

□ Procedure No.: PS/00319/2020

RESOLUTION R/00574/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT VOLUNTEER

In sanctioning procedure PS/00319/2020, instructed by the Spanish Agency for
Data Protection for PEDROSO Y GÓMEZ ASESORÍA DE EMPRESAS, S.L., view
the complaint filed by A.A.A., and based on the following,

BACKGROUND

FIRST: On October 26, 2020, the Director of the Spanish Agency for
Data Protection agreed to initiate a sanctioning procedure against PEDROSO Y GÓMEZ
BUSINESS ADVICE, S.L. (hereinafter, the claimed party), through the Agreement
which is transcribed:

<<

Procedure No.: PS/00319/2020

935-240719

AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Data Protection Agency before
the entity, PEDROSO Y GÓMEZ ASESORÍA DE EMPRESAS, S.L., with CIF.:
B83850206 owner of the website www.pergoz.com, (hereinafter, "the entity
claimed"), by virtue of a complaint filed by D. A.A.A. , (hereinafter, "the
claimant"), and based on the following:

FACTS

FIRST: On 03/18/20, you have entered this Agency, filed a complaint
by the claimant in which he indicated, among others, the following:
"This company sends me emails despite having requested via email that I get
from your distribution list. In addition, in the emails sent there is no form

of contact to exercise my rights of access, rectification, opposition and limitation.

I attach the email sent, as well as some of the emails received.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

2/15

SECOND: In view of the facts set forth in the claim and the documents provided by the claimant, the General Subdirectorate for Data Inspection proceeded to carry out actions for its clarification, under the powers of investigation granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (GDPR). Thus, on 06/18/20, an informative request is addressed to the claimed entity.

THIRD

requirement, by the claimed entity, in which, among others, it indicates:

: On 07/17/20, this Agency received a written response to the

“Upon learning of the circumstance that the claimant, who was a client of this entity, after having requested to be removed from the information distribution list, was still receiving information from this entity, it was immediately terminated.

Despite being a small entity, the possibility of hire a consultant specializing in personal data protection, remembering their hiring for the complete adaptation of the entity to the regulations in force regarding data protection. Its advice is sought for the present matter and the minimum actions to be carried out are collected: Verification of the total removal of the claimant's email data from the list of information distribution; internal investigation in relation to the causes of the

exclusion of the claimant to determine if there has been bad faith or malpractice in the bosom of the entity; Preparation and sending of a letter of apology informing of the exclusion from the distribution list (document no. 1); meeting with employees and internal communication with the points discussed, recalling and reinforcing the importance data processing and management (document no. 2); exclusion check of the distribution list of the next clients who unsubscribe from the entity.

In the formal letter of apology to the claimant. you are informed of the removal from the list of information distribution (document nº 1).

As a usual practice, this entity proceeds to unsubscribe from customers who de-registration of the entity from the information distribution list unless expressly request to receive them. Therefore, the claim is investigated, requesting the used his version of the facts, specifically the lack of exclusion from the list of information distribution. After this, it is concluded that the cause that has originated the incident was due to an involuntary human error in the management of remove the complainant from the customer information distribution list.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

3/15

In relation to the measures adopted to prevent the recurrence of incidents Similar. Assessing its relevance and usefulness, we have proceeded to hire a consultant specializing in data protection for the review of all treatment activities carried out by this entity and obtain the due legal advice on data protection.

The contract with the hired Consultant is attached (document nº 3). It proceeds to

investigate the claim, asking the employee for their version of the facts, specifically the lack of exclusion from the information distribution list, concluding that it was an involuntary human error. He proceeds to meet with those of the entity to remember and reinforce the importance of regulatory compliance in terms of data protection. As an additional measure, a circular internal to the employees to reinforce the message of the meeting (document nº 2). I know decides that the next 25 clients will unsubscribe from the distribution list that they unsubscribe from this entity will be reviewed by the Administrator. This party, fully committed to complying with current regulations, in specifically with the new data protection regulations, it is put to complete disposition of the Control Authority, in this case of the Spanish Agency of Data Protection, to facilitate any additional information that is created relevant to this topic.

FOURTH: this Agency verifies that the website www.pergoz.com, has the following characteristics regarding its privacy policy and cookie policy:

a).- On the home page there is a personal data collection form with the purpose of contacting the entity, such as name and email.

On the same home page, at the top of it, through the link of <<contact>>, is redirected to a page where, in addition to having a form for collection of personal data, (name, email and telephone) of the user, the web provides the following information about the person responsible for the page: Calle de Isabel Colbrand, 10, OFFICE 88, FLOOR 2. 28050 Madrid; 915 48 45 38; contacto@pergoz.com

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

4/15

b).- There is no link or

link that redirects to the "privacy policy" or the "legal notice" of the entity.

c).- There is no banner on the home page about the use or not of cookies by

part of the web or the possible installation of the same in the terminal equipment. Either

There is no link on this page that redirects to the "cookie policy".

FOURTH: In view of the facts denounced, in accordance with the evidence of

that is available, the Data Inspection of this Spanish Agency for the Protection of

Data considers the above, does not comply with current regulations, therefore

that the opening of this sanctioning procedure proceeds.

FOUNDATIONS OF LAW

Yo

Competition:

- On the legality of the processing of personal data and on the "Privacy Policy".

Privacy" of the web page of its ownership:

By virtue of the powers that article 58.2 of Regulation (EU) 2016/679, of the

European Parliament and of the Council, of 04/27/16, regarding the Protection of

Natural Persons with regard to the Processing of Personal Data and the Free

Circulation of these Data (RGPD) recognizes each Control Authority and, as

established in arts. 47, 64.2 and 68.1 of Organic Law 3/2018, of December 5,

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

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

this procedure.

Sections 1) and 2), of article 58 of the RGPD, list, respectively, the

investigative and corrective powers that the supervisory authority may provide to the effect, mentioning in point 1.d), that of: "notifying the person in charge or in charge of the

www.aepd.es

C/ Jorge Juan, 6

28001 – Madrid

sedeagpd.gob.es

5/15

treatment of alleged infringements of these Regulations" and in 2.i), that of:

"impose an administrative fine under article 83, in addition to or instead of the measures mentioned in this section, according to the circumstances of each case."

- About the "Cookies Policy":

In accordance with the provisions of art. 43.1, second paragraph, of the Law 34/2002, of July 11, on Services of the Information Society and Commerce Electronic System (LSSI), is competent to initiate and resolve this Procedure Sanctioning, the Director of the Spanish Agency for Data Protection.

II

On the legality of the processing of personal data, in the present case, as complaint, the claimant has received several emails from the entity claimed after notifying them of your refusal to receive them. Thus, from the Documentation provided along with the complaint highlights the following:

- 1.- On 02/10/20 an email is sent from the address ***EMAIL.1, to the email address administracion@pedrosoygomez.com, with the following message: "please remove my email from the list of subscribers".
- 2.- The complaint is accompanied by others, a copy of several emails received from the address, ***EMAIL.2 @pedrosoygomez.com, on the 12th, 13th, 14th, 16th and 17th of

March 2020, with information from the respondent entity on issues of

legal and tax advice.

Article 6.1. of the RGPD, establishes that the treatment will only be lawful if it complies with the

least one of the conditions indicated therein, among which is,

in section b), if 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”, in which case, the sending of communications that are intimate

relation to the purpose of the signed contract, would be endorsed by this precept, as would be

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

6/15

in the present case, maintain communication between both parties, regarding the

purposes pursued by the claimed entity, such as legal and tax advice.

However, when the client declares that his personal data is eliminated

of the entity's databases and that you do not wish to receive further communications from

them, the processing of personal data is no longer lawful.

Therefore, the known facts could constitute an infraction, attributable

to the claimed, for violation of art. 6.1 of the RGPD, when carrying out a treatment of the

personal data of the claimant after having rejected it, said treatment

and requested the removal of their personal data from the entity's database.

For its part, article 72.1.b) of the LOPDGDD considers it very serious, for the purposes of

prescription, "Breach of the requirements of article 6 of the RGPD".

This infraction can be sanctioned with a maximum fine of €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

of greater amount, in accordance with article 83.5.b) of the RGPD.

In accordance with the precepts indicated, and without prejudice to what results from the

instruction of the procedure, in order to set the amount of the sanction to be imposed in

the present case, it is considered appropriate to graduate the sanction to be imposed in accordance

with the following aggravating criteria established in article 83.2 of the RGPD:

-

-

The intentionality or negligence in the infringement. In the present case we are

before unintentional negligent action, (paragraph b).

The way in which the supervisory authority became aware of the infringement. The

way in which this AEPD has been aware has been through the interposition of

the complaint by the claimant, (section h).

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

7/15

The balance of the circumstances contemplated in article 83.2 of the RGPD, with

Regarding the infraction committed by violating the provisions of article 6.1, it allows

set a penalty of 2,000 euros, (five thousand euros).

III

Regarding the privacy policy of the website www.pergoz.com, it is verified that,

personal data of users can be collected on said website, but there is no

no link that redirects to the "privacy policy" or the "legal notice".

Article 13 of the RGPD establishes the information that must be provided to the

interested at the time of collecting your personal data. Information that

should appear in the "privacy policy" of the website in question:

1. When personal data relating to him is obtained from an interested party, the responsible for the treatment, at the time these are obtained, will provide all the information indicated below: a) the identity and contact details of the responsible and, where appropriate, his representative; b) the contact details of the delegate data protection, where appropriate; c) the purposes of the treatment to which the data is intended. personal data and the legal basis of the treatment; d) when the treatment is based in article 6, paragraph 1, letter f), the legitimate interests of the person in charge or of a third; e) the recipients or categories of recipients of the personal data, in your 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 decision adequacy of the Commission, or, in the case of transfers indicated in the Articles 46 or 47 or Article 49, paragraph 1, reference to adequate guarantees or appropriate and the means to obtain a copy of them or the fact that have lent.

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 data processing fair and transparent: a) the period during which the personal data will be kept or, when this is not possible, the criteria used to determine this period; b) the existence of the right to request access to data from the data controller 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 the portability of the data; c) when the treatment is based on article 6, paragraph 1, letter a), or the

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

8/15

Article 9, paragraph 2, letter a), the existence of the right to withdraw consent in any time, without affecting the legality of the treatment based on the consent prior to its withdrawal; d) the right to file a claim with a control authority; e) if the communication of personal data is a requirement legal or contractual, or a necessary requirement to enter into a contract, and if the The interested party is obliged to provide personal data and is informed of the possible consequences of not providing such data; f) the existence of decisions you automate, including profiling, referred to in article 22, paragraphs 1 and 4, and, at least in such cases, significant information about the logic applied, as well as the importance and expected consequences of said treatment for the interested party.

Therefore, the known facts could constitute an infraction, attributable to the claimed, for violation of art. 13 of the RGPD, which establishes the information that must be provided to the interested party at the time of collecting their data personal.

For its part, article 72.1.h) of the LOPDGDD considers it very serious, for the purposes of prescription, “the omission of the duty to inform the affected party about the treatment of your personal data in accordance with the provisions of articles 13 and 14 of the RGPD”

This infraction can be sanctioned with a maximum fine of €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 of greater amount, in accordance with article 83.5.b) of the RGPD.

In accordance with the precepts indicated, and without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction to be imposed in the present case, it is considered appropriate to graduate the sanction to be imposed in accordance with the following aggravating criteria established in article 83.2 of the RGD:

-

The intentionality or negligence in the infringement. In the present case we are before unintentional negligent action, (paragraph b).

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

9/15

-

The way in which the supervisory authority became aware of the infringement: the way in which this AEPD has been aware has been by complaint of a particular, (section h).

The balance of the circumstances contemplated in article 83.2 of the RGD, with Regarding the infraction committed by violating the provisions of article 13, it allows set a penalty of 2,000 euros, (two thousand euros).

IV

In relation to the "Cookies Policy" of the website, it is verified that, when accessing to the main page of the web, there is no banner or information about the use or not of cookies, there is also no link that redirects to the "policy of cookies".

The exposed facts could suppose on the part of the claimed entity the commission of the infringement of article 22.2 of the LSSI, according to which:

“Service providers may use storage devices and recovery of data in terminal equipment of the recipients, provided that they have given their consent after they have been provided clear and complete information on its use, in particular, on the purposes of the data processing, in accordance with the provisions of Organic Law 15/1999, of 13 December, on the protection of personal data.

Where technically possible and effective, the recipient's consent to Accepting the processing of the data may be facilitated through the use of the parameters from the browser or other applications.

The foregoing will not prevent the possible storage or access of a technical nature to the sole purpose of effecting the transmission of a communication over a communications network electronic or, to the extent that is strictly necessary, for the provision of a service of the information society expressly requested by the addressee".

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

10/15

This Infraction is typified as "minor" in article 38.4 g), of the aforementioned Law, which considers as such: “Use data storage and retrieval devices when the information has not been provided or the consent of the recipient of the service in the terms required by article 22.2.”, and may be sanctioned with a fine of up to €30,000, in accordance with article 39 of the aforementioned LSSI.

After the evidence obtained in the preliminary investigation phase, and without prejudice to

whatever results from the investigation, it is considered appropriate to graduate the sanction to impose in accordance with the following aggravating criteria, established by art. 40 of the LSSI:

-

The existence of intentionality, an expression that must be interpreted as equivalent to a degree of guilt according to the Judgment of the National High Court of 11/12/07 relapse in Appeal no. 351/2006, corresponding to the denounced entity the determination of a system of Obtaining informed consent that is in accordance with the mandate of the LSSI.

- Period of time during which the infraction has been committed, as it is the claim for the month of March 2020, (section b).

Pursuant to these criteria, it is considered appropriate to impose on the defendant entity a fine of 2,000 euros (two thousand euros).

v

Therefore, in accordance with the criteria set out in the previous points, the sanction total to be imposed would be 6,000 euros (six thousand euros), for infractions of the articles, 6.1 of the RGPD (2,000 euros); art. 13 of the RGPD (2,000 euros) and art. 22.2 of the LSSI (2,000 euros).

Therefore, in accordance with the foregoing, by the Director of the Agency Spanish Data Protection,

HE REMEMBERS:

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

START: PUNISHMENT PROCEDURE against the entity PEDROSO Y GÓMEZ

ASESORÍA DE EMPRESAS, S.L., with CIF.: B83850206 owner of the website

www.pergoz.com by:

-

-

-

Violation of article 6.1) of the RGPD, regarding the illicit treatment of the personal data of the claimant.

Violation of article 13) of the RGPD due to the lack of a privacy policy on its website, verifying that there is data processing users, without the necessary information contemplated in said

Article.

Violation of article 22.2) of the LSSI, regarding the non-existence of "Policy of Cookies" of the web page of its ownership.

APPOINT: ***INSTRUCTOR.1 as Instructor, and Secretary, if applicable,

***SECRETARY.1, indicating that any of them may be challenged, if applicable,

in accordance with the provisions of articles 23 and 24 of Law 40/2015, of October 1, of Legal Regime of the Public Sector (LRJSP).

INCORPORATE: to the disciplinary file, for evidentiary purposes, the claim filed by the claimant and his documentation, the documents obtained and generated by the Subdirector General for Data Inspection during the investigations, all of them part of this administrative file.

WHAT: for the purposes provided in art. 64.2 b) of Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations, the sanction that could correspond would be:

-

2,000 euros (two thousand euros), for the infringement of article 6.1) of the RGPD,
regarding the illicit treatment of the personal data of the claimant, without
prejudice to what results from the investigation of this file.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

12/15

-

-

2,000 euros (two thousand euros), for the infringement of article 13) of the RGPD,
regarding the non-existence of a privacy policy on the web, without prejudice to
what results from the investigation of this file.

2,000 euros (two thousand euros), for the infringement of article 22.2) of the LSSI,
regarding the non-existence of "Cookies Policy" on the web, without prejudice to
what results from the investigation of this file.

WHAT: In accordance with article 58.2 of the RGPD, the corrective measure that could
be imposed on the entity PEDROSO Y GÓMEZ ASESORÍA DE EMPRESAS, S.L.
would consist of ORDERING him to take the necessary measures on:

- Update and adapt the privacy policy of the website of its ownership
to the provisions of article 13 of the RGPD.

-

Include in the website information regarding the use or not of cookies and
adapt, where appropriate, the cookie policy to what is stipulated in the regulations
in force, for which you can follow the recommendations indicated in the "Guide
About Cookies" edited by the Spanish Data Protection Agency.

NOTIFY: this agreement to initiate sanctioning proceedings to the entity

PEDROSO Y GÓMEZ ASESORÍA DE EMPRESAS, S.L, granting it a term of hearing of ten business days to formulate the allegations and present the tests you deem appropriate.

If within the stipulated period it does not make allegations to this initial agreement, the same may be considered a resolution proposal, as established in article 64.2.f) of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations (hereinafter, LPACAP).

In accordance with the provisions of article 85 of the LPACAP, in the event that the sanction to be imposed was a fine, it may recognize its responsibility within 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

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

13/15

this procedure, equivalent in this case to 1,200 euros. with the app 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 this procedure, carry out the voluntary payment of the proposed sanction, which will mean a reduction of 20% of the amount of the same, equivalent in this case at 1,200 euros. With the application of this reduction, the sanction would be established in 4,800 euros and its payment will imply the termination of the procedure.

The reduction for the voluntary payment of the penalty is cumulative with the corresponding

apply for the acknowledgment of responsibility, provided that this acknowledgment of the responsibility is revealed within the period granted to formulate arguments at the opening of the procedure. The voluntary payment of the referred amount in the previous paragraph may be done at any time prior to the resolution. In this case, if it were appropriate to apply both reductions, the amount of the penalty would be set at 3,600 euros (three thousand six hundred euros).

In any case, the effectiveness of any of the two reductions mentioned will be conditioned to the abandonment or renunciation of any action or resource in via administrative against the sanction.

If you choose to proceed to the voluntary payment of any of the amounts indicated above, you must make it effective by depositing it in account number ES00 0000 0000 0000 0000 opened in the name of the Spanish Agency for the Protection of Data in Banco CAIXABANK, S.A., indicating in the concept the number of reference of the procedure that appears in the heading of this document and the cause of reduction of the amount to which it is accepted. Also, you must send the proof of admission to the Subdirector General for Inspection to continue with the procedure in accordance with the amount entered.

The procedure will have a maximum duration of nine months from the date of the start-up agreement or, where appropriate, 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.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

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.

Sea Spain Marti

Director of the Spanish Agency for Data Protection.

>>

: On November 17, 2020, the claimant has proceeded to pay the

SECOND

the sanction in the amount of 3,600 euros making use of the two planned reductions 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. Started a sanctioning procedure, if the offender acknowledges his responsibility,

the procedure may be resolved with the imposition of the appropriate sanction.

2. When the sanction is solely pecuniary in nature or it is possible to impose a

pecuniary sanction and another of a non-pecuniary nature, but 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,

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

15/15

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 with each other.

The aforementioned reductions must be determined in the notification of initiation

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

any administrative action or recourse against the sanction.

The reduction percentage provided for in this section may be increased

regulations.

In accordance with the above, the Director of the Spanish Agency for the Protection of

Data RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00319/2020, of

in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to PEDROSO Y GÓMEZ ASESORÍA

OF COMPANIES, S.L.

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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

936-031219

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es