 File No.: PS/00373/2021

RESOLUTION OF PUNISHMENT PROCEDURE

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

to the following

BACKGROUND

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

that on July 29, 2020, it is published in the Official Gazette of the Principality of

Asturias, the "Resolution of July 29, 2020, of the Ministry of Health, third

modification of urgent prevention, containment and coordination measures

necessary to deal with the health crisis caused by COVID-19" (in

hereinafter, the Resolution of July 29, 2020).

This resolution incorporates in section 3.4. of the Annex the obligation to

certain types of establishments to have a register of clients and

users available to the General Directorate of Public Health, in order to

"facilitate the tracing and follow-up of contacts of positive or suspected cases of

Covid-19". The resolution itself stipulates that "the collection of such data will require the

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

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

recommends the adoption of similar registration systems by holders of

hotel and restaurant establishments, nightclubs and entertainment venues

night.

In order to clarify this treatment, it urges the Subdirectorate General for Inspection of

Data (hereinafter, SGID), to initiate the preliminary investigation actions to which

refers to article 67 of Organic Law 3/2018, of December 6, on Protection

of Personal Data and Guarantee of Digital Rights (hereinafter,

LOPDGDD), in case such facts indicate signs of infraction in the

scope of competence of the AEPD.

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

prior investigative actions for its clarification, by virtue of the powers

of investigation granted to the control authorities in article 57.1 of the

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

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

of personal data and the free circulation of these data and by which the

Directive 95/46/EC (General Data Protection Regulation, hereinafter RGPD),

and in accordance with the provisions of Title VII, Chapter I, Second Section, of the

LOPDGDD.

Within the framework of the preliminary investigation actions, a first

request for information addressed to the GOVERNMENT HEALTH MINISTRY

FROM THE PRINCIPALITY OF ASTURIAS (hereinafter, the investigated party):

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

In this requirement, dated August 7, 2020, the following is requested:

information:

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

sustains.

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

cessity, and proportionality in the strict sense).

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

tion of compliance with the principle of data minimization.

4. Determination of the categories of establishments required to implement

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

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

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

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

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

links the person in charge of the treatment with the person in charge of the same, in accordance

with the provisions of article 28 of the RGDP.

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

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

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

5.3. Communication procedure of the registry data of each establishment

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

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

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

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

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

assigned treatment).

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

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

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

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

tion.

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

do.

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

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

The request is notified to the investigated on August 9, 2020, through the

Electronic Notification Service and Authorized Electronic Address, according to

certificate in the file.

THIRD: On August 26, 2020, the respondent adduces the allegations that

it deems appropriate and to which a response is given in the report issued by the SGID,

which is reproduced in the Sixth section.

FOURTH: On April 15, 2021, the AEPD makes a second request

in the following terms:

"In this regard, within the framework of the actions carried out by the General Subdirectorate

General Data Inspection and in use of the powers conferred by article 58.1

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

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

processing of personal data and the free circulation of these data and by which the

ga Directive 95/46/EC (General Data Protection Regulation) (hereinafter

GDPR), and art. 67 of Organic Law 3/2018, of December 5, on the Protection of

Personal Data and guarantee of digital rights (hereinafter LOPDGDD), is

requests that within ten business days you submit the following information:

1. Description of the current situation of the measures related to the registration obligation

other included in said resolution. Reference to the validity of these and, where appropriate,

to the type of affected establishments.

2. Details of any other circumstance related to data processing

subject to registration whose implementation has differed from what is specified

in writing*** WRITTEN.1."

Likewise, it is reported that the person in charge and the person in charge of the treatment of the

personal data have the obligation to provide the documents,

information and any other collaboration required to carry out the function of

inspection.

The request is notified to the investigated on April 15, 2021, through the

Electronic Notification Service and Authorized Electronic Address, according to

certificate in the file.

FIFTH: In response to the second request, on April 22, 2021, the

investigated adduces the allegations that it deems appropriate and to which it is given

response in the report issued by the SGID, which is reproduced in the section

Next.

SIXTH: On April 23, 2021, once the previous actions of

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

tions that justify the processing of the procedure, the SGID issues a report in which

the following facts are found:

"RESULT OF THE INVESTIGATION ACTIONS

This report is based on the following information:

-

Document from the Ministry registered at the AEPD

(number *** ECRITO.1) dated August 26, 2020 (hereinafter

WrittenCounseling1).

-

Document from the Ministry registered at the AEPD (no.

***WRITTEN.2) dated April 22, 2021 (hereinafter Written Counseling2).

(…)

The following content of the AEPD Communiqué is set forth below

related to the purpose of these actions:

"[…] In this regard, it is necessary to point out that the data that is collected,

even if they are related to the control of the pandemic and their treatment is

object of being able to identify possible infected, they are not data cataloged in the

GDPR as "special categories".

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

In the case of a measure for the containment of the coronavirus, its

necessity by the health authorities and it has to be obligatory, since if it were

voluntary would lose effectiveness. Additionally, if the legal basis of the

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

no negative consequences were derived, that is, that the

entrance to the establishment.

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

of taking data by the establishments has to be established by a

standard with the force of law. In such a case, the legal basis would be 6.1.c) ("the treatment

it is necessary for the fulfillment of a legal obligation applicable to the person in charge

of treatment").

In any case, it should be noted that proper monitoring of the
evolution of infections and the obligation to collect data and transfer it to the
health authorities is based on the guarantee of a public interest of
control the pandemic, so the legal basis would be, preferably, the
article 6.1.e) of the RGPD ("the treatment is necessary for the fulfillment of a
mission carried out in the public interest or in the exercise of public powers conferred
to the data controller").

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

On the other hand, the collection and transfer of data should be organized in a
that the registry allows the possible contacts to be identified (that is, that there is a
probability that they coincided, being at the same time, in the same place,
and so on). In another case, as could happen in a museum, if there is an infected person and
warns the thousands of people who could have visited that day, apart from being
overtreatment, difficulties or even collapse in the
healthcare. Issue that the authorities also have to assess
health of the Autonomous Communities.

Additionally, the principle of minimization must be complied with, by virtue of which
it might be enough to get a phone number, along with the day's data

and the time of assistance to the place. This criterion, together with the anonymization of the

holders of the device, has been assumed by the European Committee for the Protection of

Data in the Recommendation on the use of location data and applications of

contact tracing in the context of the pandemic; criteria that can

be extrapolated to this situation with the pertinent adaptations.

Consequently, it would not be necessary to request the name and surnames, which would be

unnecessary for the purpose of notifying potential contacts, and in no case

Identification by DNI is necessary because it is disproportionate.

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

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

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

conservation.

According to these criteria, establishments would be responsible for the

collection of data by virtue of a legal obligation established by a norm with

range of law and the regional administration would be the assignee of these data by

reasons of public interest provided by law. The regional administration must

establish criteria on the way in which this data is collected and communicated

personnel to the Health Administration.

For their part, citizens must receive clear, simple and

accessible about the treatment before the collection of personal data. In

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

With regard to the measures related to the registration of clients of

certain establishments taken by the Ministry, is collected at

Below is information on the different aspects:

1.

In relation to the purpose, the Written Counseling1 states that "The obligation to

record the data and contact telephone number of customers and users who come to

hotels, hostels and other tourist accommodation, hairdressers, barbershops, centers

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

saunas, spas, spas and gyms, has the sole purpose of facilitating the tracking

and follow-up of contacts of positive or suspected cases of Covid-19.”

In addition, it also indicates that "[...] the data record and contact telephone number are

will be exclusively available to the General Directorate of Public Health

and will have the sole purpose of facilitating the tracing and follow-up of contacts of

positive or suspected cases of Covid-19.

two.

In this regard, the Written Counseling1 states that the personal data that is

processed for this purpose are “Name and/or surnames and telephone number of

Contact". It also adds that "the data cited is strictly

necessary for the intended purpose, as well as being adequate, relevant and

limited to what is necessary in relation to the purposes for which they are processed.

Having a name or a surname and a telephone number are data

minimum that will serve to immediately have contact data of

people to be able to quickly deal with the follow-up of cases and

interrupt the chains of transmission that may originate in certain

establishments.”

3.

On the categories of personal data subject to treatment.

About the purpose of personal data processing.

On the scope of the measures.

In the EscritoConsejería1 the following list of establishments is provided

affected by this measure:

“Mandatory: holders of hotels, hostels and other tourist accommodation,

hairdressers, barbershops, beauty centers, beauty cabinets, salons

manicure, pedicure and waxing, saunas, spas, spas and gyms.

Justification: All these establishments work with a prior appointment system.

where the name and telephone already appear. Having these does not present difficulties

for the holders of the same, and yet, in these moments of crisis

health caused by COVID-19 provides very useful information and

valuable in controlling the spread of the virus.

Recommendation: owners of hotel and restaurant establishments,

discos and nightlife venues

Justification: In this case it is a recommendation because these establishments

They do not have a prior appointment system and it would be disproportionate to require it. Without

However, in order to seek the proportionality of the measure, it is with good

known, a very high number of people circulate in these premises whose registration,

if it existed, it would greatly favor the identification of people for the purposes of

to be able to carry out the adequate epidemiological investigation and prevent

effective protection of the health of the population.

In relation to the evolution of this measure, the Ministry, as part of the

Written Counseling2, states the following:

“By Resolution of July 29, 2020, of the Ministry of Health, the

third modification of the urgent measures of prevention, containment and

necessary coordination to deal with the health crisis caused by the

COVID-19, where it was collected as a public health measure, all of this

in order to facilitate the tracing and follow-up of contacts of positive cases

or suspected of Covid-19, the obligation to record the data and telephone number of

contact of customers and users who access hotels, hostels and other

tourist accommodation, hairdressers, barbershops, beauty centers,

aesthetics, manicure, pedicure and hair removal salons, saunas, spas, spas and

gyms. A recommendation to the same effect is also included for the

hotel and restaurant establishments, nightclubs and entertainment venues

night.

Within the content of the operative part of the aforementioned resolution, it is indicated in the

third section regarding the monitoring and application of the measure that the

compliance with the measures provided for in this resolution will be subject to

continuous monitoring and evaluation in order to guarantee its adaptation to the

evolution of the epidemiological and health situation. For these purposes, they may be

object of modification or deletion by Resolution of the Ministry

competent in health matters.

For its part, the sixth section includes the validity of the measure, stating that the

This resolution will take effect from its publication in the Official Gazette of the

Principality of Asturias and will remain in force until the Government declares the

end of the health crisis situation caused by COVID-19, by

protection of article 2.3 of Royal Decree-Law 21/2020, of June 9, (today Law 2/2021, of March 29, of urgent measures of prevention, containment and coordination to deal with the health crisis caused by COVID-19).

On the legal basis of the processing of personal data.

Consequently, it is appropriate to inform that the measure is still in force in the same conditions than those initially established, without having been subject to any modification.

On the other hand, the measure remains in force until the Government declares the end of the health crisis. Now, nothing will prevent that when the epidemiological situation that gave rise to the need for its adoption disappears (may be prior to the end of the declaration of health crisis), the same is left without effect to guarantee at all times the suitability [sic], necessity and proportionality that govern the adoption of these special measures."

Four.

In relation to the legal basis of the processing of personal data derived of the imposition of the measure, the Counseling Document1 states that:

"The basis of legitimation has been understood to be determined by article 9.2.i) of Regulation (EU) 2016/6753 (treatment is necessary for reasons of public interest in the field of public health), with internal legal support in the Law Organic Law 3/1986, of April 14, on Special Measures in Health Matters Public, and more specifically in its article 3 when it provides that "In order to

control communicable diseases, the health authority, in addition to carrying out
general preventive actions, may adopt the appropriate measures for the
control of the sick, of the people who are or have been in contact with
the same and the immediate environment, as well as those considered
necessary in case of risk of a transmissible nature".

While the data that is collected is certainly not, in and of itself, data
specially protected as belonging to special categories of data,
both the purpose of its collection and its only planned transfer, determine a
exclusive use of sanitary character. Thus, it is pointed out that the registration of data and
The contact telephone number will be exclusively available to the Management
General Public Health and will have the sole purpose of facilitating the tracking and
follow-up of contacts of positive or suspected cases of Covid-19.

In this sense, we must point out that recital 46 of the Regulation
2016/679 establishes that the processing of personal data must also
considered lawful when necessary to protect an essential interest for the
life of the interested party or that of another natural person. In principle, the personal data
should only be processed on the basis of the vital interest of another natural person
when the processing cannot be manifestly based on a legal basis
different. Certain types of treatment may respond to both reasons
matters of public interest and the vital interests of the data subject, such as
example where the processing is necessary for humanitarian purposes, including
control of epidemics and their spread, or in emergency situations
humanitarian, especially in the event of natural or man-made disasters.

On the other hand, it is necessary to point out that the Decree-Law is regulated in the
Article 86 of the Spanish Constitution. It is a norm with the rank of law of the
Executive. It may be dictated by the Government when there is a budget

enabling that justifies it, which must be an extraordinary and urgent need

regulation of that specific matter. However, this figure is not provided for in

the Asturian legal system, therefore, in order to approve a Law, it would be necessary

a period of time of several months that would be incompatible with the situation

of current health crisis that demands urgent and extraordinary measures in the

shortest term possible.

Likewise, it is necessary to bring up the Report of the Agency for the Protection of

Data nº 0017/2020 where it is stated that there are necessary safeguards to

legitimately allow the processing of personal data in situations of

health emergency like the one we are in, respecting the principles

established as is the limitation of the purpose to safeguard interests

as vital as people's health."

5.

On the proportionality of personal data processing.

In the Written Counseling1 the following assessment is provided in this regard:

“Suitability and necessity: As indicated in the Resolution of July 29, 2020, of the

Ministry of Health, third modification of the urgent measures of

prevention, containment and coordination necessary to deal with the crisis

health caused by COVID-19 at the present time, we are in

a critical situation of exceptional importance for world health and for the

health of the Asturian population. The evolution of the pandemic will be dynamic and

Many of the decisions that are made will have to be consistent with
epidemiological changes at each moment. Although the trend
epidemiological incidence of cases in our autonomous community has been
very contained since June 11 - being one of the European regions with
fewer cases- both the current situation of outbreaks in other autonomous communities
as the increase in the transit of people from areas with more incidence, suppose
that there is a high probability of appearance of new cases and outbreaks throughout
of the next few weeks. It would be important to keep an incidence contained
both to establish an adequate control in the present and to be able to reach the
autumn with the best possible epidemiological situation and with a health system
public health sector recovered from the impact caused by the first wave
epidemic, and thus, in this way, guarantee the best surveillance services,
prevention and attention to the Asturian population.

Proportionality: The obligation to record the data and contact telephone number of
customers and users who go to hotels, hostels and other accommodation
tourism, hairdressers, barbershops, beauty centers, beauty cabinets, salons
manicure, pedicure and hair removal, saunas, spas, spas and gyms, has
as the sole purpose of facilitating the tracing and follow-up of contacts of cases
positive or suspected of Covid-19.

In addition, the measure does not generally imply a significant burden for the
affected establishments given that many of them currently carry
registers of their clients or users or use prior appointment systems. This measure
It is voluntary for owners of hospitality establishments and
restaurants, discos and nightlife venues.

The [sic] measures that are adopted contain the essential regulation for the
achievement of the objectives of facilitating the tracing and follow-up of contacts of

positive or suspected cases of Covid-19, since they are proportionate to the good public it is trying to protect.

The identification, quarantine and follow-up of contacts of COVID-19. It constitutes one of the basic pillars to be able to interrupt the chains of transmission that can originate in establishments where they coincide in the

time non-cohabiting people in conditions in which it is not always possible to ensure adequate interpersonal distance. In this sense, the possibility of immediately have the contact details of the people who have could coincide with cases of COVID19 in these establishments, during the periods of risk of transmissibility of the infection of these cases, supposes a Significant improvement in the speed and effectiveness of taking action control over these contacts.

Similarly, it should be noted that the collection of such data will require the consent of the interested party. It is true that even recital 54 of the RGPD admits that the treatment of categories, special personal data may be necessary for reasons of public interest in the field of public health without the consent of the interested party. Again, we can observe as the measure established by this Ministry is proportionate to the purpose pursued and intends to respect at all times the principle of minimization of fact."

6.

On this matter, the Counseling Document 1 refers only to the following:

“For this reason, it will only be necessary to go to the registered data (name and/or surnames and phone) when we are facing a positive or suspected case of Covid-19. The data must be deleted after one month from the access since after said period, they lose their purpose, which is to deal with the health crisis at the we face."

About the retention periods of personal data.

SEVENTH: In accordance with the evidence available, the SGID considers that the treatment of personal data that is carried out by the investigated does not meet the conditions imposed by the regulations on data protection, therefore that the opening of this sanctioning procedure proceeds.

EIGHTH: On July 22, 2021, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimed party, 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 (in hereinafter, LPACAP), for the alleged infringement of articles 5.1.c), 5.1.e), 7 and 13 of the RGPD, typified in article 83.5 of the RGPD and article 72.1 of the LOPDGDD.

Likewise, it ordered the HEALTH MINISTRY OF THE GOVERNMENT OF THE PRINCIPALITY DE ASTURIAS, in accordance with the provisions of article 58.2 d) of the RGPD, so that within TEN DAYS proceed to order the person in charge or persons in charge of the treatments, that the treatment operations conform to the provisions of the RGPD and the LOPDGDD. He also required that within ONE MONTH he accredit before the AEPD the fulfillment of:

-

The adoption of all necessary measures so that the investigated entity act in accordance with the principles of «data minimization» and «limitation»

retention period", of article 5.1 sections c) and e) of the RGPD.

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

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

corresponding establishment, prior to the collection of the pertinent data.

-

personnel of the same, all the information required in the aforementioned precept, for which

that the provisions of article 7 of the RGPD must be taken into account in relation to

tion with the conditions for consent and article 6 of the LOPDGDD.

NINTH: The initiation agreement is duly notified electronically to the party

claimed on July 22, 2021, through the Electronic Notifications Service.

tronics and Authorized Electronic Address, according to the certificate that appears in the file.

tea.

TENTH: With date of both issue and notification of November 19,

2021, the instructor of the procedure agrees to open a trial period for

a period of 10 business days, in order to carry out the tests that,

Due to their relevance, the following are declared relevant:

1. All the documents obtained and

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

They are part of the procedure E/06499/2020.

2. Likewise, the allegations to the

Agreement to initiate the referenced sanctioning procedure presented by the

HEALTH COUNSELING.

Faced with said agreement to open the probationary period, the respondent has not

made a statement or provided any additional document.

ELEVEN: After the term granted for the formulation of allegations to the

agreement to initiate the procedure, it has been verified that no allegation has been received

any by the claimed party.

Article 64.2.f) of Law 39/2015, of October 1, on Administrative Procedure

Common Public Administrations (hereinafter LPACAP) -provision of which

the party claimed was informed in the agreement to open the proceeding-

establishes that if allegations are not made within the stipulated period on the content of the

initiation agreement, when it contains a precise statement about the

imputed responsibility, may be considered a resolution proposal. In the

present case, the agreement to initiate the disciplinary proceedings determined the

facts in which the imputation was specified, the infraction of the RGPD attributed to the

claimed and the sanction that could be imposed. Therefore, taking into account that

the party complained against has made no objections to the agreement to initiate the file and

In accordance with the provisions of article 64.2.f) of the LPACAP, the aforementioned agreement of

beginning is considered in the present case resolution proposal.

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

In this proceeding, the following are considered proven facts:

PROVEN FACTS

FIRST: On June 11, 2020, the already repealed Royal Decree comes into effect.

decree-law 21/2020, of June 9, on urgent prevention, containment and

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

Articles 5, 23, 26 and 27, provided:

Article 5. Action plans and strategies to deal with health emergencies.

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

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

action plans and strategies to deal with health emergencies, through

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

risk of exposure and community transmission of COVID-19 disease

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

law.

Article 23. Information obligation.

1. The obligation to provide the competent public health authority with

all the necessary data for monitoring and epidemiological surveillance

of COVID-19 that are required by it, in the appropriate format and in a

diligently, including, where appropriate, the data necessary for personal identification.

nal.

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

public administrations, as well as any center, body or agency de-

pending of these and any other public or private entity whose activity has

have implications for the identification, diagnosis, follow-up or management of

you are COVID-19.

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

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

to the health professionals who work in them.

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

The establishments, means of transport or any other place, center or entity public or private entity in which the health authorities identify the need ability to carry out traceability of contacts, they will have the obligation to provide the health authorities the information they have or that is requested regarding the identification and contact details of persons potentially affected.

Article 27. Protection of personal data.

"1. The treatment of personal information that is carried out as consequence of the development and application of this royal decree-law will be in accordance with the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, regarding the protection of natural persons. cas with regard to the processing of personal data and the free movement of these data and by which Directive 95/46/CE is repealed, in the Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of the digital rights, and in what is established in articles eight.1 and twenty-three of the Law

14/1986, of April 25, General Health. In particular, the obligations of training to the interested parties regarding the data obtained by the subjects included within the scope of application of this royal decree-law shall comply with the provisions placed in article 14 of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, taking into account the exceptions and obligations

tions provided for in section 5.

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

3. Those responsible for the treatment will be the autonomous communities, the cities from Ceuta and Melilla and the Ministry of Health, within the scope of their respective competencies, which will guarantee the application of the security measures that result from the corresponding risk analysis, taking into account that the processing affects special categories of data and that such processing These procedures will be carried out by public administrations obliged to comply of the National Security Scheme.

4. The exchange of data with other countries will be governed by Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, having taking into account Decision No. 1082/2013/EU of the European Parliament and of the Council, of October 22, 2013, on serious cross-border threats to the health and the revised International Health Regulations (2005), adopted by the Fifty-eighth World Health Assembly held in Geneva on May 23, 2005."

SECOND: On June 19, 2020, it is published in the Official Gazette of the Principal Asturian Council (BOPA) the "Resolution of June 19, 2020, of the Ministry of Health (BOPA 06.19.2020), which establishes urgent prevention measures, containment and coordination necessary to deal with the health crisis caused

by COVID-19 after the expiration of the validity of the state of alarm, once the

Phase III of the Plan for the transition to a new normal has been completed".

THIRD: Said resolution of June 19, 2020 has undergone five modifications to

through the resolutions listed below:

1. Resolution of the Minister of Health of July 14, 2020,

2. Resolution dated July 23, 2020,

3. Resolution dated July 29, 2020,

4. Resolution dated August 18, 2020,

5. Resolution dated October 9, 2020.

FOURTH: The Resolution of July 29, 2020, of the Ministry of Health, third

modification of the urgent prevention, containment and coordination measures necessary

saries to deal with the health crisis caused by COVID-19, collects, in the

section 3.4. of its Annex, the obligation for certain types of establishments

to have a register of clients and users available to the General Management

of Public Health, in order to "facilitate the tracing and follow-up of contacts of

positive or suspected cases of Covid-19".

The resolution itself stipulates that "the collection of such data will require the consent of

of the interested party, without prejudice to conditioning the right of admission for reasons of

public health in case of not being able to count on it". Likewise, it recommends the

adoption of similar registration systems by owners of establishments

hotel and restaurant services, discos and nightlife venues.

FIFTH: Said section will not be modified in subsequent resolutions, but beyond being reproduced in the Resolution of November 18, 2020, of the Ministry of Health, which orders the publication of the consolidated text of informative nature of urgent prevention, containment and coordination measures necessary to deal with the health crisis caused by COVID-19 after the expiration of the validity of the state of alarm.

SIXTH: Of the documentary that works in the file and of all the above exposed, the facts imputed to the claimed party are proven and accredited consisting of:

Require an excessive amount of data to achieve the ultimate goal

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pursued with them, which would be to be able to quickly locate a possible contact, which implies a breach of article 5.1 c) of the RGPD that stipulates that the personal data processed are adequate, pertinent and limited to what is necessary in relation to the purposes for which they are processed ("data minimization").

The resolution sets a term of one month from access, without collecting

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expressly the reasons for that time scope, which is contrary to what established in article 5.1 e) of the RGPD that determines that the data is will be kept "for no longer than is necessary for the purposes of the treatment".

Likewise, Recital 39 of the RGPD says: "This requires, in particular, guarantee that its retention period is limited to a strict minimum."

Failure to comply with the provisions of articles 4.11) and 7 of the RGPD since

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that the consent given for the purpose of facilitating the tracking and monitoring

of contacts of positive or suspected cases of Covid-19, you cannot

be considered "free" since, for this, it would be necessary that no

negative consequence, that is, that admission to the

establishment, which, precisely, does occur in the case analyzed.

~

established in article 13 of the RGPD.

Not having accredited compliance with the duty of information to the interested party

FOUNDATIONS OF LAW

Yo

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

Control Authority, and according to the provisions of articles 47, 48, 64.2 and 68.1 of the

LOPDGDD, the director of the AEPD is competent to initiate and resolve this procedure.

I lie.

Article 63.2 of the LOPDGDD determines that: "The procedures processed by the

Spanish Data Protection Agency shall be governed by the provisions of the Regulations

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

dictated in its development and, as long as they do not contradict them, on a subsidiary basis, by

the general rules on administrative procedures."

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

"1) «personal data»: any information about an identified natural person or

identifiable ("the interested party"); An identifiable natural person shall be deemed to be any person

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

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

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

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

2) "processing": any operation or set of operations carried out on

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".

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

public authority, service or other body which, alone or jointly with others, determines the

purposes and means of treatment; whether the law of the Union or of the Member States

determines the purposes and means of the treatment, the person in charge of the treatment or the

Specific criteria for their appointment may be established by Union Law.

or of the member states.

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

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

disclose information about your health status;

Thus, a first aspect to clarify is that relating to the legal classification of the data obtained.

object of treatment by the investigated: date, time of access and exit,

name and/or surnames and contact telephone number of the people who access

to the corresponding establishment, which undoubtedly fit into the category of "da-

personal cough".

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

related to the control of the pandemic and its treatment is intended to identify

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

Royal Decree-Law 21/2020, of June 9, on urgent prevention measures,

containment and coordination to deal with the health crisis caused by the

COVID-19, as well as the measures adopted, in the Asturian autonomous community, by

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

article 5.b) of the Law of the Principality of Asturias 7/2019, of March 29, on Health, no

are data that in the RGPD are classified as "data related to health"

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

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

circumstance that does not occur in this case.

THIRD: Likewise, it is stated that the MINISTRY OF HEALTH OF THE PRINCIPALITY OF

ASTURIAS, with CIF S3333001J, with address at C/Ciriaco Miguel Vigil, No. 9, 33006,

Oviedo (Asturias), is responsible for the data processing referred to in the

factual background, since according to the definition of article 4.7 of the

RGPD is the one that determines the purpose of the treatments carried out: "The registration is

will be exclusively available to the General Directorate of Public Health and

will have the sole purpose of facilitating the tracing and follow-up of contacts of cases

positive or suspected of Covid-19, without prejudice to the fact that it corresponds to the holders of hotels, hostels and other tourist accommodation, hairdressers, barber shops, salons, beauty cabinets, manicure, pedicure and waxing salons, saunas, resorts, spas and gyms, the collection of data under the provisions of the Resolution of July 29, 2020.

It is worth mentioning the Strategy for Early Detection, Surveillance and Control of COVID-19, updated as of July 5, 2021, that regarding the “Study and management of Contacts” states that its objective is to make an early diagnosis in close contacts that initiate symptoms and avoid transmission in period asymptomatic and paucisymptomatic. Specifically, it defines “Close Contact” as:

“In general, at the community level, close contact will be considered to be any person who has been in the same place as a case, at a distance of less than 2 meters and for a total cumulative time of more than 15 minutes in 24 hours. In environments in which an assessment of the follow-up of the safety measures can be made. prevention, an individualized assessment may be carried out by the prevention of occupational risks or the person in charge who is designated for that purpose. To When establishing the risk, certain circumstances will be taken into account, such as spaces where there is a high risk of generating aerosols or other personal or social characteristics of the environment in which the possible transmission".

In this context, the Third modification of the urgent prevention measures, containment and coordination necessary to deal with the health crisis caused by COVID-19, after the expiration of the validity of the state of alarm contained in the Resolution of July 29, 2020, was agreed by virtue of article 11.2 of the Statute of Autonomy of the Principality of Asturias; Articles 1, 2 and 3 of the Organic Law 3/1986, of April 14, on Special Measures in the Matter of Public Health; Article

26.1 of Law 14/1986, of April 25, General Health; article 54 of the Law

33/2011, of October 4, General Public Health, and in accordance with 5.b) of the

Law of the Principality of Asturias 7/2019, of March 29, on Health, which attributes to the

Ministry competent in health matters the exercise, as a health authority,

of the powers in matters of public intervention, inspectors and sanctions.

FOURTH: The next of the aspects to be analysed, therefore, will be the legal basis of

this treatment, since the RGPD contemplates different assumptions that can give

place to the processing of personal data.

Specifically, in accordance with article 6.1 - "Legality of the treatment" -, of the RGPD:

"1. The treatment will only be lawful if at least one of the following is met

conditions:

a) the interested party gave their consent for the processing of their data

personal for one or more specific purposes;

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

interested party is a party or for the application at the request of the latter of measures

pre-contractual;

c) the treatment is necessary for the fulfillment of a legal obligation

applicable to the data controller;

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

of another natural person;

e) the treatment is necessary for the fulfillment of a mission carried out in

public interest or in the exercise of public powers vested in the controller

of the treatment;

f) the treatment is necessary for the satisfaction of legitimate interests

pursued by the data controller or by a third party, provided that

over said interests do not prevail the interests or the rights and freedoms

fundamental data of the interested party that require the protection of personal data,

in particular when the interested party is a child. The provisions of letter f) of

The first paragraph will not apply to the treatment carried out by the

public authorities in the exercise of their functions.

2. Member States may maintain or introduce more

in order to adapt the application of the rules of this

Regulation regarding processing pursuant to paragraph 1, letters

c) and e), establishing more precisely specific treatment requirements and

other measures to ensure fair and lawful treatment, including

other specific situations of treatment under chapter IX.

3. The basis of the treatment indicated in section 1, letters c) and e), must be

established by:

a) Union law, or

b) the law of the Member States that applies to the person responsible for the

treatment. The purpose of the treatment must be determined in said

legal basis or, in relation to the treatment referred to in section 1, letter

e), will be necessary for the fulfillment of a mission carried out in the interest

public or in the exercise of public powers conferred on the person responsible for the

treatment. Said legal basis may contain specific provisions for

adapt the application of the rules of this Regulation, among others:

general conditions that govern the legality of the treatment by the

responsible; the types of data object of treatment; the interested

affected; the entities to which personal data can be communicated and the

purposes of such communication; purpose limitation; the terms of

data retention, as well as the operations and procedures of the

treatment, including 4.5.2016 L 119/36 Official Journal of the European Union EN

the measures to guarantee lawful and equitable treatment, such as those relating to

to other specific situations of treatment under chapter IX. The

Law of the Union or of the Member States will fulfill an objective of interest

public and will be proportional to the legitimate aim pursued.

4. When the treatment for another purpose other than that for which it is

collected the personal data is not based on the consent of the

interested party or in the Law of the Union or of the Member States that

constitutes a necessary and proportional measure in a democratic society

to safeguard the objectives indicated in article 23, paragraph 1, the

responsible for the treatment, in order to determine if the treatment with another

purpose is compatible with the purpose for which the data was initially collected

personal, will take into account, among other things:

a) any relationship between the purposes for which the data was collected

data and the purposes of the intended further processing;

b) the context in which the personal data were collected, in particular by

Regarding the relationship between the interested parties and the person in charge of the

treatment;

c) the nature of the personal data, specifically when they are processed

special categories of personal data, in accordance with article 9, or

personal data related to criminal convictions and offenses, in accordance

with article 10;

d) the possible consequences for the interested parties of the subsequent treatment

provided;

e) the existence of adequate safeguards, which may include encryption or

pseudonymization."

In fact, recital (46) of the RGPD already recognizes that, in situations

In exceptional cases, such as an epidemic, the legal basis for the treatments may be

multiple, based on both the public interest and the vital interest of the interested party or

another natural person.

(46) The processing of personal data should also be considered lawful when

is necessary to protect an interest essential to the life of the data subject or the

of another natural person. In principle, personal data should only be

be treated on the basis of the vital interest of another natural person when the

processing cannot manifestly be based on a different legal basis.

Certain types of treatment may serve both important reasons for

public interest as well as the vital interests of the data subject, such as

when the processing is necessary for humanitarian purposes, including the control of

epidemics and their spread, or in situations of humanitarian emergency, on

all in case of natural or man-made catastrophes.

Therefore, as a legal basis for lawful processing of personal data, without

Despite the fact that there may be other bases, such as the fulfillment of a

legal obligation, article 6.1.c), the RGPD explicitly recognizes the two mentioned:

mission carried out in the public interest (article 6.1.e) or vital interests of the interested party or other natural persons (article 6.1.d).

In relation to the legal basis of the processing of personal data derived from the imposition of the measure, the one investigated in its response to the requirements indicates that:

“The basis of legitimation has been understood to be determined by article 9.2.i) of Regulation (EU) 2016/6753 (treatment is necessary for reasons of interest in the field of public health), with internal legal support in the Organic Law 3/1986, of April 14, on Special Measures in Public Health Matters, and more specifically in its article 3 when it provides that "In order to control the communicable diseases, the health authority, in addition to carrying out the actions general preventive measures, may adopt the appropriate measures to control the sick, people who are or have been in contact with them and of the immediate environment, as well as those considered necessary in case of communicable risk.

We already pointed out in the Second Law Basis, that the personal data object of treatment are not framed in article 9 of the RGPD, but are classified as "Personal Data" in accordance with the definition provided in article 4.1 of the GDPR. On the other hand, in the Resolution of July 29, 2020, it is stated that: “The The collection of such data will require the consent of the interested party, without prejudice to condition the right of admission for reasons of public health in case of not being able to

have the same."

Emphasizing, therefore, the voluntary nature of customer registration and ruling out the

treatment of a special category of personal data, it is inferred that the basis of

legality in which the investigated is protected is the one provided for in article 6.1.a) of the RGPD,

Regarding the consent given by those affected for the processing of their data

personal for this specific purpose.

Article 4, paragraph 11, of the RGPD defines the "consent of the interested party" as:

Any manifestation of free, specific, informed and unequivocal will by which the

The interested party accepts, either by means of a declaration or a clear affirmative action, the

processing of personal data concerning you;

Article 7 of the RGPD, under the heading "Conditions for consent" provides

the next:

1. When the treatment is based on the consent of the interested party, the person responsible

saber must be able to demonstrate that he consented to the treatment of his

personal information.

2. If the data subject's consent is given in the context of a statement

writing that also refers to other matters, the request for consent will be

presented in such a way as to be clearly distinguishable from other matters,

intelligible and easily accessible form and using clear and simple language. I don't know-

Any part of the declaration that constitutes infringement of the pri- or

sente regulation.

3. The interested party shall have the right to withdraw their consent at any time.

unto The withdrawal of consent will not affect the legality of the treatment based on

in the consent prior to its withdrawal. Before giving your consent, the

interested will be informed of it. It will be as easy to withdraw consent as

give it.

4. When assessing whether consent has been freely given, it will be taken into account in

to the fullest extent possible whether, among other things, the execution of a

contract, including the provision of a service, is subject to the consent of the

processing of personal data that is not necessary for the execution of di-

cho contract.

Likewise, recital 32 of the GDPR provides: Consent must be given through

by a clear affirmative act reflecting a manifestation of free will, specifically

fica, informed, and unequivocal of the interested party to accept the treatment of data of ca-

personal nature that concern you, such as a written statement, including by means of

electronic god, or a verbal statement. (…)

For its part, recital 42 of the GDPR provides: (...) Consent must not

be considered freely provided when the interested party does not enjoy true or free

choice or you may not withhold or withdraw your consent without prejudice

.

And adds recital 43 of the RGPD: To guarantee that the consent has been

freely given, it should not constitute a valid legal basis for the

processing of personal data in a specific case in which there is a

clear imbalance between the data subject and the controller, in particular

when said controller is a public authority and it is therefore unlikely that

consent was freely given in all the circumstances of said

particular situation. Consent is presumed not to have been freely given

when it does not allow separate authorization of the different data processing operations

personal data despite being appropriate in the specific case, or when compliance

of a contract, including the provision of a service, is dependent on the

consent, even if it is not necessary for such compliance.

Finally, article 6 of the LOPDGDD under the rubric "Treatment based on the

consent of the affected party" provides:

1. In accordance with the provisions of article 4.11 of the Regulation (EU)

2016/679, consent of the affected party is understood to be any manifestation of

free, specific, informed and unequivocal will by which he accepts, either

by means of a declaration or a clear affirmative action, the processing of data

personal matters that concern you.

2. When the data processing is intended to be based on consent

of the affected party for a plurality of purposes, it will be necessary to record in

specific and unequivocal manner that said consent is granted for all

they.

3. The execution of the contract may not be subject to the affected party consenting to the

processing of personal data for purposes unrelated

with the maintenance, development or control of the contractual relationship.

From the foregoing, it follows that, in order to appreciate a consent

free, it would be necessary that no negative consequence be derived, that is, that

admission to the establishment was not conditioned, which -precisely-, was

occurs in the analyzed case.

In this sense, section 3.4 of the Resolution of July 29, 2020, provides:

"The collection of such data will require the consent of the interested party, without prejudice to

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

have the same."

With what has been exposed so far, it can be concluded that the consent given for the financing

ability to facilitate contact tracing and follow-up of positive or suspected cases

sos of Covid-19, it is not in accordance with the provisions of article 4.11) and 7 of the RGPD. Y

this is so, because it cannot be considered “free”. In this sense, the Guidelines

5/2020 on consent within the meaning of Regulation (EU) 2016/679, adopted-

das on May 4, 2020 by the European Committee for Data Protection, indicate that:

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

general rule, the RGPD establishes that, if the subject is not really free to choose,

you feel compelled to give your consent or you will suffer negative consequences if you do not

given, then the consent cannot be considered valid. The absence of such re-

requirements determines that it is not valid so that treatments based on

in it they lack legitimacy, thus contravening the provisions of article 6 of the

GDPR.

The aforementioned facts could suppose a possible violation of article 7 of the RGPD and

6 of the LOPDGDD.

FIFTH: Likewise, the processing of personal data in situations of

health emergency, continue to be treated in accordance with the regulations of

protection of personal data (RGPD and LOPDGDD), for which all their

principles, contained in article 5 of the RGPD, and among them the treatment of the

personal data with legality, loyalty and transparency, limitation of the purpose (in

In this case, facilitate the tracing and follow-up of contacts of positive cases or

suspects of COVID-19), principle of limitation of the term of conservation, and by

Of course, and special emphasis must be placed on it, the principle of minimization of

data. Regarding this last aspect, express reference must be made to the fact that the data

treaties shall be exclusively those limited to those necessary for the purpose

intended, without this treatment being able to be extended to any other data

personal data not strictly necessary for said purpose, without being able to

confuse convenience with necessity, because the fundamental right to

data protection continues to be applied normally, notwithstanding that, as

has said, the personal data protection regulations themselves establish that in

emergency situations, for the protection of essential public health interests

and/or vital information of natural persons, the health data necessary to

prevent the spread of the disease that has caused the health emergency.

In short, the mere authorization of the legal system to carry out the processing of

data does not imply absolute permissiveness, this must be adapted to the principles and rest of

content provided for in the RGPD and in the LOPDGDD.

Article 5 RGPD, referring to the "Principles related to treatment" provides:

1. The personal data will be:

a) processed in a lawful, loyal and transparent manner in relation to the interested party ("lawful

trust, loyalty and transparency»);

b) collected for specific, explicit and legitimate purposes, and will not be processed further.

riorly in a manner incompatible with said purposes; (...);

c) adequate, pertinent and limited to what is necessary in relation to the purposes for

those that are processed ("data minimization");

d) accurate and, if necessary, updated; All reasonable steps will be taken

entitled to delete or rectify without delay the personal data that

are inaccurate with respect to the purposes for which they are processed (“accuracy”);

e) maintained in a way that allows the identification of the interested parties during
no longer than is necessary for the purposes of processing the personal data;
personal data may be kept for longer periods provided that
processed exclusively for archiving purposes in the public interest, research purposes,
scientific or historical information or statistical purposes, in accordance with article 89,
paragraph 1, without prejudice to the application of technical and organizational measures
measures imposed by this Regulation in order to protect the rights and liberties
liberties of the interested party (“limitation of the term of conservation”);
f) processed in such a way as to ensure adequate security of the data
including protection against unauthorized or unlawful processing and
against its loss, destruction or accidental damage, through the application of measures
appropriate technical or organizational measures ("integrity and confidentiality").
2. The data controller will be responsible for compliance with the provisions
in paragraph 1 and able to demonstrate it ("proactive responsibility").

Well, the principles of legality, loyalty and transparency apply to all kinds of
treatment of personal data.

The legality requires that at least one of the conditions of article 6 of the
RGPD, which, as stated in the previous Law Basis, the
investigated erroneously bases it on article 9.2.i) of the RGPD, and on the
basis of consent, which must include a series of elements in the
declaration of will of the interested person for the treatment of their data

personal (article 4, section 11, article 7 and recitals 32, 42 and 43, of the RGPD

and article 6 of the LOPDGDD).

Regarding transparency, this principle establishes the obligation that the

responsible for the treatment adopts the measures that are appropriate to maintain

stakeholders —who may be users or customers— informed about how

they use your data.

Article 12.1 of the RGPD provides:

“The person responsible for the treatment will take the appropriate measures to facilitate the

interested all information indicated in articles 13 and 14, as well as any

communication under articles 15 to 22 and 34 relating to processing, in

concise, transparent, intelligible and easily accessible form, with clear language and

simple, in particular any information directed specifically at a child.

The information will be provided in writing or by other means, even if

proceeds, by electronic means. When requested by the interested party, the information

may be provided verbally as long as the identity of the

interested by other means.”

For its part, article 13 of the RGPD, a precept in which the information

that must be provided to the interested party at the time of collecting their data, provides:

"1. When personal data relating to him is obtained from an interested party, the

responsible for the treatment, at the moment in which these are obtained,

will provide all the information indicated below:

a) the identity and contact details of the person in charge and, where appropriate, of their

representative;

b) the contact details of the data protection delegate, if any;

c) the purposes of the treatment to which the personal data is destined and the basis

legal treatment;

d) when the treatment is based on article 6, paragraph 1, letter f), the

legitimate interests of the person in charge or of a third party;

e) the recipients or the categories of recipients of the personal data, in

Their case;

f) where appropriate, the intention of the controller to transfer personal data to a

third country or international organization and the existence or absence of a

adequacy decision of the Commission, or, in the case of transfers

indicated in articles 46 or 47 or article 49, paragraph 1, second paragraph,

reference to adequate or appropriate safeguards and means of obtaining

a copy of these or the fact that they have been loaned.

2. In addition to the information mentioned in section 1, the person in charge of the

treatment will facilitate the interested party, at the moment in which the data is obtained

personal, the following information necessary to guarantee a treatment of

fair and transparent data:

a) the period during which the personal data will be kept or, when it is not

possible, the criteria used to determine this period;

b) the existence of the right to request from the data controller access to

the personal data related to the interested party, and its rectification or deletion, or the

limitation of its treatment, or to oppose the treatment, as well as the right to

data portability;

c) when the treatment is based on article 6, paragraph 1, letter a), or the

Article 9, paragraph 2, letter a), the existence of the right to withdraw the

consent at any time, without affecting the legality of the

treatment based on consent prior to its withdrawal;

d) the right to file a claim with a supervisory authority;

e) if the communication of personal data is a legal or contractual requirement, or

a necessary requirement to sign a contract, and if the interested party is obliged

to provide personal data and is informed of the possible consequences

not to provide such data;

f) the existence of automated decisions, including profiling, to

referred to in article 22, sections 1 and 4, and, at least in such cases,

significant information about the applied logic, as well as the importance and

anticipated consequences of said treatment for the interested party.

3. When the controller plans the further processing of data

for a purpose other than that for which they were collected,

will provide the interested party, prior to said subsequent treatment,

information about that other purpose and any additional information relevant to

tenor of section 2.

4. The provisions of sections 1, 2 and 3 shall not apply when and in the

to the extent that the interested party already has the information."

In this sense, the investigated party has not provided information regarding the

"Means used to comply with the duty of information to the interested party", which

was requested in the first of the requirements practiced.

Article 5 of the RGPD also requires that the data be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("data minimization"). The data that people provide when accessing hotels, hostels and other tourist accommodation, hairdressers, barber shops, beauty cabinets, beauty salons, manicure, pedicure and waxing salons, saunas, resorts, spas and gyms, are: date, time of access and exit, name and/or surnames and contact telephone number.

If what you want is to be able to quickly locate a possible contact, you could it will be enough to obtain a telephone number, along with the data of the day and time on-site assistance. This criterion, together with the anonymization of the holders of the device, has been assumed by the European Committee for Data Protection in the Guidelines 04/2020 on the use of location data and data tracking tools contacts in the context of the COVID-19 pandemic; criterion that can be extrapolated to this situation with the pertinent adaptations.

Consequently, it would not be necessary to request, in addition, the name and surnames, which they would be unnecessary for the purpose of tracking and monitoring potential contacts.

Finally, section 3.4 of the Resolution of July 29, 2020, provides: "The Data must be kept in the registry only for a period of one month from the access, after which it must proceed to its deletion."

The setting of the retention period cannot be arbitrary in any case, we have already given that article 5 of the RGPD provides that they will be kept "for no longer of what is necessary for the purposes of the treatment". Likewise, Recital 39 of the RGPD says: "This requires, in particular, ensuring that their use is limited to a strict minimum. retention period."

The resolution sets a period of one month from access, but does not explain the reason for

do it that way.

Therefore, the Resolution of July 29, 2020, despite indicating in point 3 of the

section 3.4, that: “Both the registration and the processing of the data contained in the

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

December, on the Protection of Personal Data and guarantee of digital rights, and

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

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

treatment of personal data and the free circulation of these data and by which

repeals Directive 95/46/EC (General Data Protection Regulation)”, it results

that it does not do so by not having duly motivated the adequacy and relevance of the

data collected and the need to preserve said data for the time

established.

With what has been exposed so far, it should be noted that the investigated party has also incurred in

a violation of the principles and guarantees related to the treatment provided for in the

article 5 of the RGPD.

SIXTH: In accordance with the available evidence, it is considered that

the exposed facts violate the provisions of articles: 5.1.c), 5.1.e), 7 and 13 of the

RGPD, with the scope expressed in the previous Legal Foundations, which

could entail the commission of the offenses classified in article 83 section

5.a) and b) of the RGPD that under the heading “General conditions for the imposition of

administrative fines” provides that:

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

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

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

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

opting for the highest amount:

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

consent under articles 5, 6, 7 and 9;

b) the rights of the interested parties pursuant to articles 12 to 22.”

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

infractions the acts and behaviors referred to in sections 4, 5 and 6 of the

Article 83 of Regulation (EU) 2016/679, as well as those that are contrary to the

present organic law”.

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

Article 72. Infractions considered very serious.

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

2016/679 are considered very serious and will prescribe after three years the

infractions that suppose a substantial violation of the articles

mentioned therein and, in particular, the following:

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

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

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

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

h) The omission of the duty to inform the affected party about the treatment of their

personal data in accordance with the provisions of articles 13 and 14 of the

Regulation (EU) 2016/679 and 12 of this organic law. (…)”

SEVENTH: However, the LOPDGDD in its article 77, under the heading "Regime

applicable to certain categories of data controllers or processors.

sets the following:

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

of which they are responsible or entrusted:

a) The constitutional bodies or those with constitutional relevance and the

institutions of the autonomous communities analogous to them.

b) The jurisdictional bodies.

the Administrations of the

c) The General Administration of the State,

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

d) Public bodies and public law entities linked or

dependent on the Public Administrations.

e) The independent administrative authorities.

f) The Bank of Spain.

g) Public law corporations when the purposes of the treatment

related to the exercise of powers of public law.

h) Public sector foundations.

i) Public Universities.

j) The consortiums.

k) The parliamentary groups of the Cortes Generales and the Assemblies

Autonomous Legislative, as well as the political groups of the Corporations

Local.

2. When the managers or managers listed in section 1

committed any of the offenses referred to in articles 72 to 74

of this organic law, the data protection authority that is competent

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

It shall also establish the measures to be adopted to stop the

conduct or correct the effects of the infraction that had been committed.

The resolution will be notified to the person in charge or in charge of the treatment, to the

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

Interested party status, if any.

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

data protection will also propose the initiation of disciplinary actions

when there is sufficient evidence to do so. In this case, the procedure and

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

disciplinary or sanctioning that results from application. Also, when the

infractions are attributable to authorities and directors, and the

existence of technical reports or recommendations for treatment that do not

had been duly attended to, in the resolution imposing the

The sanction will include a reprimand with the name of the responsible position and

publication will be ordered in the Official State or Autonomous Gazette that

correspond.

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

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

previous sections.

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

analogous of the autonomous communities the actions carried out and the

resolutions issued under this article.

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

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

resolutions referring to the entities of section 1 of this article, with

express indication of the identity of the controller or processor

who had committed the offence. When the competition corresponds to a

regional data protection authority will be, in terms of the

publicity of these resolutions, to the provisions of its specific regulations".

In short, the LOPDGDD does not authorize the imposition of administrative fines, but rather a mere

warning, that is, without any economic effect. However, it does establish the

possibility that the necessary measures can be adopted to stop the

conduct or the corresponding defects are corrected.

EIGHTH: The RGPD refers in article 58.2 to the corrective powers of the

control authority and indicates that it will have the following:

a) send a warning to any data controller or data processor

when the planned treatment operations may infringe the provisions

in this Regulation;

b) send a warning to any person responsible or in charge of the treatment

when the treatment operations have infringed the provisions of the

this Regulation;

c) order the person in charge or in charge of the treatment to attend to the

requests to exercise the rights of the interested party under this

Regulation;

d) order the person in charge or in charge of the treatment that the operations of

treatment comply with the provisions of this Regulation, when

proceed, in a certain way and within a specified period;

e) order the data controller to notify the interested party of the

violations of the security of personal data;

f) impose a temporary or definitive limitation of the treatment, including its

prohibition;

g) order the rectification or deletion of personal data or the limitation of

treatment in accordance with articles 16, 17 and 18 and the notification of such

measures to the recipients to whom personal data have been communicated

Pursuant to Article 17(2) and Article 19;

h) withdraw a certification or order the certification body to withdraw a

certification issued in accordance with articles 42 and 43, or order the agency

of certification that a certification is not issued if they are not met or fail to comply

meet the requirements for certification;

i) impose an administrative fine under article 83, in addition to or in

Instead of the measures mentioned in this section, according to the

circumstances of each particular case; j) order the suspension of the flows of

data to a recipient located in a third country or to an organization

international.

All these measures included in this provision may be issued instead of or in addition to

of the sanctions referred to in article 83 of the RGPD, 76 and 77 of the

LOPDGDD.

II

The text of the resolution establishes the infractions committed and

the facts that have given rise to the violation of the regulations for the protection of

data, from which it is clearly inferred what measures to adopt, without prejudice

that the type of specific procedures, mechanisms or instruments for

implement them corresponds to the sanctioned party, since it is responsible for the

treatment who fully knows your organization and has to decide, based on the

proactive responsibility and risk approach, how to comply with the RGPD and the

LOPDGDD.

Therefore, in accordance with the applicable legislation and having assessed the criteria for

graduation of the sanctions whose existence has been proven, the Director of the

Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE THE GOVERNMENT OF THE HEALTH MINISTRY OF THE

PRINCIPALITY OF ASTURIAS, with CIF S3333001J, for a violation of the provisions

in articles 5.1.c), 5.1.e), 7 and 13 of the RGPD, typified in Article 83.5 of the RGPD,

a warning sanction.

SECOND: TO REQUIRE the HEALTH COUNCIL OF THE GOVERNMENT OF THE

PRINCIPALITY OF ASTURIAS, so that within a period of ONE MONTH you can certify before this

body compliance with:

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

in accordance with the principles of "minimization of data" and "limitation of the term

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

- The adoption of the necessary measures to facilitate the information foreseen in the

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

corresponding, prior to the collection of personal data of the

same, all the information required in the aforementioned precept, for which it must have

taking into account the provisions of article 7 of the RGPD in relation to the conditions for

consent and in article 6 of the LOPDGDD.

THIRD: NOTIFY this resolution to the MINISTRY OF HEALTH.

FOURTH:

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

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
Director of the Spanish Data Protection Agency