 File No.: EXP202202563

RESOLUTION OF SANCTIONING PROCEDURE

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

to the following

BACKGROUND

FIRST: A.A.A. (hereinafter, the complaining party 1) and B.B.B. (hereinafter, the part

claimant 2) on February 1 and 2, 2022 filed a claim with the

Spanish Data Protection Agency. The claims are directed against the

entity SUPERCOR, S.A., with NIF A78476397 (hereinafter, the party claimed or

SUPERCOR). The reasons on which the claims are based are the following:

The complaining parties state that they provided services as employees of the

SUPERCOR entity and that, on ***DATE.1, they received a letter of dismissal for a

alleged “serious and culpable breach” based on a series of images

captured by the video surveillance systems of the establishment in which

they carried out their tasks.

In this regard, they point out that they were informed about the installation of this

video surveillance, but without expressing in said information that there were security cameras

security in the "break room", which also did not have any sign

informative; which contravenes, in his opinion, the provisions of article 20.3 of the Statute

of the Workers and the doctrine of the Constitutional Court, expressed in the Judgment

29/2013, of February 11, and violates the fundamental rights of

workers.

With their claims, they provide, among other things, the following documentation:

. Copy of the dismissal letters of the claiming parties 1 and 2. The content of these

documents are extracted from the Fifth Proven Fact.

. Photograph that includes the informative document on the "Chambers of

video surveillance", through which the complaining parties express that the information

does not allude to the installation of cameras in rest rooms, but rather, by

On the contrary, it rather specifies that they exist in work areas. He

The content of this document is outlined in the Sixth Proven Fact.

. Photograph, in a general plan, of the bulletin board installed in the "cuarto de

rest" that is mentioned in the complaint to highlight that there was no

informative poster about the video surveillance system. However, this photograph is not

It is sharp enough so that the content of the image can be distinguished.

exposed documentation, although it can be seen that it contains information

union.

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

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

hereafter LOPDGDD), said claims were transferred to the claimed party,

to proceed with its analysis and inform this Agency within a month,

of the actions carried out to adapt to the requirements established in the

data protection regulations.

The transfer, which was carried out in accordance with the regulations established in Law 39/2015, of

October 1, of the Common Administrative Procedure of the Administrations

Public (hereinafter, LPACAP), was collected on dates 03/03/2022 and 03/21/2022,

for the claims of claiming parties 1 and 2, respectively, according to

It appears in the acknowledgments of receipt that are in the file.

On 04/21 and 26/2022, this Agency received written responses to the

claims made by the complaining parties. Regarding the facts that

have motivated the claims, the following is basically indicated:

. The system currently has the following cameras:

- Chamber 1, located at (…)

- Chamber 2, located at (…)

- Chamber 3, located at (…)

- Chamber 4, located at (…)

- Chamber 5, located at (…)

- Chamber 6, located at (...)

- Chamber 7, located at (…)

- Camera 8, it is about (…)

- Chamber 9, located at (…)

- Chamber 10, located at (…)

- Chamber 11, located at (…)

- Chamber 12, located at (…)

- Chamber 13, located at (…)

- Chamber 14, located at (...)

- Chamber 15, located at (…)

- Chamber 16, located at (…)

- Chamber 17, located at (…)

- Chamber 18, located at (…)

- Chamber 19, located at (…)

- Chamber 20, located at (…)

- Chamber 21, located at (…)

- Chamber 22, located at (…)

. Information on video surveillance and, specifically, on the existence of cameras

for labor control, it is information that is provided to all workers.

. There is signage relating to information on video surveillance, both abroad

as inside the establishment, where the information is displayed

corresponding, carrying out the communication to the interested parties through layers

in accordance with the provisions of current legislation on data protection.

The "additional information", referring to the second information layer, can be

consulted by those interested in the web "***URL.1", accessible by the public at

general.

There is also information specifically addressed to workers in the

information boards and on the web "***URL.2".

. In the documentation provided you can appreciate the information related to the

notification that was made at the time to the representatives of the workers

(union organizations) through the Intercentre Committee.

. Technical and organizational measures have been established in order to guarantee the

security of the images captured by the video surveillance system, in order to

prevent its alteration, loss of treatment or unauthorized access.

. In the establishment there is a "control room", where the equipment of

recording and viewing of images, with access only by authorized personnel

(it is provided with a physical access control system -key lock- and access

to the system by password).

. The workers' representatives, as well as the workers themselves, were

informed about the use of video surveillance systems for the purpose of

maintain control of the safety of people, property, facilities and merchandise

property of my client, as well as the application of the provisions of art. 20.3

of the Workers' Statute and despite everything, several workers had

knowingly committed criminal acts.

. The period of conservation of the images, and although the current regulations on

of data protection establishes that the deletion of the images must be produced

in a period not exceeding a month, it is much less, being the same of 15 days.

. The work center has an area set up exclusively for employees to

employees can change their clothes and put on the work uniform, and that they do not

is other than the wardrobe. It is understood that if workers use a space to

a purpose other than the one for which it is intended, they do so at all times under their

responsibility.

. The claim derives from some acts constituting a crime, which originate the

job termination of the complaining party, since there were well-founded suspicions

about significant losses of merchandise caused by employees of the

establishment.

. The aforementioned "rest room" mentioned by the claimant is not such, but

that it is a "Waste Room", which "is used unilaterally by

part of the workers of said center, as a rest room".

. The camera was installed in the "Sala de Mermas" on ***DATE.2, within the framework of

an internal investigation to find out what was happening in the

establishment and uninstalled on ***DATE.3, so it was up and running

for three and a half months. The images captured by this camera and during this

period revealed the theft of assets of the claimed entity by various

employees.

. The scope of the recordings was limited to the duration of the internal investigation,

ceased as soon as the workers were identified, not being used for

for no other purpose than to take disciplinary action.

. The installation of the camera in the "wasting room" of the establishment pursued a

legitimate objective, specifically, to discover who was committing those acts

unlawful, with the sole purpose of taking disciplinary measures that were of

application within the framework of the employment relationship. Furthermore, it points out that there was no

possibility of establishing a less intrusive measure.

. All installation of security cameras must respect the principle of

proportionality between the asset that is intended to be protected and the assets of third parties that

may be affected, and the data collected for treatment must be

adequate, relevant and limited to what is necessary in relation to the purposes for which

that are treated.

Therefore, it understands that at no time has the principle of

minimization of data in accordance with the provisions of article 5.1.c) of the GDPR, and that

the installation of the camera that gave rise to the claim is a measure in accordance with

the events that were taking place, and that, therefore, there is a justification

legitimate authority to adopt the measures that were carried out in this case, there being no

another option of establishing a less intrusive measure than the one adopted in your

moment.

With your claim, you provide, among other things, the following documentation:

. Intervention parts corresponding to the installation of "a zig-zag camera with

your recorder in the waste room" on date ***DATE.2 and upon withdrawal on

***DATE.3.

. Photographs of what the SUPERCOR entity calls the "Waste Room", in which

the recordings that determined the dismissal of the complaining parties were made.

As can be seen, this room has a table, an air conditioner,

a toaster, fridge and microwave. In the photos you can see two planks

banners and various packing boxes.

THIRD: On 04/29/2022 and 05/01/2022, in accordance with article 65 of

the LOPDGDD, the claims presented were admitted for processing.

FOURTH: On 05/13/2022, by the General Subdirectorate of Data Inspection

information related to the SUPERCOR entity is accessed in “Axesor” (“Informe

monitors"). (…).

FIFTH: On 07/21/2022, the Director of the Spanish Agency for the Protection of

Datos agreed to initiate a sanctioning procedure against the SUPERCOR entity, in accordance with

to the provisions of articles 63 and 64 of the LPACAP, for the alleged violation of the

Article 6 of the GDPR, defined in Article 83.5.a) of the same Regulation, and

qualified for prescription purposes as very serious in article 72.1.b) of the

LOPDGDD.

In the opening agreement it was determined that the sanction that could correspond,
attention to the existing evidence at the time of opening and without prejudice to the
resulting from the instruction, would amount to a total of 70,000 euros (seventy thousand
euro).
Likewise, it was warned that the imputed infractions, if confirmed, may
entail the imposition of measures, according to the aforementioned article 58.2 d) of the GDPR.
SIXTH: Notified the aforementioned start agreement in accordance with the rules established in
the LPACAP, the claimed party presented a pleading in which it requests the
procedure file. In relation to the facts that led to the opening of the
procedure, SUPERCOR reiterates the indications expressed in its brief of
response to the transfer process and add the following considerations:
. The "Video Surveillance Policy" contemplates the prohibition of installing cameras in
areas in which privacy is reserved, such as toilets, changing rooms, dining rooms and areas
Rest.
. Details the circumstances that determined the internal investigation carried out to
verify why merchandise was missing from the store. Specific,
refers that the center in question received some products that were destined for another
center, which had disappeared when the purchasing department tried to
retrieve them. According to the claimed party, an inventory of the merchandise was made
received, comparing it with the delivery note, and the lack thereof was detected.
It adds that, for this reason, at first the Security Delegate decided to install
a camera in the warehouse, which made it possible to verify the withdrawal of products by
of some employees who were not offered for sale. He points out that the verification
of these images led to the suspicion that the workers who were stealing
Warehouse merchandise was deposited in the "Waste Room" of the establishment, which
that led to the installation of a camera in the aforementioned "Sala de Mermas", so

temporary, as accredited with the documentation already provided.

. Due to the small size of the "Waste Room" (4.5 m2), a camera was installed that

focused on the small desk, the front door and the refrigerator, whose only function is

that of depositing the losses of perishable products, and not that the staff of the center

You can store drinks and food for your personal use. In the access to this room, which

it also gives access to the control center and a small warehouse, there is a sign

video surveillance information.

. The dimension of said room, whose space is reduced by the merchandise of

losses (provide photographs), it does not allow it to be equipped as a rest room for the

number of workers who must use it simultaneously (two employees per

turn), in accordance with the stipulations of Annex V, of R.D. 486/1997, of April 14,

which establishes the minimum health and safety provisions in the

work places. The defendant emphasizes the importance of the comfort of the

furniture that should exist in a rest room for at least two people, which

It is not the case of the "wasting room".

In this regard, SUPERCOR warns that, although the aforementioned "Waste Room" is not

a break room for the reasons stated, "the administrative department

of HR who interviewed the three people involved in the theft and who were

showed the images captured by the camera that was installed to clarify the

facts in the framework of the investigation, confirms that the three involved were referring to

this room as a break, and in the dismissal letter he reflected it that way, however, he did not

is more than an involuntary human error in the description of said

space, collecting the statements of the three workers who referred in

at all times to said room as the rest room".

The defendant party also states that "the workers are told that they can

have your work break outside the establishment, but never in any

space within the workplace"; and that their use of this room

as a space for rest or as a wardrobe was made under his

liability, unilaterally and for a purpose other than that for which it was intended,

that supposes an irregular use of the same one.

With its statement of allegations, the requested entity provides three photographs of the room

which he calls the "wasting room", with which he intends to prove the narrow area

that occupies said space and the impossibility of being used as a rest room

for the recreation of the workers (in the photo you can see that the room has

with a table, a chair, an air conditioner, a toaster, a fridge and

microwave); and a photograph of the informative poster installed in the access area to

this room.

Likewise, it provides a copy of the report made by the National Directorate of

Prevention and Safety of SUPERCOR, on the "improper use of the waste room:

***REPORT.1". The content of this report, which appears signed by "(...)",

coincides with what was expressed by the claimed party in its statement of allegations, which

reproduces that report almost verbatim.

SEVENTH: On 12/16/2022, during the testing phase, the

reproduced for evidentiary purposes the claims filed and their

documentation, as well as the documents obtained and generated during the phase of

admission to processing of claims; and they were considered presented

allegations to the agreement to start the disciplinary procedure formulated by

SUPERCOR and the documentation that accompanies them.

On the other hand, it was agreed to require the entity SUPERCOR to provide the

following information and/or documentation:

a) Copy of the informative notices and posters on the video surveillance system

currently available in the establishment to which the actions refer,

are aimed at the general public or the workers of the establishment,

providing details about its location and a photograph that proves this location.

b) Copy of the report of "(...)", provided to the Department of Human Resources of

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www.aepd.es

sedeagpd.gob.es

7/30

SUPERCOR on ***DATE.4, which is mentioned in the dismissal letters

delivered to the claiming parties, both dated ***DATE.1.

c) Copy of the documentation prepared by the Human Resources Department

of SUPERCOR due to the dismissal of the complaining parties, especially the

formalized (written documentation or audio files) to record the

interviews prior to dismissal held by the aforementioned Department with said

parties, to which mention is made in the brief of allegations at the opening of the

procedure presented by that entity on 08/08/2022.

In response to the request indicated in letter a), the claimed party provided a copy of the

video surveillance notice available on the corporate intranet, the information that

provides the representatives of the workers and photographs of the specific signage

on video surveillance installed in the work center subject to the actions.

Regarding the report of "(...)" referred to in section b) above, the claimed party

states that it provides "photographs of the handwritten report in which the
notes made by the person responsible regarding the correlation of the facts
that motivate the present claim and that at the time led to the dismissal of the
claimant today" (it is an almost illegible handwritten notebook, in which
annotations that seem to correspond with the information taken from the examination of the
recorded images to which the claim relates; dates are indicated
they list products and include indications such as “dressed for the street”, “gets 1
bag”, “changes clothes”); and also states that it leaves "at the disposal of the
Agency the "original notebook" in which the aforementioned report was written by
of the person in charge and that, as we have mentioned, the events are reported chronologically.
facts that led to the dismissal of the worker.”

In relation to what is indicated in the referenced section c), the claimed party
states the following:

“On the other hand, and in relation to section 3.c) of the request made by the Agency to my
represented, where the documentation prepared by the Department of
Human Resources, due to the dismissal, we want to show that there was no
interviews prior to the time of dismissal, but rather a final interview in which they communicate
the facts to the worker and the corresponding letter of dismissal is presented to her.
Likewise, we want to state that there are no recordings or videos of said interview, for
Therefore, it is not possible to provide said information, although the communication was made to the
Intercentre Committee, and for the record we contribute together with this document and as
document no. 3, the statement sent to the Union Delegate informing him of the
events that occurred in the aforementioned work center and for which the dismissal of the
worker.

Likewise, we provide as document No. 4 the certificate of (...), in which it is stated
manifested that at the time of the dismissal the union delegate was present, having

knowledge of the facts in which the worker incurred.

Finally, and as it was already revealed in our previous writings, the "room of

rest" to which mention is made in the dismissal letter, was nothing more than a mistake

grammatical, because as already stated, the work center that is the subject of the request has

a space enabled exclusively for employees to change clothes and

dress in the work uniform, which are the "staff changing rooms", so the

use of this place (SALA DE MERMAS), in which the workers carried out said

conduct, was a unilateral act on his part and that at all times it was under his

responsibility, since there was an inappropriate and irregular use of said Chamber of

Less.

In this sense, and for greater transparency, we provide together with this document the document

of faith of errata that signs the (...), in which it declares that the

term rest room (document No. 5)".

Among other documentation, provide a copy of the letter addressed to a Union Delegate

giving an account of the facts in which the claiming party 1 is involved, in which

the result of the checks of the images captured by the

video cameras installed in the center in question and details the facts verified

between ***DATE.5. The information provided on these facts coincides

literally with the collection in the respective dismissal letter, including the reference to the

"staff room set up for rest".

This documentation also includes a certification issued by the (...) of the party

claimed with the following text:

"Errata

That it is manifested that it was a mistake to name the waste room as a rest room, since

As it has already been revealed, there is no rest room in said work center, but there is

a space set up for staff to change their clothes, which is the changing room area".

EIGHTH: On 02/24/2023, a resolution proposal was formulated in the sense of

that the claimed party be penalized for a violation of article 6 of the GDPR,

typified in Article 83.5.a) of the same Regulation, and qualified for the purposes of

prescription as very serious in article 72.1.b) of the LOPDGDD, with a fine of

70,000 euros (seventy thousand euros).

NINTH: The proposed resolution outlined in the Eighth Antecedent was

notified to the claimed party on the same date of 02/24/2023, granting

deadline for making claims.

On 03/10/2023, a letter of allegations to the resolution proposal was received

in which the claimed party again requests the filing of the procedure,

reiterating that his purpose was none other than to find out which employees were

committing acts, that it has respected proportionality, the minimization of data,

the limitation of the conservation period and the suitability of the measure implemented with

the end pursued, highlighting in this regard the same circumstances set out

manifest in his earlier writings.

Thus, he points out once again that the installation of the camera was motivated by a

internal investigation, following the detection of merchandise losses, that your

use was temporary and that it was the only control measure to be able to prove the

unlawful acts that the complaining parties were committing, there being no other

less invasive way.

On these issues, he cites the Judgment of the Superior Court of Justice of Galicia

4136/2021, of June 11, which admits the installation of cameras in case of suspicion

the Constitutional Court Judgment 119/2022, dated 29

September, which admits these recordings without having to comply with the duty to inform

when there are indications of the commission of illegal acts and there is no other way

less invasive to confirm the illegality of the worker's conduct; and the Judgment of

Supreme Court 285/2022, of March 30, which admits as justification of the

dismissal of a worker proof of cameras installed for the purpose of

reduce and avoid trade losses.

As for the evidence relating to the destination of the room in which the camera was installed in

question, alleges that in previous writings he provided the plans of the establishment, in which

that, according to the defendant, the existence of a "Room of

Shrinkage", and a space enabled as "Dressing rooms". In these plans you can

Observe the ground floor of the establishment, which is made up of the store area

open to the public, the checkout line and the operating area of the center, where the

address of the same and the "Sala de Mermas", which has a job

for the personnel in charge to manage the merchandise from the establishment.

He reiterates that, due to the small dimensions of this room, which are diminished by the

space that the merchandise occupies, it is logical to think that in such a small space

the workers of this work center could take a break (provide the

center planes).

It also highlights once again that the center had "changing rooms" so that the

employees change their clothes, "not having to carry out said action outside the place authorized to do so, and in case of doing so, it will be freely and always under his responsibility, as has been the case that has given rise to the present claim".

Therefore, it continues to maintain that the complaining parties acted deliberate, voluntary and unilateral when they proceeded to change clothes in the "Room of Mermas".

Based on the foregoing, the claimed party understands that it has not violated the article 89.2 of the LOPDGDD, since in no case did it install a camera in rest areas from the workers.

On the other hand, it shows its disagreement with what is indicated in the proposal of resolution, on the non-contribution of the report prepared by the (...) of the entity, for as he provided photographs of the handwritten report prepared by himself, with the notes of the facts investigated. It clarifies that, "despite not having a more elaborate report, this is the only proof of the description and succession of the facts" that led to the dismissal of the complaining parties as consequence of their unlawful action against the interests of the claimed party.

Regarding the graduation of the sanction, SUPERCOR considers the proposed fine for facts that cannot be classified as very serious and requests that a sanction be imposed in a lower degree, in accordance with the provisions of article 29.4 of Law 40/2015, of October 10, on the Legal Regime of the Public Sector (LRJSP), and article 74 of the LOPDGDD, classifying the present case as minor offense and imposing a penalty of 40,000 euros, or up to 10 million euros or up to 2% of the total annual turnover, as provided in the Article 83.4 of the GDPR for serious infringements.

Regarding the proposed fine, amounting to 70,000 euros, SUPERCOR understands that no argument is put forward about said amount or why a fee is not imposed

lower amount, estimating this circumstance as a reason for defenselessness, by not know the criteria that have been taken into account to determine that amount.

The aforementioned entity understands that the sanctions must be established taking into account the infringement effectively committed, assessing the personal rights that have been been affected, the benefits obtained, the possible recidivism, the intentionality and any other relevant circumstance, as well as the graduation criteria collected in article 29.3 of the LRJSP; and argues the following:

. The personal rights that have been affected have been the image of the parties claimants, although the sole purpose of capturing it has been to prove the illegal act that was being committed.

. Regarding the benefits obtained, it indicates that SUPERCOR has not obtained any income as a result of the measure adopted, since the only reason was to stop suffer economic damage as a result of the illegal action of the parties claimants.

. There has been no recurrence.

. The only intention was to discover the facts that were being committed and adopt the necessary disciplinary action. Therefore, it understands that it cannot be considered as aggravating the intention, as referred to by the Agency in its proposal for resolution, since there was no other less intrusive measure to prove the commission of the crime

With the pleadings, the claimed party provides a copy of the construction plans.

distribution of surfaces of the establishment in question, ground floors and basement. He

The first of them is distributed between the sales room, the checkout line and services.

complementary, among which are indicated “C. Control”, “C. Inf.”, “Oficio”, “Cleaning”, “C.

Cleaning” and “C. Garbage”. The basement, dedicated entirely to services

complementary, it is distributed in “Cold room”, “Freezing room”,

“Warehouse”, “Forklift”, “Vest. Male” and “Vest. Female". The space that

occupies the supposed "wasting room" on the ground floor, it does not have any indication

about its name or intended use.

Of the actions carried out in this procedure and of the documentation

in the file, the following have been accredited:

PROVEN FACTS

FIRST: The claimed party, dedicated to the sale of food products,

perfumery and drugstore, has an establishment open to the public called

“(…)”, located at ***LOCATION.1.

SECOND: The center indicated in the First Proven Fact has a system

of video surveillance for which the claimed party is responsible. (…).

THIRD: In XXXX, the claimed party had suspicions about the theft of

goods (merchandise) in the aforementioned establishment by employees of the same

center. In this regard, the defendant has stated that this establishment

received some products that were destined for another center, which had

disappeared when the purchasing department tried to recover them. According to

claimed party, the lack of products was detected by comparing the inventory of the merchandise received with the delivery note.

And he adds that, for this reason, at first a camera was installed in the warehouse, that allowed checking the withdrawal of products by some employees who were not offered for sale, with the suspicion that the stolen merchandise was deposited in a room in the center; and that, for this reason and to carry out a internal investigation, dated ***DATE.2 decided to install a camera in said fourth, which is accessed through the corridor that also leads to other rooms from the center, located in an area with exclusive access to the entity's staff. Bliss camera was uninstalled on ***DATE.3.

The room in which this additional camera was installed has a table, a chair, air conditioning unit, a toaster, fridge and microwave. In the photos of the interior of this room provided by the claiming parties and claimed they see two bulletin boards and several packing boxes. On one of the boards advertisements display union information, among other things.

In relation to this room, the defendant has declared that "it is used in an unilaterally by the workers of said center, as a rest room."

FOURTH: The claiming parties provided service as employees of the party claimed in the center "(...)".

FIFTH: On ***DATE.1, the claiming parties received a dismissal letter for a "serious and culpable breach" based on a series of images captured by the video surveillance systems of the establishment in which they carried out their tasks. Said letter is signed by the complaining party and by the Department of Personnel of the claimed party.

In the dismissal letter delivered by the claimed party to claiming party 1, indicates:

“…this company has made the decision to penalize you for committing a very serious offense,

in such a way that the employment relationship that binds you to Supercor is terminated,

S.A. from the moment of receipt of this letter.

As you know, the Security Department of our center has systems

specialized video surveillance in order to ensure the safety of people and property,

as recently reminded the bodies of legal representation of the workers,

it is reported within the Nexo application… and it was exposed on the bulletin board of its Center

of Labor... being used, where appropriate, for the imposition of disciplinary sanctions for

breach of employment contract...

…from the Purchasing department a series of products destined for a

A center other than yours... an attempt was made to recover the merchandise, which was not found in your

Center... it was possible to verify that there was no sale operation that justified its

disappearance.

As a consequence, Supercor's (...) is informed of what happened... so that

using the measures at their disposal to send to this Personnel Department their

conclusions about what happened. By virtue of this, Friday XXXXXX was sent to this

Personnel Department a report detailing the following facts.

The images were checked through the security cameras installed by the

Security Department…

. On Monday XXXXXX... enter the staff room set up for rest (room

next to the office equipped with a fridge so that the staff can introduce the drink and

food of a particular and personal nature that the members of the store bring to eat in the

regulatory break), a chair and a table; being this place destined exclusively

for the rest of the staff, closes the door, and immediately begins to remove part of the

work uniform…

Immediately afterwards, he finishes undressing in this rest room... He finishes dressing with his

street clothes (without going down to the changing room located on the floor below the store...) to

then leave the rest room, already without the uniform to leave the center...

On Tuesday XXXXXX… at 3:47 p.m., enter the staff break room, close

the door, proceeding again to remove part of the work uniform. Minutes before, he entered

and left the break room, where he was eating at his regular time

another partner...

Once inside the room...

Immediately afterwards, he proceeds to dress in his street clothes…; to leave the break room

next to the collaborator... who enters while you are in the room...

On Friday XXXXXX... go into the staff room set up for rest, close the

door…

On Sunday XXXXXX... enter the staff room set up for rest, close the

door…".

The content of the dismissal letter of the complaining party 2 is similar to that outlined

previously. It also refers to the capture of images

in “the staff break room”:

On Tuesday XXXXXX… at 2:51 p.m., enter the staff break room

(room next to the office equipped with a fridge so that the staff can introduce the

drinks and food of a particular and personal nature that the members of the store bring to

take in the regulatory rest, a chair and a table; being this place destined

exclusively for the rest of the staff)…

On Sunday XXXXXX... he enters the rest room... already with part of his uniform

changed, he finishes changing his shoes in said rest room to leave

new…

Immediately afterwards at 8:23 p.m. you enter the rest room..., leaving you at 8:27 p.m.

rest room…

On Monday XXXXXX..., to immediately enter the break room and start preparing...

At 4:25 p.m., while Dª… was in the rest room, changing her work clothes and

get dressed in your street clothes, you enter…

Subsequently, at 4:33 p.m., you leave. with his partner… from the break room…".

SIXTH: The center "(...)" has an announcement for staff with information

on the "Video surveillance cameras" with the following text:

"Due to the adaptation of video surveillance systems to current regulations in

matter of data protection, the Management of the company reminds all its workers

that the continuous recording systems that exist in the shopping center and areas of

work, whether access, transit, sale, processing or storage, wharf or

parking, its purpose is to control the safety of people, property,

facilities and merchandise for sale.

In addition, they may be legally used to detect irregular actions, be they

These are carried out by people outside the company or by personnel who provide services in the

itself, being used, where appropriate, for the imposition of disciplinary sanctions for

breach of employment contract…".

FUNDAMENTALS OF LAW

Yo

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

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

control authority and as established in articles 47, 48.1, 64.2 and 68.1 of the

Organic Law 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 Protection Agency

of data.

Likewise, article 63.2 of the LOPDGDD determines that: "Procedures

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

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

regulations dictated in its development and, insofar as they do not contradict them, with character

subsidiary, by the general rules on administrative procedures".

II

The image is a personal data

The physical image of a person, according to article 4.1 of the GDPR, is data

personnel and their protection, therefore, is the subject of said Regulation. In article 4.2

of the GDPR defines the concept of "processing" of personal data.

The images generated by a system of cameras or camcorders are data of

personal nature, so its treatment is subject to the protection regulations

of data.

It is, therefore, pertinent to analyze whether the processing of personal data (image of the

natural persons) carried out through the denounced video surveillance system is

in accordance with the provisions of the GDPR.

II

Infringement. Regulatory framework

Article 6.1 of the GDPR establishes the assumptions that allow the use of

processing of personal data.

"1. Processing will only be lawful if at least one of the following conditions is met:

a) the interested party gave his consent for the processing of his personal data for one or

various specific purposes;

b) the treatment is necessary for the execution of a contract in which the interested party is a party

or for the application at his request of pre-contractual measures;

c) the processing is necessary for compliance with a legal obligation applicable to the

responsible for the treatment;

d) the processing is necessary to protect vital interests of the data subject or of another person

physical;

e) the processing is necessary for the fulfillment of a task carried out in the public interest

or in the exercise of public powers conferred on the data controller;

f) the treatment is necessary for the satisfaction of legitimate interests pursued by the user.

responsible for the treatment or by a third party, provided that such interests are not

the interests or fundamental rights and freedoms of the data subject prevail

require the protection of personal data, in particular when the data subject is a child.

The provisions of letter f) of the first paragraph shall not apply to the treatment carried out by

public authorities in the exercise of their functions.

The permanent implantation of a system of video cameras for reasons of

security has a legitimate basis in the LOPDGDD, the explanatory statement of which indicates:

“Together with these assumptions, others are included, such as video surveillance… in which the legality of the treatment comes from the existence of a public interest, in the terms established in the Article 6.1.e) of Regulation (EU) 2016/679”.

Regarding treatment for video surveillance purposes, article 22 of the LOPDGDD establishes that natural or legal persons, public or private, may carry out carry out the treatment of images through systems of cameras or video cameras in order to preserve the safety of people and property, as well as their facilities.

This same article 22, in its section 8, provides that "The treatment by the Employer data obtained through camera or video camera systems will be submits to the provisions of article 89 of this organic law”.

This article 89 of the LOPDGDD, referring to the "Right to privacy against the use of video surveillance and sound recording devices in the workplace”. sets the following:

"1. Employers may process the images obtained through camera systems or video cameras for the exercise of control functions by workers or employees provided for, respectively, in article 20.3 of the Workers' Statute and in the public function legislation, provided that these functions are exercised within its framework law and with the limits inherent to it. Employers must inform previously, and expressly, clearly and concisely, to the workers or public employees and, in

your case, your representatives, about this measure.

In the event that the flagrant commission of an illegal act has been captured by the

workers or public employees, the duty to inform will be understood fulfilled when

at least the device referred to in article 22.4 of this organic law exists.

2. In no case will the installation of sound recording systems or

video surveillance in places intended for the rest or recreation of workers or

public employees, such as locker rooms, toilets, dining rooms and the like.

3. The use of systems similar to those referred to in the previous sections for the

sound recording in the workplace will be allowed only when relevant

risks to the safety of facilities, goods and people derived from the activity

that it takes place in the workplace and always respecting the principle of proportionality,

the minimum intervention and the guarantees provided for in the previous sections. the deletion

of the sounds preserved by these recording systems will be made according to the

provided in section 3 of article 22 of this law".

On the legitimacy for the implementation of video surveillance systems in the field

labor, Royal Legislative Decree 1/1995, of 03/24, is taken into account, which approves

the revised text of the Workers' Statute Law (LET), whose article 20.3

notes:

"3. The employer may adopt the measures he deems most appropriate for surveillance and control

to verify compliance by the worker with his labor obligations and duties,

keeping in their adoption and application due consideration to their dignity and taking into account

account, where appropriate, the real capacity of workers with disabilities.

The Constitutional Court, in Judgment 98/2000, of 04/10/2000, highlights in its

legal basis 6 that "The jurisprudence of this Court has insisted

repeatedly in the full effectiveness of the fundamental rights of the worker

within the framework of the employment relationship, since this cannot imply in any way the

deprivation of such rights for those who serve in organizations

productive, which are not alien to constitutional principles and rights. Without

However, the mere manifestation of the exercise of the power of control by the

employer so that the right of the worker is sacrificed. These limitations

business must be those indispensable and strictly necessary to

satisfy a business interest deserving of guardianship and protection, so that if

there are other less aggressive and affective possibilities of satisfying said interest

of the law in question, it will be necessary to use the latter and not those more

aggressive and affective. It is, ultimately, the application of the principle of

proportionality".

To check whether a restrictive measure of a fundamental right passes the trial

of proportionality it is necessary to verify if it meets the three requirements or conditions

following:

. If such a measure is likely to achieve the proposed objective (judgment of suitability);

. If necessary, in the sense that there is no other more moderate measure for the

achievement of such purpose with equal effectiveness (judgment of necessity);

. If it is weighted or balanced, because it derives more benefits or

advantages for the general interest than damages to other goods or values in conflict

(judgment of proportionality).

Thus, among the surveillance and control measures allowed is the installation of

security cameras, although these systems should always respond at first

of proportionality, that is, the use of video cameras must be proportional to the purpose pursued, this is to guarantee the security and the fulfillment of the obligations and job duties.

In short, even though article 20.3 of the Workers' Statute authorizes the employer to adopt the measures he deems most appropriate for surveillance and control to verify compliance by the worker with his obligations and duties labor rights, this adoption must necessarily take into account the rights workers, respecting the rights to privacy and the right fundamental to data protection.

Under the terms of the aforementioned article 89 of the LOPDPGDD, it is allowed that Employers can process the images obtained through camera systems or video cameras for the exercise of control functions of workers provided for in article 20.3 of the Workers' Statute "provided that these functions are exercised within its legal framework and with the limits inherent to it.

In accordance with the foregoing, employers must inform in advance, and expressly, clearly and concisely, to workers or public employees and, in your case, your representatives, about this measure.

In short, the treatment must be adjusted and proportional to the purpose for which it is carried out. directs. The relevance in the treatment of the data must occur both in the time of data collection as well as in the subsequent treatment that is carried out of them, so that the system of cameras or video cameras installed does not may obtain images affecting the privacy of employees, resulting in disproportionate to capture images in private spaces, such as changing rooms, lockers or worker rest areas.

This is expressly established in the aforementioned article 89 of the LOPDGDD in relation to with the installation of video surveillance systems:

"2. In no case will the installation of sound recording systems or

video surveillance in places intended for the rest or recreation of workers or

public employees, such as locker rooms, toilets, dining rooms and the like.

According to this article, surveillance in workplaces should not include places

reserved for the private use of employees or that are not intended for carrying out

work tasks (such as toilets, showers, changing rooms or rest areas).

Video surveillance obligations

IV.

In accordance with the foregoing, the processing of images through a system

video surveillance, to comply with current regulations, must comply with the

following requirements:

1.- Individuals or legal entities, public or private, can establish a system

video surveillance in order to preserve the safety of people and property,

as well as its facilities.

It must be assessed whether the intended purpose can be achieved in another less

intrusive to the rights and freedoms of citizens. Personal data only

should be processed if the purpose of the processing cannot reasonably be achieved by

other means, recital 39 of the GDPR.

2.- The images obtained cannot be used for a subsequent purpose

incompatible with the one that motivated the installation of the video surveillance system.

3.- The duty to inform those affected provided for in articles 12 must be fulfilled

and 13 of the GDPR, and 22 of the LOPDGDD, in the terms already indicated.

4.- Images of the public thoroughfare cannot be captured, since the treatment of

images in public places, unless there is government authorization, only

It can be carried out by the Security Forces and Bodies.

On some occasions, for the protection of private spaces, where

cameras installed on facades or inside, may be necessary to ensure the

security purpose the recording of a portion of the public thoroughfare.

That is, cameras and camcorders installed for security purposes may not be

obtain images of public roads unless it is essential for said purpose, or

it is impossible to avoid it due to their location. And in such a case

extraordinary, the cameras will only be able to capture the minimum portion necessary to

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

Installed cameras cannot get images from third-party proprietary space

and/or public space without duly accredited justified cause, nor can they affect

the privacy of passers-by who move freely through the area.

It is not allowed, therefore, the placement of cameras towards the private property of

neighbors with the purpose of intimidating them or affecting their private sphere without cause

justified.

In no case will the use of surveillance practices beyond the environment be admitted.

object of the installation and in particular, not being able to affect public spaces

surroundings, adjoining buildings and vehicles other than those that access the space

guarded.

Images cannot be captured or recorded in spaces owned by third parties without the

consent of their owners, or, where appropriate, of the people who are in them

find.

It is disproportionate to capture images in private spaces, such as

changing rooms, lockers or rest areas for workers.

5.- The images may be kept for a maximum period of one month, except in

those cases in which they must be kept to prove the commission of acts

that threaten the integrity of people, property or facilities.

In this second case, they must be made available to the authority

competent authority within a maximum period of 72 hours from the knowledge of the

recording existence.

6.- The controller must keep a record of processing activities

carried out under his responsibility in which the information to which he makes

reference article 30.1 of the GDPR.

7.- The person in charge must carry out a risk analysis or, where appropriate, an evaluation

of impact on data protection, to detect those derived from the implementation

of the video surveillance system, assess them and, where appropriate, adopt security measures.

appropriate security.

8.- When a security breach occurs that affects the processing of

cameras for security purposes, whenever there is a risk to the rights and

freedoms of natural persons, you must notify the AEPD within a maximum period of

72 hours.

A security breach is understood to be the destruction, loss or accidental alteration or

unlawful transfer of personal data, stored or otherwise processed, or the

communication or unauthorized access to said data.

9.- When the system is connected to an alarm center, it can only be

installed by a qualified private security company

contemplated in article 5 of Law 5/2014 on Private Security, of April 4.

The Spanish Data Protection Agency offers through its website

[https://www.aepd.es] access to:

. the legislation on the protection of personal data, including the GDPR

and the LOPDGDD (section "Reports and resolutions" / "regulations"),

. the Guide on the use of video cameras for security and other purposes,

. the Guide for compliance with the duty to inform (both available at the

section "Guides and tools").

It is also of interest, in case of carrying out low-risk data processing, the

free tool Facilitates (in the "Guides and tools" section) that, through

specific questions, allows to assess the situation of the person in charge with respect to the

processing of personal data that it carries out, and where appropriate, generate various

documents, informative and contractual clauses, as well as an annex with measures

indicative security considered minimum.

administrative infraction

The claim is based on the alleged illegality of the video surveillance camera

installed in the area designated for the rest of the personnel in the center in which the

complaining parties were serving as employees of SUPERCOR. It appears in the

documentation incorporated into the actions that the entity SUPERCOR itself

defines this area of the establishment as follows:

"…staff room set up for rest (room next to the office equipped with

a refrigerator so that the staff can enter drinks and food of a particular nature and

personnel brought by members of the store to take the regulatory break), a

chair and a table; being this place exclusively for the rest of the staff…".

It is not disputed in this case the fact that the claimed party is the owner and

responsible for the reported video surveillance system and, therefore, the person responsible for

the data processing involved in the use of said system. And neither does he

fact that among the data processing carried out by the claimed party,

contemplates the collection and storage of personal data related to the image of

employees collected inside the area indicated above, specifically, the

image of complaining parties 1 and 2.

It is also proven in the proceedings that the installation of the

Video surveillance is carried out for security and labor control purposes. Also that

initially this system did not include the installation of any camera in the indicated

staff rest area.

When collecting and using the images obtained in the rest area

of the staff, the claimed party does not take into account the limits set forth in article

20.3 of the Workers' Statute Law (LET), which admits the recording of

images for the exercise of labor control functions when those functions

respect the legal framework and the limits inherent to it, such as respect for the

worker's dignity; nor the provisions of article 89.2 of the LOPDGDD,

which prohibits, in any case, the installation of video surveillance recording systems

"In places intended for the rest or recreation of workers..., such as

changing rooms, toilets, dining rooms and the like".

Consequently, in this case, the general prohibition that establishes

article 89.2 of the LOPDGDD, on the capture of images in an area of

staff break.

The claimed party has denied in its allegations that the room in which the

additional camera is a room enabled for the rest of the personnel, indicating

that it is a "wasting room" used by the workers as a storage room

rest unilaterally and under your responsibility. In this regard, he argues

that the reduced space of this room does not allow it to be equipped as a rest room for

the number of employees that can use it in each shift according to the rules

that regulate safety and health at work.

However, it does not provide any evidence that proves the destination of that space as

"wasting room".

And to save the fact that this room is defined as a rest room in the

documentation prepared by the requested entity itself, such as letters of

dismissal stated in the Fifth Proven Fact, SUPERCOR has

stated in his allegations at the opening of the proceeding that the indication of

This use, as a rest space, was produced by an involuntary human error of the

staff member of the Personnel Department who interviewed the complaining parties

to clarify the facts, which prepared the dismissal letters reflecting in the

themselves the description of said space made by the claiming parties.

Subsequently, during the test phase, the claimed party has indicated that "it does not

there were no interviews prior to the dismissal, but rather a final interview in which

The facts are communicated to the worker and she is presented with the corresponding letter of

dismissal". Therefore, if there were no interviews with the complaining parties prior to the

dismissal and the dismissal letter was already drawn up when the

The Personnel Department met with said parties to communicate the end of the

labor relationship, it is not possible that the repeated document reflects the manifestations

of the workers involved, nor that these demonstrations had

led to any error.

During the aforementioned test phase, the claimed party qualifies that supposed error

as a "grammatical error" and provides a document ("Certificate") signed by (...),

presented as "Fe de errata". It is stated in this document that it was an error

name the "wasting room" as a rest room because it already exists in the center

a space set up as a changing room; circumstance this last one that does not exclude that the

center also have a rest area.

Also in the evidence phase, the claimed party has provided a copy of the document

addressed to a Union Delegate giving an account of the facts in which it is involved

Complaining Party 1, in which the room in question is described as a “room of

personnel authorized to rest”.

It is also interesting to note that the definition of the aforementioned room as a

rest of the workers in the letters of dismissal is presented as the result

of the investigation carried out by (...) of SUPERCOR, collected in a report of

***DATE.4 that said person in charge sent to the Personnel Department. Says the

letter of dismissal:

"By virtue of this, on Friday XXXXXX a letter was sent to this Personnel Department

report detailing the following facts.

The images were checked...

On Monday XXXXXX, while you are in the work shift as Store Manager on the morning shift and

afternoon shift, at 4:12 p.m., enters the staff room set up for rest

(room next to the office equipped with a refrigerator (so that the staff can enter the

drinks and food of a particular and personal nature that the members of the store bring to

take in the regulatory break), a chair and a table; being this place destined

exclusively for staff rest, close the door…".

Said report has not been provided to the proceedings by SUPERCOR, despite the fact that

it was expressly required by the instructor of the procedure in testing phase.

In short, SUPERCOR has not provided any evidence that contradicts what

expressed by the entity itself in the documentation included in the

performances, which was put together by herself. It is concluded that the images that

have motivated the claims were captured in an area set aside for the

rest of the employees of the claimed party.

In any case, judging by the equipment in the room, which has a table, a chair,

air conditioner, a toaster, fridge, microwave and a plank

of announcements with union information, there are more than enough indications to

understand that said room was used by the workers as a rest room.

In the same way, the information provided to this Agency by SUPERCOR gives

understand that he was aware of the use that had been made of the room by the workers,

without justifying having prohibited it.

It is interesting to highlight in this regard what was declared by the Superior Court of Justice of

Catalonia, Social Chamber, in Judgment 2298/2022, of April 12, Rec. 7352/2021,

about a supposed installation of a video surveillance camera in a warehouse that

was used by company workers as clothing with the knowledge

of the person responsible for it:

"On the other hand, in view of these proven facts, it is irrelevant that the stay where

cameras were installed outside the warehouse or any other, since the important thing is that they

used as a changing room by decision of the appellant today, which is why it remains

included in the factual assumption of the prohibition established in article 89.2 of the

Organic Law 3/2018, apart from the fact that, in any case, it is clear that the fact of having

cameras installed in the room of the work center used as the locker room for employees

workers, involves an obvious violation of the fundamental right to privacy

recognized in article 18.1 EC, even independently of the aforementioned article 89.2 of the Law

Organic 3/2018. And, of course, faced with all this, it is not relevant that the plaintiff

could know that the cameras were installed, since said circumstance does not affect their

fundamental right to privacy".

And not only that. It is also understood that the capture of such

images for the control of compliance by the complaining parties of their

labor obligations and duties, since it has not been justified that the intended purpose is not

could have been obtained by other, less intrusive means. It is taken into account that

the recording of images in the indicated areas supposes a greater intrusion into the

privacy.

The defendant considers that the use made of the video surveillance system

pursues a legitimate objective, such as the protection of their assets and the control of the

compliance by the claiming parties with their labor duties and obligations, which

the installation of the camera in question was temporary and only for the development of a

internal investigation justified by suspicions of theft of property by

of the employees.

However, this Agency understands that the establishment in question already had

a global video surveillance system that allowed the viewing and recording of

images in all public areas, as detailed in the records of

this act, without the claimed party having justified the reasons that led it to

complement said system with the installation of an additional camera in the area of

rest of the workers, nor that the installation of this chamber was

essential to obtain the desired results regarding the subtraction of

items owned by the claimed party. Nor has SUPERCOR justified that

These conclusions could not have been obtained without this additional camera,

making use only of the system installed in the zones in which the

imaging along with other instruments at your disposal.

Proof of this is that SUPERCOR has stated that, initially,

verified the lack of products by carrying out an inventory of the

merchandise received at the center and also that initially images were used

taken in the warehouse area to verify that some employees removed

merchandise that was not offered for sale.

In a similar situation, the National Court, Social Chamber, in Judgment

251/2021, of 11/30/2021 (Rec. 226/2021) has stated:

"This principle of proportionality assumes that these systems can be used when other

prevention, protection and security measures, of a physical or logical nature, which do not require

the capture of images are clearly insufficient or inapplicable in relation to the

legitimate purposes mentioned above, that is to say that a balance between the

damages caused (intrusion into the privacy of people) and the benefits it entails

its use (labour control, business assets, etc.) and, therefore, it is not enough to allege

a generic "legitimate business interest in protecting your assets and preventing theft" to

carry out a control as agreed, without any prior specific justification".

The SUPERCOR entity has not stated anything to the contrary with respect to any of the

reasoning expressed in this Foundation of Law in its brief of

allegations to the motion for a resolution, in which he has limited himself to reiterating (I) that the

action carried out was the only possible measure to prove the illegal acts

that they were being committed, without justifying it in any way; (II) that the plans

provided prove the existence of a "Waste Room", when they do not contain

no indication about the use of this room; (iii) or that the use of said

space as a changing room was made unilaterally by the claiming parties.

On the other hand, now warns in this letter of allegations to the proposal of

resolution that the report of (...) of the entity that is cited in the Letters of Dismissal

does not exist, that the only description of the events appears in the manuscript that was

provided during the test phase, despite the fact that in its response to the requirement

evidence indicated that it left the notebook available to the Agency "in which the

wrote the aforementioned report", which he did not provide, as explained.

Also, in this statement of allegations, in support of his claim to archive

actions, cites several judgments that do not modify the approach and conclusion

expressed in this act.

Among them, the Sentence of the Superior Court of Justice of Galicia 4136/2021, of 11

of June, which admits the installation of cameras in case of well-founded suspicions of illegal acts, the

which respects as necessary the double concurrence of required information and

weighing.

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The Judgment of the Constitutional Court 119/2022, of September 29, which admits

these recordings without having to comply with the duty to inform when there are indications

about the commission of illegal acts, there is no other less invasive way to confirm the

illegality of the worker's conduct and resting places are respected. In this

Judgment is declared:

"Consequently, in the general framework of monitoring compliance with an employment contract,

and for these purposes alone, the employer may install a video surveillance system. Installation

and use of the system will not require the consent of the workers, but it does require a duty of

inform them in advance and expressly about its existence and purpose. The

location of the cameras must respect the privacy of the places intended for

rest or recreation, or that have a reserved character. However, the use of

the images captured to verify or prove the flagrant commission of an illegal act

will require the prior duty of information, which may be understood to have been fulfilled when the

placed in a visible place an informative sign of the existence of the system, of its

responsible and its purpose.

(…)

In the specific circumstances of the case, it can be stated that the installation of the

video surveillance and the consequent use of the captured images was a measure

justified, suitable, necessary and proportionate.

(i) The measure was justified, because there were sufficient indicative suspicions of a

irregular behavior of the worker —already described— that had to be verified.

(ii) The measure can be considered suitable for the intended purpose, which was none other that the verification of the eventual illegality of the conduct, which was confirmed precisely by viewing the images.

(iii) The measure was necessary, since it does not seem that any other less invasive and equally effective to prove the labor infringement. Any other measure would warned the worker, thus making the company's actions useless.

(iv) Finally, the measure can be considered proportionate. At this point you have to weigh various elements of judgement. So, first of all, the cameras were not installed in places of rest, leisure or of a reserved nature, where there is an expectation reasonable privacy, but were installed in work areas open to the attention to the public. Second, the cameras were not installed surreptitiously, but rather They were located in visible places, both for the workers of the establishment and For the general public. Third, the cameras were not used on a regular basis. generalized or indefinite, or to carry out a prospective investigation, but to verify the possible existence of irregular conduct detected the day before. Therefore, the degree of interference in the sphere of privacy of the worker (art. 18.1 CE), in terms of space and time, cannot be considered unbalanced in relation to the rights and interests of the company in the detection and punishment of conduct that violates the contractual good faith, within the framework of the exercise of the rights to private property and freedom of enterprise, recognized in arts. 33 and 38 CE, respectively".

And the Supreme Court Judgment 285/2022, of March 30, which admits as justification for the dismissal of a worker the proof of the cameras installed with the purpose of reducing and avoiding trade losses, although this Judgment refers to the installation of cameras in workplaces:

"The disputed issue consisted of determining whether the evidence of

video surveillance provided by the company in the legal process to justify the dismissal

disciplinary action of one of its workers, motivated by the commission of irregularities in relation to

with the cash register at your workplace. The company had installed fixed cameras in

certain points of sale to try to reduce and prevent the unknown loss in the

retail trade. Previously, the staff representatives were informed of the

changes in the location of the cameras and the installation of new video surveillance equipment

in certain points with specification of the same, as well as the installation of posters

stickers informing of the existence of a camera at the entrance of the establishments and in the

inside them."

Consequently, by virtue of the foregoing, it is considered that the facts

exposed violate the provisions of article 6 of the GDPR, by carrying out

processing of personal data (collection and recording of images of the parties

claimants) without legal basis that legitimizes them, therefore they suppose the commission of a

infringement typified in article 83.5.a) of the GDPR, which gives rise to the application of the

corrective powers that article 58 of the aforementioned Regulation grants to the Agency

Spanish Data Protection. This article 83.5.a) of the GDPR provides the following:

Violations of the following provisions will be penalized, in accordance with section

2, with administrative fines of maximum EUR 20,000,000 or, in the case of a company,

of an amount equivalent to a maximum of 4% of the total global annual turnover of the

previous financial year, opting for the highest amount:

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

tenor of articles 5, 6, 7 and 9;".

For the purposes of the limitation period for infringements, the infringement indicated in the previous paragraph is considered very serious in accordance with article 72.1 of the LOPDGDD, which states:

"Based on what is established in article 83.5 of Regulation (EU) 2016/679, they are considered very serious and will prescribe after three years the infractions that suppose a violation substance of the articles mentioned therein and, in particular, the following:

b) The processing of personal data without the fulfillment of any of the legal conditions of the treatment established in article 6 of Regulation (EU) 2016/679".

This is the typification that adjusts to the specific conduct analyzed in this case, so so that the request expressed by the claimed party in his brief cannot be upheld of allegations to the proposed resolution, so that the facts exposed are sanctioned in accordance with the provisions of article 83.4 and are classified as an infraction serious to mild according to articles 73 and 74 of the LOPDGDD. Notably SUPERCOR has not indicated which infraction of those included in these articles of the LOPDGDD adjusts to the infringing facts that are considered proven. Throughout case, it should be noted that the classification expressed in these articles is valued for prescription purposes only.

SAW

Sanction proposal

Article 58.2 of the GDPR establishes:

"Each control authority will have all the following corrective powers indicated below:

(...)

d) order the person in charge or person in charge of treatment that the operations of treatment comply with the provisions of this Regulation, where appropriate,

in a certain way and within a specified period;

(...)

i) impose an administrative fine in accordance with article 83, in addition to or instead of

the measures mentioned in this paragraph, according to the circumstances of each

particular case".

According to the provisions of article 83.2 of the GDPR, the measure provided for in article

58.2.d) of the aforementioned Regulation is compatible with the sanction consisting of a fine

administrative.

Regarding the infringement of article 6 of the GDPR, based on the facts

exposed, it is considered that the sanction that would correspond to be imposed is a fine

administrative.

The fine imposed must be, in each individual case, effective, proportionate

and dissuasive, in accordance with the provisions of article 83.1 of the GDPR. Thus

considers, in advance, the status of a large company of the claimed party and

its volume of business (recorded in the proceedings (...).

In order to determine the administrative fine to be imposed, the

provisions of article 83.2 of the GDPR, which states the following:

"2. Administrative fines will be imposed, depending on the circumstances of each case.

individually, in addition to or in lieu of the measures contemplated in article 58,

section 2, letters a) to h) and j). When deciding to impose an administrative fine and its amount

in each individual case due account shall be taken of:

a) the nature, seriousness and duration of the offence, taking into account the nature,

scope or purpose of the processing operation in question as well as the number of

affected stakeholders and the level of damages they have suffered;

b) intentionality or negligence in the infraction;

c) any measure taken by the controller or processor to alleviate the

damages suffered by the interested parties;

d) the degree of responsibility of the controller or processor, taking into account

of the technical or organizational measures that have been applied by virtue of articles 25 and 32;

e) any previous infringement committed by the controller or processor;

f) the degree of cooperation with the supervisory authority in order to remedy the

infringement and mitigate the possible adverse effects of the infringement;

g) the categories of personal data affected by the infringement;

h) the way in which the supervisory authority became aware of the infringement, in particular if the

Controller or processor notified the infringement and, if so, to what extent;

i) when the measures indicated in article 58, paragraph 2, have been ordered

previously against the person in charge or the person in charge in relation to the same

matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or certification mechanisms

approved under article 42, and

k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as

financial benefits obtained or losses avoided, directly or indirectly, through

the offence".

For its part, article 76 "Sanctions and corrective measures" of the LOPDGDD,

Regarding section k) of the aforementioned article 83.2 GDPR, it provides:

"1. The sanctions provided for in sections 4, 5 and 6 of article 83 of Regulation (EU)

2016/679 will be applied taking into account the graduation criteria established in the

section 2 of said article.

2. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679 also

may be taken into account:

a) The continuing nature of the offence.

b) Linking the offender's activity with data processing

personal.

c) The benefits obtained as a consequence of the commission of the infraction.

d) The possibility that the conduct of the affected party could have led to the commission of the

infringement.

e) The existence of a merger process by absorption subsequent to the commission of the infraction,

that cannot be attributed to the absorbing entity.

f) The affectation of the rights of minors.

g) Have, when it is not mandatory, a data protection delegate.

h) Submission by the person responsible or in charge, on a voluntary basis, to

alternative conflict resolution mechanisms, in those cases in which there are

disputes between those and any interested party".

In the present case, the criteria of

following graduation:

. Article 83.2.b) of the GDPR: "b) intentionality or negligence in the infringement".

The installation of the video surveillance camera that allowed the collection of images

in a private space for workers to rest, it is carried out at the initiative

of the claimed party, intentionally.

In this regard, SUPERCOR has stated that its only intention was to discover the

acts that were being committed and adopt the necessary disciplinary measures, and,

based on this, it understands that the

intentionality, since there was no other less intrusive measure to prove the

commission of the crime

However, the intention that is assessed as aggravating is not related to

the end pursued, but with the installation of cameras in a rest area of the

workers.

. Article 76.2.b) of the LOPDGDD: "b) The link between the offender's activity and the

processing of personal data".

The high link of the claimed party with the performance of data processing

personal, clients and workers, considering the activity carried out.

Likewise, the graduation criterion is considered concurrent as mitigating

following:

. Article 83.2.a) of the GDPR: "a) the nature, seriousness and duration of the infringement,

taking into account the nature, scope or purpose of the processing operation

in question as well as the number of interested parties affected and the level of damage and

damages they have suffered".

. The number of interested parties: the use of the video surveillance system to

Labor control affects only the workers of the specific center in which

the controversial video surveillance camera was installed.

Considering the exposed factors, the valuation reached by the fine for the

violation of article 6 of the GDPR is 70,000 euros (seventy thousand euros).

The defendant understands that there is no argument on the amount of the fine that was

imposes, without considering the graduation criteria set forth, which were already included in the

same scope in the motion for a resolution.

To justify a reduction in the amount of the fine, it alleges that it has only been seen

affected the image of the complaining parties, a circumstance that has already been

considered when grading the amount of the fine, as has been exposed; and that the

The sole purpose of capturing these images was to prove the illegal act that was

was committing, which is not denied in the proceedings, but it has been estimated

insufficient to understand the performance of SUPERCOR as proportionate, since

there were other measures to find out the allegedly illegal acts that were coming

committing.

SUPERCOR also alleges the absence of recidivism to be considered

as a mitigation. Although none of the graduation factors considered

is mitigated by the fact that the claimed entity has not been the subject of a

prior sanctioning procedure.

In this regard, the Judgment of the AN, of 05/05/2021, rec. 1437/2020, indicates:

"It considers, on the other hand, that the non-commission of a

previous violation. Well, article 83.2 of the GDPR establishes that it must be taken into account

for the imposition of the administrative fine, among others, the circumstance "e) any infraction

committed by the person in charge or the person in charge of the treatment". It is a

aggravating circumstance, the fact that the budget for its application does not exist

entails that it cannot be taken into consideration, but it does not imply or allow, as it claims

the plaintiff, its application as mitigation".

According to the aforementioned article 83.2 of the GDPR, when deciding to impose a fine
administration and its amount must take into account "any previous infraction committed
by the person responsible." It is a normative provision that does not include the inexistence of
previous infractions as a factor for grading the fine, which must be
be understood as a criterion close to recidivism, although broader.
Regarding the absence of benefits, also alleged as mitigation by the entity
claimed, it is taken into account that article 76.2 of the LOPDGDD, in its letter c),
includes among the criteria that must be considered when setting the amount of the
sanction "the benefits obtained as a consequence of the commission of the infraction" and
not the absence of these benefits. The same Judgment of the National Court
cited, of 05/05/2021, refers to the need for the "budget" of
fact contemplated in the standard so that a certain criteria of
graduation, and, as has been said, the absence of benefits is not among the
circumstances regulated in the cited article.

This graduation criterion is established in the LOPDGDD in accordance with the provisions
in article 83.2.k) of the GDPR, according to which administrative fines will be imposed
taking into account any “aggravating or mitigating factor applicable to the
circumstances of the case, such as the financial benefits obtained or the losses
avoided, directly or indirectly, through the infringement”, it being understood that avoiding
a loss has the same nature for these purposes as gains.
If we add to this that the sanctions must be "in each individual case" effective,

proportionate and dissuasive, in accordance with the provisions of article 83.1 of the GDPR,

admit the absence of benefits as a mitigation, not only is it contrary to the

assumptions of facts contemplated in article 76.2.c), but also contrary to

the provisions of article 83.2.k) of the GDPR and the principles indicated.

Thus, assessing the absence of benefits as a mitigation would nullify the effect

dissuasive of the fine, to the extent that it lessens the effect of the circumstances that

effectively affect its quantification, reporting to the person in charge a benefit to the

that he has not earned. It would be an artificial reduction of the sanction that can

lead to understand that infringing the norm without obtaining benefits, financial or of the type

whatever, it will not produce a negative effect proportional to the seriousness of the fact

offender.

In any case, the administrative fines established in the GDPR, in accordance with the

established in its article 83.2, are imposed depending on the circumstances of each

individual case and, at present, the absence of benefits is not considered to be a

adequate and decisive grading factor to assess the seriousness of the conduct

offending. Only in the event that this absence of benefits is relevant to

determine the degree of illegality and guilt present in the concrete

infringing action may be considered as an attenuation, in application of article

83.2.k) of the GDPR, which refers to "any other aggravating or mitigating factor

applicable to the circumstances of the case.

VII

adequacy measures

Once the infringement is confirmed, it is necessary to determine whether or not to impose the

responsible for adopting adequate measures to adjust its performance to the

regulations mentioned in this act, in accordance with the provisions of the aforementioned article

58.2 d) of the GDPR, according to which each control authority may “order the

controller or processor that the processing operations are

comply with the provisions of this Regulation, where appropriate, in a

certain manner and within a specified period…". The imposition of this

This measure is compatible with the sanction consisting of an administrative fine, as

provided in art. 83.2 of the GDPR.

In this case, the controversial video surveillance camera was used

temporarily and uninstalled in XXXXXX. Based on this, it is not proposed

imposition on the defendant of the obligation to adopt measures additional to the

fine penalty.

Therefore, in accordance with the applicable legislation and assessed the criteria of

graduation of sanctions whose existence has been accredited,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE SUPERCOR, S.A., with NIF A78476397, for an infraction

of Article 6 of the GDPR, typified in Article 83.5.a) of the same Regulation, and

qualified for prescription purposes as very serious in article 72.1.b) of the

LOPDGDD, a fine of 70,000 euros (seventy thousand euros).

SECOND: NOTIFY this resolution to SUPERCOR, S.A.

THIRD: Warn the penalized person that they must make the imposed sanction effective

Once this resolution is enforceable, in accordance with the provisions of Article

art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common of Public Administrations (hereinafter LPACAP), within the payment period

voluntary established in art. 68 of the General Collection Regulations, approved by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003, of December 17, by means of its income, indicating the NIF of the sanctioned and the number of procedure that appears in the heading of this document, in the account restricted IBAN number: ES00 0000 0000 0000 0000 0000 (BIC/SWIFT Code: XXXXXXXXXXXX), opened on behalf of the Spanish Agency for Data Protection in the banking entity CAIXABANK, S.A. Otherwise, it will proceed to its collection in executive period.

Once the notification has been received and once executed, if the execution date is between the 1st and 15th of each month, both inclusive, the term to make the payment voluntary will be until the 20th day of the following or immediately following business month, and if between the 16th and the last day of each month, both inclusive, the payment term It will be until the 5th of the second following or immediately following business month.

In accordance with the provisions of article 50 of the LOPDGDD, this Resolution will be made public once the interested parties have been notified.

Against this resolution, which puts an end to the administrative process 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 reversal before the Director of the Spanish Agency for Data Protection within a period of one month from count 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 for in article 46.1 of the referred Law.

Finally, it is noted 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 through

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

of the Electronic Registry of the Agency [https://sedeagpd.gob.es/sede-electronica-

web/], or through any of the other registries 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 proceedings within a period of two months from the day following the

Notification of this resolution would terminate the precautionary suspension.

Mar Spain Marti

Director of the Spanish Data Protection Agency

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