

Procedure No.: PS/00238/2019

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: On November 24, 2018, you had entry into this Agency in writing  
of A.A.A. (hereinafter the claimant) against CLÍNICAS DEL SUR, S.L.U.

HOSPITEN RAMBLA in which it states that the clause for sending information  
commercial by said clinic establishes that in order not to receive publicity it is necessary to  
check a box which you consider contrary to data protection regulations  
that establishes that an affirmative act is needed for the remission of publicity, and not  
negative one.

SECOND: In view of the facts denounced in the claim and the  
documents provided by the claimant, the Subdirectorate General for Inspection of  
Data proceeded to carry out preliminary investigation actions for the  
clarification of the facts in question, by virtue of the investigative powers  
granted to the control authorities in article 57.1 of the Regulation (EU)  
2016/679 (General Data Protection Regulation, hereinafter RGPD), and  
in accordance with the provisions of Title VII, Chapter I, Second Section, of the Law  
Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of  
digital rights (hereinafter LOPDGDD).

As a result of the research actions carried out, it is confirmed  
that the data controller is the claimed party.

In addition, the following extremes are noted:

On January 8, 2019, the respondent entity states that it has addressed the

claimant, indicating that you have taken note of your wish not to receive publicity and that it will take the appropriate measures in relation to the form.

It has been found that on the HOSPITEN website, the following personal data: name and surname, date of birth, email and telephone contact (<https://hospiten.com/cita-previa>).

Regarding privacy policy there are two boxes to fill in freely by the user, which indicate the following:

I accept the privacy terms

I accept the sending of actions and commercial communications, including by electronic means, and the elaboration of profiles with the purposes expressed of the HOSPITEN Group

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The first box in turn has the following link,

<https://hospiten.com/privacidad-proteccion-de-data>, in which the following is indicated:

HOSPITEN MANAGEMENT A.I.E. (hereinafter, HOSPITEN), in accordance with

EU Regulation 2016/679 on Data Protection and other regulations in force in

matter of Protection of Personal Data, informs the

users of the website [www.hospiten.com](http://www.hospiten.com) (hereinafter, the Page) the Privacy Policy

Privacy and Data Protection that will apply in the processing of data

personal information that the User voluntarily provides when accessing its website.

The User, when providing HOSPITEN with their personal data to

through the electronic forms of the Web, and where appropriate, through the marking the corresponding acceptance box, you expressly consent that HOSPITEN may process this data under the terms of this Privacy Policy clause.

Privacy and Data Protection and for the purposes expressed herein. (The underline is carried out by the AEPD)

HOSPITEN informs the users of the Page that their data of a personal nature may only be obtained for processing when they are adequate, relevant and not excessive in relation to the scope and purposes determined, explicit and legitimate for which they have been obtained. will be canceled when they are no longer necessary or relevant for said purpose or when requested by the holder in the exercise of his right of cancellation. HOSPITEN expresses its commitment to comply with current legislation in at all times in terms of data protection.

THIRD: On July 8, 2019, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimant, for the alleged infringement of Article 7 of the RGPD, typified in Article 83.5 of the RGPD.

FOURTH: On 07/12/2019 the start agreement has been notified, and on 07/26/2019 the Respondent has presented the following allegations:

“Once the RGPD entered into force and after the analysis of the articles, and within a process of updating and continuous improvement to adapt to current regulations, CLISUR, as of July 3, 2018, proceeds to give instructions to its manager of the website, the entity Intelequia Software, S.L. to adapt the way of collecting the consent of users to the page for the processing of their data for purposes commercials by putting two different checkboxes:

-one for information and acceptance of privacy on the main purpose of the management of the previous appointments requested through the page

-another acceptance box to be marked with an additional purpose

in the event that the user consents to receive commercial actions from CLISUR.”

CLISUR, states that "the data collected through the" citation

prior” between the period of May 25, 2018 to July 3, 2018, have not been

used for commercial purposes.

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Likewise, the certificate issued by INTELEQUIA SOFTWARE SOLUTIONS,

dated July 15, 2019, certifies that CLISUR has not had access to the table of

"hos\_Subscribers" data for use, so it could not be used for the purposes

of use of sending advertising or commercial actions.

However, CLISUR has instructed its database manager

to proceed to the deletion, in the current database "hos\_Subscribers", of

any personal data that may exist of those collected in the period

prior to the procedure change on the page. In this way, it is ensured

CLISUR that, in no case, data collected between May 25 and July 3,

2018 may be used for commercial purposes in future actions.”

CLISUR concludes stating that, “regarding the treatment of the data of the

applicant, the internal protocols established

for all your patients.

You have been informed in the terms of article 13 of the RGPD, prior to the

treatment of your data and once, you express your opposition to the treatment

for information and publicity purposes, the document is received and its registration is registered on site.

opposition in the patient management program, which means that your data have never been used by CLISUR for advertising purposes.

However, a check has been made and at no time said

The patient has not appeared in the "hos\_Subscribers" database of the web either, so that the only data that has been processed by CLISUR of the defendant, are the necessary to provide health care and those that allow us to act in legitimate defense of our interests in this proceeding.

The plaintiff, from the first contact with CLISUR, has been attended by our patient care services and at the admission desks of the center where he has gone. All kinds of clarifications have been made on the text of information and dial boxes made available to you and your request has been addressed. consent for the treatment in the terms accepted by him with the signature of the document, and the boxes you have voluntarily checked. They have also been addressed in a timely manner all your complaints according to the attached file to the procedure.

Therefore, the plaintiff's rights have not been violated in any case.

and he has not been able to suffer any damage or harm.

In view of everything that has been done, by the Spanish Protection Agency of Data in this procedure the following are considered proven facts,

#### FACTS

FIRST: the clause for sending commercial information by the clinic claimed establishes that in order not to receive publicity, a box must be checked, which It is considered contrary to the data protection regulations that establish that for the advertising referral requires an affirmative act, not a negative one.

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SECOND: The entity claimed states that it has been immersed in the adaptation of all its procedures to regulatory change, for which it has proceeded to carry out modifications to its website and has implemented measures in its organization with the purpose of guaranteeing the security, the exercise of rights of the people affected by any type of treatment in its management.

This is accredited by means of a certificate issued by INTELEQUIA SOFTWARE SOLUTIONS, dated July 15, 2019, noting the implementation of two boxes on its website, one for information and acceptance of privacy on the purpose principal of the management of the previous appointments requested through the page and another acceptance box to be able to be marked with an additional purpose in the case of that the user consents to receive commercial actions from CLISUR.

Specifically, these boxes appear like this:

I accept the privacy terms

I accept the sending of actions and commercial communications, including by electronic means, and the elaboration of profiles with the purposes expressed of the HOSPITEN Group

In addition, the first box also has the following link,

<https://hospiten.com/privacidad-proteccion-de-datos>, where it is indicated that “your data of a personal nature through the electronic forms of the Web, and where appropriate,

By marking the corresponding acceptance box, you consent expressly that HOSPITEN may process this data under the terms of this Privacy Policy and Data Protection clause and for the purposes here expressed.”

It is also confirmed through said certificate that the data collected through  
through the "prior appointment" service between the period of May 25, 2018 to July 3  
of 2018, have not been used for commercial purposes and that CLISUR has not had  
access to the data table "hos\_Subscribers" for use, so it could not be  
used for the purpose of sending advertising or commercial actions.

## FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each  
control authority, and as established in arts. 47 and 48.1 of the LOPDPGDD, the  
Director of the Spanish Data Protection Agency is competent to resolve  
this procedure.

II

The defendant is imputed the commission of an infraction for violation of the  
article 7.1 of the RGPD in relation to article 6 of the LOPDPGDD, which states that  
“When the treatment is based on the consent of the interested party, the person in charge

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You must be able to demonstrate that you consented to the processing of your data  
personal.”

In this line, article 6 of the LOPDPGDD establishes that in accordance with  
the provisions of article 4.11 of Regulation (EU) 2016/679, means  
consent of the affected party, any manifestation of free will, specific,  
informed and unequivocal by which it accepts, either by means of a declaration or a

clear affirmative action, the processing of personal data that concerns you.

The infringement is typified in article 83.5 of the RGPD that establishes that "The

Violations of the following provisions will be sanctioned, in accordance with the

section 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;

b) the rights of the interested parties according to articles 12 to 22;

c) transfers of personal data to a recipient in a third country or a

international organization under articles 44 to 49;

d) any obligation under the law of the Member States that is adopted

under Chapter IX;

e) Failure to comply with a resolution or a temporary or definitive limitation of the

processing or suspension of data streams by the data protection authority

control pursuant to Article 58(2) or failure to provide access in

breach of article 58, paragraph 1.

Without prejudice to the provisions of article 83 of the RGPD, the aforementioned Regulation

has in its art. 58.2 b) the possibility of sanctioning with a warning, in relation

with what is stated in Considering 148:

"In the event of a minor offence, or if the fine likely to be imposed

would constitute a disproportionate burden for a natural person, rather than

sanction by means of a fine, a warning may be imposed. must however

Special attention should be paid to the nature, seriousness and duration of the infringement, its

intentional nature, to the measures taken to alleviate the damages suffered,



the degree of liability or any relevant prior violation, the manner in which that the control authority has been aware of the infraction, compliance of measures ordered against the person responsible or in charge, adherence to codes of conduct and any other aggravating or mitigating circumstance.”

### III

The art. 83.5 of the RGPD establishes that "Infringements of the provisions following will be sanctioned, in accordance with section 2, with administrative fines

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EUR 20,000,000 maximum or, in the case of a company, an amount equivalent to a maximum of 4% of the total global annual turnover of the previous financial year, 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 according to articles 12 to 22;
- c) transfers of personal data to a recipient in a third country or a international organization under articles 44 to 49;
- d) any obligation under the law of the Member States that is adopted under Chapter IX;
- e) Failure to comply with a resolution or a temporary or definitive limitation of the processing or suspension of data streams by the data protection authority control pursuant to Article 58(2) or failure to provide access in breach of article 58, paragraph 1.

Without prejudice to the provisions of article 83 of the RGPD, the aforementioned Regulation has in its art. 58.2 b) the possibility of sanctioning with a warning, in relation with what is stated in Considering 148:

“In the event of a minor offence, or if the fine likely to be imposed would constitute a disproportionate burden for a natural person, rather than sanction by means of a fine, a warning may be imposed. must however Special attention should be paid to the nature, seriousness and duration of the infringement, its intentional nature, to the measures taken to alleviate the damages suffered, the degree of liability or any relevant prior violation, the manner in which that the control authority has been aware of the infraction, compliance of measures ordered against the person responsible or in charge, adherence to codes of conduct and any other aggravating or mitigating circumstance.”

#### IV

In accordance with the evidence available in this time, and without prejudice to what results from the investigation, it is considered that the Known facts could constitute an infraction, attributable to the defendant, for an alleged violation of article 7.1 of the RGPD in relation to article 6 of the LOPDGDD, indicated in foundation II.

#### v

Article 72.1.c) of the LOPDGDD states that “according to what is established Article 83.5 of Regulation (EU) 2016/679 are considered very serious and Infractions that suppose a substantial violation will prescribe after three years. of the articles mentioned therein and, in particular, the following:

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

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

SAW

Article 58.2 of the RGPD provides the following: "Each supervisory authority

shall have all of the following corrective powers listed below:

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

warning when the processing operations have violated the provisions of

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, where appropriate,

in a certain way and within a specified period;

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

instead of the measures mentioned in this paragraph, depending on the circumstances

of each particular case.

The art. 83.5 of the RGPD establishes that "Infringements of the provisions

following will be sanctioned, in accordance with section 2, with administrative fines

EUR 20,000,000 maximum or, in the case of a company, an amount

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

previous financial year, 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 according to articles 12 to 22;

c) transfers of personal data to a recipient in a third country or a

international organization under articles 44 to 49;

d) any obligation under the law of the Member States that is adopted

under Chapter IX;

e) Failure to comply with a resolution or a temporary or definitive limitation of the

processing or suspension of data streams by the data protection authority

control pursuant to Article 58(2) or failure to provide access in

breach of article 58, paragraph 1.

Without prejudice to the provisions of article 83 of the RGPD, the aforementioned Regulation

has in its art. 58.2 b) the possibility of sanctioning with a warning, in relation

with what is stated in Considering 148:

“In the event of a minor offence, or if the fine likely to be imposed

would constitute a disproportionate burden for a natural person, rather than

sanction by means of a fine, a warning may be imposed. must however

Special attention should be paid to the nature, seriousness and duration of the infringement, its

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intentional nature, to the measures taken to alleviate the damages suffered,

the degree of liability or any relevant prior violation, the manner in which

that the control authority has been aware of the infraction, compliance

of measures ordered against the person responsible or in charge, adherence to codes of

conduct and any other aggravating or mitigating circumstance.”

7th

Among the corrective powers contemplated in article 58 of the RGPD, in its

section 2 d) establishes that each supervisory authority may “order the

responsible or in charge of the treatment that the treatment operations are comply with the provisions of this Regulation, where appropriate, in a certain manner and within a specified period...". The imposition of this measure is compatible with the sanction consisting of an administrative fine, as provided in art. 83.2 of the GDPR.

In the present case, the respondent has been required so that by virtue of article 7 of the RGD, which regulates the conditions for consent in data processing guarantees that the consent of the affected party is a 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.

In this specific case, it has been proven that the claimed entity has been immersed in the adaptation of all its procedures to the normative change, for which which has proceeded to make changes to its website and has implemented measures in your organization in order to guarantee security in the treatment of the personal data of its clients, in accordance with the regulations previously indicated.

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of sanctions whose existence has been proven,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE CLÍNICAS DEL SUR, S.L.U., with NIF B38031241, for a infringement of article 7 of the RGD, typified in Article 83.5 of the RGD, a sanction of warning.

SECOND: NOTIFY this resolution to CLÍNICAS DEL SUR, S.L.U.

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. 114.1 c)

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

Interested parties may optionally file an appeal for reconsideration before the Director

of the Spanish Agency for Data Protection within a period of one month from the

day following the notification of this resolution or directly contentious appeal

before the Contentious-Administrative Chamber of the National High Court, with

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,

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within two months from the day following the notification of this act,

according to the provisions of 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,

the firm decision may be provisionally suspended in administrative proceedings if the interested party

states its intention to file a contentious-administrative appeal. If this is the

In this case, the interested party must formally communicate this fact in writing addressed to

the Spanish Agency for Data Protection, presenting it through the Registry

Electronic Agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or through

any of the other records provided for in art. 16.4 of the aforementioned Law 39/2015, of 1

october. You must also transfer to the Agency the documentation that accredits the

effective filing of the contentious-administrative appeal. If the Agency did not have

knowledge of the filing of the contentious-administrative appeal within two

months from the day following the notification of this resolution, I would consider

The precautionary suspension has ended.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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