 File No.: PS/00211/2021

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and in

consideration to the following

BACKGROUND

FIRST: Mrs. A.A.A., with NIF ***NIF.1 (hereinafter, the claimant), dated 7

January 2021 filed a claim with the Spanish Agency for the Protection of

Data (hereinafter, AEPD) against BANKIA, S.A.,

with NIF A14010342. Pursuant to the merger by absorption agreement signed between

BANKIA, S.A., as the absorbed entity, and CAIXABANK, S.A., with NIF

A0866***CUENTA.119, as absorbing entity, registered in the Mercantile Registry on

March 26, 2021, the latter (hereinafter the claimed one) was subrogated in the position

legal of the first.

The claimant bases her claim on the treatment that the respondent entity has

made of your personal data, without your knowledge or consent, with

occasion of the execution of a current account contract signed in your name in

which also featured as contractors and co-owners of the account two people

physical more. It considers that the respondent allowed a third party, B.B.B., to act on her behalf.

representation and will enter into a contract on their behalf, considering it valid and sufficient

for that act the power that the third party exhibited; power of attorney that the claimant considers

did not enable him to intervene on his behalf in a legal business of the

characteristics of the one that celebrated with the claimed.

The claimant granted on October 1, 2010 in favor of B.B.B., (the third) a power of attorney

that empowered him to represent it in different acts, among others "to open

current or credit accounts", but the notarial document warned that the

representation granted was circumscribed exclusively to the assets

related and integrated in the ***COMMUNITY OF GOODS.1 and two more, C.B.”

The claimant has provided the report issued on December 21, 2020 by the

Department of Conduct of Institutions of the Bank of Spain in response to the

complaint that she formulated before that regulatory body after having addressed

to the Customer Service (SAC) of the claimed party. The report says at the point

IV, “Conclusion”:

“[...] Bankia heeded the instruction of the claimant's representative to include it

as a co-owner in an account, but the entity does not prove that a power of attorney was presented

to grant powers to do so. [...]” (emphasis added)

In section III, "Opinion of the Department" the following argument is offered:

“The account with a number ending in ***ACCOUNT.1 was opened on 07/26/20 at

name of three

different individuals, including the claimant[...]. The entity asserts that [the

claimant] acted on behalf of his father, D.B.B.B., and that he had power of attorney

enough for the purpose. [The claimant] points out that the power conferred covered the

account opening. What is recorded is a copy of the deed granted on 10/01/10 according to

which the claimant, [...], granted a general power of attorney to her father, D.B.B.B., including the

power to open current accounts, "ONLY AND EXCLUSIVELY WITH THE ASSETS

RELATED AND INTEGRATED IN THE ***COMMUNITY OF GOODS. 1 AND TWO

MORE CB”.

Thus, [the respondent] admitted the power conferred, which was only valid in relation to certain assets of ***COMUNIDAD DE BIENES.1 and Dos Más C.B, so that D. B.B.B., acting on behalf of her daughter [the claimant], included her as the owner in an account that also included two other natural persons. That is it was an account whose ownership did not correspond to the community property aforementioned.

[...]

Consequently, we consider that in the actions of the entity there has been violation of good financial practices, by not having acted with due diligence required in defense of the interests of its client to the extent that Bankia attended the instruction of the claimant's representative to include her as co-owner in a account, but there is no evidence that the power provided was sufficient to protect said performance."

SECOND: In view of the claim, in accordance with the provisions of article 65.4 of Organic Law 3/2018, of December 5, on the protection of personal data protection and guarantee of digital rights (LOPDGDD), the AEPD transfers it to the one claimed on February 16, 2021 so that within a month it can provide an explanation of the facts denounced, detail the measures adopted to prevent similar situations from occurring in the future and also proceed to Communicate your decision to the claimant.

On March 12, 2021, the response from the Data Protection Delegate is received (DPD) of the claimed in which it exposes the actions carried out by the entity and the conclusions obtained.

The report begins by saying: “The claim of Ms. [the complainant] relies on the alleged violation of your rights by Bankia by allowing a third party (D. B.B.B.), father of the claimant, contracting a current account in his name

making use of a power of attorney that questions that he was granted representation for

it. [...]"

The DPD concludes "[...] That it has not been proven, therefore, that there was

violation of data protection when dealing with the claim filed

before the Bank of Spain of an issue unrelated to this regulation, such as the

hiring on behalf of Mrs. [the claimant] by a third party using

of a power of attorney that is questioned will grant the necessary powers to do so.

And in this sense, the claimant has been answered, providing a copy of said

communication as document no. 2." (emphasis ours)

Provide these documents with your response:

(i) Letter that the SAC of BANKIA addresses to the claimant, dated March 10, 2021,

with which he conveys his response to the report issued by the Department of

Conduct of Bank of Spain Entities regarding your claim R-

***REFERENCE.1.

(ii) Letter that the DPD addresses to the claimant on March 12, 2021 in which

informs you that the AEPD has notified you of your claim and indicates that the SAC

proceeded on March 10, 2021 to send you the notes of the current account

corresponding to July 26 and 27, 2018.

THIRD: On May 4, 2021, the Director of the AEPD issues a resolution admitting

to process the claim made.

In accordance with article 65.5 of the LOPDGDD, the admission agreement for processing

the claimant was notified and received by her on May 5, 2021.

FOURTH: On June 18, 2021, the Director of the AEPD agrees to initiate sanctioning procedure to the claimed, 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 the alleged infringement of article 6.1 of the RGPD in relation to article 5.1.a), typified in article 83.5.a) of the GDPR.

FIFTH: Allegations to the initial agreement.

Notified of the agreement to initiate the sanctioning procedure, the claimed presents its arguments on July 2, 2021 in which it requests that the nullity of full right of the procedure for the reasons detailed in the first allegation of your brief. Subsidiarily, remember to file the procedure for non-existence of infringement of the data protection regulations of personal character. And, in the alternative to the above claims, that is warned (article 58.2.b, RGPD) or, failing that, is reduced significantly the amount of the fine provided for in the opening agreement.

In support of their respective claims, they invoke these arguments:

1. The first allegation is headed “Of the defenselessness caused to my principal as a consequence of setting the amount of the sanction in the initial agreement”.

It states in this section that the opening agreement suffers from a "radical defect", derived from an interpretation of articles 64 and 85 of the LPACAP contrary to the Constitution, which determines the nullity of the procedure, in accordance with article 47.1.a) LPACAP.

In his opinion, the opening agreement is invalidated, on the one hand, by the total and absolute helplessness that has generated him that the AEPD has set in him the amount of the sanction, instead of expressing only the limits of the possible sanction;

because through the initiation agreement an assessment of his guilt has been made

"in audita parte", an assessment lacking motivation and in which even

mentioned the mitigating and aggravating factors that concur. On the other hand, the vice of nullity derives from the rupture of the principle of separation between the phase of investigation and sanction, a consubstantial principle of Criminal Law and applicable to the Law Administrative penalty according to the doctrine of the Constitutional Court (SSTC 8/1981, of June 8; 54/2015, of March 16; and 59/2014, of May 5).

The principle of separation between the investigation and resolution phases would have been violated, says the respondent, because the initial agreement has substantially affected to the impartiality of the examining body and has deprived it of an objective knowledge of the facts, since, before beginning its investigative work, the investigating body has known what is the criterion of the sanctioning body, to which it will submit the file for the imposition of the sanction that “could correspond”, a body with which, in addition, maintains a hierarchical dependency relationship.

Regarding article 85 of the LPACAP, he understands that it is applicable only to those cases in which "the sanctioning rule imposes a fine of a fixed and objective nature for the commission of an offence”. To which he adds that the opening agreement has not respecting the literal tenor of the precept -according to which the amount of the sanction “initiated” the sanctioning procedure- for what exceeds its forecast assimilating “the very act of initiation with the fact that the procedure is get started."

2. The second allegation deals with the legality of his conduct.

The defendant defends the legality of her conduct on the basis of a "conclusion" to the

which, according to what he says, this Agency reached in the agreement to open the procedure. Of

In this way, the arguments that he invokes in defense of the legality of his action turn

around a "conclusion" that it attributes to us and they have no other purpose than to distort it.

Thus, it states that the sanctioning body "concludes that, based on the power of attorney

granted, which we attach [...], my client should have opened an account to

name of the Community of Property to which the claimant belonged, [...]

open an account in the name of the claimant, and that such action constitutes an infringement

of article 6.1 RGPD as there is no legal basis for data processing

of the claimant, in addition to considering that such action supposes a blatant lack

of diligence in the activity that is proper to it.” (emphasis ours)

After this assertion that he attributes to the Agency, he explains the reasons why

He disagrees with it and on which he bases his challenge. We transcribe the following

paragraphs of his plea:

"My client could not disagree more with these assertions, and this, of

in accordance with the very terms of the power granted, which are clearly

clear in relation to the will of the principal, which grants a power that empowers the

proxy to open accounts in establishments in your name and representation,

action carried out by the bank branch once the

document before us."

“Precisely, and obviously, the lack of diligence would be attributable in the

assumption of having opened an account in the name of the Community of Goods, since

that it is not a power of attorney granted by the Community of Goods to carry

perform such action on your behalf; it is clear that my client cannot

open an account in the name of a Community of Goods, made up of several

community members, without a power granted by them in that sense."

"As you can see, my client's actions strictly adhered to the terms

of the power granted, since he acted strictly in accordance with the delegation of

powers granted at the time by the claimant."

Next, taking as the major premise of his argument the conclusion that

attributed to the AEPD, makes the following reasoning:

-On his diligent performance:

It begins by indicating that, according to the power of attorney, the only "partners" that are members of

the community property together with the claimant were her brothers D.D.D. and E.E.E.

It adds that the account holders coincide with the community members who are members of the

community of goods. And, then, he concludes: "for what precisely does exist

diligence on the part of my principal: the attorney duly empowered to do so

opens an account in the name and on behalf of the claimant, and the other

co-owners are the two other members of the Community of Property". (The underlined

is from the AEPD)

-About the power granted:

It argues that the power includes a "limitation of powers for the attorney:"; that

is "a limiting power directed to the agent, not to my principal (or any other

banking entity, or any third party outside the power). He adds that "nowhere in the

power the claimant has recorded the indication or express instruction that the

management of the mandate is carried out through an account opened in the name of the

Community of goods." “And an instruction in this sense we understand that it would be very debatable if it actually concerns the banking entity) is the proxy the responsible for complying with the mandate conferred, not my client. That is, it is at agent, exclusively and excluding, to whom it concerns to comply with the representative mandate granted, and who is responsible for responding to the principal and render accounts of its management.”

Regarding the power that the third party exhibited before the claimed party, he says that "The claimant, by granting said power of attorney, confers his express authorization and his consent to open checking accounts in your name, such as the fact that concerns us, resulting in the corresponding treatment of your data for purposes legitimate as the execution of the contractual relationship or the fulfillment of the normative obligations required of my principal, resulting in lawful, loyal treatment and transparent.”

-Regarding the amount of power, he states that, “like all financial entities, have a regular and direct dialogue with the attorneys and powers of attorney representation”, “has a procedure for sufficient power of attorney and robust effective, aimed at analyzing and verifying that people acting under a mandate representative they do it with enough and sufficient power.” Attach as a document annex three a "enough guide" that is used by the entity.

-Regarding the report issued by the Department of conduct of Bank entities of Spain, which pronounces on the insufficiency of the power that the third party exhibited

before the defendant, says that it is the jurisdiction of the Courts of Justice "the

interpretation and decision on the sufficiency of a power of attorney,

the specifications of the mandate and the powers conferred."

-Regarding the competence of this AEPD to hear the controversy raised,

considers that it is clear that this dispute "exceeds the scope of jurisdiction

of the AEPD" since the substantive question deals with an "aspect of the right not

enshrined in the data protection regulations", so, in his opinion, his

resolution should be brought before the courts of justice.

3. Your third allegation refers to the circumstances that the AEPD has assessed in

in order to graduate the amount of the fine sanction.

3.1. Previously, it states that it is evident that the sanction that appears in the

opening agreement was "predetermined". That, for the Agency, the circumstances

that concur in the specific case are "irrelevant", since their presence is

"merely accessory" to fix the sanction. Draws attention to the fact that

the sanction of 60,000 euros that, he says, the Agency agrees to impose for any

infringement of article 6.1 of the RGPD "that does not deserve a sanctioning reproach

especially high", is usually accompanied by a large number of aggravating circumstances and

no extenuating. On the contrary, in the case at hand, in which

set the possible sanction of a fine at 60,000 euros, a "large number of

aggravating circumstances" and, in addition, a mitigating factor has been appreciated and the opening agreement

specifies "the scant" "seriousness of the sanction, taking into account the damages

suffered by the owner of the data".

3.2. It considers that none of the aggravating circumstances that the AEPD,

"improperly", it has considered concurrent and that the infraction that is imputed to it, of

exist, an extreme that denies, it would be slight, so it requests that it be imposed, "at most",

the warning measure provided for in article 58.2.b) RGPD.

Reason in this sense, the following:

(i) On the aggravating circumstance of article 83.2.a) RGPD appreciated in the opening agreement,

“To the demand that it be valued

transcribe this excerpt from the agreement:

adequately the content of the powers of representation that are exhibited before

she joins the fact that contracting through a representative is not

infrequent in the framework of their business activity.” And on it he does the following

Comments that deserve to be reproduced:

-That, “in no case does it affect the hiring in its entirety through

representative, as argued in the initial agreement, since my

principal has a fairly reliable and robust system, in which the

all measures to analyze and verify the content of any power of attorney and

the powers that can be granted through it.” (emphasis ours)

-That you find it surprising that the fact that the

affected is a person, "precisely because, as indicated by the Agency in its written

of the Start Agreement, these hirings by means of a representative are not

infrequent in the framework of [his] business activity”. insists that there should be

valued the number of affected and the level of damages, which he qualifies as

invaluable since no economic damages have been “produced and/or justified”.

(ii) About the circumstance of article 83.2.b) of the RGPD that was appreciated as

aggravating circumstance in the opening agreement, affirms that the Agency has established a

presumption: presumes that "it is a common practice" of that claimed entity "that of lack of legal basis in the event that a client is represented by power of attorney. Therefore, given this position of the Agency, it invokes the principle of presumption of innocence and recalls that this is projected not only on the typical conduct, the commission of which must be accredited, but also on the circumstances that affect the responsibility and the sanctioning reproach that intends to be granted to such conduct.

The defendant justifies the presumption that it attributes to the AEPD -which is a common of the entity that of lacking a legal basis in the event that a client is represented by a power of attorney-, with these paragraphs that We transcribe, which collect fragments of the opening agreement:

<< “There is serious negligence in the actions of the defendant. taking in consideration that in the development of its business activity there are with relative frequency contracting through a representative, is part of the minimum diligence that is required for the principal to verify that, indeed, the power that the representative exhibits before her over the representation that he claims to hold enables him to act on his behalf in the particular business that is intended to be held

In turn, it is indicated that "The evident link between the business activity of the claimed and the processing of personal data (article 83.2.k, of the RGPD in relation with article 76.2.b, of the LOPDGDD) In the business activity of the claimed It is essential to process numerous personal data of your clients so, taking into account the very important volume of business of the financial entity claimed when the events occur (between July 2018 and February 2020) the significance of the infringing conduct that is the subject of this claim is undeniable.”>>

3.3. It requests that the circumstance of article 76.2.c) of the

LOPDGDD, since there was no benefit for her derived from the activity

object of reproach and in the absence of damage to the claimant.

Regarding the circumstance of article 76.2.e) LOPDGDD that the opening agreement

has assessed as mitigating, declares that it is irrelevant, since it has not served to

reduce the sanctioning reproach, given the "disproportionate amount" of the sanction

who looks at him.

Taking into account the circumstances of the case and the absence of negligence, requests

that a sanction of economic content is not imposed, but only a

warning provided for in article 58.2.b) RGPD.

Provide the following documents:

1. The deed of empowerment in favor of the lawyer who intervenes on behalf of the

claimed in this sanctioning procedure.

2.The notarial public deed authorized on October 1, 2010 relating to the power

granted by the claimant in favor of the third party, B.B.B.. The document indicates that the

appearing party -current claimant- intervenes "In his own name and right,

stating the appearing party that, together with his brothers D.D.D. Y

C.C.C.,, are the only members of the ***COMMUNITY OF PROPERTY.1” and

TWO MORE, C.B., [...].”

The deed, after collecting the data from the intervener, says:

"GRANTS:

That confers power, as broad and sufficient as is legally required and is

necessary in favor of [the third party, B.B.B.] [...] so that, in its name and representation,

AND ONLY AND EXCLUSIVELY WITH GOODS RELATED AND

INTEGRATED IN THE ***COMMUNITY OF GOODS.1 and TWO MORE, C.B.", make use of

the following FACULTIES:

The words that are reproduced in capital letters appear like this in the public deed and,

also highlighted in bold.

The "Powers" conferred include the following: Section f) mentions

"open current or credit accounts, even with mortgage guarantee [...]". The last

section, "j", highlighted in bold letters says: "j) The

proxy so that he can appear before any public or private organization and

can sign, collect and pay any amount that results in favor of the aforementioned

community property, which will be widely interpreted without any limitation."

(emphasis ours)

3. A quick guide, updated as of October 17, 2019, for Registration/Modification of

quite.

SIXTH: Test phase.

On September 27, 2021, it is agreed to open a test practice phase

for a period of thirty days. It is also agreed to include in the file,

test purposes, the claim that has given rise to the sanctioning procedure and

its attached documentation; the documents obtained and generated in the process of

request for information that the Subdirectorate of Inspection sent to the person claimed before

to agree on the opening of the procedure and the allegations to the agreement to start the PS/

00211/2021 presented by the claimed party together with its attached documentation.

The following test procedures are carried out:

a. Before the claim:

1. In the same document in which the respondent is informed of the opening of the

proof, dated September 27, 2021, you are required to submit the following

information and documentation:

1.1. Copy of the current account contract that gave rise to the opening of the account

number ***ACCOUNT.1, signed on July 26, 2018, in which the claimant

was listed as contracting party and co-holder of the aforementioned bank account.

1.2. In relation to the aforementioned contract, a copy of all documents is requested

that he had collected on the occasion of the contract in order to prove the identity of

each one of the contracting parties and the one that accredited the supposed representation conferred

by the claimant for such act to B.B.B. (the third).

1.3. That you report the date on which you stopped processing the personal data of the

claimant linked to the current account contract mentioned in point 1.1.

You must provide the documents that prove your answer.

1.4. Copy of the arguments presented in file R-***REFERENCE.1

before the Department of Conduct of Entities (General Secretariat) of the Bank of

Spain in the file processed as a result of the claim made by the current

claimant against BANKIA, S.A.

2. On October 8, 2021, the response from the respondent to the

requested tests.

States that the processing of personal data related to the ownership of

the bank account ending in ***ACCOUNT.1 ceased on February 26, 2020, the date

account cancellation. It says to provide as document 3 a copy of the

“communication confirming the cancellation of the account to the claimant”.

It says to provide, as document 1, a copy of the current account contract number ***ACCOUNT.1, signed on July 26, 2018 and as document 2, the copy of the power notarial document that "certifies the representation of D. B.B.B., granted by the" claimant “to act in your name and on your behalf” and the identification documents of the claimant and the third party.

The truth, however, is that the respondent did not provide a copy of the account contract current ending in ***ACCOUNT.1 that had been requested. He just sent a copy of the standard general conditions corresponding to the "Contract for the Provision of Services”, in which the clauses of this adhesion contract are collected. The document provided does not even include the date of issue and validity. Either provided the identity documents of the claimant and of the third party, allegedly included in document number 2, nor the "communication confirming the cancellation of the account to the claimant” that he said he provided as document number 3.

3. Second request for evidence to the claimed one:

On October 18, 2021, the instructor of the file agrees to practice new evidence proceedings before the respondent who receives the notification on 19 October 2021. In the letter he is informed that he had not provided the documentation that was requested and is requested to send:

3.1. The copy of the current account contract that gave rise to the opening of the account completed in ***ACCOUNT.1. In order to avoid confusion, it is indicated in the letter that had to submit the following documents:

“(i) The particular conditions of the contract of the aforementioned bank account duly signed by each of the three co-owners along with the date of celebration.

(ii) The documents annexed to the contract that, for any other purposes of the

entity, the three co-owners would have signed, it being understood that we are not referring to the

type model of general conditions but to the document that the co-owners had

signed."

3.2. The documents you obtained from the other two co-owners of the bank account,

other than the claimant, in order to prove their identity.

3.3. The movements made in the bank account ending in ***ACCOUNT.1,

from the date of its opening to the date on which you canceled the personal data

of the claimant linked to such account.

3.4. All the documentation sent to the Bank of Spain, Department of

Conduct of Entities, attached to their allegations, within the framework of procedure R-

***REFERENCE.1.

4. On October 29, 2021, the response from the respondent to the second

test request with which it is limited to providing these documents:

(i) The "Annex to the Contract for the Provision of Services, Service Document of

Payment". It states that "the "Payment Services Document" is annexed and part

part of the Contract for the Provision of Services and is delivered to the owner together with

the General Conditions of said contract." "This document is for

purpose of establishing the conditions applicable to the payment services regulated in the

Law 16/2009 of November 13 on Payment Services [...] and the Directive (EU)

2015/2***ACCOUNT.16 [

...]"

(ii) Letter dated January 17, 2020 that BANKIA's SAC addresses to the claimant.

It deals with the request for information in relation to products in which it appears in

that entity as an intervener.

In summary, the firm will of the respondent not to provide the

this Agency a copy of the current account contract, account identified with a

numerical series ending in ***ACCOUNT.1, which was registered in the name of the claimant

and two other natural persons. Nor did he want to provide the document that

prove that he informed the claimant of the date on which he allegedly proceeded to

terminate the contract.

b. Before the claimant.

1. In a letter dated September 27, 2021, which is recorded as received on September 29,

September 2021, you are requested to provide the documentation and information that is

details:

1.1. Copy of your ID.

1.2. That report (i) what is the origin of the ***COMMUNITY OF PROPERTY.1 and Two

More, C.B. (hereinafter, the Community of Goods or C.B.); (ii) what is the nature

of the assets that comprise it; (iii) what is your participation fee in the aforementioned

community of property and (iv) the date of constitution of the community and, if applicable, the

date of its dissolution.

1.3. That, if any, provide a copy of the private contract or the deed

in which they agreed to pool certain assets.

1.4. That report of the CIF of the community of goods.

1.5. To report on the rules of operation by which the community of

assets and provide, where appropriate, a copy of the document in which such

standards, which must be signed by the three community members.

1.6. What to report if before July 26, 2018, the date on which D. B.B.B. celebrated in

your name a current account contract with the entity BANKIA, S.A., there was any

bank account opened in the name of the “community property”.

2. On September 30, 2021, the Registry of this Agency has entered the

Claimant's response to the requested evidence.

It states that the C.B. was established in 1998 by his two brothers, D. C.C.C.. and Dª

D.D.D., and that she joined the community on December 30, 2004, when

acquire by purchase a third part of the farm whose exploitation constitutes the object

of the C.B, so its participation fee is 33%.

Provides the deed of sale dated December 30, 2004, which documents

the acquisition, through purchase, of a third part of the farm operated by C.B.

Exhibit III of the deed says: "With the purchase formalized here, the buyer

becomes part of the ***COMUNIDAD DE BIENES.1 and another one, C.B." (domiciled

in [...]) of which the vendors were the only members, with equal rights and

obligations than the other community members.”

Provides the Foundational Statutes, of November 1998, which incorporate the

rules by which the C.B. is governed. in everything that is not expressly foreseen in the

article 392 of the Civil Code. Of Title III, dedicated to the "Administration of the

Community”, these stipulations are transcribed:

“All commercial operations of the Community will be carried out in its name, not

However, in relation to the different modalities of bank accounts or operations,

that could be made after this date, regardless of whether the

owned by the Community, the indistinct power to dispose,

cancel, modify, etc. to the named community members.” (Article 12)

“The Community will be represented, governed and administered by D.C.C.C., remaining

appointed for these purposes as its administrator. The change of government

the Community will inevitably be made through a General Assembly of Communards.”

(Article 16)

Provides a Report issued by the Department of Conduct of Bank Entities

of Spain regarding a claim filed with the regulatory body against a

third banking entity, other than the one claimed, for facts related to the

that concern us (reference ***REFERENCE.2)

c. Before the Bank of Spain, Department of Conduct of Entities.

A copy of the checking account contract completed in ***ACCOUNT.1 is requested

signed by the claimed entity and which was in its possession as part of the

claim file with reference R-***REFERENCE.1. He answers that the

The obligation of secrecy to which the institution is subject prevents the referral of the

documentation required, in accordance with article 82 of Law 10/2014, of 26

June, on organization, supervision and solvency of credit institutions.

SEVENTH: Claimant's request to transfer the documentation

that integrates the administrative file.

On September 30, 2021, the Agency received a document from the

claimant in which he requests that he be given a copy of the allegations that

the entity against which you directed your claim or/and the entity

subrogated in its legal position (claimed).

In accordance with the jurisprudence of the Third Chamber of the Supreme Court of the

echoing the resolutions of the Contentious-Administrative Chamber of the

National Court under which the claimant in a sanctioning procedure

does not hold the rights that article 53.1 of the LPACAP grants to those interested in

the administrative procedure, the claimant's request for transfer of

the allegations made by the respondent.

You are informed that, however, once the procedure is over, you can exercise the right

granted by article 13.d) of the LAPAC and request “access to information

information, files and records, in accordance with the provisions of Law 19/2013, of 9

December, of transparency, access to public information and good governance and the

rest of the legal system.

EIGHTH: Resolution proposal.

By the instructor of the file, the proposal is signed on January 26, 2022

resolution that is formulated in the following terms:

“That by the Director of the Spanish Agency for Data Protection, a sanction is made for

CAIXABANK S.A., with NIF A0866***ACCOUNT.119, for a violation of article 6.1.

of the RGPD, typified in article 83.5.a) of the RGPD, and foreseen as a very

serious in article 72.1.b) of the LOPDGDD, with an administrative fine of €60,000

(sixty thousand euros).”

The proposed resolution is notified electronically to the respondent, being the date

of making available on January 26, 2022 and the date of acceptance of the

notification on January 27, 2022, as evidenced by the FNMT certificate that

work on file.

NINTH: Extension of the term to formulate allegations to the proposal of

resolution.

On February 7, 2022, a document is received from the respondent requesting that, at
protection of article 32 of the LPACAP, an extension of the term is granted for
formulate arguments to the proposed resolution. The requested extension is granted
for the maximum allowed by the LPACAP, which is communicated in writing dated March 8,
February 2022, which is notified electronically on the same date and is accepted
by the recipient on February 9, 2022.

TENTH: Allegations to the proposed resolution.

In them, received at the AEPD on February 16, 2022, the respondent formulates the
same claims as against the agreement to open the procedure: First
term, requests that the nullity of the procedure be declared null and void
sanctioning agent in question “for the reasons described in the First allegation of the
this writing”. Subsidiarily, that the file of the procedure be agreed by
non-existence of infringement of data protection regulations. And with character
subsidiary with respect to the previous claims, which is warned according to the
article 58.2.b) of the RGPD or, failing that, significantly reduce the amount of
the administrative fine established in the proposed resolution.

1. As a preliminary, it reiterates the arguments set forth in the allegations to the
opening agreement because, in his opinion, the proposed resolution “does not refute in any way
any of the things indicated in the aforementioned allegations.”

2. In the “petitum” of his arguments to the proposal, he says that the declaration of nullity
of the sanctioning procedure is based on “the reasons described in the allegation

First of this writing". However, this claim is also related to the

second allegation and even the third allegation.

In the first and second arguments, it invokes the nullity of full Law of the

sanctioning procedure for violation of fundamental rights susceptible

of constitutional protection in accordance with article 47.1.a) of the RGPD.

In these arguments, first and second, he states, as he did before the agreement

opening, that the helplessness it suffers derives, on the one hand, from the fact that the AEPD has

fixed the amount of the sanction in the initiation agreement and that, by acting in this way,

his guilt is being assessed "in audita parte", without giving him the possibility of

allegations and evidence, and, on the other, that there is a "dilution of the phases of

instruction and resolution of this sanctioning procedure" because the assessment of

his guilt is effected in the opening agreement by the same body that is

competent to resolve the procedure, thereby affecting the impartiality

of the instructing body.

In general, the arguments contained in the first and second arguments are a

reiteration of those formulated against the initial agreement, although the form varies

of exposing them that seeks to refute the response that was given to all of them in the proposal

of resolution. For this reason, and every time they are reproduced in the Fifth Antecedent

of this resolution the allegations of the claimed against the initial agreement, we

We limit ourselves to transcribing those paragraphs that well represent something new in what

alleged to the contrary or are more significant.

Framed in the first allegation it says:

"In defense of this vitiated action, the Resolution Proposal indicates, in

firstly, that the in audit evaluation starts from the concurrent circumstances

in the case and, consequently, the determination by the competent body to

sanction of the amount of the sanction proceeding prior to the instruction

of the matter, derive directly and immediately from the provisions of article 64

of Law 39/2015, of October 1, of Common Administrative Procedure of

the Public Administrations (hereinafter, “LPACAP”); although then

a manifest contradiction is incurred, by indicating that the action of the

AEPD, complying with the aforementioned requirements, "have included in them the

reasoning that justifies the legal qualification of the facts and the

circumstances that have been assessed for the determination of the sanction.”

(emphasis ours)

“The Resolution Proposal also considers that the determination of the

amount of the sanction, and the consequent evaluation of the circumstances

concurrent in the case comes from the option, granted by the LPACAP to the

charged with proceeding with the advance payment of the sanction and the recognition of

concurrent guilt in his conduct, established in article 85 of the

LPACAP, with the consequent reduction in the amount of the penalty.”

After transcribing that provision, he adds:

“The literalness of this norm does not suppose, in the opinion of my client, a

enabling the sanctioning body to prejudge the case by proposing ab initio the

amount of a sanction, given that this breaks the most elementary

principles of the sanctioning procedure with the consequent bankruptcy of the

rights of the defendant in said procedure.

Indeed, article 85.1 of the LPACAP does not require a prior determination of

the penalty, since nowhere does it refer to a pre-established penalty,

but to the imposition of the appropriate sanction. That is to say, the norm, that in all

case is applicable "initiated the procedure", provides for the possible recognition of

responsibility that may determine the imposition of the “appropriate” sanction,

so that this fixation seems to be foreseen after the actual

acknowledgment of responsibility.

That article 85.3 provides that the reductions must be adopted on the

“proposed” sanction, which requires that it has actually been determined in the

Within the procedure, after hearing the administrator, what is that amount,

which literally leads to the conclusion that it will be a motion for a resolution

the ideal moment for the determination of said amount, since the

Agreement of Initiation is not the ideal place to “propose” the imposition of a

sanction, but simply to start the processing of the procedure.”

“A consequence of all of the above is that the AEPD makes an interpretation

joint of articles 64 and 85 of the LPACAP that leads to the violation of the

my principal's right to the presumption of innocence and makes him defenseless,

In addition to assuming an inadmissible intrusion of the sanctioning body in the

investigative activity, by prejudging the guilt of my client and the sanction

that it considers applicable. So please respectfully understand my

represented that the interpretation applied by the AEPD of the precepts

mentioned would lead to its full unconstitutionality, for constituting a

violation of the fundamental rights of the party against whom a lawsuit is filed

sanctioning procedure processed by the AEPD.”

A very special attention deserves the following comment of the claimed that

we proceed to reproduce:

"The Resolution Proposal culminates the argumentation contained in its

Second Law Foundation with the following reasoning:

"(…) the one invoked by the claimed "clear breach of the principle of

separation of the instruction phase and sanction" that would have affected the

impartiality of the investigating body, with the consequent nullity of the

procedure in accordance with article 47.1.a) of the LPACAP, "lacks

constitutional relevance for the purposes of art. 24.2 CE", because as specified

the Constitutional Court, is a legal principle whose protection

corresponds to the judicial bodies, without the requirement of impartiality

of the sanctioning administrative body is a guarantee derived from the

article 24.2 of the C.E. with the character of a fundamental right."

The content of such reasoning causes this part not only an enormous

perplexity, but an absolute stupefaction, given that it follows

that this Agency has not appreciated regarding the administrative procedure

sanctioning the necessary separation of the phases of investigation and resolution

and the necessary intervention in the same of two different organs, without the

sanctioning body can intervene or "direct", as has happened in this case,

the independent action of the examining body.

Simply remember for this purpose that article 63.1 of the LPACAP is

evident when he points out that "procedures of a punitive nature are

will always initiate ex officio by agreement of the competent body and will establish the

due separation between the instructing phase and the sanctioning phase, which is

will entrust to different bodies.

Thus, the law states

absolutely, as much as the Proposal pretends to say the contrary, that

"who instructs does not solve", given that the different functions must

be attributed to different bodies.

And to our greatest surprise, the Motion for a Resolution not only considers

that the aforementioned principle of separation of the phases of investigation and resolution does not

is predicable to the administrative sanctioning procedure, thus contradicting what

expressly set forth in the LPACAP and constantly reminded by

very reiterated jurisprudence of the Constitutional Court (for all, in the STC

9/2018, of February 5), but also affirms without any hesitation that the

principle “according to which the one who instructs does not resolve, is not applicable to the

administrative procedure”, on the basis of an alleged jurisprudence

constitutional law that has nothing to do with such a conclusion.

For its part, STC 74/2004, of April 22, invoked in the Proposal for

Resolution, it does refer to the right to effective judicial protection, but in the

aspect referring to the non-application to the administrative procedure of the right to

ordinary judge predetermined by law, which also bears no relation

with what is analyzed in this proceeding.” (emphasis ours)

Framed in the second allegation, "From the defenselessness caused to my principal

as a consequence of establishing the aggravating and mitigating circumstances in the

startup agreement” says:

“In the act that supposes the beginning of the processing of the sanctioning procedure,

the Agency, in addition to setting ab initio and unheard part what is the reproach

sanctioning, even proceeds to determine the mitigating and aggravating

concurrent in the case, despite the fact that my client has not had the opportunity to

no time to reveal and provide before the aforementioned body those

circumstances that may be applicable in this case; Given the,

obviously, he could not have been aware of the opening of the procedure until

that you have been notified of the Start Agreement in which the Agency appreciates

unilaterally the circumstances that she has considered.”

He considers that this fact "leads to the generation of an absolute and total

helplessness”.

It reiterates once again the argument that the determination of the sanction that could

correspond and the modifying circumstances of the responsibility that must be

be taken into account in its determination “supposes a substantial affectation of the

of action of the competent body for the investigation "which supposes in his opinion a

“breaking of the principle of separation between the phase of investigation and sanction, which is

consubstantial to criminal law and, by order of the Constitutional Court, to criminal law.

sanctioning administrative.” Principle included in the LPACAP whose article 63.1.

provides that “Procedures of a punitive nature […] shall establish the

due separation between the instructing phase and the sanctioning phase, which will be entrusted to

different organs.”

3. The third allegation also deals with the nullity of the sanctioning procedure.

The respondent affirms that the agreement to initiate the procedure issued by the

Director of the AEPD on June 18, 2021 is null and void due to "the

manifest and serious material incompetence of the person who issued [it]. Exhibits in

defense of his thesis two facts that would determine, in his opinion, the incompetence material of the person who held, and currently holds, the position of Director of the AEPD on the date on which the agreement to start the file is issued sanctioning

(i) That according to article 15 of the Agency Statute, approved by the Royal Decree 428/1993, of March 26 (hereinafter, the Statute of 1993) on the date on which that the term of four years of the mandate of the current Director was fulfilled, on 24 July 2019, his dismissal would have occurred.

It argues that the appointment of the current Director of the AEPD was made through Royal Decree 715/2015, of July 24, in accordance with the provisions of Article 14.1 of the 1993 Statute.

That the LOPDGDD, in its First Transitory Provision, which is signed "Statute of the Spanish Agency for Data Protection", establishes that the Statute of 1993 would continue in force in everything that did not oppose what was established in the

Title VIII of the LOPDGDD -in the document the Organic Law 15/1999, of Protection of Personal Data (LOPD)- and that "is added in the aforementioned Temporary Provision that certain precepts related to the Presidency of the Agency and with the Advisory Council of the Agency (specifically sections 2, 3 and 5 of article 48 and article 49), would not apply until the expiration of the mandate of who could hold the status of Director of the AEPD in the moment of entry into force of the LOPDGDD (December 7, 2018)." Add that

On that date, the person in charge of the Directorate of the AEPD was the current Director,

"whose mandate expired on July 24, 2019 so that, as of that date

expiration of the mandate, the aforementioned precepts were already applicable."

It warns that in accordance with article 14.3 of the 1993 Statute "the mandate of the

Director of the Data Protection Agency will have a term of four years

counted from his appointment and will only cease for the reasons provided in article

15 of this Statute". And that article 15.1 of the 1993 Statute provides that the

"Director of the Data Protection Agency will cease to hold office

due to the expiration of his mandate.

It underlines that neither the 1993 Statute nor the LOPDGDD contain a provision in the

sense that the Directorate or the Presidency of the

Agency, a forecast that is included in Royal Decree 389/2021, of June 1, by which

the Statute of the Spanish Agency for Data Protection (Statute of

2021) which in its article 12.3 establishes that "The person holding the Presidency

ceased will continue in office until the new holder takes office

of the Presidency". Provision that, the claimed underlines, is only applicable from

from June 3, 2021.

Based on the rules invoked, it argues that while the current Director of

The AEPD was appointed by Royal Decree of July 24, 2015, pursuant to the

article 14.3 of the 1993 Statute, after four years, on July 24, 2019,

according to article

expired her appointment as Director of the Agency and that, "

15.1 of the 1993 Statute, the expiration of the mandate led to its direct removal from the

performance of the position of Director of the AEPD from July 24, 2019 to say,

he had ceased to function."

Infer from the foregoing that as of that date - July 24, 2019 - the current Director

of the AEPD lacked the competence to dictate administrative acts of the AEPD.

Regarding the expiration of the appointment of the head of an administrative body, the claimed cites judgment 2393/2017 of June 16, 2017 issued by the Chamber of the Contentious-Administrative of the Supreme Court (cassation appeal 1585/2016).

Finally, it alleges that "Other jurisprudential pronouncements in the same sense would be the resolutions of the Supreme Court with the references 1067/2017 and 1093/2017; It should be added that the Supreme Court expressly excludes from the assumptions of expiration of the appointment the application of the doctrinal figure of the de facto official."

(ii) The abolition of the governing body "Director of the Spanish Protection Agency Data", deletion that would have occurred with the entry into force of the Royal Decree 389/2021 approving the AEPD Statute, Single Additional Provision.

It states that in the sole Transitory Provision of the aforementioned Royal Decree "there is no any provision that such deletion will not be temporarily effective, for example, maintaining as the governing body of the AEPD that of "Director", until the appointment of the head of the "Presidency of the Spanish Agency for the Protection of Data", nor is there any mention of a potential application of article 12.3 of the Statute of 2021, which refers only to "the person holding the Presidency", nor it is expected that the head of the abolished body will become the head of the Presidency of the AEPD, so that, as of June 3, 2021, all administrative acts dictated by the body "Director of the Spanish Agency for Data Protection"

They are also administrative acts in which there is a vice of legality that

implies the legal non-existence of the same, so we are facing a case of

nullity of full right, while the acts that affect the procedure that we

occupies are dictated by an expired and non-existent body of the AEPD."

4. The sixth allegation of the brief of allegations to the proposal is headed "Missing

jurisdiction to determine the sufficiency of the power.

Faced with the response contained in the motion for a resolution, which confirmed that this

Agency was competent to deal with this controversy -competence that the

Respondent denied in her allegations the initiation agreement- the respondent adduces in her

allegations to the proposal, as an argument in its favor, the same resolutions

court cases that the proposed resolution cited in support of the competence of the AEPD.

To this end, the claimed conveniently "limits" the text of the judgments of the Chamber

of the Administrative Litigation of the National High Court that were cited in the

motion for a resolution so that what are the arguments put forward by whoever

was a plaintiff in the contentious-administrative proceedings that

ended with the reviewed SSAN appear to be reasoning of the Court that

made those sentences.

For greater expository clarity, we transcribe this excerpt from the sixth allegation of

the allegations to the proposed resolution:

"We agree with this Agency that, in accordance with the doctrine of the Chamber of the

Administrative Litigation of the National High Court, "can weigh the

circumstances surrounding the specific assumption, in order to determine,

only, if there has been a sectoral regulation of data protection",

but it is not a weighing exercise that you are carrying out in the

present sanctioning procedure, but an interpretation of the content of a

civil document that has a full impact on the determination of the infraction: if the

power is sufficient and valid, as my client maintains and argues, not

there is infraction; if the power is not enough and invalid, how do you keep this

Agency, there is violation. Therefore, there is no weighting, but a valuation

law that is not within its jurisdiction. in their own words

(Second Law Ground): "Another thing is that to exercise its

competence has to carry out factual or legal assessments whose nature

we could describe as prejudicial and on which it could not adopt a decision

definitive with effects against third parties". That is why it occurs, also in

his own words, "a proper incursion into civil matters", usurping

this Agency the jurisdiction of the civil courts, the only ones entitled to

resolve substantive issues (not weighty aspects) regulated in the

Civil Code, and not in the data protection regulations."

"That is why the sentence brought up in the Proposed Resolution

(SAN 232/2005, of July 3) reinforces the argument of my client,

"The appellant begins the defense of his claim alleging the incompetence

of the Data Protection Agency since the controversy is about the

existence or not of a certain contract and this question is of a

essentially civil, and therefore removed from its jurisdiction, according to

Article 37 of the LOPD provides. In fact, the Director of the Agency for

Data Protection has not resolved on the origin or inappropriateness of the

debt, but its resolution is focused on considering infringed certain

precepts of the LOPD, knotting as a consequence to said infractions the

imposition of a sanction.”

And it is that of the previous terms, applied mutatis mutandi to the present

procedure, the following results:

(i) it is an essentially civil matter, and therefore

removed from its competition

(ii) the Proposed Resolution decides on the sufficiency or not of the power (the

civil matter)

(iii) the infringement occurs as a result of said assessment: the

data processing is illegal because the AEPD understands that power is not

sufficient, an interpretative circumstance totally foreign to the regulations of

Data Protection."

(emphasis ours)

The respondent concludes this allegation stating that “[...] the legal assessment that we

occupies is an assessment of a prejudicial nature, resulting in a judgment of a

which in no case results from its competence, and which is crucial and

transcendental for the imputation or not of infraction.”

5. The seventh allegation of the brief bears the rubric “All the information has been

documentation requested by this Agency.

The respondent expresses her "total disagreement" with the statement included in the

resolution proposal according to which the decision was accredited in the file

Willingness of the respondent not to provide this Agency with the current account contract

ending in ***ACCOUNT.1 that was registered in the name of the claimant nor the

document that accredited that he had informed him of the date on which he proceeded to give

cancel the contract. And then he states:

“Although these documents appear in the file that concerns us, for having

been provided by my client in the two trial periods opened by

the investigating body (this Agency has all the documents signed

by the co-owners due to the registration of the interested account), we return to

send what has already been sent (ANNEX 1); and taking advantage to point out our total

disagreement with the transcribed statement, which in no way conforms

to the actions of my client before the judicial bodies or

administrative, and before this Agency in particular, strict and diligently compliant

of the duty of collaboration with the public administrations and the courts of

Justice."

(emphasis ours)

6. The fourth allegation, “Legality of the treatment”, deals with the substantive issue

discussed in the sanctioning file. In addition to considering reproduced his

allegations to the initial agreement the respondent transcribes article 12 of the statutes

of community property and makes the following considerations:

“As can be seen, the statutes themselves do not circumscribe the management of the

from the community to an account owned by the Community of Owners,

Contrary to what this Agency maintains in its Resolution Proposal,

but that the management of the goods object of the same can be done in a

indistinctly by any community member and in relation to any type of account

or banking operation, without the ownership of the same having to correspond to the

Community of goods."

It adds that, apparently, this "circumstance" has been ignored by the Agency and has been forgotten by the claimant who, he says, intends to burden him with "obligations of supervision and surveillance that neither appear in the statuses of the Community of Goods nor nor do they arise from the regulation applicable to said legal figure or from the financial regulations applicable to my client."

The respondent also states: "According to section 2 above and the content and scope of power, (paragraph 3 above) it is meridian that the power object of the present controversy enabled the agent to open an account in the name of the empowering."

And then he adds: "And said account was opened on July 26, 2018, by the other two partners of the Community of Property and the claimant, opportunely represented by the agent, empowered to open accounts in his name (not to open accounts on behalf of the Community of Goods): we are dealing with an account whose co-ownership was shared by the members of the Community of Goods (and, as we have seen previously, the statutes of the same expressly established that its management could be carried out through accounts whose ownership was not corresponding to the Community of Goods itself).

"As you can see, the legal powers granted were absolutely valid, Regardless of the matters or goods that it affects, for the opening of the account disputed by the claimant; On the other hand, in relation to the mandate collected With respect to Community property, we must point out that the relations of the Community common thing that belongs to all the community members, among them the use and disposition of it is a matter that falls to the community members, not to the financial entity that makes available to its customers the provision of a financial service (possession of a checking account that includes a cashier service), without being required to function of "police" or "audit" with respect to relationships to which the entities

finances are totally unrelated."

"Obviously, in the provision of said financial service, the client can

establish certain limitations, quantitative or operational (for example,

refunds up to an amount or not making transfers abroad), that the

banking entity must observe and respect; but in no case can assume the

execution of a mandate that is not assigned to him, being the specific instructions

of the principal irrelevant to my client, for being, we reiterate, a third party alien to

the relations between the same and the agent: its non-compliance will generate

liability of the agent to the principal, but not of the financial institution

before the principal.

"We find ourselves, therefore (if this is the case) before an abuse of power, not before a

insufficiency of powers for the legal transaction between the claimant and my

represented."

"As we have indicated, the claimant intends to transfer to my client a

responsibility of the agent; [...]"

He concludes by saying that "the specific instructions to act constitute a

delimitation of the representation that concern the attorney in its entirety, not the

financial institution that has opened an account in accordance with the powers

expressly indicated in the power displayed for that purpose."

7. The fifth allegation bears the rubric "Violation of the principle of

proportionality, inadequate assessment of the factors applicable to the circumstances

of the present case".

He begins by reiterating considerations that he already made in his allegations to the agreement of opening referring to the ancillary nature that, in his opinion, have for this Agency the concurrent circumstances in the case in order to set the amount of the sanction and affirms that the action of the AEPD "is very far from the objectivity and impartiality that they are per se required by law."

It invokes the application of the principle of proportionality and cites to this end the STS of 20 November 2001 (appeal of cassation 7686/1997) on whose foundations is based to conclude that "it is necessary that the sanctioning body proceed to evaluate meticulously the concurrent circumstances in the present procedure".

It maintains that, in the present case, there are no aggravating circumstances that were unduly estimated in the motion for a resolution.

1. Regarding the circumstances provided for in article 83.2.a) RGPD raises the following issues:

1.1. Regarding the duration of the infraction, which was classified as aggravating in the resolution motion says:

"In this sense, it cannot be considered a permanent infraction, while the contract itself was terminated in which the claimant he was a starter for a limited period of time.

BANKIA, in response to the request for cancellation and termination of the account contract interested party, presented by the claimant on 02/05/2020, proceeded to execute said order on 02/26/2020; that is, he processed the claimant's withdrawal from the

account in a period of less than a month from when it was requested. Likewise,
the circumstances of the procedure in question would only affect, in all
case, and exclusively, to the claimant, since it is about the interpretation
of the content of a specific power of attorney, not a failure of the admission and
process of sufficient powers of representation.”

1.2. Regarding the consideration made in the proposal regarding the seriousness of the
conduct of the entity claimed, as long as it occurred in the development of the
activity of a bank for which the correct identification of the
holders of banking operations, points out that "in no case is it a
situation that affects all hiring through a representative,
since, as has been argued and proven in the Initiation Agreement, my
principal has a fairly reliable and robust system, in which the
all measures to analyze and verify the content of any power of attorney and
of the powers that may be granted through it.” (The underline is
our)

1.3. He shows his disagreement with the fact that it was not appreciated as a circumstance
extenuating that the affected person has been only one and by a specific power of attorney:

“Precisely, as indicated by the Agency, these contracts through
representative are not only not infrequent, but absolutely common in the
framework of the business activity of my client, being the first time that
this Entity faces a penalty procedure for this reason (and
We reiterate, it is a CONCRETE power of attorney with a content susceptible to
interpretative controversy), so it should have been considered the
number of affected (1), as well as the level of damages caused,
that we understand has not occurred because the claimant has not justified

no type of economic damage nor has it demanded any compensation.”

2. Regarding the circumstance of article 83.2.b), the proposed resolution appreciated as an aggravating circumstance the serious lack of diligence suffered by the conduct of the entity.

Well, the defendant has argued, as she also did against the agreement of opening, that the AEPD has established "a presumption, completely devoid of any type of evidentiary support” “when considering that a CONCRETE power with a content susceptible to controversial interpretation, implies that the management and process of enough in the Entity is deficient per se, without offering any guarantee to the constituents; which is a clear violation of the principle of presumption of innocence and attribute to my principal a blatant lack of diligence that remains denied by the internal procedure enabled for the purpose at hand.” Which It supposes an absolute transgression of what is established in article 24.2 of the Spanish constitution.

3. On the application of the mitigating factor of article 76.2.e) of the LOPDGDD.

The complainant specifically affirms that “The Resolution Proposal does not take into account consideration the fact that there has been "a process of fusion by absorption after the commission of the offence, which cannot be attributed to the entity absorbent”, as stated in article 76.2 e) of Organic Law 3/2018, of 5

December, of Protection of Personal Data and guarantee of digital rights (in hereinafter, "LOPDGDD"), something that is completely undeniable in the present

case."

4. On the application of the mitigating factor of article 76.2.c) of the LOPDGDD.

The complainant alleges, as she also did in the opening agreement, that the AEPD

has not taken into consideration as mitigating factors that "there has been no benefit

for my principal derived from the activity object of reproach as well as that he has not

there was no harm."

Finally, he reiterates what he already stated in his arguments to the opening agreement, that the

RGPD makes available to the AEPD (article 58) a plurality of powers that

are not the economic sanction and that, in the present case, taking into account the

concurrent circumstances, it is not appropriate to impose an economic sanction but only

address a warning in accordance with article 58.2.b) RGPD. To this end, it reiterates that

in the hypothetical case that the conduct for which he is held responsible was

constituting an infringement of the RGPD, which it denies, such an infringement would be minor.

Remember again the meaning of the concept of minor infringement in light of the Opinion

2016/679, WP 253, of the Article 29 Working Group.

The respondent provides an annex to the brief of allegations to the proposal, the copy of the

bank contract entered into on July 26, 2018 in which he was listed as co-holder

the claimant.

Of the actions carried out in this procedure and the documentation

that works in the file, the following have been accredited:

PROVEN FACTS

FIRST: The claimant, with NIF ***NIF.1, denounces that the respondent registered in

dated July 26, 2018 a checking account in which she was listed as a co-owner

without obtaining your consent, by improperly allowing [allowed]

to such an end that B.B.B. act on his behalf, considering valid and sufficient the

power of representation that he exhibited to act on his behalf in a business

legal of the characteristics of the one that has originated the claim.

SECOND: The respondent registered a checking account on July 26, 2018 -

account with numbering ending in ***ACCOUNT.1- in which he included as co-owners

the claimant and two other natural persons, C.C.C. and D.D.D.

This is recognized by the respondent in her allegations of September 3, 2020

presented in the claim procedure R***REFERENCIA.1, followed by the

Bank of Spain, Department of Conduct of Entities. The defendant says in the

third allegation of the brief that “reiterates that on 07/26/2018, D. B.B.B. discharged the

account number ***ACCOUNT.1, by virtue of power of attorney dated 10/01/2010,

authorized by the notary D.[...] with protocol number 1937, which has been provided

contrary to the record. In said account, the claimant was included as the owner,

who resigned as such on 02/26/2020 in compliance with his request included in his

claim dated 02/05/2020 which is also in the file.”

THIRD: The respondent was requested during the test phase, on two occasions,

through two separate documents requesting evidence of September 27, 2021 and 18

October 2021, to provide a copy of the banking contract that gave rise to the

opening of the account with a number ending in ***ACCOUNT.1 of which it was

co-owner of the claimant.

The respondent did not provide the copy of the requested contract. Despite the observations

that were made informing him that the documentation sent was not the one requested

provided, in response to the first request, the standard general condition of the "Contract

Provision of Services” and, in response to the second, the general condition

called "Annex to the Contract for the Provision of Services, Document of Services

Payment".

FOURTH: A copy of the authorized notarial public deed is in the file

on October 1, 2010 regarding the power of attorney granted by the claimant in favor of

B.B.B.. It indicates that the appearing party -current claimant-, who intervenes in

the act in his own name and right, states that, together with his brothers

C.C.C. and D.D.D., are the only members of the ***COMMUNITY OF GOODS.1. Y

TWO MORE, C.B." "GRANTS:

That confers power, as broad and sufficient as is legally required and is

necessary in favor of B.B.B. [...] so that, in its name and representation, AND ONLY AND

EXCLUSIVELY WITH GOODS RELATED AND INTEGRATED IN THE

*** COMMUNITY OF GOODS.1 and TWO MORE, C.B.”, make use of the following

POWERS:” (Underlining is ours)

In the notarial document appear in capital letters and highlighted in bold the

words reproduced here in capital letters.

The deed details in sections a) to j) the powers conferred. Section f)

mentions “opening current or credit accounts, even with a mortgage guarantee [...]”.

Section j), highlighted in bold, says: "The

proxy so that he can appear before any public or private organization and

can sign, collect and pay any amount that results in favor of the aforementioned

community property, which will be widely interpreted without any limitation.”

FIFTH: The claimant filed a claim -reference R-***REFERENCE.1-

before the Department of Conduct of Institutions of the Bank of Spain, among others

reasons, for the facts that have given rise to this procedure,

The report issued on December 21, 2020 by the regulatory body says at its point

IV, “Conclusion”, that “In relation to the facts that give rise to this claim, this

Department concludes that Bankia heeded the instruction of the representative of the

claimant to include it as a co-owner in an account, but the entity does not prove that

A power of attorney will be presented granting authority to do so. [...]”.

Point III of the Bank of Spain report, "Opinion of the Department", says that the

claimed “[...] admitted the conferred power, which was only valid in relation to

certain assets of C.C.C. and Dos Más C.B., so that D. B.B.B., acting in

representation of his daughter Ms. ª [the claimant], included her as the owner of an account

which also included two other natural persons. That is, it was about

an account whose ownership did not correspond to the community property before

mentioned.

[...]

Consequently, we consider that in the actions of the entity there has been

violation of good financial practices, by not having acted with due diligence

required in defense of the interests of its client to the extent that Bankia attended

the instruction of the claimant's representative to include her as co-owner in a

account, but there is no evidence that the power provided was sufficient to protect said

performance."

SIXTH: The claimant joined the community property on December 30,

2004, by virtue of the acquisition by purchase from the community members of a third part of

the farm that constitutes the object of the activity of the community. The exhibition III of the

deed of sale says: "With the purchase here formalized the buyer goes to

join the ***COMUNIDAD DE BIENES.1 and another, C.B." (domiciled in [...]) of the

that the sellers were the only members, with equal rights and obligations

than the rest of the community."

SEVENTH: The C.B. is governed, in everything not provided for in article 392 of the Civil Code,

by the Founding Statutes. Title III, "Community Administration",

contains these stipulations:

"All commercial operations of the Community will be carried out in its name, not

However, in relation to the different modalities of bank accounts or operations,

that could be made after this date, regardless of whether the

owned by the Community, the indistinct power to dispose,

cancel, modify, etc. to the named community members." (Article 12)

"The Community will be represented, governed and administered by D.C.C.C., remaining

appointed for these purposes as its administrator. [...]." (Article 16)

EIGHTH: The respondent has stated in response to the requested evidence,

regarding "The date on which the data of [the claimant] was stopped in

relationship with the account ***ACCOUNT.1. The processing of data related to the

Ownership of said account ceased on the date of its cancellation, on the 26th of

February 2020, we contribute to this effect communication confirming the demotion to the

claimant."

FOUNDATIONS OF LAW

Competence of the Director of the AEPD

Yo

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

Data Protection, in accordance with the provisions of article 58.2 of the

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

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

of your personal data and the free circulation of these data and by which it is repealed

Directive 95/46/CE, (RGPD) and as established in articles 47 and 48 of the Law

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

guarantees of digital rights (LOPDGDD)

Article 63.2 of the LOPDGDD provides that "The procedures processed by the

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

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."

Preliminary issues invoked by the respondent: Lack of material competence of the

AEPD and full nullity of the agreement to initiate the sanctioning procedure.

II

For reasons of argumentative logic, the following are examined first.

preliminary issues raised by the respondent.

1.- About the lack of material competence of the AEPD

The AEPD cannot share the argument invoked to the contrary regarding a

alleged lack of material competence of this body to know the

sanctioning procedure that concerns us given that it has raised

a matter of a civil nature.

The respondent stated in its pleadings to the initial agreement that the dispute

that has given rise to this disciplinary proceeding "exceeds the scope of jurisdiction

of the AEPD" because it refers to an "aspect of the right not enshrined in the regulations

of data protection", so, in his opinion, its resolution should be urged before

the Courts of Justice.

In his arguments to the motion for a resolution - the sixth argument of his brief, of the

that in this resolution a review is made, Precedent tenth, point 4- the

claimed raises the same issue under the heading "Lack of jurisdiction to

determine the sufficiency of power. The arguments you have offered in these

arguments in defense of his position consist exclusively of a convenient

misrepresentation of the meaning of the judgments of the Contentious Chamber

Administrative Court of the National High Court (SSAN) that were cited by this Agency in the

resolution proposal.

The motion for a resolution responded to the lack of material competence of the

AEPD that the respondent had invoked in her allegations to the initiation agreement in the

following terms that we reproduce:

<<However, the alleged incompetence of this Agency must be

rejected according to the doctrine followed for years by the Chamber of the

Administrative Litigation of the National High Court that in numerous

sentences has been considering that the AEPD, in the exercise of the functions

legally entrusted to it, can weigh the circumstances that

surround the specific assumption in order to determine, only, if it has been

produced a violation of the sectoral regulations on data protection.

This, because in no case could it be justified that the AEPD failed to comply with the duties that are legally imposed on him in the current regulations -in the currently in articles 57 and 58.2 of the RGPD and 47 of the LOPDGDD- argued an undue incursion of this body in civil matters;

especially, when such valuation, whose nature has been qualified by the jurisprudence of prejudicial and devoid of legal effects against third parties, it is essential to perform the functions entrusted to it by law.

The doctrine established by the Contentious-Administrative Chamber of the Hearing National, is reflected, among others, in the SAN of July 3, 2007 (rec.232/2005), whose Second Legal Basis says:

“The appellant begins the defense of his claim alleging the incompetence of the Data Protection Agency since the controversy is about the existence or not of a certain contract and this question is of a essentially civil and, therefore, removed from its jurisdiction, according to provides the art. 37 of the LOPD. Actually the Director of the Agency of Data Protection has not resolved on the origin or inappropriateness of the debt, but its resolution is focused on considering infringed certain precepts of the LOPD, knotting as a consequence to said infractions the imposition of a sanction. Just read the operative part of the resolution challenged to verify what has just been stated. And it is certainly fully competent to issue this resolution. Another thing is that to exercise your competence has to carry out factual or legal assessments whose nature could qualify as prejudicial, and on which it could not adopt a decision definitive with effects against third parties. If the data quality principle collected in the LOPD requires that the data processed by a third party referring to a

person are accurate and truthful, the Administration specifically in charge to enforce this regulation, for the sole purpose of considering fulfilled or violated this principle can make an assessment of accuracy and veracity of certain data, in this case the certainty of a debt, without this means a departure from its rules of competition. This reason for challenge must be rejected. (The emphasis is ours).

Also significant is the judgment of October 17, 2007 in which the Chamber of the Administrative Litigation of the National High Court (Grounds of Third right) says:

"And, finally, regarding the lack of competence, also of the Agency, to make judgments or appraisals of a civil or commercial nature, on the nature of the obligation and the certainty of the debt, we must point out that Instruction 1/1995, of March 1, authorizes the aforementioned Agency to safeguard the quality of the personal data that access the patrimonial solvency files, in relation to the monetary obligations referred to in article 29 of the Law Organic 15/1999. (…) Therefore, the legal regulation and the content of the expressed instruction prevent endorsing the thesis held by the appellant in your statement of claim, because, as we have pointed out, it is not possible, to the

effects now examined, pretending that, under cover of an undue incursion in civil matters, the Agency fails to comply with the legally imposed duties ceasing to sanction behaviors that incur administrative illicit

provided for in Organic Law 15/1999, when briefly, and without going into

arduous and sophisticated civil matters, the characteristics accredited

that the Instruction establishes for the inclusion of the data in the files of

equity solvency". (Underlining is ours) >>

In her argument against the proposed resolution, the respondent has not offered a

only argument that distorts the considerations that were made in it about the

competence of the AEPD to hear the matter raised, considerations that

we just played.

The answer offered on this question by the respondent in her pleadings to the

The proposal is based on the SSANs cited in the proposal document, although on them

performs an exercise of skill to conveniently confuse the meaning of the

pronouncements of the Court, in addition to sometimes intertwining what are

legal reasoning of the sentencing Court with his own arguments or those of those who

were plaintiffs in the contentious proceedings that ended with the SSAN

of July 3 (rec. 232/2005) and October 17, 2007. The respondent concludes his

argumentation regarding this issue with a final syllogism whose major premise,

result of the aforementioned misrepresentation of the meaning of the SSAN, does not conform to the

TRUE.

For greater expository clarity, we transcribe the sixth allegation of the brief of

allegations of the respondent against the proposed resolution:

"We agree with this Agency that, in accordance with the doctrine of the Chamber of the

Administrative Litigation of the National High Court, "can weigh the

circumstances surrounding the specific assumption, in order to determine,

only, if there has been a sectoral regulation of data protection",

but it is not a weighing exercise that you are carrying out in the

present sanctioning procedure, but an interpretation of the content of a

civil document that has a full impact on the determination of the infraction: if the power is sufficient and valid, as my client maintains and argues, not there is infraction; if the power is not enough and invalid, how do you keep this Agency, there is violation. Therefore, there is no weighting, but a valuation law that is not within its jurisdiction.

in their own words

(Second Law Ground): "Another thing is that to exercise its competence has to carry out factual or legal assessments whose nature we could describe as prejudicial and on which it could not adopt a decision definitive with effects against third parties". That is why it occurs, also in his own words, "a proper incursion into civil matters", usurping this Agency the jurisdiction of the civil courts, the only ones entitled to resolve substantive issues (not weighty aspects) regulated in the Civil Code, and not in the data protection regulations."

"That is why the sentence brought up in the Proposed Resolution (SAN 232/2005, of July 3) reinforces the argument of my client,

"The appellant begins the defense of his claim alleging the incompetence of the Data Protection Agency since the controversy is about the existence or not of a certain contract and this question is of a essentially civil, and therefore removed from its jurisdiction, according to Article 37 of the LOPD provides. In fact, the Director of the Agency for

Data Protection has not resolved on the origin or inappropriateness of the

debt, but its resolution is focused on considering infringed certain

precepts of the LOPD, knotting as a consequence to said infractions the

imposition of a sanction."

And it is that of the previous terms, applied mutatis mutandi to the present

procedure, the following results:

(i) it is an essentially civil matter, and therefore

removed from its competition

(ii) the Proposed Resolution decides on the sufficiency or not of the power (the

civil matter)

(iii) the infringement occurs as a result of said assessment: the

data processing is illegal because the AEPD understands that power is not

sufficient, an interpretative circumstance totally foreign to the regulations of

Data Protection."

(emphasis ours)

The respondent ends her argument by saying that "[...] the legal assessment that

we are concerned with is an assessment of a preliminary nature, resulting in a judgment of

civil nature that in no case results from its competence, and that is crucial and

transcendental for the imputation or not of infraction."

As has been anticipated, this Agency cannot share the claim of the

claimed nor the arguments it offers. In relation to what is alleged against the

motion for a resolution, the following qualifications must be made:

a. In her argument, the respondent begins by stating that she agrees with the

doctrine of the A.N. according to which the AEPD "can weigh the circumstances that

surround the specific assumption, in order to determine, only, if there has been

a [violation of] sectoral regulations on data protection", but denies

continuation that in this case there was a "weighting" because it says that what

there has been is a “legal assessment that is not within its jurisdiction”. argue

that "if the power is sufficient and valid, as my client maintains and argues,

there is no infraction; if the power is not enough and invalid, how do you keep this

Agency, there is violation. Therefore, there is no weighting, but a legal assessment

that does not result from its competence.”

The term “weighting”, and sometimes also “valuation”, is used in the

SAN mentioned above and in many others opposed to the "legal assessment with effects

against third parties”, indicating that the first is a necessary assessment to be able to

apply sectoral data protection regulations but that, unlike the

second, it has no effect in other legal areas other than that relating to

Data Protection. And the abundant doctrine of the A.N. on the matter admits without

discussion that the AEPD can carry out the necessary assessment to determine if it has

whether or not there has been an infringement of its specific regulations, an assessment that circumscribes its

effects to the resolution issued by the Agency.

It should be added, in light of what was stated by the respondent, that what in her opinion

determines that "There is therefore no weighting, but a legal assessment that does not

results from its competence”, is the fact that the decision on the existence or

non-existence of a breach of the GDPR depends on the decision on the civil matter

background. The respondent forgets that it is precisely this same circumstance that

prompted those who invoked the Agency's lack of material competence to file

contentious-administrative appeal against the resolutions of the AEPD issued in assumptions in which the existence of an infringement of the sectoral regulation of data protection was subordinated to a ruling on a civil matter,

statement that as the A.N. has repeated ad nauseum has "natural prejudicial" and "does not produce legal effects against third parties". And in all resolutions issued, the pronouncement of this Court has had the same meaning.

The SAN of July 2, 2014 (rec. 121/2013) can be cited, which in its Fundamentals Law second and fifth says:

"The appellant [...] bases her claim on the following reasons:

1) Lack of competence of the AEPD, which entails the nullity of full right of the resolution because in the resolution the absence of contracting, which is a civil matter, not a data protection matter, which cannot be reviewed by the Agency. [...]"

FIFTH. - In view of the foregoing, the claims of the lawsuit cannot prosper, as this Chamber has stated on multiple occasions in relation to similar resources [...].

Thus, regarding the lack of competence of the AEPD, in the recent judgment of May 23, 2014, appeal 198/13, the Chamber considered that "the exception of lack of competence of the AEPD, considering that what is really discussed in the assumption is the existence or not of contracting, which is a civil matter, and not personal data protection.

Faced with this argument, it must be brought up, on the one hand, what prescribed in article 4 of Law 29/1998, of the Jurisdiction, according to which the jurisdiction of the contentious-administrative jurisdiction extends to knowledge and decision of preliminary and incidental questions not pertaining to the administrative order, directly related to the

appeal, except those of a constitutional and criminal nature, and the provisions of the International Treaties, without the decision that is pronounced producing outside the process in which it is issued, pronouncing, in the same sense, the article 10.2 of the LOPJ.

Therefore, and as we have stated, among others, in the SSAN 11-6-2009 (Rec. 508/2009) and 13-9-2012 (Rec.119/2010) the general rule is that the order administrative jurisdiction can and must know and rule on issues beyond its competence, without the need to suspend the course of the process and wait for the competent bodies to issue their resolution on the same, when necessary for the correct resolution of the object main proceeding.

On the other hand, indicate that it corresponds to the AEPD, in accordance with article 37.a) LOPD and as this Chamber has also reiterated, ensure compliance with the legislation on data protection and control its application, as well as exercise the sanctioning power in the terms provided in Title VII (Art. 37.g).

Sanctioning procedure that is always initiated ex officio, in the case of alleged commission of any of the infractions regulated in said Title VII, among them, and as one of the essential principles in the matter of data protection, a possible violation of the principle of consent unequivocal of article 6.1 of said LOPD ".”

In the same sense, the SAN of May 8, 2014, rec. 142/2013,

(First Ground of Law) in which the Court says as follows:

“The plaintiff bases its impugning claim on the following

reasons: a) lack of competence of the Data Protection Agency since

we are faced with a civil matter; b) [...].

Following the order set out in the demand, it will be analyzed first, the

invoked incompetence of the Spanish Agency for Data Protection, for

when in the present case the existence of contracting is considered, which is a

civil issue, not personal data protection.

This is an issue that has been dismissed by the Chamber

reiterated as follows. Corresponds to the Spanish Agency for

Data Protection in accordance with art.37.a) of the LOPD, ensure compliance

of the legislation on data protection and control its application, as well as

exercise the sanctioning power in the terms provided in Title VII of the

aforementioned Law (art. 37.g). It therefore has competence for the repression of

behaviors that affect the field of data protection, among which are

find the violations of the principles of consent and quality of

data appreciated by the contested administrative resolution and established in

the arts. 6.1 and 6.3 of the LOPD. And if those principles require that the data of a

person processed by a third party, are carried out with their consent and are

truthful and exact, the Spanish Agency for Data Protection, to the sole

purposes of determining whether or not there has been a violation of the aforementioned

principles, you can make an assessment as to whether the consent for the

treatment of the data of the affected party in relation to certain

services, whether or not it is covered by the contracting of said services and

on the accuracy and veracity of a certain data, such as the

existence of a debt reported to a financial solvency file.

Therefore, since the Spanish Agency for Data Protection has competence

to determine whether or not legal requirements have been met and

statutorily established for the processing of personal data of

the person affected, cannot accept the thesis that the appellant maintains

in your statement of claim.” (emphasis ours)

b. It also affirms the one claimed in its allegations to the proposal: “In its own

words (Second Law Foundation): "Another thing is that in order to exercise

competence has to carry out factual or legal assessments whose nature

we could describe as prejudicial and on which it could not adopt a decision

definitive with effects against third parties”.

This paragraph of the defendant's allegations may lead one to think that she is

reflecting the spirit of the SAN from which it comes. Basically because it has been limited

a sentence, preceded by a reference to the Second Legal Foundation, which

begins with an adversative connector –“Other thing”- that extracted from the paragraph in which

is incardinated suggests that in that sentence the Court rejects the competence of the

AEPD to hear the matter of a civil nature connected with the infringement of the

RGPD for which you are responsible.

However, it is enough to go to the text of the SAN of July 3, 2007 (rec. 232/2005) of the

that proceeds -sentence that is transcribed in the motion for a resolution that we have

reproduced at the beginning of this section 1 of the Legal Basis II - and make a

careful reading to understand the meaning of these words and, at the same time, the

intended purpose of the claimant.

c. The defendant affirms in her allegation: “That is why it occurs, also in its

own words, “an undue incursion into civil matters”, usurping this

Agency the jurisdiction of the civil courts, the only ones entitled to resolve

substantive issues (not ponderative aspects) regulated in the Civil Code, and not

in the data protection regulations.

Note that there are two elements in that paragraph: (i) a sentence from the SAN

of October 17, 2007 cited by the AEPD - "an undue incursion into issues

civilians”- and (ii) some affirmations that the respondent makes motu proprio: “usurping this

Agency the jurisdiction of the civil courts, the only ones entitled to resolve

substantive issues (not ponderative aspects) regulated in the Civil Code, and not

in the data protection regulations. Two elements united in a single phrase in

which has been included in quotation marks an affirmation made by the National High Court

in one of its sentences that says exactly the opposite of what is claimed

it states.

Regarding the phrase taken from the SAN –“an undue incursion into issues

civilians"- it is clarifying to see the paragraph in which it has been written: The Foundation of

Third right of the SAN of October 17, 2007 says:

“And, finally, regarding the lack of competence, also of the Agency, to make

judgments or appraisals of a civil or commercial nature, on the nature of the

obligation and the certainty of the debt, we must point out that Instruction 1/1995,

of March 1, authorizes the aforementioned Agency to safeguard the quality of the

personal data that access the patrimonial solvency files, in

relation to the monetary obligations referred to in article 29 of the Law

Organic 15/1999. (…) Therefore, the legal regulation and the content of the

expressed instruction prevent endorsing the thesis held by the appellant in

your statement of claim, because, as we have pointed out, it is not possible, to the

effects now examined, pretending that, under cover of an undue incursion

in civil matters, the Agency fails to comply with the legally imposed duties

ceasing to sanction behaviors that incur administrative illicit

provided for in Organic Law 15/1999, when briefly, and without going into

arduous and sophisticated civil matters, the characteristics accredited

that the Instruction establishes for the inclusion of the data in the files of

equity solvency.” (emphasis ours)

In light of the foregoing, it seems obvious what is the meaning of the aforementioned SSAN, which in

In no case have they concluded, as the defendant tries to make believe, that the AEPD

lacks jurisdiction to make “judgments or appraisals of a civil or

trade"; On the contrary, what the Court affirms is that it cannot be claimed,

as the defendant does, that "under the cover of an undue incursion into matters

civil” the Agency fails to fulfill the duties that are legally imposed on it.

Well, the respondent ends its argument by stating the following:

“And it is that, from the previous terms, applied mutatis mutandi to the present

procedure, the following results:

(i) it is an issue of an essentially civil nature, and therefore removed from

its competence [...]”.

If, as suggested by the defendant, we apply to the matter at hand, "mutatis mutandi",

the aforementioned SSAN, it is evident that the statement made in point "(i)" is

false, because as can be inferred from the SSAN, despite the existence of a civil matter,

considers that it has a prejudicial nature and that it is not removed from its jurisdiction.

And that false statement is, at the same time, the major premise of the syllogism with which he closes

his argument on this matter - we refer to points "ii" and "iii" of his

allegation - and whose logical conclusion is necessarily false, since the premise is false.

from which part.

Thus, the claim of the respondent set forth in this section 1 must be

rejected.

2.- On the nullity of full right of the sanctioning procedure under the

Article 47.1.a) of the LPACAP

This Agency, as stated in the motion for a resolution, cannot share the

alleged nullity of the sanctioning procedure invoked by the defendant.

The respondent considers that the agreement to open this proceeding

sanctioning party is radically null and void in accordance with article 47.1.a) of the

LPACAP according to which the acts of the

public administrations that “injure the rights and freedoms susceptible to

constitutional protection.”

The arguments that you have made on this issue in response to the proposal for

resolution are essentially identical to their allegations against the opening agreement,

Therefore, only the elements that may result from them will be analyzed.

novel in some way.

The defendant has been invoking that the opening agreement suffers from a "defect

radical” derived from the interpretation that the AEPD makes of articles 64 and 85 of the

LPACAP contrary to the Spanish Constitution (C.E.) that determines the nullity of the procedure pursuant to article 47.1.a) LPACAP.

In his opinion, the opening agreement is invalidated, on the one hand, by having fixed in it the amount of the sanction, instead of expressing only the limits of the possible sanction, which has generated a total and absolute defenselessness because, he says, Through the initiation agreement, an assessment of his guilt has been made “in audita part”, an assessment lacking motivation and in which they have even mentioned the mitigating and aggravating factors that concur.

On the other hand, in his opinion, the vice of nullity derives from the breach of the principle of separation between the investigation phase and the resolution phase, a consubstantial principle of Criminal Law and applicable to sanctioning Administrative Law in accordance with the doctrine of Constitutional Court (SSTC 8/1981, of June 8; 54/2015, of March 16; and 59/2014, of May 5). The principle of separation between the phases of instruction and resolution would have been violated, says the respondent, because the initial agreement has substantially affected the impartiality of the examining body and has deprived it of a objective knowledge of the facts, since, before beginning his work as an instructor, the examining body has known the criteria of the sanctioning body, to which it will submit the file for the imposition of the sanction that "could correspond", body with which, in addition, maintains a hierarchical dependency relationship.

Regarding article 85 of the LPACAP, he understands that it is applicable only to those cases in which "the sanctioning rule imposes a fine of a fixed and objective nature for the commission of an offence”. To which he adds that the opening agreement has not respecting the literal tenor of the precept -according to which the amount of the sanction “initiated” the sanctioning procedure- for what exceeds its forecast

assimilating “the very act of initiation with the fact that the procedure is

get started."

In short, the defendant locates the origin of the radical vice in which, in her opinion,

would have incurred in an interpretation of articles 64 and 85 of the LPACAP contrary

to the C.E. The fundamental rights that it considers violated are the right to

defense and the rupture of the principle of separation between the phase of investigation and

resolution that has deprived the instructor of the necessary impartiality. In their

allegations to the proposed resolution also invokes the violation of the right to

the presumption of innocence since it affirms that the joint interpretation of the articles

64 and 85 of the LPACAP made by the AEPD "leads to the violation of the right of my

represented to the presumption of innocence.

We reiterate what was said in the motion for a resolution that the agreement on

opening issued in this procedure is fully in line with the provisions of the

Article 68 of the LOPDGDD, according to which it will suffice to specify the

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

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

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

“minimum content” of the initiation agreement. According to this precept, among others

details, must contain "the facts that motivate the initiation of the procedure, its

possible legal qualification and the sanctions that may correspond, without prejudice to

whatever results from the instruction

Therefore, as stated in the motion for a resolution, the resolution of
opening has met the requirements mentioned in articles 68 of the LOPDGDD
and 64 of the LPACAP and, in addition, the reasons that justify
the legal classification of the facts and circumstances that have been assessed to
determination of the penalty.

The respondent has made various objections to the arguments set forth in
the proposed resolution of this procedure:

a. That “[...], the Resolution Proposal indicates, [...], that [...], the determination by the
competent body to sanction the amount of the sanction proceeding with
prior to the investigation of the matter, derive directly and immediately from what
established in article 64 of Law 39/2015, of October 1, on Procedure
Common Administrative of Public Administrations (hereinafter, “LPACAP”); Yes
well, then, a manifest contradiction is incurred, by indicating that the
action of the AEPD, complying with the aforementioned requirements, "have included
in them the reasoning that justifies the legal qualification of the facts and the
circumstances that have been assessed for the determination of the sanction.” (The
underlining is ours)

This Agency cannot share the comment of the respondent and does not appreciate any
contradiction between article 64 of the LPACAP and having included in the agreement of
opening “the reasoning that justifies the legal qualification of the facts and the
circumstances that have been assessed for the determination of the sanction.” Article
64.2 of the LPACAP -as noted in the proposed resolution through the
opportune underlined - begins by saying that "The initiation agreement must contain
at least:”, so it allows that in addition to the required minimum content, the foreseen
in article 64.2., other elements or additional considerations may be included.

b. The respondent also objects to the proposal that is "[...] considered

as well as the determination of the amount of the sanction, and the consequent

evaluation of the concurrent circumstances in the case of the option,

granted by the LPACAP to the defendant to proceed with the advance payment of the sanction and

acknowledgment of concurrent guilt in their conduct, established in article

85 of the LPACAP, with the consequent reduction in the amount of the penalty.” Add that

The "The literalness of this rule does not suppose, in the opinion of my client, a

enabling the sanctioning body to prejudge the case by proposing ab initio the

amount of a sanction, given that this breaks the most elementary

principles of the sanctioning procedure with the consequent breach of the rights

of the defendant in said procedure.

That “[...] article 85.1 of the LPACAP does not require a prior determination of the

sanction, since nowhere does it refer to a pre-established sanction, [...]

rule, which in any case is applicable "initiated the procedure", provides for the possible

acknowledgment of responsibility that may determine the imposition of the sanction

“proceed”, in such a way that this fixation seems to be foreseen after the actual

acknowledgment of responsibility.

That the “[...] proposed resolution will be the ideal moment for determining the

mentioned amount, since the Initiation Agreement is not the ideal place to “propose”

the imposition of a sanction, but to simply initiate the processing of the

process."

“A consequence of all of the above is that the AEPD carries out a joint interpretation

of articles 64 and 85 of the LPACAP that leads to the violation of the right of my

principal to the presumption of innocence and makes him defenseless, [...]

respectfully my client that the interpretation applied by the AEPD of the

aforementioned precepts would lead to its full unconstitutionality, for constituting a

violation of the fundamental rights of the party against whom a lawsuit is filed

sanctioning procedure processed by the AEPD." (emphasis ours)

In these paragraphs, the respondent denies once again that the AEPD correctly applies

Article 85 of the LPACAP and considers that the application that has been made of

this provision, together with article 64 of the same legal text, violates the C.E.

to the extent that it entails, in his opinion, a violation of rights

fundamental. The correct interpretation, in his opinion, is that it is in the process of

resolution proposal in which the amount of the sanction must be set and that the

Article 85.1 of the LPACAP does not require a prior determination of the sanction, since in

nowhere does it refer to a pre-established sanction. It also adds that article 85

of the LPACAP is not, in his opinion, an authorization for the sanctioning body to prejudge

the case proposing ab initio the amount of a sanction.

With regard to such objections, we must reiterate that the application that the AEPD comes

making of the provision whose interpretation is in question is absolutely

correct. That it is not possible that when fixing in the opening agreement the amount of the

sanction that may correspond if there is a violation of the guarantees

constitutional or legal because the administrative procedure begins precisely

with the opening agreement and it is from then -not before- when article 53

of the LPACAP recognizes the interested party a series of rights, among them the one foreseen in

article 53.1.e). The procedure has been developed following all the formalities

prescribed and always scrupulously respecting the procedural guarantees and

the rights that the law grants to the defendant, so that neither is "prejudging" or

there is a “pre-established sanction”.

On the procedural moment in which the amount of the proposed sanction must be set –

in the understanding that we refer to the sanction that "could" be imposed in the

sanctioning resolution since all the phases of the

procedure- article 85 does not allow any doubt when it provides that "The aforementioned

reductions, must be determined in the notification of initiation of the

procedure [...]”, for which it must necessarily be established in said agreement the

amount of the sanction that could correspond for the presumed infraction derived from

the alleged facts. And that extreme amply justifies that it refers to the

modifying circumstances of responsibility, since these have a direct impact on

determination of the amount of the penalty.

Regarding the application contrary to the C.E. who supposedly has been doing the

AEPD of article 85 of the LPACAP in combination with article 64 of the same text

which, in his opinion, derives from a violation of fundamental rights that

would determine that the opening agreement is vitiated by radical nullity, it should be noted,

as stated in the proposal, that the AEPD has been applying article 85 LPACAP of

the same way since the entry into force of the aforementioned law without the Contentious Chamber

Administrative Court of the National High Court has never ruled in line with the

criterion that that entity defends. On the other hand, if their statements are true, all

the opening agreements dictated by the AEPD since the entry into force of the

LPACAP would be null and void and null also the resolutions issued. Y

being the nullity of full right a matter of public order that must be

assessed ex officio by the Courts, on which they have to rule even

preferential form with respect to any of those that have motivated the filing

of the contentious appeal, nor the A.N. nor has the Supreme Court (T.S.)

pronounced corroborating the thesis that the defendant defends.

Both before the A.N., Contentious-Administrative Chamber, and before the Third Chamber

of the T.S. proceedings have been substantiated in which the controversy has revolved around

the application by the AEPD of article 85 of the LAPAC and its alleged

unconstitutionality, although it is true that the controversy focused on other aspects

of this standard different from those discussed here: We refer to the STS, Sala de

the Contentious Administrative, of February 18, 2021 (cassation appeal

2201/2020) and the SAN of October 15, 2019 (rec. 601/2017) Nor in those

occasions, in which it could hardly go unnoticed by the Court a

violation of fundamental rights such as the one that, in the opinion of the defendant, derives

of the application that the AEPD makes in the initial agreements of articles 85 and 64

LPACAP, none of the aforementioned jurisdictional bodies ruled on

consistent with the thesis that supports the claimed.

c. Special attention deserves the comments of the respondent against what was stated

in the motion for a resolution on the alleged violation of the principle of

separation between the investigation phase and the resolution phase which, in his opinion, would have deprived

the instructor of the necessary impartiality and that the entity invoked as the cause of the

radical nullity of the opening agreement in accordance with article 47.1.a) LPACAP

reproduces what is alleged in this point by the respondent against the proposal of

resolution:

"The Resolution Proposal culminates the argumentation contained in its

Second Law Foundation with the following reasoning:

“(…) the one invoked by the claimed “clear breach of the principle of separation of the instruction and sanction phase” that would have affected the impartiality of the body instructor, with the consequent nullity of the procedure in accordance with article 47.1.a) of the LPACAP, “has no constitutional relevance for the purposes of art. 24.2 CE”, because as the Constitutional Court specifies, it is a principle of legal character whose guardianship corresponds to the judicial bodies, without the requirement of impartiality of the sanctioning administrative body is a guarantee derived from article 24.2 of the C.E. with the character of law fundamental."

The content of such reasoning causes this part not only an enormous perplexity, but an absolute stupefaction, given that it follows that this Agency has not appreciated regarding the administrative procedure sanctioning the necessary separation of the phases of investigation and resolution

and the necessary intervention in the same of two different organs, without the sanctioning body can intervene or "direct", as has happened in this case, the independent action of the examining body.

Simply remember for this purpose that article 63.1 of the LPACAP is evident when he points out that "procedures of a punitive nature are will always initiate ex officio by agreement of the competent body and will establish the due separation between the instructing phase and the sanctioning phase, which is will entrust to different bodies. Thus,

the law states,

absolutely, as much as the Proposal pretends to say the contrary, that

"who instructs does not solve", given that the different functions must

be attributed to different bodies.

And to our greatest surprise, the Motion for a Resolution not only considers

that the aforementioned principle of separation of the phases of investigation and resolution does not

is predicable to the administrative sanctioning procedure, thus contradicting what

expressly set forth in the LPACAP and constantly reminded by

very reiterated jurisprudence of the Constitutional Court (for all, in the STC

9/2018, of February 5), but also affirms without any hesitation that the

principle “according to which the one who instructs does not resolve, is not applicable to the

administrative procedure”, on the basis of an alleged jurisprudence

constitutional law that has nothing to do with such a conclusion.

For its part, STC 74/2004, of April 22, invoked in the Proposal for

Resolution, it does refer to the right to effective judicial protection, but in the

aspect referring to the non-application to the administrative procedure of the right to

ordinary judge predetermined by law, which also bears no relation

with what is analyzed in this proceeding.” (emphasis ours)

The first of the paragraphs comes from the motion for a resolution. the claimed

comments on it that "it follows" "that this Agency has not appreciated regarding the

sanctioning administrative procedure the necessary separation of the phases of

instruction and resolution.

Contrary to what was stated by the respondent, compliance with the procedural rules

in the sanctioning file that concerns us has been total and absolute, which can

be easily verified by examining the iter of the procedure. Among them also the

article 63.1. LPACAP under which “procedures of a nature

sanctioning shall establish the proper separation between the instruction phase and the

sanctioning".

Having established the foregoing, it should be added with respect to the fragment of the motion for a resolution that the respondent comments in her allegations that coincides with the meaning of the STC 174/2005, of July 4, which was cited in the resolution proposal along with other four SSTCs. In the aforementioned STC, in Legal Basis 2, the High Court says so:

"[...] although this Court has reiterated that, in principle, the demands arising of the right to a process with all the guarantees apply to the procedure administrative penalty, however, it has also been made special

incidence in which said application must be carried out with the modulations required to the extent necessary to preserve the essential values that are found at the base of art. 24.2 CE and the legal certainty guaranteed by the art. 9.3 CE, as long as they are compatible with their own nature (by all, STC 197/2004, of November 15, FJ 2). More specifically, and as regards specifically to the guarantee of impartiality, it has been pointed out that it is one of the assumptions in which it is necessary to modulate its projection in the sanctioning administrative procedure, [...]

In view of this, the principle of the sanctioning procedure established in the art. 134.2 of Law 30/1992, of November 26, on the legal regime of Public administrations and the common administrative procedure, in accordance with

to which “the procedures that regulate the exercise of the sanctioning power

must establish the proper separation between the instruction phase and the

sanctioning, entrusting them to different bodies”, is a principle of

legal character whose guardianship corresponds to the judicial bodies through the

corresponding resources, without the requirement of impartiality of the organ

administrative sanction is, as the appellant entity claims, a

derived guarantee, with the character of a fundamental right, of art. 24.2 EC,

whose requirements, relating to judicial impartiality, only apply to the court

court that must decide on the legality of the administrative action.

In this way, the eventual infraction in an administrative procedure

sanctioning principle of entrusting to different bodies the phase

instructor and the sanctioning entity lacks constitutional relevance for the purposes

of art. 24.2 CE and, […]” (Underlining is ours)

In view of the text of that STC, the paragraph of the proposed resolution that the

claimed has reproduced in its allegations -seasoned with various comments-

It is not likely to generate doubts about its meaning and scope. Even less when

For greater expository clarity, the proposed resolution reproduced both the

fragment transcribed above like those of four other SSTCs.

It can hardly be inferred that the Agency has said, suggested or admitted that the

separation between the investigation and resolution phase is not a guarantee imposed

by the LPACAP, article 63.1., as the respondent has stated in her brief of

allegations because he says referring to the AEPD: "but also affirms without any

I notice that the principle “according to which the instructor does not decide, is not applicable to the

administrative Procedure".

Despite the stupor that the representative of the defendant has had to suffer with his

reading, what the AEPD says in that paragraph is, on the one hand, that the T.C. considers

that in the sanctioning administrative procedure the due separation of the phase of

instruction and resolution “is a principle of a legal nature whose protection corresponds to the

judicial bodies”. And on the other, that the T.C. says that regarding the “requirement of

impartiality of the sanctioning administrative body”

in the procedure

derived from article 24.2 of the C.E. with the character

“a guarantee

administrative is not

of fundamental right.”

From which it is concluded that the intended dilution between the investigation phase and

resolution invoked to the contrary could not serve as a basis for the existence of a vice of

radical nullity for violation of a fundamental right susceptible of protection

constitutional. Another thing is that it can, if it deems it appropriate, invoke the violation

of article 63 of the LPACAP and the consequent annulment of the procedure

in accordance with article 48.1 LPACAP.

As stated in the motion for a resolution regarding the separation between the

investigation and resolution phase, article 24.2 of the EC refers to eleven rights

which in turn constitute a set of procedural guarantees. The

judgments of the Constitutional Court (TC) have been delimiting which of them

are applicable and which are not to the administrative procedure.

The principle of separation of the instructional and sanctioning phase that, in the opinion of the

claimed, would have been violated in the opening agreement thereby determining a vice of radical nullity provided for in section a of article 47.1.a) LPACAP, has its origin in the STC 145/1988, of July 12, which considers that "the impartiality of the judge is incompatible or is compromised by his performance as an instructor".

Note that what the respondent invokes is exactly the opposite: that the instructor has seen his impartiality affected because the competent body for resolve has been pronounced in the opening agreement on the sanction that could prevail. In such a way that the impartiality of the judge, in this case of the penalty, is intact.

Well, we must also add that the T.C. commented on the application from that principle to the sanctioning administrative procedure in the following terms:

(i) In the STC of 02/15/1990 (RTC 1990/22) it says that "It is a reiterated doctrine of this Court that it cannot be claimed that the Instructor in a procedure administrative sanction, and even less, the body called to resolve the file, enjoy the same guarantees as judicial bodies; because in In this type of procedure, the Instructor is also an accuser as soon as he formulates a sanctioning resolution proposal and, on the other hand, the body called to decide is the same one that initiates the file and, therefore, does not stop being Judge and part at the same time." (emphasis ours)

(ii) In STC of 04/26/1990 (RTC 1990/76) it states that "By the very nature of the administrative procedures, in no case can a separation between instruction and resolution equivalent to that with respect to Judges must be given in jurisdictional processes. The right to the ordinary judge predetermined by law and to a process with all the guarantees -among them, the independence and impartiality of the judge - is a characteristic guarantee of the

judicial process that does not extend to the administrative procedure, since the

strict impartiality and independence of the organs of the judiciary is not,

by essence, applicable with the same meaning and to the same extent to the organs

administrative.” (emphasis ours)

(iii) In the STC of 03/17/1995 the High Court says the following:

“In relation to this fundamental right not to be judged by someone who has been

previously investigating the case, this Court has declared that, due to

Its purpose is exclusively to avoid, by the court

in charge of knowing the oral trial and of dictating Judgment of certain

prejudices about the guilt of the accused [...] Also, and from a point of view

from an objective point of view, we have also said that, as it falls within the

guarantees of the accusatory criminal process, it is not necessarily extensible to other

processes of a similar nature, such as the case of the administrative procedure

sanctioning (STC 22/1990 [RTC 1999, 22]

In any case, the accumulation of instructing and sentencing functions does not

cannot be examined in the abstract, but must be descended to the cases

and verify whether the impartiality of the

judge (STC 98/1990), having to take into account that not every act

instruction compromises said impartiality, but only those who, for

assume the Judge a trial on the participation of the accused in the punishable act,

may produce in his mind certain prejudices about the guilt of the

defendant to be disqualified from hearing the oral trial phase (SSTC

106/1989; 1***ACCOUNT.1/1992, 170 and 320 1993)". (emphasis ours)

(iv) From STC 174/2005, of July 4, we reproduce the following excerpts:

"1. The purpose of this amparo remedy is to determine, on the one hand, whether in the

sanctioning administrative procedure, which has led to the imposition of

the sanction to the appellant entity, its right to a process with

all the guarantees (art. 24.2 CE), as the due separation has not been respected

between the investigating body and the sanctioning body; [...]

2. The complaint regarding the violation of the right to a process with all the

guarantees (art. 24.2 CE), from the perspective of the requirement of impartiality,

it must be understood articulated by way of art. 43 LOTC, since the entity

appellant alleges that it would have occurred in the administrative procedure

sanctioning for not respecting the proper separation between the body

administrative of instruction and the sanctioning, derived from the fact that the Mayor of the

City Council was the instructor of the procedure and, in addition, president of the

Government Commission that imposed the sanction.

In this regard, it should be remembered that, although this Court has reiterated that, in

principle, the demands derived from the right to a process with all the

guarantees apply to the sanctioning administrative procedure, however,

Special emphasis has also been placed on the fact that said application must be carried out

with the required modulations to the extent necessary to preserve the

essential values that are at the base of art. 24.2 EC and safety

legal guaranteed by art. 9.3 CE, as long as they are compatible with their own

nature (for all, STC 197/2004, of November 15, FJ 2). More in

specifically, and with regard specifically to the guarantee of impartiality,

It has been pointed out that it is one of the cases in which it is necessary to modulate

its projection in the sanctioning administrative procedure, since

said guarantee “cannot be predicated of the sanctioning Administration in the

same sense as with respect to judicial bodies” (STC 2/2003, of 16

January, FJ 10), then, "without prejudice to the prohibition of all arbitrariness and the

subsequent judicial review of the sanction, the strict impartiality and independence

of the organs of the judiciary is not, by essence, predicable in the same

measure of an administrative body” (STC 14/1999, of February 22, FJ 4),

concluding from this that the independence and impartiality of the judge, as

requirement of the right to a process with all the guarantees, is a guarantee

characteristic of the judicial process that does not simply extend to the procedure

administrative penalty (STC 74/2004, of April 22, FJ 5).

In view of this, the principle of the sanctioning procedure established in the

art. 134.2 of Law 30/1992, of November 26, on the legal regime of

Public administrations and the common administrative procedure, in accordance with

to which “the procedures that regulate the exercise of the sanctioning power

must establish the proper separation between the instruction phase and the

sanctioning, entrusting them to different bodies”, is a principle of

legal character whose guardianship corresponds to the judicial bodies through the

corresponding resources, without the requirement of impartiality of the organ

administrative sanction is, as the appellant entity claims, a

derived guarantee, with the character of a fundamental right, of art. 24.2 EC,

whose requirements, relating to judicial impartiality, only apply to the court

court that must decide on the legality of the administrative action.

In this way, the eventual infraction in an administrative procedure

sanctioning principle of entrusting to different bodies the phase

instructor and the sanctioning entity lacks constitutional relevance for the purposes

of art. 24.2 CE and, […]" (Underlining is ours)

(v) STC 74/2004 of April 22 (F.J. 5) declared the following:

"5. It is also alleged by the plaintiff for amparo the infringement of the right to

a process with all the guarantees (art. 24.2 CE) [...] alleging that the command

who imposed the sanction, who was the one who carried out the hearing procedure, had been

denounced by the appellant before the General Director of the body by the commission

of certain irregularities.

[...]

In accordance with our doctrine, we must remember that the right to [...]

process with all the guarantees -among them, the independence and impartiality

of the judge - is a characteristic guarantee of the judicial process that is not

extends to the administrative procedure, since the strict impartiality and

independence of the organs of the judiciary is not, by essence, predicable

with the same meaning and to the same extent of the administrative bodies

(SSTC 22/1990, of February 15, FJ 4, and 76/1990, of April 26, FJ 8.a; AATC

320/1986, of April 9, FJ 4, and 170/1987, of February 11, FJ 1). as i know

expressed in the STC 22/1990, of February 15 (FJ 4), it is not idle to bring

collation the caution with which it is convenient to operate when transferring guarantees

constitutional rights extracted from the criminal order to the sanctioning administrative law

it is about; this delicate operation cannot be done automatically, because

The application of these guarantees to the administrative procedure is only possible

to the extent that they are compatible with its nature. In this way in

On different occasions, the Constitutional Court has held that it cannot

pretend that neither the instructor of an administrative sanctioning procedure,

let alone the body called to resolve the file, enjoy the same

guarantees that the judicial bodies (STC 14/1999, of February 22, FJ 4).

Consequently, the interpretation and application of the regime of abstention and

recusal of those who make up the administrative bodies belongs to the

of ordinary legality, without being able to use the remedy of amparo

to review the one carried out by the Courts, in this case by the jurisdiction

military, since the amparo remedy does not constitute a third judicial instance

in which problems of mere ordinary legality (ATC

170/1987, of February 11, FJ 2).” (emphasis ours)

Therefore, the one invoked by the claimed "clear breach of the principle of separation of the

instruction and sanction phase” that would have affected the impartiality of the body

instructor, with the consequent nullity of the administrative procedure in application

of article 47.1.a) of the LPACAP, "lacks constitutional relevance for the purposes

of art. 24.2 CE.”, because as the Constitutional Court specifies, it is a principle of

legal character whose guardianship corresponds to the judicial bodies, without the requirement of

impartiality of the sanctioning administrative body is a guarantee derived from the

article 24.2 of the C.E. with the character of a fundamental right. All this without prejudice

to underline once again that this principle seeks to guarantee the impartiality of the

judge proscribing his performance as an instructor. issue other than the

claimed raises in which the impartiality of the court has not been affected.

The respondent also invoked the radical annulment of the procedure in accordance with

article 47.1.a) LPACAP since, in his opinion, the opening agreement violated

your right of defence.

This claim must also be rejected for obvious reasons. From the point

of view of article 24 of the C.E. helplessness has a material character rather than

formal. Defenselessness with legal-constitutional significance occurs only

when the interested party is, unjustifiably, unable to request the

judicial protection of their rights and legitimate interests or when the violation of

procedural or procedural rules carries with it the deprivation of the right to

defense, with the consequent real and effective damage to the interests of the affected party

be deprived of their right to allege, prove and, where appropriate, to replicate the

contrary arguments (STC 31/1984, of March 7, STC 48/1984, of April 4,

STC 70/1984, of June 11, STC 48/1986, of April 23, STC 155/1988, of April 22

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

The defendant has not suffered in this proceeding any loss or injury to her

right of defense because in the procedure all formalities have been respected

having had the opportunity to argue and prove what was appropriate to his right. It has been

to reiterate in this sense that the rights granted by article 53.1.e) LPACAP to the

interested in the administrative procedure -procedure that begins

precisely with the act that, in the opinion of the respondent, would have injured her right to

defense - have been scrupulously respected. That precept, article 53.1.e)

LPACAP grants those interested in an administrative proceeding the right to

“make allegations, use the means of defense admitted by the Legal

Legal, and to provide documents at any stage of the procedure prior to the

hearing process, which must be taken into account by the competent body when

draft the resolution proposal."

The respondent invokes in its allegations to the proposal an alleged violation of the

right of presumption of innocence, recognized as a fundamental subjective right

in article 24.2 of the Constitution and in article 6.2 of the European Convention on

Human Rights and which is expressly included in the LPACAP, article 53.2.b),

which provides that, in addition to the rights provided for in section 1, in the case of

administrative procedures of a punitive nature, the alleged

Those responsible shall have the right "To the presumption of non-existence of

administrative until the contrary is proven.

On this fundamental right, the STS of June 3, 2008 (rec.146/04) is made

echo of the doctrine of the Constitutional Court that says: "[...] the principle of presumption

of innocence guarantees the right not to suffer a sanction that is not based on a

prior evidentiary activity on which the competent body can base a

reasonable judgment of guilt, and entails, among other requirements, that the

Administration proves and, therefore, motivates, not only the constitutive facts of the

offence, participation in such acts and the circumstances constituting a

graduation criteria, but also the culpability that justifies the imposition of

sanction (among others, SSTC 76/1990, of April 26; 14/1997, of January 28;

209/1999, of November 29 and 33/2000, of February 14).

The STS of April 28, 2016 (RC 677/2014) regarding this right to

presumption of innocence, which governs without exception in the scope of the procedure

administrative penalty, says that “[...] according to the Constitutional Court in

Judgment 66/2007, of March 27, states that "a sanction cannot be imposed

any that is not based on a previous lawful evidentiary activity", and implies

also the recognition of the right to an administrative sanctioning procedure

due or with all the guarantees, that respects the principle of contradiction and in which the

alleged perpetrator has the opportunity to defend their own positions,

prohibiting the initiation of sanctioning proceedings when it is appreciable from

unequivocally or manifests the inexistence of rational indications that it has been

committed an infringing conduct, or in which the illegality or the

culpability"

Well, in the sanctioning procedure that concerns us, all

procedural guarantees (contradiction, defense, separation of the investigation phase

and resolution) and also the opening of the aforementioned procedure occurred on the basis

of clear evidence of a possible infringing conduct of the claimed entity.

Based on the foregoing, the claim of the respondent to declare the nullity of

this procedure under article 47.1.a) of the LPACAP must be rejected.

3. Regarding the full nullity of the procedure due to the alleged lack of

material competence of the current Director of the AEPD.

The respondent affirms that the agreement to initiate the procedure issued by the

Director of the AEPD on June 18, 2021 is null and void due to "the

manifest and serious material incompetence of the person who issued [it]. Article

47.1. of the LPACAP says that the acts of the Public Administrations are null and void

full right in the following cases, "b) Those issued by a body manifestly

incompetent by reason of the matter or the territory.”

This Agency cannot share such a statement or the arguments in which it is

supports.

In defense of her thesis, the defendant exposes two facts that would determine her

understand the material incompetence of the person who held -and holds

currently - the position of Director of the AEPD on the date on which the

agreement to initiate the disciplinary proceedings.

(i) The respondent bases the lack of competence of the Director of the AEPD to dictate the

agreement to open this procedure in which his mandate would have expired.

Considers that, in accordance with article 15 of the Agency's Statute, approved by the

Royal Decree 428/1993, of March 26 (hereinafter, the Statute of 1993) on the date

in which the term of four years from his appointment was completed, on July 24,

2019, her dismissal would have occurred since she was appointed under article 14.3 of the

Statute of 1993 through the Royal Decree of July 24, 2015, so

“according to article 15.1 of the 1993 Statute, the expiration of the mandate entailed its

direct cessation in the performance of the position of Director of the AEPD as of 24

July 2019 [...]”. (emphasis ours)

Therefore, it concludes that as of July 24, 2019, the current Director of the AEPD

lacked the competence to dictate administrative acts of the AEPD.

This Agency cannot share such allegations since neither Organic Law 15/1999,

nor does the current Organic Law 3/2018 contemplate an automatic termination of the mandate of the

Director of the AEPD.

The respondent confuses what is a "cause" for cessation - the expiration of the mandate of

four years - with the "cessation agreement" that must be based on one of the causes

provided in the standard. Article ***ACCOUNT.1 of the LOPD and the 1993 Statute

(articles 14 and 15) configure a system that guarantees the independence of the AEPD,

according to which its Director can only be dismissed prior to the

expiration of their mandate in the cases provided for in number 3.

This means that, in the same way that his appointment is carried out

by Royal Decree of the Government, once the mandate has expired, the cessation will have to

be declared by Royal Decree, without it being possible for the Director of the AEPD to stop

exercise the functions attributed to it as long as there is no formal act in which

the cessation is agreed, an act that at the present time has not occurred. If not

we would find ourselves before an abandonment of the position by the Director of the Agency

which would constitute a very serious disciplinary offence, in accordance with article 95.2.c) of the text

Consolidation of the Law of the Basic Statute of the Public Employee, approved by Real

Legislative Decree 5/2015, of October 30, or article 6.c) of the Regulation of

Disciplinary Regime of Officials of the State Administration, approved

by Royal Decree 33/1986, of January 10.

It is clarifying in this sense that in the B.O.E. of July 25, 2015, in which

Royal Decree 715/2015 was published by which the current

Director of this Agency, Royal Decree 713/2015 will also be published

agreed to dismissal, in accordance with articles 14.3 and 15.1 of the 1993 Statute,

of the until then Director of the Spanish Data Protection Agency, José Luis

Rodriguez Alvarez.

The SSTS, Contentious Chamber, do not apply to the question raised.

Administrative, 2393/2017, of June 16, 2017 (cassation appeal 1585/2016),

1067/2017 and 1093/2017 that the defendant has invoked in defense of the alleged

nullity of the agreement to open the sanctioning procedure.

The factual assumption contemplated in them, identical in the three judgments

cited, cannot be assimilated to the situation of the AEPD management. The SSTS are

on the figure of the assignment of functions, regulated in Royal Decree 123/1997 of the

Autonomous Community of Catalonia (articles 6.b; 105.1; 106.1; 106.3 and 106.4) According to

of its specific regulations, it is an extraordinary form of coverage of

jobs reserved for civil servants in the event of

urgent needs, coverage that is provisional in any case.

The regulations governing this figure expressly provide that the appointment in

functions will be "automatically without effect" if a maximum period of six

months from the date of the resolution that agrees to the assignment of functions without

has published the competition to fill the job, unless the job

work is reserved to an official for some of the reasons established in the

regulations in force.

Consequently, the doctrine established in such judgments is not applicable to the

termination of the mandate of the Director of the AEPD. We are not dealing with an order from

functions for urgent needs, nor the regulation of the position of Director of the AEPD

has parallelism with the regulation of the figure of the assignment of functions in terms of

its time limits and its consequences.

In the present case, nothing in the statute of the AEPD, nor in organic law 3/2018, nor

in law 40/2015 indicates that an automatic termination occurs at the time that

the period of time for which the Director of the AEPD was appointed ends; for him

On the contrary, the new statute expressly states that it will continue in

functions. On the other hand, no rule requires that the situation of exercise of the

position in functions is expressly declared by means of a formal act, nor

There is a rule that requires that the signature of the head of a body that is

in functions such a circumstance is declared.

(ii) The second fact invoked by the respondent is the suppression of the body "Director of

the Spanish Agency for Data Protection", deletion that it says would have occurred

with the entry into force of Royal Decree 389/2021 approving the Statute

of the AEPD (Statute of 2021), Unique additional provision.

It argues that in the 2021 Statute "there is no provision whatsoever regarding

temporarily such suppression is not effective, for example, maintaining as an organ

director of the AEPD that of "Director", until the appointment of the head of the

"Presidency of the Spanish Agency for Data Protection", nor is there any mention

to a potential application of article 12.3 of the 2021 Statute, which refers

only to "the person holding the Presidency", nor is it expected that the holder

of the abolished body becomes the head of the Presidency of the AEPD, so that,

As of June 3, 2021, all administrative acts issued by the body

"Director of the Spanish Data Protection Agency". The claim ends

so in the administrative acts dictated "a vice of legality concurs that

implies the legal non-existence of the same, so we are facing a case of

nullity of full right, while the acts that affect the procedure that we

occupies are dictated by an expired and non-existent body of the AEPD."

Nor can this allegation be shared. The 2021 Statute completes the

regulation of the LOPDGDD specifying the procedure for appointing the

president of the entity, a body whose provision is found in the LOPDGDD, therefore

that until the publication of the statute could not proceed to the provision of said

position. However, the functions of the Agency must continue to be exercised, for

which, as long as the appointment of the president does not take place in the terms

foreseen in said Statute corresponds without solution of continuity its performance to the

head of the body that had been exercising them.

Thus, the claim of the respondent to declare the nullity of the procedure

for the reasons it invokes (assumed in article 47.1.b, LPACAP) it must be

rejected.

III

Applicable provisions

Article 5 of the RGPD deals with the principles that must govern the treatment of

personal data, provision that provides:

"1. The personal data will be:

a) treated lawfully, loyally and transparently with the interested party (<<lawfulness, loyalty and

transparency>>)

(…)

2. The controller will be responsible for compliance with the provisions

in section 1 and able to demonstrate it (<<proactive responsibility>>)"

Article 6 of the RGPD, under the heading "Legality of the treatment", specifies in its

section 1 the cases in which the processing of third party data is

considered lawful:

"1. The treatment will only be lawful if it meets at least one of the following

conditions:

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 person in charge of the treatment or by a third party, provided that on said

interests do not override the interests or fundamental rights and freedoms of the

interested party that require the protection of personal data, in particular when the

interested is a child.

The provisions of letter f) of the first paragraph shall not apply to the processing

carried out by public authorities in the exercise of their functions." (The underlined

is ours)

Article 4 of the RGPD provides:

"For the purposes of this Regulation, the following shall be understood as:

[...]

2) “processing”: any operation or set of operations carried out on

personal data or sets of personal data, whether by procedures

automated or not, such as the collection, registration, organization, structuring,

conservation, adaptation or modification, extraction, consultation, use,

communication by transmission, broadcast or any other form of enabling of

access, collation or interconnection, limitation, suppression or destruction;

The infringement of article 6.1 of the RGPD is typified in article 83.5.a) of the

RGPD that establishes:

“The infractions of the following dispositions will be sanctioned, in accordance with the

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

global total annual turnover of the previous financial year, opting for

the largest amount:

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

consent under articles 5, 6, 7 and 9;”.

Violation of article 6.1 of the RGPD

IV

1.- The person claimed in this sanctioning procedure is attributed a

infringement of article 6.1 of the RGPD given that the processing of data

personal property of the claimant was not covered by any of the legal bases

listed in that provision. The treatment carried out was maintained from the

July 26, 2018 until at least February 26, 2020 if we accept the

statements by the respondent that on that date she had terminated the treatment.

The treatment contrary to article 6.1 of the RGPD for which the company is responsible.

claimed materialized in the collection of the personal data of the claimant to

the conclusion of a bank contract linked to the account with finalized numbering

in ***ACCOUNT.1 in which she appeared as owner, exactly as co-owner along

with two other individuals, for at least nineteen months.

The claimant did not intervene in the celebration with the entity claimed of the contract of the

which derives the account ending in ***ACCOUNT.1. The respondent has stated that the

account was registered in the name of the claimant thanks to the intervention of a

third party, D. B.B.B., who exhibited for this purpose a power of attorney that the claimant

had been granted in his favor on October 1, 2010. We refer to the allegations

that made the claim before the Bank of Spain -fragment that is reproduced in the

Second Proven Fact- in which it says that “it reiterates that on 07/26/2018, D. B.B.B.

registered the account number ***ACCOUNT.1, by virtue of the power of attorney of

10/01/2010, authorized by the notary D.[...] with protocol number 1937, who has

been provided contrary to the file. In said account was included as owner the

claimant, who resigned as such on 02/26/2020 in compliance with his request

[...]”

The legal figure of representation implies the substitution of the will of a

person by another in the constitution or formation of a legal business, so that the

business in which the representative intervenes has effects in the legal sphere of the

represented, as long as, of course, the representative acts within the

faculties conferred by power. In such a way that, if the power of representation

is insufficient for the act or legal business in which the representative intervenes, that

act or business -in general- does not produce effects in the legal sphere of the represented.

2. The principle of legality that governs the processing of personal data (article 5.1.a, of the RGPD) is developed in article 6 of the RGPD ("Legality of the treatment").

Article 6.1 of the RGPD provides that the treatment will be lawful only if it concurs, at least, one of the conditions that the precept relates through six sections.

From a theoretical point of view, the data treatment we are examining could have its legal basis, only, in the circumstances described in sections a) and b) of article 6.1. GDPR.

However, in light of the account of the facts, it is clear that the legality of this treatment could not be justified in the circumstance described in letter a) of article 6.1, RGPD: "The interested party gave their consent for the processing of their data personal for one or several specific purposes;". The claimant never consented to the treatment by the claimed of your personal data linked to the bank account ended in ***ACCOUNT.1 in which she appeared as the owner. This is confirmed by fact that, knowing that treatment, the claimant filed a claim with the SAC of the claimed entity; claim that is presupposed to be able to present a claim before the Bank of Spain, as it did, according to the Order ECC/2502/2012, of November 16, which regulates the procedure for filing of claims with the claims services of the Bank of Spain, CNMV and the General Directorate of Insurance and Pension Funds, article 6.1.d.

Section b) of article 6.1 RGPD establishes that the treatment will be lawful when "it is necessary for the execution of a contract to which the interested party is a party or for the application at the request of the latter of pre-contractual measures;".

In this sense, recital 44 of the RGPD says that “The treatment must be lawful

when necessary in the context of a contract or the intention to conclude a

contract."

So that the circumstance of article 6.1.b) of the RGPD can operate as a basis

The legal nature of data processing is an essential assumption that whoever intervenes

as a contracting party or who expresses the intention to conclude a contract and

identifies with certain personal data is effectively the owner of the data

treated. If this is not the case, that is, if the person who intervenes as a party to a contract is not the

owner of the data that he has provided as his own for his identification -as it happens,

for example, in fraudulent hiring - the treatment cannot be estimated

lawful in application of the circumstance of article 6.1.b), since the owner of the data does not

is in such a case party to the contract, but is alien to it. Similarly, if the power

of representation is insufficient to enter into a contract on behalf of the principal

the processing of your personal data cannot be considered lawful in application of the

article 6.1.b), since the contract signed by the person who does not hold representation for

intervening in it does not produce effects in the legal sphere of the represented party.

By virtue of the principle of proactive responsibility (article 5.2 RGPD) the person in charge

is obliged to display the necessary activity to comply with the principles that must

presiding over data processing, so the principle of legality is of interest here. and must

to also be in a position to certify compliance. The principle of

proactive responsibility is projected both on the diligence that is required of the

responsible for the treatment - who has to adopt the technical and organizational measures

necessary to comply with the principles that govern the treatment, collected in the

article 5.1 of the RGPD- as well as on the burden of proof of compliance. Of

way that the person in charge who intends to protect the legality of data processing

in section b) of article 6.1 RGPD must act diligently and verify that

who intervenes in the contracting is also the owner of the data with which it has been

identified as a contracting party.

3. At this point we must bring up that the claimed, despite being

expressly required on two occasions, did not provide this Agency in the period of

proof of the copy of the bank contract that was entered into on behalf of the claimant through

of your proxy.

As stated in the sixth Precedent of this resolution, during the period of

proof, in response to the request to provide a copy of the contract, the

claimed was limited to providing a standard general condition, the so-called "Contract

Provision of Services". A second test procedure was carried out in which

he was warned that he had not provided the requested documentation and was required to

again to provide a copy of the aforementioned contract. However, the claimed

he did not provide the contract on this occasion either and responded by providing a second

general conditions, this time the "Annex to the Contract for the Provision of Services,

Payment Services Document". That is why, in the motion for a resolution, as

result of the tests carried out, it was said: "In summary, the

determination of the respondent not to provide this Agency with a copy of the contract

current account, account identified with a number ending in ***ACCOUNT.1,

which was registered in the name of the claimant and two other natural persons. Either

has wanted to provide the document that proves that he informed the claimant of the date in which, supposedly, he proceeded to cancel him in the contract.

In its allegations to the proposed resolution the one claimed, in addition to showing its disagree with the conclusion included in the proposal, states that the documents had been provided by her “in the two trial periods opened by the instructor” and adds: “we resubmit what has already been submitted.” The copy of the contract that purpose has decided to facilitate to the Agency arrives when the procedural process is that of resolution. Article 90.2 of the LPACAP establishes:

“In the resolution, facts other than those determined in the resolution may not be accepted. course of the procedure, regardless of their different legal assessment. Nope However, when the competent body to resolve considers that the infraction or the sanction are more serious than that determined in the resolution proposal, The accused will be notified so that he can submit as many allegations as he deems appropriate in within fifteen days." (emphasis ours)

All this is not an obstacle so that later, with an exclusively informative, a description is made of the contractual document that the respondent has now provided as an annex to his arguments to the motion for a resolution. Contract, called "Easy Account", includes as co-holders three natural persons, the claimant and two other persons. All of them are identified by their data -name, two surnames and NIF-, also the claimant, but in the document there is no reference to the intervention of a third party in its representation. The contract is signed on July 26, 2018 and as "use / purpose" of the account is indicated “domestic”. Nor in the sections of the document intended for the signature of the co-owners, it is indicated that the claimant intervenes through

of your representative. In the space for signatures, below the name and two

surnames of the claimant, the signature D.B.B.B. that is not accompanied by

information regarding that it is not the signature of the contract holder but that of another

person allegedly acting on their behalf. Ultimately, the contract

linked to the bank account that was registered in the name of the claimant was not

mentioned the intervention of a third party on behalf of the claimant at the same time

that the contract was not signed by the claimant.

This sanctioning resolution, respectful of the guarantees of the procedure, more

even though they may affect the right of defence, “no” is based on different facts

of those established in the motion for a resolution - a procedural moment in which no

had a copy of the contract because the respondent refused to provide it in the

of proof- for what it values exclusively as a determining fact of the treatment

illicit of the personal data carried out by the claimed insufficiency of the power

that exhibited the third.

Consequently, in order to assess whether the conduct of the entity complained against is

constituting an infringement of the principle of legality, any mention of

the characteristics of said contract, which have been known on the occasion of its

recent referral, being relevant, exclusively, if the power that the third party

exhibited empowered him to enter into a contract on behalf of the claimant in which

that she was listed as a co-owner of the account.

Works in the file the power of attorney that D. B.B.B. presented to the respondent in order to

accredit the representation that he claimed to hold. The notarial document says:

"GRANTS:

"That confers power, as broad and sufficient as is legally required and is

necessary in favor of B.B.B. [...] so that, in its name and representation, AND ONLY AND

EXCLUSIVELY WITH GOODS RELATED AND INTEGRATED IN THE

***COMUNIDAD DE BIENES.1 y TDOS MÁS, C.B..", make use of the following

POWERS:" (Fourth Proven Fact) (Underlining is ours)

Reading this declaration of intent makes it clear that the power of attorney that the claimant

confers in 2010, in which it grants D. B.B.B. the faculties that are detailed through

of sections a) to j), was limited to acts or businesses that had

relationship with the goods integrated in the community of goods of which she was a member

part.

To the clarity of the literal tenor of the power of attorney clause is added the graphic

used in the document. As we have indicated in the Background of this

resolution, the words that we reproduce in capital letters appear in the power of attorney

also in capital letters and also highlighted in bold (which is not possible

reproduced here for technical reasons) with the evident intention that it does not arise

no doubt regarding the framework or scope in which they are conferred in favor of D. B.B.B.

the faculties that the power describes through sections a) to j).

Among the powers conferred on the representative, the power of attorney mentions in the

section f) "open current or credit accounts, even with mortgage guarantee [...]".

Now, it does not raise any doubts for a reader who lacks the training and

knowledge that is presumed to those who carry out their work activity in a bank and

On a daily basis, they must examine and assess the powers of representation that are presented to them.

exhibit, that this faculty, like all those detailed in sections a) to j), is

granted to the representative alone and "exclusively" - adds the document of

empowerment- when their action or intervention is linked to the assets

related and integrated in the ***COMMUNITY OF GOODS.1 and two more, C.B..

Expression that seems necessary to refer to community property, since

it lacks legal personality, which does not prevent it, due to traffic needs

have their own NIF assigned by the AEAT, different from that of each of the

community members that make it up, which allows them to operate in the market and can be

holders of bank accounts, an extreme admitted without discussion by the Bank of

Spain.

The power of attorney that the claimant granted in 2010 to the third party conferred her representation

to act on your behalf only and exclusively if the legal business was linked

to the integrated and related goods in the community of goods. out of that

course the third party was not empowered to act on behalf of the

claimant and this despite the fact that the power exercised was included among those

are described in sections a) to j) of the power of attorney.

The meaning and scope of the power granted by the claimant is clarified in light of the

provisions governing community property, articles 392 and

following of the Civil Code and, in what is not foreseen in them, by its Statutes

Foundational. Article 398 of the Civil Code establishes:

"For the administration and better enjoyment of the common thing, the

agreements of the majority of the participants.

There will be no majority except when the agreement is reached by the participants who

represent the largest amount of the interests that constitute the object of the

community.

If there is no majority, or the agreement thereof is seriously detrimental to the

interested in the common thing, the Judge will provide, at the request of a party, what

appropriate, including appointing an administrator. [...]”

Title III of the Foundation Statutes, "Community Administration", says in

its article 12:

“All commercial operations of the Community will be carried out in its name, not

However, in relation to the different modalities of bank accounts or operations,

that could be made after this date, regardless of whether the

owned by the Community, the indistinct power to dispose,

cancel, modify, etc. to the named community members.” (emphasis ours)

That clause, by indicating that "All commercial operations of the Community are

shall be made in the name of this [...]”, states that the community property must be the owner of

any commercial operation that is carried out with respect to the goods that comprise it.

In addition, regarding the powers "to dispose, cancel, modify, etc" regarding

to “bank accounts or operations”, article 12 of the Statutes warns that the

ownership will belong to the community property – “[...] regardless of whether the

owned by the Community [...]”-. In short, the Statutes of the community

make it clear that commercial operations, such as opening a bank account

related to the goods that make up the community of goods, will always be made to

community name.

The current account contract that the respondent entered into with a third party, D.B.B.B.,

allegedly acting on behalf of the claimant, was not associated with

"the assets integrated and related to the B.C." In the referred contract they appear as

holders three natural persons, including the claimant, without it being possible to admit - as

suggested in its allegations - that the circumstance that these three

natural persons holding the contract were at the same time the three community members who

made up the *** COMMUNITY OF GOODS.1 and two more, C.B.., means that the

agent exercised the powers "with the assets integrated and related to the

C.B.", as required by the deed of empowerment.

Thus, it turns out that the power of attorney that the claimant granted in 2010 in favor of Mr.

BBB did not empower him to enter into the banking contract signed with the

claimed, but that such a contract exceeded the limits of the power that she had given him.

conferred.

This is also the opinion of the Department of Conduct of Entities of the Bank of

Spain that in the report issued as a result of the claim made by the claimant

concluded that "[...] Bankia heeded the instruction of the claimant's representative

to include it as a co-owner in an account, but the entity does not certify that

present a power of attorney granting authority to do so. [...]"

Consequently, while the contract that the respondent signed with D.B.B.B., in which

that the claimant appeared as the owner, exceeded the limits of the power that she

had conferred in 2010, the claimant was not part of said contract, so that the

processing of your personal data, which is the object of assessment in this file,

could not rely on the legitimizing circumstance of article 6.1.b) of the RGPD.

4. The allegations that the respondent has made in the proposed resolution in

defense of the legality of the data processing carried out are undermined by the

preceding exposure. However, reference is made to the arguments of the

complainant that turn, in short, on two issues. One of them is part of a

peculiar interpretation of article 12 of the Foundational Statutes of the community

of goods. Thus, it states the following:

“[...], the statutes themselves do not circumscribe the management of the assets of the

community to an account owned by the Community of Owners,

Contrary to what this Agency maintains in its Resolution Proposal,

but that the management of the goods object of the same can be done in a

indistinctly by any community member and in relation to any type of account

or banking operation, without the ownership of the same having to correspond to the

Community of goods."

“It is clear that the power that is the subject of this dispute enabled the

proxy to open an account on behalf of the principal.” And said account was

opened on July 26, 2018, by the other two partners of the Community

of Assets and the claimant, duly represented by the attorney,

authorized to open accounts in your name (not to open accounts in the name of

the Community of Goods): we are dealing with an account whose co-ownership was

shared by the members of the Community of Goods (and, as we have seen

Previously, the statutes of the same expressly established that the

its management could be carried out through accounts whose ownership was not

corresponding to the Community of Goods itself). [...]”

On the other hand, the arguments that the respondent puts forward suggest that the

power of attorney granted in favor of D. B.B.B., in which she justifies the legitimacy

of the treatment that has been carried out of the personal data of the claimant, documents

two legal transactions: the granting of a power of attorney to the third party to

act on behalf of the claimant with the powers detailed in the sections

a) to j) and a mandate to the agent related to the assets that make up the

community of goods, in such a way that in this way it abstracts, ultimately

eliminates the delimitation contained in the deed of power according to which the powers

that the claimant grants to D.B.B.B. to act in your name and on your behalf

be solely and exclusively with the goods integrated and related to the

*** COMMUNITY OF PROPERTY.1 and two more, C.B.. In this sense, the respondent says the

Next:

“As you can see, the legal powers granted were absolutely

valid, regardless of the matters or goods to which it affects, for the

opening of the account questioned by the claimant; on the other hand, in relation

to the mandate collected with respect to the goods of the Community, we must point out

that the relations of the common thing that belongs to all the comuneros,

including the use and disposal of the same, is a matter that falls to the

community members, not to the financial entity that makes available to its clients the

provision of a financial service (holding a current account that

includes a cashier service), without being required to perform a “police” function or

of "audit" with respect to relationships to which financial entities are

totally foreign.

Obviously, in providing said financial service, the client can

establish certain limitations, quantitative or operational (for example,

refunds up to an amount or not making transfers abroad), which

the banking entity must observe and respect; but in no case can assume
the execution of a mandate that is not assigned to him, the specific ones being
instructions of the principal irrelevant to my client, for being,
we reiterate, third party alien to the relations between the same and the agent: his
Non-compliance will generate liability of the agent against the principal,
but not from the financial entity before the principal."
In conclusion, the specific instructions to act constitute a delimitation
of the representation that concern the attorney in its entirety, not the entity
that has opened an account in accordance with the faculties
expressly indicated in the power displayed for that purpose." (The underline is
our)
5. It results from the foregoing that the banking contract that D. B.B.B. signed with the
entity claimed on behalf of the claimant on the basis of the power granted by
she in 2010 exceeded the limits of the representation that was conferred on her, reason
for which the treatment of the personal data of the claimant could not be based
in the legitimizing circumstance of the treatment of article 6.1.b) of the RGPD, nor in
no other as has been reasoned at the beginning of this exhibition, so the
treatment carried out by the entity claimed violated the principle of legality.
The infringement of article 6.1 of the RGPD for which the claimed party is responsible is
It is typified in article 83.5.a) RGPD that establishes:
"The infractions of the following dispositions will be sanctioned, in accordance with the
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
global total annual turnover of the previous financial year, opting for
the largest amount:
a) the basic principles for the treatment, including the conditions for the

consent under articles 5, 6, 7 and 9;".

The LOPDGDD, for prescription purposes, qualifies in its article 72.1.b) as an infringement very serious "The processing of personal data without the concurrence of any of the conditions of legality of the treatment established in article 6 of the Regulation (EU) 2016/679."

v

Lack of diligence of the entity

The Constitutional Court, by all STC 76/1999, affirms that the sanctions administrative ones participate in the same nature as criminal ones, being one of the manifestations of the ius puniendi of the State, and that, as a requirement derived from the principles of legal certainty and criminal legality enshrined in articles 9.3 and 25.1 of the CE, the presence of the element of guilt is essential as condition for the creation of sanctioning responsibility.

Law 40/2015 on the Legal Regime of the Public Sector provides in article 28, under the rubric "Responsibility", "1. They may only be sanctioned for acts constituting of administrative infraction natural and legal persons, as well as, when a Law recognize their capacity to act, the affected groups, the unions and entities without legal personality and independent or autonomous estates, which result responsible for them by way of fraud or negligence."

The defendant is perfectly aware of the relevance it has in the development of its business activity the correct verification of the power that

exhibits who claims to hold the representation of another person. In this sense, it has
contributed with its allegations to the initial agreement the document called "guide
fast", updated on October 17, 2019, of "Registration / Modification of
Quite a lot" with which he affirms that the entity works. document that puts
manifest that the enough of powers is something habitual for her in the development of the
business activity carried out.
The facts set forth in the preceding Basis show that the
claimed did not act with the diligence to which it was obliged. Notwithstanding that in the
contractual document does not show that the claimant intervened in it through
representative, the respondent did not observe the necessary diligence to verify if who -
as it has been affirming since the beginning- acted in the act of the celebration of the business
representative of the claimant had a power of attorney granted in her favor that
empowered to act in that particular contract on her behalf, without which
The principle of legality of the treatment cannot be considered fulfilled.
It is true that the respondent obtained from the alleged representative of the claimant the
copy of the power that he exhibited, kept it at the disposal of the authorities
authorities and has sent a copy to this Agency. Now, the mere reception and
conservation of the power of representation is irrelevant if it has not been accompanied,
at the appropriate time, of its examination and assessment and, as a result of that analysis,
It has been reasonably concluded whether or not that power was enough for the agent to
intervene in a certain legal business on behalf of its principal.
The literal meaning of the power exhibited by the alleged representative of the claimant does not
could raise any doubt about its scope by the clarity of the terms in which
that is written and because in the development of their professional activity they are not
infrequent the actions through a representative that make necessary a
careful reading of the scope of the power that the client exhibits.

In this sense, we bring up the STS of July 15, 1988, cited in its report
by the Bank of Spain, in which it states that credit institutions must
display the diligence of an expert trader, since his activity requires
a certain qualification and experience, as a result of the sector in which they operate, and a
great diversification given the multiplicity of activities they carry out. Sentence
stresses that the due diligence “is not that of a good father of a family, but rather that
corresponds to the defendant as a bank, an expert trader who, normally,
exercises deposit and commission functions for which (...) care is required
especially in these functions, especially if one takes into account that the entities
banking companies find a good part of their just profit in such tasks”.

In the present case in which the offending subject is a bank that acted in the
development of their professional activity requires qualifying as "serious" the lack of diligence
of which suffered the conduct in which the infringement of the RGPD of the
that the defendant is held responsible.

Finally, it is appropriate to point out that the intervention with fraudulent or torticero intention
that eventually could have inspired the third, D.B.B.B., does not excuse
responsibility to the claimed one because it is not proven that she would have acted
with the necessary diligence, taking into account the circumstances of the case. We quote for this purpose
the recent STS, Contentious Chamber, of December 13, 2021, which results
extrapolated to the present case as regards the consequences of its lack of
diligence. The Third Legal Basis states that “[...] that intervention

fraudulent of a third party does not imply by itself that the contracting company has

acted with sufficient diligence. [...]. But it is required of said contracting company,

as necessary diligence so that he cannot be reproached for the breach of his

obligations regarding the protection of personal data [...]

implementation of control and verification measures aimed at ensuring that the person

intends to hire is who they say they are, that is, they coincide with the holder of the DNI

contributed." (emphasis ours)

SAW

Determination of the sanction

1.- Article 58 of the RGPD, under the heading "Powers", establishes in its section 2 that

"Each supervisory authority shall have all of the following corrective powers

listed below:

a) (...)

b) send a warning to any person responsible or in charge of the treatment when the

treatment operations have violated the provisions of this Regulation;

[...]

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

measures mentioned in this section, according to the circumstances of each case

particular;

[...]."

The respondent has requested in its pleadings to the initial agreement and in its

allegations to the proposal that a sanction of economic content not be imposed

but a warning (article 58.2 RGPD) arguing that there is no

of the aggravating circumstances that were appreciated in the opening agreement and that the infraction in

the one that could have been incurred is slight. Subsidiarily, it requests that it be reduced

significantly the amount of the penalty.

In his allegations to the proposal, he adds that the RGPD makes available to the AEPD

(article 58) a plurality of powers that are not economic sanctions; that, in the

In this case, taking into account the concurrent circumstances, it is not appropriate to impose a

economic sanction but only direct a warning in accordance with article 58.2.b)

and that if there were any infraction it would be minor in the sense of the concept

of minor infringement in light of Opinion 2016/679, WP 253, of the Working Group of the

article 29.

This Agency disagrees with the opinion of the respondent since neither the violation of the RGPD

for which he is held responsible can be classified as "slight", much less is it

The substitution of the administrative fine for a warning is acceptable. As it was told

in the resolution proposal the infraction attributed to the one claimed in this file

penalty is not light and such consideration has nothing to do with the classification of

the infractions that the LOPDGDD makes in very serious, serious and minor, according to the

which, article 72.1.b), the offense committed is considered, for the purposes of

prescription, very serious infringement.

It is now reiterated what was said then, that the seriousness of the conduct of the claimed

results from the risk involved; risk to the rights of individuals, in particular

for clients of the financial institution. This, because in their business activity they

has appreciated a serious lack of diligence in the mandatory and rigorous examination that

must make of the power exhibited by a third party in order to conclude if this is enough to

accredit the representation that it claims to hold. And in the risk assessment you must

It must be taken into account that the entity claimed -both the absorbed entity and its successor and currently claimed - are entities with a very important volume of customers.

The opinion 2016/679, WP 253, of the Working Group of article 29 that the claimed invokes makes these considerations that come to ratify the decision to impose a fine sanction:

“[...] by evaluating the facts of the case in light of the criteria provisions provided for in article 83, paragraph 2, the supervisory authority authority may decide that in a particular case it is more or less necessary impose a corrective measure in the form of a fine.

[...]

Recital 148 introduces the notion of 'minor infringements'. sayings Violations may constitute violations of one or more provisions of the Regulation cited in article 83, paragraphs 4 or 5. However, the evaluation of the criteria provided for in Article 83, paragraph 2, can give result in the supervisory authority deeming, for example, that in the circumstances circumstances of the case the violation does not entail a significant risk for the rights of the interested parties and does not affect the essence of the obligation in question. In such cases, the fine may (although not always) be replaced by a warning.[...]

Recital 148 does not oblige the supervisory authority to always replace a fine for a warning in the event of minor infraction but rather

offers that possibility, after a concrete evaluation of all the circumstances

of the case.

[...]

However, the effective, proportionate and dissuasive reaction to a violation

of article 83, paragraph 5, will depend on the circumstances of the case."

"

Based on the foregoing, it must be confirmed that it is not appropriate to adopt the corrective measure of

warning being the appropriate in this case, article 58.2.i) of the RGPD, the

imposition of an administrative fine sanction.

2. Pursuant to Regulation (EU) 2016/679 in determining the fine to be

be imposed for the infringement of article 6.1 of the RGPD for which the company is responsible.

claimed, infringement typified in article 83.5.a RGPD, the

provisions of articles 83.1 and 83.2 of the RGPD, precepts that indicate:

"Each control authority will guarantee that the imposition of administrative fines

under this Article for infringements of this Regulation

indicated in sections 4, 9 and 6 are in each individual case effective,

proportionate and dissuasive."

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

individual case, in addition to or as a substitute for the measures contemplated in the

Article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine

administration and its amount in each individual case will be duly taken into account:

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

such as the number of interested parties affected and the level of damages that

have suffered;

b) intentionality or negligence in the infringement;

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 person in charge or of the person in charge of the treatment,

taking into account the technical or organizational measures that they have applied under

of articles 25 and 32;

e) any previous infringement committed by the person in charge or the person in charge of the treatment;

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

infringement and mitigate the possible adverse effects of the infringement;

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

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

particular whether the person in charge or the person in charge notified the infringement and, if so, in what

measure;

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

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

same matter, compliance with said measures;

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

certification approved in accordance with 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 infringement."

Regarding section k) of article 83.2 of the RGPD, the LOPDGDD, article 76,

“Sanctions and corrective measures”, provides:

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

may also be taken into account:

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of treatment of

personal information.

c) The profits obtained as a result of committing the offence.

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

of the offence.

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

infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when not mandatory, a data protection officer.

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

alternative conflict resolution mechanisms, in those cases in which

there are controversies between them and any interested party.”

The respondent begins her arguments regarding the proposal by reiterating considerations

that he already made in his allegations to the opening agreement referring to the ancillary nature

that, in his opinion, the concurrent circumstances in the case have for this Agency

in order to set the amount of the penalty. He argues that for the AEPD the presence of

the circumstances is "merely accessory" because, according to what he maintains, the Agency

coincides in imposing the same sanction of a fine -60,000 euros- for any

infraction that does not deserve a particularly high sanctioning reproach.

The respondent adds in the allegations to the proposal that in the determination of the

amount of the fine to be imposed, the principle of

proportionality and cites for this purpose the STS of November 20, 2001 (appeal of cassation 7686/1997) on whose foundations it is based to conclude that "it is necessary that the sanctioning body proceed to meticulously evaluate the concurrent circumstances in this proceeding.

In accordance with the transcribed article 83.1 of the RGPD, proportionality is a requirement law to which this regulatory body is subject in determining the amount of the penalty fee. Precept that also obliges this Agency to ensure that the fine imposed in each case is “effective” and “dissuasive”. The principle of proportionality implies a correspondence between the seriousness of a behavior and the sanctioning consequence attributed to it, so the violation of said principle will occur when such correspondence does not exist. However, in light of the offending conduct, and given the concurrent circumstances in the case, there is no lack of proportionality in the sanction fine of 60,000 euros that was set in the proposal letter and that confirms this resolution. This, despite the fact that the respondent affirms exhaustively in its allegations to the proposal -without specifying on what he bases such affirmations- that the action of the AEPD "is very far from the objectivity and impartiality that are per se required normatively.”

In the present case, in accordance with the provisions of article 83.2 of the RGPD and of the exposed facts, it is estimated that the following factors concur that reveal a greater unlawfulness or culpability of the conduct that is the object of assessment:

-Article 83.2.a) of the RGPD: “the nature, seriousness and duration of the infringement

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

[..]".

This circumstance has a great significance in the matter analyzed because it

It encompasses various aspects that affect the unlawfulness of the conduct and

in the guilt of the defendant: the duration of the offense and its seriousness.

Regarding the duration of the infraction attributed to the claimed one, it is highlighted that, in

In this case, the infringing conduct participates in the very nature of the so-called

permanent infractions, in which the consummation is projected in the shortest time

beyond the initial fact and extends, violating the data protection regulations,

during the entire period of time in which the data is processed. I know

pronounced in this sense the sentences of the National High Court of 09/16/2008

(rec.488/2006) and the Supreme Court of 04/17/2002 (rec. 466/2000)

In the report issued by the Department of Conduct of Entities of the Bank of

Spain that appears in the file shows that the respondent opened the account in the name

of the claimant on July 26, 2018 and informed her in writing that on July 26,

February 2020 caused a loss as a starter. Therefore, the illicit treatment of data

of the claimant was maintained over time for at least one year and seven months.

The objections that the respondent has put forward rejecting the application of this

circumstance as an aggravating circumstance cannot prosper. The entity argues that

"In this sense, it cannot be considered a permanent infraction,

while the contract itself was terminated in which the claimant

he was a starter for a limited period of time.

BANKIA, in response to the request for cancellation and termination of the account contract

interested party, presented by the claimant on 02/05/2020, proceeded to

execute said order on 02/26/2020; that is, he processed the claimant's withdrawal from the

account in a period of less than a month from when it was requested. Likewise,

the circumstances of the procedure in question would only affect, in all

case, and exclusively, to the claimant, since it is about the interpretation

of the content of a specific power of attorney, not a failure of the admission and

process of sufficient powers of representation."

Article 83.2.a) of the RGPD contemplates as a factor that affects the determination of the

the amount of the fine the duration of the offence. And, as has been said, it is consubstantial

to the permanent nature of the infringement, as opposed to those of mere activity,

that the illicit conduct is committed during the entire time in which the

treatment contrary to the RGPD, in this case for nineteen months. question that

It has nothing to do with the time it took for the claimed party to cancel the

claimant as the account holder, on which it should be added, on the other hand, that

In order to cancel it, it was necessary for the claimant to go to the Bank

from Spain.

Regarding the seriousness of the offending conduct in application of article 83.2.a) of the

RGPD, we reproduce what was said in the resolution proposal: That it must

be assessed in connection with the following factors that affect the operation of

treatment: its "nature, scope or purpose". It turns out that the infringement

committed is "serious" insofar as it occurs in the development of the activity itself

of a private bank for which it is essential that a perfect and correct

identification of the subjects who are holders of banking operations,

operations that, in addition, have transcendence in other areas, such as the fiscal one. The

infringing conduct occurred as a result of not accrediting the hiring of

the account in the name of the claimed party through the intervention of a supposed

representative and an improper assessment of the scope of the power exhibited what connects

that conduct with a breach of the obligations inherent to its activity

business.

The respondent has objected to what was stated in the preceding paragraph, identical to the

of the proposed resolution, that “in no case is it a situation that affects the

all contracts through a representative, since, as stated

has argued and proven in the Initiation Agreement, my principal has a

fairly reliable and robust system, in which all the measures for

analyze and verify the content of any power of attorney and the powers that are

can bestow through it.” (The emphasis is ours) And it should be noted that

that is, in no way is it stated in the proposal or in this resolution that

have been affected neither the totality of the hirings nor any other hiring

than the one on which the facts that are the object of this procedure deal.

-Article 83.2.b) the intentionality or negligence of the infraction;

As stated in the preceding arguments, the conduct of the defendant

suffers from a "serious" lack of diligence, as the aforementioned STS of 15 reminds us

of July 1988. It is part of the diligence that is required, since it is inherent to its

activity, that the claimed verify that the power that the representative exhibits over the

representation that he claims to hold effectively enables him to act on behalf of the

owner of the data in the specific business that is intended to be carried out.

Also connected with the degree of diligence that the data controller is

obliged to deploy in the fulfillment of the obligations imposed by the

Data protection regulations include the SAN of 10/17/2007 (Rec. 63/2006).

Although it was issued before the entry into force of the RGPD, its pronouncement is perfectly

extrapolated to the case we are analyzing. The SAN, after alluding to the fact that

entities in which the development of their activity entails a continuous treatment of

customer data and third parties must observe an adequate level of diligence,

specified that “(...). the Supreme Court has been understanding that there is imprudence

whenever a legal duty of care is disregarded, that is, when the offender fails to

behaves with due diligence. And in assessing the degree of diligence,

especially weigh the professionalism or not of the subject, and there is no doubt that,

in the case now examined, when the appellant's activity is constant and

abundant handling of personal data, it must be insisted on the rigor and

exquisite care to adjust to the legal precautions in this regard”. (The underlined

is ours)

The defendant has objected to the estimation of this aggravating circumstance that the AEPD violates with

this article 24.2 of the C.E. because, he affirms, that this Agency has established “a

presumption, completely devoid of any type of evidentiary support” “when considering

that a CONCRETE power with a content susceptible to interpretation

controversial, implies that the management and process of enough in the Entity is

deficient per se, without offering any guarantee to the principals; what it means

a clear violation of the principle of presumption of innocence and to attribute to my

principal a blatant lack of diligence that is denied by the procedure

internal authorized for the purpose at hand.”

However, the alleged presumption that the claimed complaint has not been established

in no case.

- The obvious link between the business activity of the defendant and the treatment of personal data (article 83.2.k, of the RGPD in relation to article 76.2.b, of the LOPDGDD) In the business activity of the claimed entity, it is essential to treatment of personal data of its clients, therefore, taking into account the important volume of business of the claimed financial entity - of the entity absorbed- when the events occur (between July 2018 and February 2020) the significance of the infringing conduct object of this claim is undeniable.

The following operate as circumstances that mitigate the seriousness of the infraction:

-Article 83.2.k, RGPD, in relation to article 76.2.e) of the LOPDGDD: “The existence of a merger by absorption process subsequent to the commission of the infringement that cannot be attributed to the absorbing entity.”

On 03/26/2021 -therefore, after the infraction was committed- the registered in the Mercantile Registry the public deed with the merger agreement by absorption between BANKIA, S.A., (as absorbed entity) and CAIXABANK, S.A., (as acquiring entity).

This circumstance was appreciated both in the initial agreement and in the proposal for resolution, despite the fact that the respondent denies that this was the case.

The respondent criticizes that the Agency has not taken into consideration as mitigating that "there has been no benefit for my principal derived from the activity object of reproach, as well as that there has been no damage” and requests its application.

Indeed, the AEPD rejected in the proposed resolution the request of the claimed that the circumstance provided for in article 83.2.k) of the RGPD in connection with article 76.2.c) LOPDGDD. It was indicated to that respect that the decision not to uphold the extenuating circumstance invoked to the contrary was in

consistent with the criteria followed by the National High Court, Contentious Chamber

Administrative, among others, in the SAN of April 17, 2018 (rec. 254/2017) that

We consider that it can be extrapolated to the case despite the fact that it was issued under the LOPD.

In the aforementioned SAN, the Court rejected the claim of the plaintiff,

sanctioned by the AEPD, that article 45.5.e) LOPD be applied as a mitigating factor

for “no benefits.” The Court argues (Third Legal Basis) that

“Regarding the absence of benefits, we cannot but reiterate what was argued by the

appealed resolution, regarding what is relevant is that the actions of A yes were

motivated by the search for economic benefit, so the fact that the former

is not finally obtained cannot serve as a basis for an attenuation of

culpability or unlawfulness of their conduct. (emphasis ours)

The claim of the claimant, which it reiterates in its allegations to the proposal, that

the circumstance of article 76.2.c) LOPDGDD, in

connection with article 83.2.k) of the RGPD, cannot be accepted. This Agency estimates

that the correct application of both provisions unequivocally leads to

reject that such a circumstance can be applied as a mitigating factor, so that

It can only be applied as an aggravating circumstance.

Article 83.2.k) of the RGPD refers to “any other aggravating or mitigating factor

applicable to the circumstances of the case, such as profits made or losses

avoided, directly or indirectly, through the infraction” and article 76.2.c) of the

LOPDGDD provides that, in accordance with the provisions of article 83.2.k) of the RGPD,

The following may also be taken into account: “c) The benefits obtained as a result

of the commission of the offence.”

The admission of the "absence" of benefits as a mitigating factor would be in

contradiction with article 76.2.c) of the LOPDGDD, since the budget of

fact on which that circumstance is built is, exclusively, the "obtaining

of benefits” since it strictly mentions the “benefits obtained”.

At the same time, article 83.2 of the RGPD -which relates the circumstances that

shall be duly taken into account in the imposition of a fine and its amount- on

whose base is applied, in connection with section k), article 76.2.c) of the

LOPDGDD, must necessarily be interpreted in light of the principles that are

detailed in section 1 of article 83: the sanctions must be “in each case

individual” “effective”, “proportionate” and “dissuasive”.

Admitting the "absence" of benefits as a mitigating factor would be in total contradiction

with the dissuasive nature that the fine must have in accordance with article 83.1 of the RGPD.

By assessing the "absence" of benefits as a mitigating factor, to the extent that

lessens the effect that the set of circumstances have on the quantification of the

amount of the fine, its dissuasive effect is restricted and the person responsible is reported a

benefit that has not been deserved. It would be an artificial reduction of the sanction

which can lead to the understanding that breaking the rule without obtaining benefits, financial or

of whatever type, implies a decrease in the unlawfulness or the culpability of

the offending conduct.

Appreciated the concurrence, as aggravating factors, of the circumstances of the

sections a), b) and k) of article 83.2 of the RGPD, the last in relation to article

76.2.b) of the LOPDGDD, and the mitigation of article 83.2.k) of that legal text in

In relation to article 76.2.e) of the LOPDGDD, the amount of the

fine to be imposed on the person claimed for the infraction of article 6.1. of

RGPD, typified in its article 83.5.a).

Therefore, in accordance with the applicable legislation and having assessed the criteria for

graduation of the sanction whose concurrence has been accredited,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE CAIXABANK, S.A., with NIF A0866***ACCOUNT.119, for a

infringement of article 6.1 of the RGPD, typified in article 83.5.a) of the RGPD, a

fine €60,000 (sixty thousand euros)

SECOND: NOTIFY this resolution to CAIXABANK, S.A., with NIF

A0866***ACCOUNT.119.

THIRD: Warn the sanctioned party that he must make the imposed sanction effective once

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

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

Common Public Administrations (hereinafter LPACAP), within the payment term

voluntary established in article 68 of the General Collection Regulation,

approved by Royal Decree 939/2005, of July 29, in relation to article 62 of

Law 58/2003, of December 17, through its entry, indicating the NIF of the

sanctioned and the number of the procedure that appears in the heading of this

document, in restricted account number ES00 0000 0000 0000 0000 0000, open to

name of the Spanish Agency for Data Protection in the bank

CAIXABANK, S.A. Otherwise, it will proceed to its collection in period

executive.

Received the notification and once executed, if the date of execution is

between the 1st and 15th of each month, both inclusive, the term to make the payment

voluntary will be until the 20th day of the following month or immediately after, and if

between the 16th and last day of each month, both inclusive, the payment term

It will be until the 5th of the second following month or immediately after.

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

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

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

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

Interested parties may optionally file an appeal for reconsideration before the

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

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

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

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

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

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

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

aforementioned Law.

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

may provisionally suspend the firm resolution in administrative proceedings if the

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

If this is the case, the interested party must formally communicate this fact by writing addressed to the Spanish Agency for Data Protection, presenting it through Electronic Register of the Agency [https://sedeagpd.gob.es/sede-electronica-web/], or through any of the other registers provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the documentation proving the effective filing of the contentious appeal-administrative. If the Agency was not aware of the filing of the appeal contentious-administrative within a period of two months from the day following the notification of this resolution would end the precautionary suspension.

Sea Spain Marti

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