministry

and the Cantabrian Health Service the basic information required by said article 13,

specifying that the owners of the establishments must provide their clients with

You have said information prior to the collection of your data.

THIRD. DATA MINIMIZATION PRINCIPLE.

The exclusion of the name and surnames of the interested parties from the customer registry supposes

would result in the total anonymization of the data and, consequently, it would not even result in

application of the personal data protection regulations. Said of another

Thus, the only personal data contained in the registry is the

name and surname of the interested parties, that is, the minimum personal identifying data

possible captives.

It corresponds to the health authority of Cantabria to assess the adequacy of the data to the

purpose of the treatment, thus, the Head of the Public Health Service issued a report to the

regarding date July 29, 2021, which says:

“Regarding the data necessary for the identification of the client, you must consider

It should be noted that, given the high transmissibility associated with this type of establishment,

the GSP Case Study and Contact Identification Program, within

of the deployment of the second phase of the expanded tracking, considers that they are contacts

narrow passages “In beauty salons and hairdressing salons, in the event that a worker

dor is a confirmed case, the clients who have attended personally. Consider-

ration that should be understood as extended to all establishments in which the

worker maintains physical contact with the customer, such as nail salons,

pedicure and waxing.

This requires the worker to identify who he has attended, that is, it is necessary to

sary not only have the census of clients (person) of an establishment (shop)

gar), in a working day (time); but in order to establish the four-

rentena, it is necessary to know who has been in close and prolonged contact

with the client. This identification cannot be made in any other way than

names and surnames. A worker cannot identify among a list of telephones

phones or numerical identifications to whom you have attended.

In general, for all types of establishments, these data are ele-

in the process of identifying close contacts, because to begin with,

identify them, the first step is to check if it is

identified as a case or as a contact and then proceed to contact the

person. Contacting the person without first ascertaining whether

it is already a case or a contact, a very common phenomenon, it makes it impossible to act

tuar on it. For example, it could lead to quarantining

an already isolated person or in a vaccinated person.

It should be noted that there is not always a telephone number-

unique subject or individual. On numerous occasions the client provides a number of

mobile phone of which you are not the owner (your partner is, for example) or a number is provided

landline number used by several people in the family environment, and in the case

of minors the phone of their parents, so the lack of knowledge of the

identity of the person could lead to quarantining a person

already isolated or in a vaccinated person, or would prevent knowing if the actions of

control are being dictated to the minor or to the parents.

In short, the proposed resolution prevents the development of the ordinary actions

of the Case Study Program and Identification of Contacts of Canta-

bria, as well as the investigation of outbreaks and alerts caused by variants

of concern, in a highly transmissible environment such as hairdressers

and beauty centers.

Therefore, the inclusion in the registry of the minimum identification data of the interested

users, in addition to the mobile phone, the date and time of access is not disproportionate.

nothing, but reasonable, adequate, pertinent and strictly limited to the purpose per-

followed.

FOURTH. PRINCIPLE OF LIMITATION OF THE CONSERVATION PERIOD.

According to the report of the Head of the Public Health Service dated July 29

of 2021, the setting of the period of four days is incompatible with the epidemiological requirements

myological, specifically the identification of close contacts, investigation of

outbreaks and the incubation and transmissibility periods.

"(…) According to the above, the Case Study and Identification Program

Contacts of Cantabria requires for ordinary actions at least 17

days of keeping the record, in addition, the investigation of the origin of outbreaks

for variants of concern requires retrospective research two periods

incubation period before the onset of symptoms, 28 days. It has been considered prudent

add two more days to the retention period of the data included in the re-

customer registration, up to 30 days, in order to alleviate possible delays or errors."

In short, the period of conservation of the data, set at 30 days, constitutes the

time needed to accomplish the intended purpose.

And attached:

- Report of the Head of the Public Health Service dated July 29, 2021 (document

ment no. 1).

- Report of the General Directorate of Public Health regarding the resolution by which

the second modification of the Resolution of the Ministry of Health of

June 18, 2020, which establishes the sanitary measures applicable in the

Autonomous Community of Cantabria during the period of new normality (documentation

ment no. 2).

- Report of the General Directorate of Public Health regarding the Resolution by which

the tenth modification of the Resolution of May 11, 2021 is approved, by the

which establishes sanitary measures for the prevention, containment and control of

pandemic caused by Covid-19 in the Autonomous Community of Cantabria (documentation

ment no. 3).

- Cantabria Case Study and Contact Identification Program (documentation

ment no. 4).

Likewise, through an addendum, it requests to admit as evidence the expert, consisting of

Do not hesitate to request a report from D. A.A.A., Director of the Public Health Observatory.

ca del Cantabria, in order to ratify what is stated in the allegations contained in the

foundations of law III and IV.

EIGHTH: On August 13, 2021, this Agency receives a letter from the

that responds to the requirement contained in the start-up agreement.

Regarding the first of the requirements consisting of "the adoption of all the

measures necessary for the investigated entity to act in accordance with the

principles of «minimization of data» and «limitation of the term of conservation», of the art.

article 5.1 sections c) and e) of the RGPD", argues that the personal data included does not

are disproportionate, but it is about the minimum possible identifying data

possible and your request is reasonable, relevant and appropriate. Similarly, the period of

data conservation, set at 30 days, constitutes the time necessary to comply with

fulfill the intended purpose.

Regarding compliance with the duty of information, it argues that, taking into account

that the owners of the establishments are the ones who collect the personal data

staff, it is up to them, in their capacity as data processors, to provide

interested parties the information required by article 13 of the RGPD at the time of the

data collection.

And reports that the basic information required has been published on the website of the Ministry

given by article 13 of the RGPD and attaches the Record of treatment activities (in

hereinafter RAT) available at: ***URL.1

NINTH: On November 22, 2021, the instructor of the procedure agreed

perform the following tests:

1. All the documents obtained and

generated by the Inspection Services and the Report of previous actions that form

man part of the procedure E/06497/2020.

2. Likewise, the allegations to the Agreement are deemed reproduced for evidentiary purposes.

initiation of the referenced sanctioning procedure presented by the CON-

SEJERÍA DE SANIDAD and the documentation that accompanies them:

- Registration of people who access certain open establishments

-

-

-

to the public and leisure and free time activities or mass activities.

Situation report (data closed on 07/15/2021)

Proposed report on response actions to the epidemiological situation

ca of Covid-19 in Cantabria - 06/25/2021

Epidemiological report in relation to the agreement to initiate the procedure

sanctioning PS/00091/2021 dated July 29, 2021.

- Protocol for the detection and management of cases and contacts of Covid-19. Version 7.

And declared unnecessary the request for expert evidence consisting of requesting a report

to D. A.A.A., director of the Public Health Observatory of Cantabria, under the

provided for in article 77.3 of the LPACAP, since the report that could be issued by the

director of the aforementioned Observatory had no relevance for the determination of the

chos, nor its legal qualification, nor in the attribution of possible responsibilities.

TENTH: On March 11, 2022, a resolution proposal was formulated, pro-

imposing a sanction of WARNING for infraction of articles 5.1.c) and 7 of the

RGPD, typified respectively in article 83.5.a) of the RGPD and in article

72.1.a) and 72.1.c) of the LOPDGDD and responding to the allegations presented.

This proposal was duly notified on the same date it was made available.

tion through the Electronic Notifications Service and Electronic Address Enabling

tada, according to the certificate that appears in the file.

ELEVEN: On March 25, 2022, the interested party files allegations against

the motion for a resolution which, in summary, includes the following considerations

portions:

1) Principle of data minimization: Start your pleadings brief referring to

to the literal tenor of article 64.2.b) of the LPACAP and article 68.1 of the LOPDGDD

to argue that these assume that the imputed facts must be fixed

two and unalterable from the very moment the sanctioning procedure begins.

tionor, regardless of their different legal assessment, which may vary

according to the course of the instruction of the procedure. To support your argument,

collects the doctrine of the Constitutional Court regarding the right of the accused in

an administrative sanctioning procedure both the right to know the facts
of which he is accused as the inalterability of the essential facts object of
accusation (For all, STC 117/2002 of May 20). All this, to conclude that
This has not been the case in this proceeding because, even when the agreement
The initial procedure referred to the violation of the principle of data minimization
by the Resolution approving the second modification of the Resolution
of the Ministry of Health of June 18, 2020, which establishes the
sanitary measures applicable in the Autonomous Community of Cantabria during the
period of new normality, published in the Extraordinary Cantabria Official Gazette.
Rio No. 59 of July 24, 2020, throughout the motion for a resolution alludes to
several times to the content of the Resolution approving the tenth
modification of the Resolution of May 11, 2021, which establishes
sanitary measures for the prevention, containment and control of the occasional pandemic
nothing for the Covid-19 in the Autonomous Community of Cantabria, published in the
Extraordinary Official Gazette of Cantabria no. 51 of June 25, 2021.
Next, it considers reproduced all the allegations made regarding
respect to the principle of minimization of data in the pleadings brief presented
against the agreement to initiate this proceeding, with particular emphasis on
in your consideration that the request for data established by Resolution
published on July 24 is the minimum possible because, he affirms, it only requires
re the name and surnames of the clients of the establishments. Similarly,
insists that the assessment of the adequacy, relevance and limitation of the data
treated to what is necessary in relation to the intended purpose corresponds to the auto-
health authority of Cantabria, extracting a paragraph from report 17/2020 of the
AEPD for considering that it supports said affirmation. He goes on to argue that
the report of the head of the Public Health service of July 29, 2021, accepted

by the instruction as evidence, details the reasons that advised

the inclusion of the name and surnames in the customer registry, not having motivated

do its rejection by the instruction.

Breach of the conditions of consent: Begin your allegation

in this regard reiterating what was already said in the previous one in relation to the facts that

two)

must be subject to the procedure. And this because he understands that the instruction

cannot refer to the Resolution of May 11, 2021 because it is dated

subsequent to the Agreement to initiate this proceeding, in which a

Non-compliance with the data protection regulations by the Resolution by which

the second modification of the Resolution of the Ministry of Health is approved

of June 18, 2020, which establishes the applicable health measures

in the Autonomous Community of Cantabria during the period of new normality,

published in the extraordinary Cantabria Official Gazette No. 59 of July 24,

2020.

In the same way, it is reiterated in what is alleged regarding the conditions of consent

against the agreement to initiate the procedure, insisting that the legal basis

Indicates for the treatment of identifying data of natural persons who access

certain public establishments to facilitate the traceability of contacts

cough, collected in the corresponding registry of clients foreseen in the Resolution

of June 18, 2020, is in compliance with a legal obligation

applicable to the person responsible for the treatment, and in the fulfillment of a mission

ted in the public interest.

In relation to the wording of section 2.6 of the resolution, he clarifies that the reference

reference to the conditioning to the will of the client for the delivery of data, which

intends to clarify that the owner of the establishment cannot use other mechanisms

nisms to obtain it other than the voluntary delivery of said data by the

client and that, the lack of them, what it means is that the Real

Decree 2816/1982, of August 27, approving the General Regulations

Police Department of Public Shows and Recreational Activities, either as in

this case for reasons of public health, or for any of the requirements to which the

company would have conditioned their right of admission.

Finally, it stresses that it was a temporary measure that is currently not

is in force in the autonomous community of Cantabria and requests that a resolution be issued

tion declaring the non-existence of infraction and the filing of the proceedings.

Of the actions carried out in this procedure and the documentation

in the file, the following have been accredited:

PROVEN FACTS

FIRST: On June 11, 2020, the already repealed Real

Decree-Law 21/2020, of June 9, on urgent prevention, containment and

coordination to deal with the health crisis caused by COVID-19.

Articles 5, 23, 26 and 27, provided:

Article 5. Action plans and strategies to deal with emergencies

sanitary.

In accordance with the provisions of article 65 of Law 16/2003, of May 28, of

cohesion and quality of the National Health System, the adoption of

action plans and strategies to deal with health emergencies, through

coordinated actions in public health, attending to the different levels of

risk of exposure and community transmission of COVID-19 disease

for the development of the different activities contemplated in this royal decree-

law.

Article 23. Information obligation.

1. The obligation to provide the public health authority with

authority all data necessary for monitoring and surveillance

epidemiology of COVID-19 that are required by it, in the format

properly and diligently, including, where appropriate, the data necessary for the

personal identification.

2. The obligation established in the previous section is applicable to all

public administrations, as well as any centre, body or agency

dependent on these and any other public or private entity whose activity

have implications for the identification, diagnosis, monitoring or management of

COVID-19 cases.

In particular, it will apply to all centers, services and establishments

health and social services, both in the public and private sectors, as well as

to the health professionals who work in them.

Article 26. Provision of essential information for the traceability of contacts.

The establishments, means of transport or any other place, center or

public or private entity in which the health authorities identify the

need to carry out traceability of contacts, they will have the obligation to provide
the health authorities the information they have or that is
requested regarding the identification and contact details of the persons
potentially affected.

Article 27. Protection of personal data.

"1. The processing of personal information that is carried out as
As a result of the development and application of this royal decree-law, it will be
in accordance with the provisions of Regulation (EU) 2016/679 of the European Parliament
and of the Council, of April 27, 2016, regarding the protection of people
physical with regard to the processing of personal data and the free
circulation of these data and by which Directive 95/46/CE is repealed, in the Law
Organic 3/2018, of December 5, on the Protection of Personal Data and
guarantee of digital rights, and in the provisions of articles eight.1 and
twenty-three of Law 14/1986, of April 25, General Health. In particular, the
obligations of information to the interested parties regarding the data obtained by
The subjects included in the scope of application of this royal decree-law are
shall comply with the provisions of article 14 of Regulation (EU) 2016/679 of the
European Parliament and of the Council, of April 27, 2016, taking into account the
exceptions and obligations provided for in section 5.

2. The purpose of the treatment will be the monitoring and epidemiological surveillance of the
COVID-19 to prevent and avoid exceptional situations of special gravity,
attending to reasons of essential public interest in the specific field of
public health, and for the protection of vital interests of those affected and of other
natural persons under the provisions of Regulation (EU) 2016/679 of the
European Parliament and of the Council, of April 27, 2016. The data collected
will be used exclusively for this purpose.

3. Those responsible for the treatment will be the autonomous communities, the

cities of Ceuta and Melilla and the Ministry of Health, within the scope of their

respective competences, which will guarantee the application of the measures of

mandatory security resulting from the corresponding risk analysis,

taking into account that the treatments affect special categories of data

and that said treatments will be carried out by public administrations

obliged to comply with the National Security Scheme.

4. The exchange of data with other countries will be governed by Regulation (EU)

2016/679 of the European Parliament and of the Council, of April 27, 2016, having

taking into account Decision No. 1082/2013/EU of the European Parliament and of the Council,

of October 22, 2013, on serious cross-border threats to the

health and the revised International Health Regulations (2005), adopted by the

Fifty-eighth World Health Assembly held in Geneva on May 23,

2005."

SECOND: On June 18, 2020, it is published in the Official Bulletin of Canta-

bria (BOC) the "Resolution establishing the applicable sanitary measures

in the Autonomous Community of Cantabria during the period of new normality".

THIRD: On July 24, 2020, the "Resolution by the

that the second modification of the Resolution of the Ministry of Health is approved

of June 18, 2020, which establishes the sanitary measures applicable in

the Autonomous Community of Cantabria during the new normality period."

In the "Resolved" First, section 2, it says:

First. Modification of the Resolution of the Ministry of Health of June 18,

2020.

2.- A section 2.6 is added with the following wording:

"2.6. Without prejudice to the provisions of its sector regulations, the holders of

TVs and tourist accommodation, hairdressers, beauty centers, cabinets of

aesthetics, manicure, pedicure and waxing salons, saunas and gyms

They must have a record of the people who access the establishment

in which the date and time of access, name and surname are collected.

two and contact phone number. The collection of such data will require the

consent of the interested party, without prejudice to conditioning the right of admission

sion for reasons of public health in case of not being able to count on it.

The register will be exclusively available to the General Directorate

of Public Health and will have the sole purpose of facilitating the tracking and follow-up

of contacts of positive, probable or possible cases of Covid-19.

The data must be kept in the registry only for a period of

one month from the access, after which it must be cancelled.

tion.

Both the registration and the processing of the data contained therein

will govern in any case by the provisions of Organic Law 3/2018, of December 5

bre, Protection of Personal Data and Guarantee of Digital Rights and

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

of April 2016, regarding the protection of natural persons with regard to

respect to the processing of personal data and the free circulation of these data

and by which Directive 95/46/EC is repealed".

FOURTH: On June 25, 2021, the "Resolution by the

that the tenth modification of the Resolution of May 11, 2021 is approved, by

which establishes sanitary measures for the prevention, containment and control of the

pandemic caused by Covid-19 in the Autonomous Community of Cantabria”

In the “Resolved” First, it says:

Section 1.4 is modified and now has the following wording:

First. Modification of the Resolution of the Minister of Health of 11

May 2021, which establishes health measures for the prevention,

containment and control of the pandemic caused by Covid-19 in the Community

Autonomous City of Cantabria.

1.

"1.4. Without prejudice to the provisions of its sector regulations, the holders of

televisions and tourist accommodation, catering establishments where

serve lunch and dinner, leisure and entertainment establishments, hairdressers,

beauty salons, beauty cabinets, manicure, pedicure and waxing salons.

saunas and gyms must have a record of the people who

access the interior areas of the corresponding establishment in which

date and time of access, name and surname and telephone number of

Contact. The collection of such data will require the consent of the interested party,

without prejudice to conditioning the right of admission for public health reasons.

ca in case you can't count on it.

The register will be exclusively available to the General Directorate

of Public Health and will have the sole purpose of facilitating the tracking and monitoring

of contacts of positive, probable or possible cases of Covid-19.

The data must be kept in the registry only for a period of

one month from the access, after which it must be cancelled.

tion.

Both the registration and the processing of the data contained therein

will govern in any case by the provisions of Organic Law 3/2018, of December 5

bre, Protection of Personal Data and Guarantee of Digital Rights and

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

of April 2016, regarding the protection of natural persons with regard to

respect to the processing of personal data and the free circulation of these data

and by which Directive 95/46/EC is repealed".

FIFTH: The RAT: ***URL.1 which informs

the next:

Extended information on Personal Data Protection

In compliance with the General Data Protection Regulation (Regulation

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

It is informed:

Treatment

Register of people who access certain establishments open to the

public and mass activities (Resolution of May 11, 2021 by the

that sanitary measures are established for the prevention, containment and control

of the pandemic caused by Covid-19 in the Autonomous Community of

Cantabria)

C/ Jorge Juan, 6

28001 – Madrid

Responsible for the treatment

General Directorate of Public Health of the Ministry of Health of the Government

from Cantabria.

C/*** ADDRESS.1

Phone: ***PHONE.1. Email: ***EMAIL.1

Data Protection Delegate

PRODAT

Business Center ***ADDRESS.2 Santander (Cantabria)

Phone:***PHONE.2. Email: ***EMAIL.2

Purpose

Facilitate contact tracing and follow-up of positive, probable, or suspected cases.

possible Covid-19.

Expected conservation periods

1 month

Profiling and automated decisions

No profiling or individual decision-making is envisaged.

automated duals.

Legitimation

- Compliance with a legal obligation applicable to the data controller.

ment, provided for in article 6.1 c) of the RGPD.

- The fulfillment of a mission carried out in the public interest, provided for in the

article 6.1 e) of the RGPD.

- The need to protect the vital interests of the interested party or of another person.

a physical one, provided for in article 6.1 d) of the RGPD.

Affected group

- People who access hotels and tourist accommodation, establishments

restaurant services in which lunches and dinners are served, establishment

leisure and fun, hairdressers, beauty centers, beauty cabinets,

manicure, pedicure and waxing salons, saunas and gyms.

- People who access nightclubs, party and dance halls with special

tacles, pubs, whiskey bars and similar establishments, with or without minor

live performances of a musical, artistic and cultural nature.

- People who access leisure activities and free time.

- People

Y

access

events

a

that

crowded.

activity-

data category

- Date and time of access, name and surnames and contact telephone number.

touch.

C/ Jorge Juan, 6

28001 – Madrid

- In the case of leisure and free time activities, details of the participants

www.aepd.es

sedeagpd.gob.es

in the activity and the personnel who participate in it, as well as the group

of stable coexistence to which they belong.

- In the case of mass events and activities, name, surnames, co-

email, municipality and community of residence, date of the event,

seat number and sector.

Consequences of not providing the data

- May condition the right of admission for public health reasons.

Recipients

General Directorate of Public Health of the Ministry of Health of the Government

from Cantabria.

Rights

The interested party can exercise their rights of access, rectification, deletion,

limitation of treatment and opposition, by contacting the controller

ble of the treatment.

You also have the right to claim before the Spanish Agency for the Protection of

Data, www.aepd.es

FOUNDATIONS OF LAW

Yo

In accordance with the powers that article 58.2 of Regulation (EU) 2016/679

(General Data Protection Regulation, hereinafter RGPD), grants each

control authority and as established in articles 47 and 48.1 of the Law

Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of

digital rights (hereinafter, LOPDGDD), is competent to initiate and resolve

this procedure the Director of the Spanish Data Protection Agency.

Likewise, article 63.2 of the LOPDGDD determines that: “The procedures

processed by the Spanish Agency for Data Protection will be governed by the provisions

in Regulation (EU) 2016/679, in this organic law, by the provisions

regulations issued in its development and, as long as they do not contradict them, with a

subsidiary, by the general rules on administrative procedures."

II

The facts declared previously proven violate articles: 5.1.c) and 7 of the

RGPD, typified in article 83.5.a) of the RGPD and in article 72.1.a) and 72.1.c) of the

LOPDGDD.

Article 83.5.a) of the RGPD indicates:

"Infractions of the following provisions will be sanctioned, in accordance

with paragraph 2, with administrative fines of a maximum of EUR 20,000,000

or, in the case of a company, an amount equivalent to a maximum of 4%

of the total global annual turnover of the previous financial year, optionally

dosed for the highest amount:

a) the basic principles for the treatment, including the conditions for the

consent under articles 5, 6, 7 and 9; (…)"

In this regard, the LOPDGDD, in its article 71 establishes that "they constitute infractions

nes the acts and behaviors referred to in sections 4, 5 and 6 of article 83

of Regulation (EU) 2016/679, as well as those that are contrary to this law

organic".

For the purposes of the limitation period, article 72 of the LOPDGDD indicates:

Article 72. Infractions considered very serious.

"1. Based on the provisions of article 83.5 of the Regulation (EU)

2016/679 are considered very serious and infringements will expire after three years.

tions that suppose a substantial violation of the articles mentioned in

that and, in particular, the following:

a) The processing of personal data violating the principles and guarantees established

established in article 5 of Regulation (EU) 2016/679.

c) Failure to comply with the requirements of article 7 of the Regulation

(EU) 2016/679 for the validity of consent. (…)"

However, the LOPDGDD in its article 77, under the heading "Regime applicable to de-

certain categories of controllers or processors", establishes the following

following:

"1. The regime established in this article will be applicable to treatments

of which they are responsible or entrusted:

(…)

c) The General State Administration, the Administrations of the communities

autonomous entities and the entities that make up the Local Administration.

(…)

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

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

this organic law, the data protection authority that is competent

will issue a resolution sanctioning them with a warning. The resolution

It will also establish the measures that should be adopted so that the con-

conduct or correct 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

on which it reports hierarchically, where appropriate, and to those affected who have the

Interested party status, if any.

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

data collection will also propose the initiation of disciplinary actions when

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

The sanctions to be applied will be those established in the legislation on the disciplinary regime.

plinary or sanctioning that results from application. Likewise, when the infractions

are attributable to authorities and directors, and the existence of in-

technical forms or recommendations for treatment that would not have been

duly attended to, the resolution in which the sanction is imposed will include

A reprimand will be issued with the name of the responsible position and the

publication in the corresponding Official State or Autonomous Gazette.

4. The resolutions must be communicated to the data protection authority

that fall in relation to the measures and actions referred to in the

previous sections.

5. They will be communicated to the Ombudsman or, where appropriate, to the analogous institutions

logs of the autonomous communities the actions carried out and the resolutions

tions issued under this article.

6. When the competent authority is the Spanish Agency for the Protection of

Data, it will publish on its website with due separation the resolutions

tions referring to the entities of section 1 of this article, with express indication

identification of the person responsible or in charge of the treatment that would have co-

committed the infraction. When the competence corresponds to a self-governing authority

nomic of data protection will be, in terms of the advertising of these re-

solutions, to the provisions of its specific regulations".

In summary, the LOPDGDD does not authorize the imposition of administrative fines, but rather a sanction

warning, that is, without any economic effect.

III

In response to the allegations presented by the investigated entity against the agreement

At the beginning, the following was stated in the proposal:

On the legal basis of the treatment: The MINISTRY reasons that the phrase, with ma-

more or less successful, intended to express that the personal data provided, only

collected with the express consent of the people who facilitated them and that in

the case of not having that consent, section 2.6 was limited to recognizing

the right of admission that corresponds to public establishments by virtue of the

Royal Decree 2816/1982, of August 27, approving the General Regulations

Police Department of Public Shows and Recreational Activities, either as in

this case for reasons of public health, or for any of the requirements to which the company

prisoner would have conditioned their right of admission.

Well, both section 2.6 of the second amendment to the Resolution, as well as the

section 1.4 of the Resolution approving the tenth amendment to the Re-

solution of May 11, 2021, which establishes sanitary measures for the

prevention, containment and control of the pandemic caused by Covid-19 in the Co-

Autonomous Community of Cantabria" established a legal obligation on the holders

of certain establishments: "they must have a record of the persons

who access (...)" in charge of collecting certain data: date and time of access

name, name and surnames and contact telephone number.

This obligation was based on Royal Decree-Law 21/2020, of June 9,

of urgent prevention, containment and coordination measures to deal with the

health crisis caused by COVID-19: Establishments, means of transport,

port or any other place, center or public or private entity in which the authorities

health authorities identify the need for traceability of contacts, they will have

the obligation to provide the health authorities with the information available to

gan or that is requested of them regarding the identification and contact data of the per-

are potentially affected.

Therefore, it should be noted that the (compulsory) processing of personal data for fi-

contact tracing could not depend on the provision of consent.

protection of the affected persons, that is, of the basis of legality provided for in article

6.1.a) of the GDPR.

According to the jurisprudence of the Court of Justice of the EU (Second Chamber) of November 11,

November 2020, in case C-61/19, consent requires an act of will

active and unequivocal by the interested party:

36. Indeed, the wording of article 4, point 11, of said Regulation, which defines

defines the "consent of the interested party" for the purposes, in particular, of its article

6, paragraph 1, letter a), is even stricter than that of article 2, letter

h), of Directive 95/46, since it requires a manifestation of will

"free, specific, informed and unequivocal" of the interested party, which takes the form

of a statement or "a clear affirmative action" that marks their acceptance

tion of the processing of personal data concerning you. Thus, the rule

ment 2016/679 now expressly provides for active consent (see,

in this sense, the judgment of October 1, 2019, Planet49, C-673/17,

EU:C:2019:801, paragraphs 61 to 63).

Likewise, Guidelines 5/2020 of the European Committee for Data Protection (CEPD)

on consent in the sense of Regulation (EU) 2016/679 they say in their paragraph

ted 13:

The term "free" implies real choice and control on the part of the data subjects.

As a general rule, the RGPD establishes that, if the subject is not really free

to choose, you feel compelled to consent or you will suffer consequences

negative if you do not give it, then the consent cannot be considered valid.

c, If consent is included as a non-negotiable part of the

general conditions it is assumed that it has not been given freely. Consequently,

consent, it will not be considered that the consent has been given freely if the

interested party can not deny or withdraw their consent without prejudice. The notion of

imbalance between the data controller and the data subject is also

takes into account in the RGPD.

Consequently, subjecting the registration of clients to the provision of consent

by people who want to access certain establishments

It is not in accordance with data protection regulations. And this is so, because it is

It is especially important that consent is given freely, which means that

People should be able to refuse or withdraw their consent without facing consequences.

negative events, such as being denied access to the facility.

It invokes the STS 3609/2020, of November 5, 2020, which says: "This scheme has been

seen radically modified with the approval of the RGPD. Its article 6.1 does not maintain

already defines the rule of the need for consent, as a fundamental legitimating basis

in order to process personal data. On the contrary, what it establishes is a list of

possible legitimizing bases, which place each other on an equal plane and between

which includes, as one more, the consent, without any priority. In the

Under the GDPR, the processing of personal data can also be based on

you in any of said bases (for example, the legitimate interest, ex art. 6.1 f), of

so that the eventual illegality of the data processing is not determined by the

fact that one of them does not concur (consent), but must be proven

that none of the foreseen ones attend".

In the case analyzed, there were other legal bases that legitimized the treatment of

the data already defined in article 27.2 of Royal Decree Law 21/2020, without the need

to resort to the consent of the interested party:

2. The purpose of the treatment will be monitoring and epidemiological surveillance

of COVID-19 to prevent and avoid exceptional situations of special seriousness-

for reasons of essential public interest in the specific field of

public health, and for the protection of vital interests of those affected and of

other natural persons under the provisions of the Regulation (EU)

2016/679 of the European Parliament and of the Council, of April 27, 2016. The data

The data collected will be used exclusively for this purpose.

These legal bases (article 6.1.c), d) and e) of the RGPD), considered in the Report

17/2020 of the AEPD to which it alludes -in exceptional situations, such as an epidemic-,

appear in the RAT of the Ministry of Health, however, the literal nature of the precept

contained in section 2.6 of the second amendment to the Resolution and

then, in section 1.4 of the tenth amendment to the Resolution, there is no room for

doubts regarding the existence of consent as a legal basis.

To greater abundance, of the literalness of the Resolution, of obligatory fulfillment

for citizens, nothing more is inferred than that consent was the legal basis

law that legitimized the processing of your personal data. It is clear when indicated

that “will require the consent of the interested party”. And this, regardless of what

had in the RAT, since the diction of the legal norm generates legitimate confidence in

citizens that consent is the legitimating legal basis of the treatment

I lie.

Consequently, the allegations made are dismissed.

Regarding the means for complying with the duty of information, he refers to the fact that,

It is the owners of the establishments who collect the data of the people who

access these establishments and includes them in the corresponding register, at

position of the General Directorate of Public Health. Therefore, consider that these are

Those who provide interested parties with the information required by article 13 of the RGPD in

the time of data collection.

It alleges that the information regarding the treatment appears in the resolution itself of 18

June 2020 (we understand that it refers to the second modification of the Resolution of

dated July 24, 2020) and which is also available on the website of the Ministry and

of the Cantabrian Health Service, therefore, it cannot be imputed to the Ministry of Health

entity, responsible for the treatment, having infringed the right of information of the in-

data collected in article 13 of the RGPD.

In this sense, regarding the violation of article 13 of the RGPD, typified in the art.

Article 83.5.b) of the RGPD, the alleged allegation is upheld.

Regarding the principle of data minimization, he argues that the only character data

personal data contained in the registry are the name and surnames of the interested parties.

two, that is, the minimum possible personal identification data. About this issue
A report was issued by the head of the Public Health Service dated July 29,
2021 which says: it is necessary to know who has been in close and prolonged contact
paid with the client. This identification cannot be made in any other way than
names and surnames. A worker cannot identify among a list of telephone numbers
nos or numerical identifications to whom you have attended. However, it is surprising that
there is also a report from the data protection officer on the application of the
data protection regulations in the controversial case, aware of, among
other things, the principle of data minimization.

The GDPR requires that data processing be limited to what is necessary to comply with
ment of its purpose (article 5.1.c)). That is, the selected data categories
for treatment must be necessary to achieve the stated objective of the operations.
treatment rations and the person in charge must strictly limit the collection of
data to that information that is directly related to the specific purpose
that pursues the treatment, in the case analyzed "Facilitate the tracking and monitoring of
contacts of positive, probable or possible cases of Covid-19".

The personal data collected according to the third and fourth proven facts
They are: date and time of access, name and surname and contact telephone number.

Likewise, the RAT also provides:

- In the case of leisure and free time activities, details of the participants
in the activity and the personnel who participate in it, as well as the group

of stable coexistence to which they belong.

- In the case of mass events and activities, name, surnames, co-

e-mail, municipality and community of residence, date of the event, number

grouper of seat and sector.

On the other hand, the AEPD published on July 31, 2020, a statement (***URL.2) regarding

on the collection of personal data by establishments that said the following:

following:

Additionally, the principle of minimization must be complied with, by virtue of the

which might be enough to get a phone number, along with the data

cough of the day and time of assistance to the place. This criterion, along with the anomaly

the device holders, has been assumed by the European Committee

Data Protection ropeo in the Recommendation on the use of personal data

tracing and contact tracing applications in the context of

pandemic; criterion that can be extrapolated to this situation with the adaptations

are relevant.

In this sense, Guidelines 04/2020 on the use of location data and tools

contact tracing measures in the context of the COVID-19 pandemic, adopting

given by the CEPD, report in section 40:

40. In accordance with the data minimization principle, in addition to complying

other measures of data protection by design and by default, the

data subject to treatment must be reduced to the strictly necessary minimum.

cesareans. The application must not collect information that is unrelated

with the specific purpose or not necessary — for example, marital status,

communications identifiers, equipment directory elements,

messages, call logs, location data, caller IDs

devices etc.

According to the Strategy for Early Detection, Surveillance and Control of COVID-19, updated

As of December 22, 2021, regarding the "Study and management of contacts" it has

which aims to make an early diagnosis in close contacts

that initiate symptoms and avoid transmission in the asymptomatic and paucisymptomatic period.

co. Specifically, it defines "Close contact" as: "(...) In general, at the

community, close contact will be considered to be any person who has been

in the same place as a case, at a distance of less than 2 meters and for a period of time.

cumulative total po of more than 15 minutes in 24 hours. In environments where

can make an assessment of the follow-up of the prevention measures will be able to carry out

Obtain an individualized assessment by the occupational risk prevention service

or the person in charge who is designated for that purpose. When establishing the risk,

will take into account certain circumstances such as spaces in which there is risk

elevated aerosol generation or other personal or social characteristics of the

setting in which possible transmission is assessed.

Due to the foregoing, it is considered disproportionate to request: the name,

surnames or email, which would be unnecessary for the purpose of notifying

possible close contacts.

Add, in addition, that the information on the categories of data that appear in the

RAT do not coincide with the data indicated in section 2.6 of the second amendment

of the Resolution and later, in section 1.4 of the tenth amendment of the Resolution

solution, which must be collected. Specifically, the MINISTRY adds another

additional information such as "email".

In accordance with the foregoing, the allegations adduced are dismissed.

Regarding the limitation of the retention period, the MINISTRY, based on the

report of the Head of the Public Health Service dated July 29, 2021, has justified

Do the reason why you have applied a retention period of 30 days.

To do this, it concludes that: the Case Study and Contact Identification Program

of Cantabria requires at least 17 days of storage for ordinary actions.

registration, in addition, the investigation of the origin of outbreaks by variants of concern

occupation requires retrospective investigation two incubation periods before the

onset of symptoms, 28 days. It has been considered prudent to add two more days to the

retention period of the data included in the customer registry, up to 30

days, in order to alleviate possible delays or errors.

It also invokes the Communication of the European Commission of April 17, 2020, which

says: They should be deleted after a maximum period of one month (incubation period

plus the margin) or after the person has been tested with

negative result (…).

In this sense, the allegation made regarding the violation of article

5.1.e) of the RGPD, typified in article 83.5.a) of the RGPD.

IV

In response to the allegations presented by the respondent against the proposal of

resolution, the following should be noted:

As a PRELIMINARY QUESTION, this Agency states that for the resolution of the

present disciplinary file, the allegations presented have been taken into account.

given by the investigated throughout the entire procedure, proceeding to respond

then to those presented against the motion for a resolution and endorsing

the considerations made by the instruction.

1.- In relation to the first of your allegations, the one referring to the principle of minimizing

data, the respondent is reminded that, even though article 64 of the LPA-

CAP establishes that the Start Agreement must contain the identification of the person

or persons allegedly responsible, a description of the facts that motivate

the initiation of the procedure, its possible qualification and the sanctions that could be

respond, without prejudice to what results from the instruction of the procedure, the article

89 of the same legal body, establishes that in the Resolution Proposal "the

in a reasoned way the facts that are considered proven and their exact legal qualification.

law, the infraction that, if applicable, they constitute, the person or

persons responsible and the proposed sanction, the assessment of the evidence

practiced, especially those that constitute the basic foundations of the decision

sion, as well as the provisional measures that, if applicable, have been adopted."

In accordance with the foregoing, it is mandatory that, in the Proposal, and not in the Initial Agreement,

cio, the proven facts and their qualification are fixed, being in this process where

You have the right to be informed of the accusation. Consequently, perfectly

The modification of the content of the Initiation Agreement in the Proposed Resolution is valid.

tion.

Thus, it is clear that the content of the Agreement can be modified without

in addition to giving a new hearing procedure. In this sense, it is pronounced

Supreme Court (among others, STS of April 27, 1998), which states that the right to

be informed of the accusation of art. 24.2 CE, is normally satisfied in the

sanctioning administrative procedure through the notification of the proposal of

resolution, because it is in this one that contains a precise pronouncement about

the responsibility that is imputed, integrated, at least, by the definition of the

offending behavior that is appreciated, and its subsumption in a specific offending type, and therefore

the punitive consequence that is linked to it in the case in question."

In fact, the Constitutional Court has been declaring since its inception that

sanctioning administrative procedure are applicable the guarantees provided

in article 24.2 of the Constitution, affirming that this supposes a procedural guarantee

mental that entails that the sanction is imposed in a procedure where it is pres-

sees the right to defense without defenselessness, with the possibility of arguing and proving and par-

I tend to the presumption of innocence and the reversal of the burden of proof.

Along these lines, the Constitutional Court considers it necessary, so that there is no

helplessness in the sense of the provisions of article 24.1 of the Constitution, that "the

defendant has had occasion to defend himself fully from the accusation from the

moment when he knows it fully (for all SSTC, 41/1998 and 87/1991 and STS

129/2006).

In any case, the jurisprudence of the Constitutional Court is constant, pointing out

lar that the right to be informed of the accusation of article 24.2 of the Constitution

Spanish, is normally satisfied in the sanctioning administrative procedure to

through the notification of the Resolution Proposal, since it is in this where the

has a precise statement about the responsibility that is imputed (SSTC

29/1989, of February 6, among many others).

In view of the foregoing and also taking into account the nature prior to the issuance of the agreement
date of initiation of this sanctioning procedure (July 14, 2021), of the Re-
solution approving the tenth modification of the Resolution of May 11
of 2021, which establishes health measures for the prevention, containment and
control of the pandemic caused by Covid-19 in the Autonomous Community of
Cantabria, published in the extraordinary Official Gazette of Cantabria no. 51 of 25 of
June 2021, the reference to it is not strange, which is still, in defi-
definitive, a modification of the initial resolution and in which non-compliance persists.
cough present in the first.

On the other hand, it is specified that the statements made by the investigated
regarding the data required by virtue of the second modification of Resolution
of June 18, published in the BOC on July 24, 2020, are inaccurate since
insists that the requested data is only the name and surname of the clients
who would like to access the establishments despite the fact that it is included in said resolution
tion the need also for the telephone number regarding which nothing is said in the
allegations. Added to this are the considerations and motivation already exposed in the
instruction according to which it was evident that there was no coincidence between the
data to provide indicated in section 2.6 of the second modification of the Resolution
tion (name, surnames and contact telephone number) and then, in the section
1.4 of the tenth modification of the Resolution, with those included in the RAT, which re-
I wanted to provide the email

Likewise, and with respect to what was stated in the report of the head of the public health service
of July 29, 2021 about the need to have the name and surnames of
customers of the establishments in question, it is considered appropriate to bring to col-
tion again the arguments exposed by the statement. And it is that already in pro-

An excerpt from the statement issued by the AEPD on July 31,

2020 (***URL.3) according to which the need to comply with the principle was clear.

pio of data minimization, taking as an example of a valid means the obtaining

only of a telephone number, together with the data of day and time of assistance

to the place, for the purpose pursued in this case. Furthermore, this is the criterion assumed

also by the European Committee for Data Protection in its recommendations. Forks

that, even if the situation described by the head of the public health service arose,

Republic of Cantabria in its report, that the client provides a mobile phone number of the

who is not the owner, said telephone number is indeed a sufficient instrument to establish

establish contact with said client and thus transmit the necessary information regarding

a possible transmission of the virus that is, ultimately, the objective of the collection of

the data in this case.

2.- In relation to what was alleged regarding the breach of the conditions of

feeling proceeds, in the first place, to refer to what has already been exposed in the consideration

above regarding the interpretation made by the respondent of article 64 of the

LPACAP. Thus, taking into account the wording of article 89 of the same law and the judiciary

jurisprudence already mentioned, it is evident that it is precisely in the Proposal for Re-

solution where the facts that are considered probative must be stated in a reasoned manner.

two and its exact legal qualification, the infraction will be determined which, in its case,

they constitute, the person or persons responsible and the proposed sanction.

ga, the evaluation of the tests carried out, especially those that constitute the

basic foundations of the decision, as well as the provisional measures that, in its

case, they would have been adopted.

On the other hand, and following the line of argument raised by the researched about the

proper interpretation of the reference to the need for consent

customer's request for the collection of their data, it should be noted that it cannot be pro-

pear And this because the allusion to the applicability of the provisions of the Royal Decree

2816/1982, of August 27, approving the General Police Regulations

of Public Spectacles and Recreational Activities necessarily requires that

it is the company that determines the right of admission. Thus, what determines the ar-

Article 59.1, section e) of RD 2816/1982 is that “the public may not enter the

belt or local without meeting the requirements to which the Company had conditioned the de-

right of admission, through its advertising or through posters, clearly visible, placed

located in the places of access, clearly stating such requirements. In the

this assumption, who determines the impossibility of access of the clients to the

establishments is the resolution itself, by conditioning in its articles the access of

the clients to the voluntary presentation of their data at the entrance of the same.

For the rest, there is nothing left but to refer to what was already exposed by the instruction when dealing with the

present allegations of a reiteration of what was adduced then and already duly

answered.

v

Article 4 of the RGPD, under the heading "Definitions", provides the following:

“1) “personal data”: all information about an identified or identified natural person.

testable (“the interested party”); An identifiable natural person shall be deemed to be any person

whose identity can be determined, directly or indirectly, in particular by

an identifier, such as a name, an identification number,

location, an online identifier or one or more elements of the identity

physical, physiological, genetic, psychic, economic, cultural or social of said person;

2) «processing»: any operation or set of operations carried out on data

personal data or sets of personal data, either by automated procedures

ized or not, such as the collection, registration, organization, structuring, conservation,

adaptation or modification, extraction, consultation, use, communication by transmission

sion, dissemination or any other form of authorization of access, collation or interconnection,

limitation, suppression or destruction".

7) "responsible for the treatment" or "responsible": the natural or legal person, authori-

public entity, service or other body that, alone or jointly with others, determines the purposes

and means of treatment; if the law of the Union or of the Member States determines

undermines the purposes and means of the treatment, the person in charge of the treatment or the criteria

specific for their appointment may be established by the Law of the Union or of the

Member states"

15) "health-related data": personal data relating to physical or mental health

of a natural person, including the provision of health care services, which

monitor information about their health status;

Thus, from the proven facts it turns out that the data subject to treatment by

the COUNCIL have been: date and time of access, name, surname, telephone number

Phone number of people who accessed the establishment. In the case of events and activities

massive numbers, name, surnames, email, municipality and community of

residence, event date, seat number and sector. And in the case of activities

of leisure and free time, data of the participants in the activity and of the personnel

party, as well as the stable coexistence group to which they belonged.

In this regard, it is necessary to point out that the data that is collected, although

related to the control of the pandemic and its treatment is for the purpose of being able to

identify possible infected, in a context of COVID-19 crisis, in which

publishes Royal Decree-Law 21/2020, of June 9, as well as the measures adopted

by the Minister of Health, as a health authority in accordance with the provisions

in article 59.a) of Law 7/2002, of December 10, on the Sanitary Regulation of

Cantabria, are not data that in the RGPD are cataloged as "data related to the

health" (article 4.15 RGPD) or "special categories of personal data" (article 9.2

RGPD) in which case, the provisions of this last article would be applicable.

SAW

Likewise, it is stated that the MINISTRY is responsible for data processing

referred to in the exposed antecedents, since, according to the definition of the

Article 4.7 of the RGPD is the one that has determined the purpose of the treatments carried out.

two: "The registry will be exclusively available to the General Directorate

of Public Health and will have the sole purpose of facilitating the tracking and monitoring of

contacts of positive, probable or possible cases of Covid-19", notwithstanding that

has corresponded to the owners of hotels and tourist accommodation, hairdressers,

beauty centers, aesthetic cabinets, manicure, pedicure and waxing salons,

saunas and gyms, data collection under the provisions of Resolution

which establishes the health measures applicable in the Autonomous Community

of Cantabria during the period of new normality, adopted by virtue of article 2

of Decree 2/2020, of June 18, of the President of the Autonomous Community, by the

which provides for the entry of the Autonomous Community of Cantabria, in the situation of

new normal; Article 59 of the Law of Cantabria 7/2002, of December 10, of

Sanitary Ordinance of Cantabria, which attributes to the Ministry competent in matters

ria of health the exercise of health authority (paragraph a), as well as the adoption

of preventive health protection measures when there is or is reasonable suspicion

clearly the existence of an imminent risk to the health of the community (apart from

ted f); and, in application of Royal Decree-Law 21/2020, of June 9, on urgent measures

prevention, containment and coordination people to deal with the health crisis

caused by Covid-19.

In this context, the second modification of the Resolution was agreed by virtue of the

article 25.3 of the Statute of Autonomy for Cantabria, article 26.1 of the Law

14/1986, of April 25, General Health, article 3 of the Organic Law 3/1986,

of April 14, of Special Measures in the matter of Public Health, and article 54 of

Law 33/2011, of October 4, General Public Health, at the proposal of the Directorate

General Public Health Commission, and in accordance with article 59.a) of the Law of

Cantabria 7/2002, of December 10, of Sanitary Ordinance of Cantabria.

In accordance with article 6.1 - "Legality of the treatment" -, of the RGPD:

"1. The processing will only be lawful if at least one of the following conditions is met:

nes:

a) the interested party gave their consent for the processing of their personal data

for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the interested party

is part of 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 treatment is necessary to protect the vital interests of the interested party or another

Physical person;

e) the treatment is necessary for the fulfillment of a mission carried out in the interest

public or in the exercise of public powers vested in the data controller;

f) the treatment is necessary for the satisfaction of legitimate interests pursued

by the data controller or by a third party, provided that said interests

interests do not prevail or the fundamental rights and freedoms of the interest

cases that require the protection of personal data, in particular when the interested

sado be 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), setting more precisely

specifies specific treatment requirements and other measures that guarantee treatment

lawful and fair treatment, including other specific treatment situations

under chapter IX.

3. The basis of the treatment indicated in section 1, letters c) and e), must be established

decided 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, in what

regarding 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 powers

data conferred on the data controller. Said legal basis may contain

specific provisions to adapt the application of the rules of this Regulation-

ment, among others: the general conditions that govern the legality of the treatment by

party responsible; the types of data object of treatment; stakeholders affected

two; the entities to which personal data can be communicated and the purposes of such

communication; purpose limitation; the terms of conservation of the data, as well

such as processing operations and procedures, including measures to

guarantee lawful and equitable treatment, such as those relating to other situations

specific treatment under chapter IX. The Law of the Union or of the States

two members will fulfill a public interest objective and will be proportional to the legitimate purpose

pursued.

4. When the treatment for another purpose other than that for which the data was collected

personal data is not based on the consent of the interested party or on the Law

of the Union or of the Member States which constitutes a necessary and proportionate measure.

in a democratic society to safeguard the objectives indicated in the art-

Article 23, paragraph 1, the controller, in order to determine whether the treatment

treatment for another purpose is compatible with the purpose for which they were initially collected

personal data, will take into account, among other things:

a) any relationship between the purposes for which the personal data were collected

purposes and purposes of the intended further processing;

b) the context in which the personal data have been collected, in particular by what

regarding the relationship between the interested parties and the data controller;

c) the nature of the personal data, specifically when dealing with specific categories.

special personal data, in accordance with article 9, or personal data re-

subject to criminal convictions and infractions, 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 pseudonymity.

zation."

In fact, recital (46) of the RGPD already recognizes that, in exceptional situations,

such as an epidemic, the legal basis of the treatments can be multiple, low-

both in the public interest and in the vital interest of the interested party or another person

physical.

(46) The processing of personal data should also be considered lawful when

is necessary to protect an interest essential to the life of the data subject or the

of another natural person. In principle, personal data should only be processed

be made on the basis of the vital interest of another natural person when the processing

cannot manifestly be based on a different legal basis. Certain types

of treatment can respond both to important reasons of public interest

as to the vital interests of the interested party, such as when the treatment

training is necessary for humanitarian purposes, including the control of epidemics and

its spread, or in situations of humanitarian emergency, especially in

case of natural or man-made disasters.

Therefore, as a legal basis for lawful processing of personal data, without per-

judgment that there may be other bases, such as compliance with a

legal obligation, article 6.1.c), the RGPD explicitly recognizes the two mentioned: mi-

sion carried out in the public interest (article 6.1.e) or vital interests of the interested party or

other natural persons (article 6.1.d).

However, the MINISTRY, in the allegations presented to the initial agreement

states that: “The Spanish Agency for Data Protection infers that the legal basis of the

treatment of personal data in which the Ministry of Health is protected is

that provided for in article 6.1 a) of the RGPD, regarding the consent of those affected.”

And he argues that the legal basis is as follows:

- In compliance with a legal obligation applicable to the person responsible for the

treatment, provided for in article 6.1 c) of the RGPD. Among others, the article

26.1 of Law 14/1986, of April 25, General Health, article 3 of

Organic Law 3/1986, of April 14, on Special Measures in matters of

of Public Health, and article 54 of Law 33/2011, of October 4, Gene-

General Public Health, attribute to the health authorities competence

to adopt measures regarding the risk of disease transmission.

des, epidemic and health crises. These precepts are expressly invoked

affected by the second modification of the resolution of June 18, 2020.

- In the fulfillment of a mission carried out in the public interest, provided for in

article 6.1 e) of the RGPD and the need to protect vital interests

of the interested party or of another natural person, provided for in article 6.1 d) of the

GDPR. This is stated in article 27. 2 of Royal Decree-Law 21/2020 and the article

Article 27.2 of Law 2/2021 regarding the processing of information for

the traceability of the contacts that the establishments have, means

or any other place, center or public or private entity.

However, as we have already clarified in the Basis of Law III, precept 2.6 of
the second modification of the Resolution and later, section 1.4 of the tenth mo-
dification of the Resolution, include consent as a legal basis for the processing
treatment of the personal data of the people who accessed the aforementioned states
establishments.

Article 4, paragraph 11, of the RGPD defines the "consent of the interested party" as:

Any manifestation of free, specific, informed and unequivocal will by which the
The interested party accepts, either by means of a declaration or a clear affirmative action, the
processing of personal data concerning you;

Article 7 of the RGPD, under the heading "Conditions for consent" provides
the next:

1. When the treatment is based on the consent of the interested party, the person responsible
saber must be able to demonstrate that he consented to the treatment of his
personal information.

2. If the data subject's consent is given in the context of a statement
writing that also refers to other matters, the request for consent will be
presented in such a way as to be clearly distinguishable from other matters,
intelligible and easily accessible form and using clear and simple language. I don't know-
Any part of the declaration that constitutes infringement of the pri- or
sente regulation.

3. The interested party shall have the right to withdraw their consent at any time.
unto The withdrawal of consent will not affect the legality of the treatment based on
in the consent prior to its withdrawal. Before giving your consent, the
interested will be informed of it. It will be as easy to withdraw consent as
give it.

4. When assessing whether consent has been freely given, it will be taken into account in

to the fullest extent possible whether, among other things, the execution of a

contract, including the provision of a service, is subject to the consent of the

processing of personal data that is not necessary for the execution of di-

cho contract.

Likewise, recital 32 of the GDPR provides: Consent must be given through

by a clear affirmative act reflecting a manifestation of free will, specifically

fica, informed, and unequivocal of the interested party to accept the treatment of data of ca-

personal nature that concern you, such as a written statement, including by means of

electronic god, or a verbal statement. (…)

For its part, recital 42 of the GDPR provides: (...) Consent must not

be considered freely provided when the interested party does not enjoy true or free

choice or you may not withhold or withdraw your consent without prejudice

.

And adds recital 43 of the RGPD: To guarantee that the consent has been

freely given, it should not constitute a valid legal basis for the treatment

processing of personal data in a specific case in which there is a

clear balance between the data subject and the data controller, in particular when

where said controller is a public authority and it is therefore unlikely that the

consent was freely given in all the circumstances of that situation

particular. Consent is presumed not to have been freely given when

allows separate authorization of the different data processing operations per-

despite being appropriate in the specific case, or when compliance with a

contract, including the provision of a service, is dependent on the consent,

even when this is not necessary for such compliance.

Lastly, article 6 of the LOPDGDD under the rubric “Treatment based on consent

feeling of the affected” provides:

1. In accordance with the provisions of article 4.11 of the Regulation (EU)

2016/679, consent of the affected party is understood to be any manifestation of

free, specific, informed and unequivocal will by which he accepts, either

by means of a declaration or a clear affirmative action, the processing of data

personal matters that concern you.

2. When the data processing is intended to be based on consent

of the affected party for a plurality of purposes, it will be necessary to record in

specific and unequivocal manner that said consent is granted for all

they.

3. The execution of the contract may not be subject to the affected party consenting to the

processing of personal data for purposes unrelated

with the maintenance, development or control of the contractual relationship.

From the foregoing, it follows that, in order to appreciate a consent

free, it would be necessary that no negative consequence be derived, that is, that

entry to the establishment will not be conditioned, which -precisely-, does occur

in the analyzed case.

In this sense, section 2.6 of the second amendment to the Resolution provides:

The collection of such data will require the consent of the interested party, without prejudice.

right to condition the right of admission for reasons of public health in the event

not being able to count on it.

For its part, section 1.4 of the Resolution approving the tenth amendment

Resolution of May 11, 2021, which establishes sanitary measures

for the prevention, containment and control of the pandemic caused by Co-

vid-19 in the Autonomous Community of Cantabria, provides:

The collection of such data will require the consent of the interested party, without prejudice.

right to condition the right of admission for reasons of public health in the event

not being able to count on it.

With what has been exposed so far, it can be concluded that the consent given for the financing

ability to facilitate contact tracing and follow-up of positive, probable, or

of Covid-19, is not in accordance with the provisions of article 4.11) and 7 of the

GDPR.

And this is so, because it cannot be considered “free”. In this sense, the Guidelines

5/2020 on consent within the meaning of Regulation (EU) 2016/679, adopted-

das on May 4, 2020 by the European Committee for Data Protection, indicate that:

The term "free" implies real choice and control on the part of the data subjects.

As a general rule, the RGPD establishes that, if the subject is not really free

to choose, you feel compelled to consent or you will suffer consequences

negative if you do not give it, then the consent cannot be considered valid.

do. The absence of such requirements determines that it is not valid

so that the treatments based on it lack legitimacy contravening

Doing so the provisions of article 6 of the RGPD.

The facts described could constitute the offense provided for in article

83.5.a) of the RGPD and in article 72.1.c) of the LOPDGDD, for alleged violation

of article 7 of the RGPD.

viii

Likewise, the processing of personal data in emergency health situations

ria continue to be treated in accordance with data protection regulations

(RGPD and LOPDGDD), for which all its principles, contents,

two in article 5 of the RGPD, among them, the principle of data minimization.

Regarding this last aspect, express reference must be made to the fact that the data processed

must be exclusively those limited to those necessary for the intended purpose.

da, without this treatment being able to be extended to any other personal data

not strictly necessary for said purpose, without it being possible to confuse

knowledge with necessity, because the fundamental right to data protection remains

being applied normally, without prejudice to the fact that, as has been said, the regulations themselves

personal data protection law establishes that in emergency situations,

for the protection of essential public health and/or vital interests of people

physical data, the necessary health data may be processed to prevent the spread of

disease that has caused the health emergency.

In short, the mere authorization of the legal system to carry out the processing of

data does not imply absolute permissiveness, this must be adapted to the principles and rest of

content provided for in the RGPD and in the LOPDGDD.

Article 5 RGPD, referring to the "Principles related to treatment" provides:

1. The personal data will be:

(…)

c) adequate, pertinent and limited to what is necessary in relation to the purposes for

those that are processed ("data minimization");

(…)

It therefore requires that the data be adequate, pertinent and limited to what is necessary.

rio in relation to the purposes for which they are processed ("data minimization").

The data provided by people when accessing hotels and accommodation

tourism, hairdressers, beauty centers, aesthetic cabinets, nail salons,

pedicure and hair removal, saunas and gyms, are: date and time of access, name and

surnames and contact telephone number.

If what you want is to be able to quickly locate a possible contact, you could

it will be enough to obtain a telephone number, along with the data of the day and time

on-site assistance. This criterion, together with the anonymization of the holders of the

device, has been assumed by the CEPD in Guidelines 04/2020 on the use of

location data and contact tracing tools in the context of the pandemic

COVID-19 pandemic.

Consequently, it would not be necessary to request, in addition, the name and surnames, which

they would be unnecessary for the purpose of tracking and monitoring potential contacts.

Therefore, the second modification of the Resolution despite indicating in the paragraph

fourth of section 2.6, that: "Both the registration and the processing of the data contained

nests in it will be governed in any case by the provisions of Organic Law 3/2018,

of December 5, Protection of Personal Data and Guarantee of the Rights Di-

and in 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

to the processing of personal data and the free circulation of these data and for which

Directive 95/46/CE is repealed", it turns out that it did not.

The data collected was not adequate or relevant, but excessive.

The facts described could constitute the offense provided for in article

83.5.a) of the RGPD and in article 72.1.a) of the LOPDGDD, for alleged violation

of article 5.1.c) of the RGPD.

IX

Taking into account the wording of article 83.7 of the RGPD, the regime applicable to the

This procedure will be the one established in the LOPDGDD, in its article 77, under the

heading "Regime applicable to certain categories of persons responsible or in charge

of the treatment", establishes the following:

"1. The regime established in this article will be applicable to treatments

of which they are responsible or entrusted:

a) The constitutional bodies or those with constitutional relevance and the

institutions of the autonomous communities analogous to them.

b) The jurisdictional bodies.

c) The General Administration of the State,

autonomous communities 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

related to the exercise of powers of public law.

the Administrations of the

h) Public sector foundations.

i) Public Universities.

j) The consortiums.

k) The parliamentary groups of the Cortes Generales and the Assemblies
Autonomous Legislative, as well as the political groups of the Corporations
Local.

2. When the managers or managers listed in section 1
committed any of the offenses referred to in articles 72 to 74
of this organic law, the data protection authority that is competent
will issue a resolution sanctioning them with a warning. The resolution
It shall also establish the measures to be adopted to stop the
conduct or correct 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
on which it reports hierarchically, where appropriate, and to those affected who have the
Interested party status, if any.

3. Without prejudice to what is established in the previous section, the
data protection will also propose the initiation of disciplinary actions
when there is sufficient evidence to do so. In this case, the procedure and
The sanctions to be applied will be those established in the legislation on the
disciplinary or sanctioning that results from application. Also, when the
infractions are attributable to authorities and directors, and the
existence of technical reports or recommendations for treatment that do not
had been duly attended to, in the resolution imposing the

The sanction will include a reprimand with the name of the responsible position and

publication will be ordered in the Official State or Autonomous Gazette that

correspond.

4. The resolutions must be communicated to the data protection authority

that fall in relation to the measures and actions referred to in the

previous sections.

5. They will be communicated to the Ombudsman or, where appropriate, to the institutions

analogous of the autonomous communities the actions carried out and the

resolutions issued under this article.

6. When the competent authority is the Spanish Agency for the Protection of

Data, it 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 controller or processor

who had committed the offence. When the competition corresponds to a

regional data protection authority will be, in terms of the

publicity of these resolutions, to the provisions of its specific regulations".

In short, the LOPDGDD does not authorize the imposition of administrative fines, but rather a mere

warning, that is, without any economic effect. However, it does establish the

possibility that the necessary measures can be adopted to stop the

conduct or the corresponding defects are corrected.

The text of the resolution establishes the infractions committed and

the facts that have given rise to the violation of the regulations for the protection of

data, from which it is clearly inferred what measures to adopt, without prejudice

that the type of specific procedures, mechanisms or instruments for

implement them corresponds to the sanctioned party, since it is responsible for the

treatment who fully knows your organization and has to decide, based on the

proactive responsibility and risk approach, how to comply with the RGPD and the

LOPDGDD

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 the MINISTRY OF HEALTH, with CIF S3933002B, for a

infringement of articles 5.1.c) and 7 of the RGPD, typified in article 83.5 of the RGPD,

a warning sanction.

SECOND: NOTIFY this resolution to the MINISTRY OF HEALTH.

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.

938-100322

Sea Spain Marti

Director of the Spanish Data Protection Agency

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es