

936-031219

□ Procedure No.: PS/00379/2019

RESOLUTION R/00154/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00379/2019, instructed by the Agency

Spanish Data Protection Agency to A.A.A., given the complaint filed by CUERPO

NATIONAL POLICE BRIGADE OF JUDICIAL POLICE, UDEV GROUP,

POLICE STATION OF *** LOCATION.1, and based on the following,

BACKGROUND

FIRST: On February 24, 2020, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against A.A.A. (onwards,

the claimed), through the Agreement that is transcribed:

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Procedure No.: PS/00379/2019

AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Agency for the Protection of

Data and based on the following

FACTS

FIRST: On 03/19/2019 there is an entry from the POLICE BRIGADE

JUDICIAL, UDEV GROUP, POLICE STATION OF ***LOCALITY.1, official letter No. ***OFFICIAL.1,

extension of the report made at the Police Station against D. A.A.A. for an alleged crime

of fraud and to which two hundred and ninety-five photographs of

contracts of companies, printed type alabaran-contract of other mercantile,

forms contract type of the company Grupo Pitágoras whose CIF coincides with the

DNI number of the investigated, etc.

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The copy of the photographs of the contracts has been made available to the Court of

Instruction number 1 of ***LOCATION.1

SECOND: Upon receipt of the claim, the Subdirector General for

Data Inspection proceeded to carry out the following actions:

On 02/25/2019, the claim submitted was transferred to the defendant for analysis

and provide information to this Agency indicating the legitimate cause of the

data processing that has been carried out and what purpose or purposes these had

processing, as well as the origin of the personal data processed and the measures

taken to prevent the commission of an infringement of the data protection regulations

data.

On 06/17/2019 it was transferred to both DISTRIHOGAR 2013 S.L. and to the GROUP

EDITORIAL COMFORT what was stated by the complainant, so that within a period of

month from the reception of said writings, whether or not they confirm the alleged extremes

by the defendant, writings that were reiterated on 07/02/2019.

On 05/22/2019, the respondent submitted a written response to the request sent by

the AEPD stating that there is no evidence of a past or present relationship with the companies

Grupo Edilie, Signo Editores, Grupo Zafiro and Agrupación y Salud RYC.

Second, that the documentation that it does recognize was archived by

having terminated the business relationship with the companies Distrihogar and Grupo Confort

Editorial and was transported in his vehicle to proceed with its destruction,

in accordance with article 32.1 of the RGPD.

That personal data is processed with the legitimacy of the execution of a contract and failing that, the express and unequivocal consent of the interested. Said information is legitimized in the treatment of "Clients and providers".

That between the data controller and the owner of the personal data a purchase-sale contract is established, prior telephone contact with the interested party and the contract is formalized and signed at the headquarters of the person in charge of the treatment or in the client's office/home. Once the relationship ends Data is destroyed guaranteeing information security.

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That in terms of purpose, personal data is processed for the management of orders and sale of products on credit at home and for accounting, tax management and administration of the entity itself.

That in relation to the origin of the data, these are obtained from accessible sources to the public (Infobel telephone directory) and to the interested party.

That in terms of the security measures adopted, the data controller guarantees that safeguard, technical and organizational measures have been taken to guarantee proper use and treatment of personal data.

That the data controller guarantees that only he has access to and processes the data of a personal nature. The places where the information systems are located are not of access to the public and does not have contracted personnel, given that their professional relationship It's like freelancer-commercial.

That the data controller has implemented measures to guarantee the confidentiality and availability of automated information, as well as the regular backups on external media located in a place other than computer equipment.

That the inputs and outputs of devices are made taking the measurements of necessary security to prevent access by unauthorized third parties with unlocking mechanisms by means of an access code. To prevent recovery improper use of the data, the data controller has established mechanisms that guarantee confidential destruction.

On 09/20/2019, in accordance with article 65 of the LOPDGDD, the Director of the Spanish Agency for Data Protection agreed to admit the claim for processing filed by the claimant against the respondent.

FOUNDATIONS OF LAW

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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 and 48 of the LOPDGDD, The Director of the Spanish Agency for Data Protection is competent to initiate and to solve this procedure.

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II

The reported facts are specified in the processing of personal data without consent; Specifically, the aforementioned data have allegedly been used

to defraud their victims and attract potential customers.

Said treatment could constitute a violation of article 6, Lawfulness

of the treatment, of the RGPD that establishes that:

"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;

(...)"

Article 4 of the GDPR, Definitions, in section 11, states that:

"11) «consent of the interested party»: any manifestation of free will,

specific, informed and unequivocal by which the interested party accepts, either through

a statement or a clear affirmative action, the processing of personal data that

concern him".

Also article 6, Treatment based on the consent of the affected party,

of the new Organic Law 3/2018, of December 5, on Data Protection

Personal and guarantee of digital rights (hereinafter LOPDGDD), indicates

that:

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"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 will free, specific, informed and unequivocal by which he accepts, either through a declaration or a clear affirmative action, the treatment of personal data that concern.

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 state specific and unequivocal that said consent is granted for all of them.

3. The execution of the contract may not be subject to the affected party consenting to the processing of personal data for purposes unrelated to the

maintenance, development or control of the contractual relationship”.

Article 83.5 a) of the RGPD, considers that the infringement of “the principles

basic for the treatment, including the conditions for the consent in accordance with

of articles 5, 6, 7 and 9” is punishable, in accordance with section 5 of the

mentioned article 83 of the aforementioned Regulation, “with administrative fines of

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

at a maximum of 4% of the total global annual turnover of the financial year

above, opting for the highest amount.

On the other hand, the LOPDGDD in its article 72 indicates for prescription purposes:

“Infringements considered very serious:

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

2016/679 are considered very serious and the infractions that

suppose a substantial violation of the articles mentioned in that and, in

particularly the following:

(...)

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b) The treatment of personal personal data without the concurrence of any of the conditions of legality of the treatment established in article 6 of the Regulation (EU) 2016/679.

(...)"

III

The documentation in the file offers clear indications that the claimed person violated article 6 of the RGPD, since the personal data contained in the copies of the contracts and intervened forms are used without consent of their owners, presumably to defraud their victims and the acquisition of potential customers.

The Contentious-Administrative Chamber of the National High Court, in similar assumptions has considered that when the owner of the data denies the contracting, the burden of proof corresponds to the person who affirms its existence, owing the data controller of third parties to collect and keep the documentation necessary to prove the consent of the holder. Thus, the SAN of 05/31/2006 (Rec. 539/2004), Fourth Law Basis.

It should be noted that respect for the principle of legality of the data requires that accredited evidence that the owner of the data consented to the processing of the data of personal character and display a reasonable diligence essential to prove that end. Failure to act in this way would result in emptying the content of the principle of legality.

IV

In order to establish the administrative fine to be imposed,

observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which

point out:

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"1. Each control authority will guarantee that the imposition of fines

administrative actions under this article for violations of this

Regulation indicated in sections 4, 5 and 6 are in each individual case

effective, proportionate and dissuasive.

2. Administrative fines will be imposed, depending on the circumstances

of each individual case, in addition to or as a substitute for the measures contemplated

in article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine

administration and its amount in each individual case will be duly taken into account:

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

nature, scope or purpose of the processing operation in question

as well as the number of stakeholders affected and the level of damage and

damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the

treatment, taking into account the technical or organizational measures that have

applied under articles 25 and 32;

e) any previous infraction committed by the person in charge or the person in charge of the

treatment;

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

remedying the breach and mitigating the possible adverse effects of the breach;

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

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

particular if the person in charge or the person in charge notified the infringement and, in such case,

what extent;

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

previously ordered against the person in charge or the person in charge in question

in relation to the same matter, compliance with said measures;

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

certificates approved in accordance with article 42, and

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k) any other aggravating or mitigating factor applicable to the circumstances of the

case, such as financial benefits realized or losses avoided, direct

or indirectly, through infringement.

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its

Article 76, "Sanctions and corrective measures", establishes that:

"two. In accordance with the provisions of article 83.2.k) of the Regulation (EU)

2016/679 may also be taken into account:

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of treatments

of personal data.

- c) The profits obtained as a result of committing the offence.
- d) The possibility that the conduct of the affected party could have induced the commission of the offence.
- e) The existence of a merger by absorption process after the commission of the infringement, which cannot be attributed to the absorbing entity.
- f) Affectation of the rights of minors.
- g) Have, when it is not mandatory, a delegate for the protection of
- h) The submission by the person in charge or person in charge, with voluntary, to alternative conflict resolution mechanisms, in those assumptions in which there are controversies between those and any interested."

data.

In accordance with the transcribed precepts, and without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction of fine to impose in the present case for the infringement typified in article 83.5 of the RGPD of which the defendant is held responsible, in an initial assessment, are estimated concurrent the following factors:

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The merely local scope of the treatment carried out by the claimed party.

Numerous people have been affected by the offending conduct.

The damage caused because the sales always had as recipients a

determined vector of the population, elderly or elderly people, whose ability to

dense is less.

Although there is no evidence that the defendant had acted

intentionally, the conduct observed is deeply negligent.

The respondent is a natural person.

Therefore, as stated,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

FIRST: START PUNISHMENT PROCEDURE against D.A.A.A., with NIF

***NIF.1, for the alleged infringement of article 6.1.a) of the RGPD, sanctioned in accordance with

to the provisions of article 83.5.a) of the aforementioned RGPD and classified as a very

serious in article 72.1.a) of the aforementioned Law.

SECOND: APPOINT B.B.B. and, as Secretary to C.C.C.,

indicating that any of them may be challenged, as the case may be, in accordance with

established in articles 23 and 24 of Law 40/2015, of October 1, on the Regime

Legal Department of the Public Sector (LRJSP).

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THIRD: INCORPORATE in the disciplinary file, for evidentiary purposes,

the claim filed by the claimant and its documentation, the documents

obtained and generated by the General Subdirectorate for Data Inspection during the

research phase.

FOURTH: THAT for the purposes provided in art. 64.2 b) of Law 39/2015, of 1

of October, of the Common Administrative Procedure of the Public Administrations,

The sanction that could correspond would be 6,000 euros, without prejudice to what result of the instruction.

FIFTH: NOTIFY this agreement to D. A.A.A., with NIF ***NIF.1,

granting him a hearing period of ten business days to formulate the

pleadings and submit any evidence you deem appropriate. In his writing of

allegations you must provide your NIF and the procedure number that appears in the header of this document.

If within the stipulated period it does not make allegations to this initial agreement, the

The same may be considered a resolution proposal, as established in the

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

Common to Public Administrations (hereinafter, LPACAP).

In accordance with the provisions of article 85 of the LPACAP, in the event of

that the sanction to be imposed was a fine, it may recognize its responsibility within

of the term granted for the formulation of allegations to this initial agreement; it

which will entail a reduction of 20% of the sanction to be imposed in

the present procedure. With the application of this reduction, the sanction would be

established at 4,800 euros, resolving the procedure with the imposition of this

sanction.

Similarly, you may, at any time prior to the resolution of the

present procedure, carry out the voluntary payment of the proposed sanction, which

which will mean a reduction of 20% of its amount. With the application of this

reduction, the sanction would be established at 4,800 euros and its payment will imply the

termination of the procedure.

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The reduction for the voluntary payment of the sanction is cumulative to the one

It is appropriate to apply for the acknowledgment of responsibility, provided that this

acknowledgment of responsibility is revealed within the period

granted to formulate arguments at the opening of the procedure. The pay

volunteer of the amount referred to in the preceding paragraph may be made at any

time prior to resolution. In this case, if it were appropriate to apply both

reductions, the amount of the penalty would be established at 3,600 euros.

In any case, the effectiveness of any of the two reductions mentioned

will be conditioned to the withdrawal or renunciation of any action or resource in via

administrative against the sanction.

In the event that you choose to proceed with the voluntary payment of any of the

amounts indicated above (4,800 or 3,600 euros), you must make it effective

by depositing it in account number ES00 0000 0000 0000 0000 open to

name of the Spanish Data Protection Agency at CAIXABANK Bank,

S.A., indicating in the concept the reference number of the procedure that appears in

the heading of this document and the reason for the reduction of the amount to which

welcomes

Likewise, you must send proof of payment to the General Subdirectorate of

Inspection to proceed with the procedure in accordance with the quantity

entered.

The procedure will have a maximum duration of nine months from the

the date of the start-up agreement or, where applicable, of the draft start-up agreement.

Once this period has elapsed, it will expire and, consequently, the file of

performances; in accordance with the provisions of article 64 of the LOPDGDD.

Finally, it is pointed out that in accordance with the provisions of article 112.1 of the LPACAP, there is no administrative appeal against this act.

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Director of the Spanish Data Protection Agency

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: On March 3, 2020, the claimant has proceeded to pay the

SECOND

sanction in the amount of 3600 euros making use of the two reductions provided in the Startup Agreement transcribed above, which implies the recognition of the responsibility.

THIRD: The payment made, within the period granted to formulate allegations to the opening of the procedure, entails the waiver of any action or resource in via administrative action against the sanction and acknowledgment of responsibility in relation to the facts referred to in the Initiation Agreement.

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, and as established in art. 47 of the Organic Law 3/2018, of 5 December, of Protection of Personal Data and guarantee of digital rights (in hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection

is competent to sanction the infractions that are committed against said Regulation; infractions of article 48 of Law 9/2014, of May 9, General Telecommunications (hereinafter LGT), in accordance with the provisions of the article 84.3 of the LGT, and the infractions typified in articles 38.3 c), d) and i) and 38.4 d), g) and h) of Law 34/2002, of July 11, on services of the society of the information and electronic commerce (hereinafter LSSI), as provided in article 43.1 of said Law.

II

Article 85 of Law 39/2015, of October 1, on Administrative Procedure Common to Public Administrations (hereinafter, LPACAP), under the rubric "Termination in sanctioning procedures" provides the following:

"1. A sanctioning procedure has been initiated, if the offender acknowledges his responsibility, the procedure may be resolved with the imposition of the sanction to proceed.

2. When the sanction is solely pecuniary in nature or fits impose a pecuniary sanction and another of a non-pecuniary nature but it has been justified the inadmissibility of the second, the voluntary payment by the alleged perpetrator, in any time prior to the resolution, will imply the termination of the procedure, except in relation to the replacement of the altered situation or the determination of the compensation for damages caused by the commission of the infringement.

3. In both cases, when the sanction is solely pecuniary in nature, the competent body to resolve the procedure will apply reductions of, at least 20% of the amount of the proposed sanction, these being cumulative each. The aforementioned reductions must be determined in the notification of

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initiation of the procedure and its effectiveness will be conditioned to the withdrawal or

Waiver of any administrative action or recourse against the sanction.

The reduction percentage provided for in this section may be increased
regulations.

According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00379/2019, of
in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to A.A.A.

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 as prescribed by
the art. 114.1.c) of Law 39/2015, of October 1, on Administrative Procedure

Common of the Public Administrations, the interested parties may file an appeal
contentious-administrative 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.

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