938-0419

Procedure No.: PS/00159/2019

RESOLUTION OF PUNISHMENT PROCEDURE

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

to the following:

BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the claimant) dated July 9, 2018

filed a claim with the Spanish Data Protection Agency. The

claim is directed against AVON COSMETICS SAU with NIF A28151298 (in what

hereafter, Avon or the claimed party). The grounds on which the claim is based are that Avon

has made an inappropriate use of your personal data, not verifying your identity and

including it in the financial solvency file Asnef.

Thus, he indicates that he contacted the defendant, requesting

that their data be canceled from the aforementioned file, refusing Avon, and also the contract

provided does not have a signature and does not prove that it had been registered on the page

Web.

The claimant attaches the following documentation:

- Complaint filed on July 3, 2018 at the offices of the

General Police Directorate, Madrid-Usera Police Station, Record No.:

21882/18, where it is stated that on the occasion of attempting to carry out a

banking operation in your entity inform you that it is registered in a list

of defaulters by Avon Cosmetic.

- Document with the Equifax logo dated May 25, 2018 in which

The name, surnames and DNI of the claimant appear in the Asnef file,

associated with a product of Others being the registration date 04/11/2018 and the

informant Avon Cosmetics, SAU.

SECOND: In view of the facts denounced in the claim and the

documents provided by the claimant and of which she has had knowledge

Agency, the Subdirectorate General for Data Inspection proceeded to carry out

preliminary investigative actions to clarify the facts in

matter, by virtue of the investigative powers granted to the authorities of

control in article 57.1 of Regulation (EU) 2016/679 (General Regulation of

Data Protection, hereinafter RGPD), and in accordance with the provisions of the

Title VII, Chapter I, Second Section, of Organic Law 3/2018, of December 5,

Protection of Personal Data and guarantee of digital rights (hereinafter

LOPDGDD).

On October 10, 2018, Avon has sent this Agency the following

information in relation to the facts denounced:

1. According to the information contained in its database, the claimant is

distributor of Avon by virtue of a commercial distribution contract, signed on 27

November 2017, which, they contribute. They also attach the acceptance log given

that its acceptance is online, as well as the screen printing of the

Avon.

Account number: ***NUMBER.1

Registration date: ***DATE.1

Name: A.A.A.

Surnames: A.A.A.

Date of birth: ***DATE.2

Email: ***EMAIL.1

Street name: ***ADDRESS.1

City: MADRID

Zip Code: ***ADDRESS.1

Phone: ***PHONE.1

Regarding the debt claimed from the claimant:

1. They provide a copy of the invoice and the order delivery note, state

that the claimant placed an order for an amount of XXX.XX euros, which,

have been paid within 21 days from the date of the invoice, as established

in the eighth clause of the commercial distribution contract and that, on this date

still pending payment.

2. Due to the foregoing, the claimant is included in the asset solvency file

and credit prior notification and payment requirement.

Said notification was carried out, in the first place, through the aforementioned

eighth clause of the commercial distribution contract "In the event that the

payment of any amount due within the aforementioned period of twenty-one (21) days, the data

relating to non-payment may be communicated to common files relating to

compliance or non-compliance with monetary obligations in the manner provided in the

applicable regulations." and secondly, through personalized communication and

sent to the claimant informing her of both the amount of the debt and the

Possibility of inclusion of your data in asset solvency files. Bliss

The communication was made via certified SMS to the telephone number indicated by the

distributor when perfecting the commercial distribution contract informing of the

existing debt and the consequences of not making the payment (attach a copy of the

Certified SMS sent to the claimant in which it is stated verbatim:

"Certified SMS: we contact you. Due to the debt,

expired and payable, which is pending payment to Avon and amounts to €XXX.XX.

If this payment is not made within a maximum time of 15 days from receipt

of this message, we will proceed to register the debt in ASNEF (file of

delinquency). For any questions, contact At. Client 918892929".

Through Diligence dated April 15, 2019, it is incorporated into the file

E/05308/2018 -of which PS/00159/2019 brings cause- the general information of the

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entity extracted from the Mercantile Registry on the same date from which we highlight that

the subscribed and paid up share capital amounts to 1202024.21 euros.

THIRD: On April 24, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against AVON COSMETICS

SAU, with NIF A28151298, for the alleged infringement of article 6.1. GDPR

typified in article 83.5.a) of the aforementioned RGPD.

FOURTH: Once the initial agreement has been notified, the representation of the denounced entity,

By means of a letter dated May 13, 2019, it formulated, in summary, the following

allegations:

1. That Avon had a sufficient legal basis to process the data of your

distributor, consisting of a distribution contract duly accepted and

signed (electronically), which would not have been formalized by the claimant, but by

a third party, who fraudulently using your data, would have formalized that

contract to take advantage of Avon's financing conditions and acquire its

products without the intention of paying for them (this is committing a typical scam).

The reason why the claimant's data has been included in a file

of solvency is that there has been a deception and fraud, it has been based on an error

invincible of type, in the awareness that the complainant was who she said she was.

2. Point out that we are facing a case identical to those of the creation of profiles false in social networks in order to commit crimes of libel and slander, pointing out that this is precisely the position that the AEPD has always taken, providing the Resolution R/2831/2012, in which, in addition to exempting the companies responsible social networks of all responsibility, it was agreed to sanction the individual natural person responsible for committing identity theft and deception.

3. States that the AEPD itself has accepted this proposal for Avon, agreeing in its resolution E/09980/2018 regarding a case identical to the one that we are now face the closure of the sanctioning procedure.

4. Indicates that it is proven that Avon acted diligently in accordance with the information that he had at that time and that everything seems to indicate was intentionally provided to induce an invincible error of the type.

5. It adds that Avon scrupulously respects current legislation regarding Data Protection. Thus, Avon ordered on July 13, 2018 the immediate withdrawal of the claimant in the aforementioned asset solvency file without making any type of opposition to the cancellation of your data.

6. Avon requests that the documentation that accompanies these allegations.

FIFTH: The testing period was started by the instructor of the procedure, remembering:

a).- consider reproduced for evidentiary purposes the complaint filed by the complainant and his documentation, the documents obtained and generated by the

Inspection Services before Avon and b).- consider reproduced for evidentiary purposes, the allegations to the initiation agreement PS/00159/2019, presented by the representation of the reported entity.

SIXTH: On June 21, 2019, a resolution proposal was formulated, proposing the imposition of a fine of €60,000 on AVON COSMETICS SAU, with NIF A28151298, for the infringement of article 6 of the RGPD, typified in article 83.5 of the GDPR.

SEVENTH: With the date of entry into this Agency on July 5, 2019, Avon made allegations against the aforementioned resolution proposal in which it requests the file or provisional suspension of the procedure.

The respondent alleges that her actions have been scrupulously respectful with the right to privacy and with respect to the personal data of the claimant, for having been the treatment of the data carried out by Avon at all times in accordance with current Spanish regulations on the protection of personal data or and where appropriate, having based said action on an invincible error of type, on the awareness that the distributor was who she said she was.

It states that in the event that the AEPD continues to consider it necessary to documentary evidence of the date of withdrawal of the complainant ordered by Avon, The AEPD requires Asnef/Equifax to provide a documentary certificate that prove that it was Avon itself, through the system enabled by Equifax, that gave deregistration of the complainant on July 13, 2018 in the Asnef file.

Subsidiarily requests the provisional suspension of this administrative procedure pending clarification of the facts subject to criminal investigation.

PROVEN FACTS

1º- There is a claim filed by the claimant, stating that Avon

has made an inappropriate use of your personal data, not verifying your identity and

including it in the financial solvency file Asnef. A complaint is filed with the

General directorate of police.

2º - It is stated that your data was informed to Asnef by AVON COSMETICS,

with discharge date 04/11/2018.

3rd - AVON COSMETICS has provided an invoice for the order

made by the claimant and the delivery note of said order.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of 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 Processing of Personal Data and the

Free Circulation of these Data (General Data Protection Regulation, in

hereinafter RGPD) recognizes each control authority and according to what is established in the

Articles 47, 64.2 and 68.1 of Organic Law 3/2018, of December 5, on Protection

of Personal Data and Guarantee of Digital Rights (hereinafter LOPDGDD),

The Director of the Spanish Agency for Data Protection is competent to initiate

this procedure.

II

The joint assessment of the documentary evidence in the procedure

brings to the attention of the AEPD a vision of the action denounced to Avon, which has

been reflected in the facts declared proven above reported.

Beforehand, it is necessary to resolve the allegation presented by the

representation of Avon, based on the existence of a criminal preliminary ruling, as already

was set out in the motion for a resolution.

It is stated that having had knowledge that certain facts that could
be constitutive of an alleged crime of fraud typified in article 248 and
following the Penal Code, a complaint has been filed with the national police,
which would entail the declaration of the suspension of the present procedure before the
concurrence of a possible criminal infraction for false documentation, impersonation of
personality and scam. In particular, and by virtue of the complaint filed by the
claimant, Avon has become aware that its process may have been misrepresented
contracting using a third party fraudulently the identity of the
complainant.

It should be noted that art. 77.4 of Law 39/2015, of October 1, of the
Common Administrative Procedure of Public Administrations (LPACAP): “In
sanctioning procedures, the facts declared proven by
firm criminal judicial resolutions will bind the Public Administrations
regarding the sanctioning procedures that substantiate”. However, even though
there were prior criminal proceedings in process, which do not appear, it must be indicated,
that there is no triple identity necessary to apply article 77 of the LPACAP, (from
subject, fact and foundation), between the administrative infraction that is valued and the
possible infraction or criminal infractions that could derive from the alleged
Preliminary proceedings carried out by a jurisdictional body. This, because the subject
offender it is obvious that it would not be the same -regarding infractions of the LOPD the
responsible is the Avon entity, while the criminal responsible for a possible
crime of usurpation of marital status or fraud would be the third that would have been done
go through the whistleblower. Nor would the legal basis be the same: while the
legal right protected by the LOPDGDD is the fundamental right to the protection of
personal data, the legal right that is protected in criminal types whose commission
would investigate, if necessary, the Investigating Court would be the marital status and the

heritage, respectively.

In this sense, the Judgment of the National High Court of

04/27/2012 (rec. 78/2010), in whose second Legal Basis the Court

pronounces in the following terms in response to the appellant's allegation that the AEPD

has violated article 7 of the R.D. 1398/1993 (rule that was in force until the

entry into force of the LPACAP): “In this sense, Art. 7 of the Royal Decree

1398/1993, of August 4, of the procedure for the exercise of the power

sanctioning, it only foresees the suspension of the administrative procedure

when the effective and real existence of a criminal proceeding is verified, if

considers that there is identity of subject, fact and basis of law between the

administrative infraction and criminal infraction that may correspond.

However, and for the concurrence of a criminal preliminary ruling, it is required

that it directly conditions the decision to be taken or that it is

essential to solve, budgets that do not concur in the case examined,

in which there is a separation between the facts for which it is sanctioned in the

resolution now appealed and those that the appellant invokes as possible illicit

penalties. Thus, and even if it had been initiated, in the present case, and due to the facts

now controversial, also criminal proceedings against the distribution company,

The truth is that both the sanctioning conduct and the protected legal interest are

different in both ways (contentious-administrative and criminal). In the criminal field, the

a protected legal asset is a possible documentary forgery and fraud, and in the

administrative, on the other hand, the power to dispose of your personal data by

of its owner, so such objection of the defendant must be rejected".

In consideration of the foregoing, the question raised by the

representation of Avon and should be rejected.

III

The defendant is accused of committing an infraction for violation of the

Article 6 of the RGPD, "Legality of the treatment", details in its section 1 the assumptions

in which the processing of third party data is considered lawful:

"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;

(…)"

The infraction for which the claimed entity is held responsible is

typified in article 83 of the RGPD that, under the heading "General conditions for

the imposition of administrative fines", states:

"5. Violations of the following provisions will be sanctioned, in accordance

with 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:

1 The basic principles for the treatment, including the conditions for the

consent under articles 5,6,7 and 9."

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the Digital Rights (LOPDGDD) in its article 72, under the heading "Infringements considered very serious" provides:

"1. Based on the provisions of article 83.5 of the Regulation (U.E.) 2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in it and, in particularly the following:

(…)

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

IV

The documentation in the file offers evidence that Avon, violated article 6.1 of the RGPD, since it does not prove the legitimacy for the treatment of the data of the claimant, since the contract does not appear signed and has its formalization has been denied.

The Administrative Litigation Chamber of the National High Court, in cases like the one presented here, has considered that when the owner of the data denies contracting corresponds the burden of proof to who affirms its existence the person responsible for the processing of third-party data must collect and keep the documentation necessary to prove the consent of the holder. We quote, for all, the SAN of 05/31/2006 (Rec. 539/2004), Fourth Law Basis.

The personal data of the claimant were registered in the files of Avon and were treated for the issuance of invoices for services associated with the denouncing person and to be included in the asset and credit solvency file.

The documentation that Avon has provided consists of a commercial contract of

distribution, and the online acceptance log.

However, and this is essential, Avon does not credit the legitimacy for the

treatment of the data of the claimant, since the contract does not appear signed and has

its formalization has been denied.

The only two extremes that the claimant, Avon, has accredited through the

documents that he provided to the Agency during the preliminary proceedings, namely, that the

The claimant's data was obtained through the web.

The reason is that none of the aforementioned documents proves what is

material in the matter, that Avon has complied with its inexcusable obligation

imposes the data protection regulations to prove one of the causes

legitimizing the treatment of the owner of the data.

In short, the respondent has not provided a document or evidence

one that shows that the entity, in such a situation, would have deployed the

minimum diligence required to verify that your interlocutor was indeed the one

claimed to hold

Respect for the principle of legality that is in the essence of the fundamental right

of protection of personal data requires that it be accredited that the

responsible for the treatment displayed the essential diligence to prove that

extreme. Failure to act in this way -and this Agency, who is responsible for ensuring

for compliance with the regulations governing the right to data protection of

personal character - the result would be to empty the content of the principle of legality.

It should be noted that, despite the informative requirement of the Inspection of

Data from this Agency, the respondent did not put an end to the irregular situation caused and that insists on considering legitimate the processing of data carried out arguing which is sufficient evidence for these purposes the commercial distribution contract, whose acceptance was made online that, as has been said, in no case do they prove such legitimation.

Regarding what is invoked by Avon, in relation to resolution R/02831/2012 and E/09980/2018, alleging, in short, that they are identical cases. can't prosper for containing subjective assessments of the claimed, and are not similar to this procedure, in this Avon has processed the data without having proven that it has the legitimacy for its treatment and even considering that the date of removal in the Asnef file was July 13, 2018.

On the other hand, regarding resolution R/02831/2012, Regulation (EU) 2016/679, of April 27, 2016, General Data Protection (RGPD), establishes its material scope of application in article 2, which provides for its application to the treatment totally or partially automated of personal data, as well as to the treatment not automated processing of personal data contained or intended to be included in a file. As established in section 2 of the same article, it does not apply to processing of personal data: a) in the exercise of an activity not included in the scope of application of Union law; b) by the Member States when they carry out activities included in the scope of application of the chapter 2 of Title V of the TUE; c) carried out by a natural person in the exercise of exclusively personal or domestic activities; d) by the authorities authorities for the purposes of prevention, investigation, detection or prosecution of criminal offenses, or the execution of criminal sanctions, including protection against threats to public safety and their prevention.

According to the provisions of its recital 18, Regulation (EU) 2016/679, of April 27, 2016, General Data Protection (RGPD), does not apply to processing of personal data by a natural person in the course of a exclusively personal or domestic activity and, therefore, without any connection with a professional or commercial activity. Between personal or domestic activities may include correspondence and keeping an address book, or the activity on social media and online activity conducted in the context of mentioned activities. However, the RGPD applies to those responsible or in charge of the treatment provided by the means to treat personal data related with such personal or domestic activities, so it should be understood that it is not applicable to the activity in social networks, which is not this case that falls within the material scope of the regulations on the protection of personal data staff.

v

In order to determine the administrative fine to be imposed, the provisions of articles 83.1 and 83.2 of the RGPD, precepts that indicate:

"Each control authority will guarantee that the imposition of fines administrative actions under this article for violations of this Regulation indicated in sections 4, 9 and 6 are in each individual case effective, proportionate and dissuasive."

"Administrative fines will be imposed, depending on the circumstances of each individual case, in addition to or as a substitute for the measures contemplated in the Article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine administration and its amount in each individual case will be duly taken into account:

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

nature, scope or purpose of the processing operation in question

as well 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 whether the person in charge or the person in charge notified the infringement and, if so, in what

measure;

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

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

same matter, compliance with said measures;

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

certification approved in accordance with article 42, and

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

such as financial benefits obtained or losses avoided, directly or

indirectly, through the infringement."

Regarding section k) of article 83.2 of the RGPD, the LOPDGDD, article 76,

"Sanctions and corrective measures", provides:

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

may also be taken into account:

a) The continuing nature of the offence.

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

personal information.

c) The profits obtained as a result of committing the offence.

d) The possibility that the conduct of the affected party could have induced the

commission of the offence.

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

infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when not mandatory, a data protection officer.

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

alternative conflict resolution mechanisms, in those cases in which

that there are controversies between them and any interested party."

In the case at hand when the claimant denied that she had contracted with Avon, and

not having provided any means of sufficient proof that accredits said hiring,

should be considered violated article 6 of the RGPD.

It is considered appropriate to graduate the sanction of a fine to be imposed in this case

Avon as responsible for an infringement typified in article 83.5.a) of the RGPD, and

the following factors are considered concurrent:

1 The merely local scope of the data processing carried out by the claimed party.

2 Only one person has been affected by the offending conduct.

3 The damage caused to the affected party by the processing of their data is not very

significant.

4. The duration of the treatment carried out by the claimed party without legitimacy for it,

but, at least, there is evidence that the commercial distribution contract was signed on 27

November 2017.

5. There is no evidence that the respondent had acted maliciously or with a

relevant negligence.

6. The respondent did not adopt any measure to correct the effects of the infringement.

7. There is an obvious link between the processing of personal data and

the activity carried out by the claimed entity.

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

of the sanctions whose existence has been proven,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE AVON COSMETICS SAU, with NIF A28151298, for an infringement

of Article 6 of the RGPD, typified in Article 83.5 of the RGPD, a fine of €60,000.00.

SECOND: NOTIFY this resolution to AVON COSMETICS SAU.

THIRD: Warn the sanctioned person that he must make the imposed sanction effective once

that this resolution is enforceable, in accordance with the provisions of art. 98.1.b)

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

Public Administrations (hereinafter LPACAP), within the established voluntary payment period

in art. 68 of the General Collection Regulations, approved by Royal Decree

939/2005, of July 29, in relation to art. 62 of Law 58/2003, of December 17,

by entering, indicating the NIF of the sanctioned person and the number of the procedure that

appears at the top of this document, in the restricted account number ES00 0000

0000 0000 0000 0000, opened on behalf of the Spanish Agency for Data Protection in

CAIXABANK Bank, S.A. Otherwise, it will proceed to its collection in period

executive.

Received the notification and once executed, if the date of execution is between the

days 1 and 15 of each month, both inclusive, the term to make the voluntary payment will be

until the 20th day of the following month or immediately after, and if it is between the days

16th and last of each month, both inclusive, the payment term will be until the 5th of the second

following or immediately following business month.

In accordance with the provisions of article 50 of the LOPDPGDD, this

Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the

LOPDPGDD, 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 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,

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, it may be

precautionary suspension of the firm decision in administrative proceedings if the interested party expresses its intention to file a contentious-administrative appeal. If this is the case, the

The interested party must formally communicate this fact in writing addressed to the Agency Spanish Data Protection, presenting it through the Electronic Registry of the Agency [https://sedeagpd.gob.es/sede-electronica-web/], or through one of the remaining records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1.

You must also transfer to the Agency the documentation that proves the filing effectiveness of the contentious-administrative appeal. If the Agency were not aware of the filing of the contentious-administrative appeal within two months from the day following the notification of this resolution, it would end the suspension precautionary

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Director of the Spanish Data Protection Agency