 Procedure No.: PS/00259/2020

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and with

based on the following:

BACKGROUND

FIRST: D. A.A.A., with NIF ***NIF.1 (hereinafter, the claimant), files

claim before the Spanish Data Protection Agency (AEPD) dated

04/06/2020. The claim is directed against BANKIA, S.A., with NIF A14010342 (in

successively, the claimed one). The reason on which you base your claim is the receipt of

commercial advertising that the respondent sent him through postal mail after

that you have opposed the processing of your data for advertising purposes and that the

claimed, of whom he is a client, replied that he was attending to his right and proceeded to

adopt the necessary measures for compliance.

Provide these documents with your claim:

a. The one that contains the commercial communication (Annex 2), integrated in turn by

two documents. In the first of them, in the lower right part, there are

the personal data of the claimant - name, two surnames and postal address

complete - and below a barcode. The position in which they are located

in the document the personal data coincides with the one that occupies the window of

a type of envelope that is commonly used in postal mail and that allows

see the recipient's details printed inside the envelope. In the

upper right corner of the document contains the anagram of the claimed

with his name. In the lower right corner the indication “11.02.2020”. In the

The body of the document contains this legend: "It is very difficult to find the house

of your dreams. Therefore, WE REMOVE THE COMMISSIONS OF YOUR NEW

MORTGAGE. Just for having your payroll domiciled and nothing else. We remove the

Then, in two parallel columns, figure:

commissions of:”

"OPENING";

“EARLY AMORTIZATION”;

"CANCELLATION

ADVANCED”; "MAIL COSTS". Immediately below is indicated:

“So that dreaming costs less. *Check conditions at Bankia offices or

bankia.es”.

The second document that integrates annex 2 of the written claim is

identical to the first with this particularity: the recipient's personal data

do not match those of the claimant -the mailing address is the same but not the

name and surnames, in this case B.B.B.- nor the date of shipment, in this case

case on 02/24/2020.

a. The letter, dated 11/28/2018, that the respondent sent to the claimant in which

acknowledges receipt of your request not to receive information of a commercial nature or

publicity of the entity and that their data were not communicated to other

entities, subsidiaries of the Bankia group or collaborators for the

commercial (Annex 1). In it, the respondent informs the claimant that she has

responded to your request and has proceeded to adopt the necessary measures for your

compliance.

The following excerpt is reproduced from the letter sent to the claimant in

response to your request not to receive commercial information:

“In relation to your request for which you [the claimant], with D.N.I. [the one from

claimant], informs us of your desire not to receive information of a

commercial or

of this Entity, as well as that your data is not

communicated to other entities or investees of the Bankia group or

collaborators, we inform you that we have fulfilled your request

and we have proceeded to adopt the necessary measures to comply with it.”

(emphasis ours)

advertising

The claimant also provided the AEPD together with the response letter that

received from the defendant a seven-page document with the anagram of the

entity that has the rubric "Processing of Personal Data" "Information

on the conditions for the processing of personal data (updated)”.

In the document they appear first, under the heading “Data of

Customer ID”, the personal data of the claimant. Later

It is stated that “The personal data requested by [the respondent] will be treated

in accordance with the following basic data protection information.” The

“Basic report on data protection” is structured in several sections

dedicated to the “Responsible”; “Purposes”; "Legitimation"; “Recipients”;

“Rights” and “Additional information”. In the section “Purposes” it mentions,

among others, the "Sending of commercial campaigns, communication of offers of

products, services and promotions of both the [claimed] and third parties.”

The "Legitimation" section mentions "the execution of the contract, the

compliance with a legal obligation, consent of the interested party and the

legitimate interest". Further on there is a section called "Sending

personalized commercial communications. Point 1.1. refers to

"personalized commercial communications through any channel (...)

about products, services, promotions based on your profile,

from your personal data, the products you have contracted, as well as

from the operations, movements, transactions associated with their

products" and is divided into points 1.1.1, 1.1.2 and 1.1.3. in all of them

It appears as an option "No".

SECOND: In view of the facts set forth in the claim, the Subdirectorate

General Data Inspection, in accordance with the provisions of article 65 of the

Organic Law 3/2018, on Data Protection and Guarantees of Digital Rights

(LOPDGDD), in order to assess the admissibility of the claim, within the framework of the

file E/3708/2020 and by means of a document signed on 06/03/2020, transfers the

claim to the respondent so that within a month they can provide an explanation of

the facts denounced, detail the measures adopted to avoid that in the future

continue to produce similar situations and proceed to communicate your decision to the

claimant.

The document was served on the respondent electronically. The certificate issued by the

Electronic Notification Service and Authorized Electronic Address of the

FNMT-RCM (hereinafter, FNMT), which appears in the file, records the

made available in the electronic headquarters on 06/03/2020 and the acceptance of the

notification on 06/06/2020.

The respondent responds to the information request on 07/03/2020 and submits a report with the actions carried out by the office of the data protection delegate (DPD).

It states, first of all, that it has been verified that the claimant did not formulate before the claimed -neither before its management office, nor before the SAC nor before the DPD- any claim for the reason on which the claim filed with the AEPD is based.

Second, it asserts that the claimant exercised "the right to object" to the receipt of commercial communications from the claimed party on 11/04/2018, by email addressed to protecciondatos@bankia.com, being processed and answered the request on 11/21/2018 in writing that coincides with the that the claimant attached as Exhibit 1 to his claim. It also indicates that the claimant has alleged that on 02/11/2020 “he received a communication” about the mortgage without commissions and that he has provided a copy of said communication.

Regarding the nature of the "communication" that the respondent sent to the claimant and the legality of the data processing carried out, makes these considerations:

-“As can be seen from the documents provided by Mr. [claimant], What the claimant refers to with "communication" is the sending of the cover of correspondence that the entity uses to send information by physical correspondence to customers about their products (statements, movements, commissions...), which, as can be seen from the two covers provided, is the same in its graphics for all clients with the only difference that it collects the data of correspondence specific to each client.”

- “It is not, therefore, a personalized commercial communication or addressed to the claimant for his profile but for a generic and common cover for all clients, similar to the posters that are exposed in the offices or their facades, and

general for all customers who receive their correspondence physically in

paper."

- “And therefore, it must be understood that it is a shipment protected by the interest

legitimate of [¿?] as reported in the privacy policy of the entity, when

be referred in general to products or services marketed by the

entity and similar to the products contracted by its clients (products

financial).” (emphasis is ours)

The respondent concludes with this statement: "the claimant has not been addressed

personalized commercial communication as he has exercised his right to

opposition to receiving this type of commercial communications. (The underline is

our)

The respondent sends to the AEPD with its response a copy of the letter that it sent to the

claimant, informing him of the decision adopted in view of the facts reported in

your claim.

The Director of the AEPD, in accordance with the provisions of article 65 of the

LOPDGDD, dated 07/13/2020 agrees to admit this claim for processing.

The agreement for admission to processing was notified to the claimant by mail on the same

day of its signature and it is recorded as received on 07/21/2020.

THIRD: On 10/07/2020, the Director of the AEPD agrees to open a

sanctioning procedure to the claimed in accordance with the provisions of the articles

63 and 64 of Law 39/2015, of October 1, of the Common Administrative Procedure

of the Public Administrations (hereinafter, LPACAP), for the alleged infringement of the

Article 6.1.f) of Regulation (EU) 2016/679, of April 27, of the European Parliament and

of the Council, on the protection of natural persons with regard to

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

repeals Directive 95/46/CE (RGPD), typified in article 83.5.a) of the RGPD.

FOURTH: Once the initial agreement has been notified, the claimed party, by means of a document presented on

10/19/2020, requests that, in accordance with article 53.1.a) of the LPACAP, a

a copy of the documents that make up the administrative file, and that,

In accordance with article 32.1 of the aforementioned LPACAP, the term is extended by five days

initially granted to formulate allegations.

FIFTH: In a letter dated 10/23/2020, it is agreed to extend the term to formulate

allegations for the maximum legally permitted and the copy is sent to the claimed

of the electronic file.

That document, together with a copy of the file, was notified to the respondent by means

emails being the date of availability 10/23/2020 and the date of

acceptance on 10/26/2020. This is stated in the document "Confirmation of receipt

of the notification" of the Citizen Folder application.

SIXTH: On 11/03/2020, the respondent presents its allegations to the settlement agreement

opening of the sanctioning procedure in which it requests that the nullity of the

full Law of the procedure for the reasons detailed in the first allegation

of your writing. Subsidiarily, it requests that the file of the procedure be agreed

due to non-existence of infringement of the data protection regulations

staff. And, in a subsidiary manner with respect to the previous claims, that

agree to warn the claimed party (article 58.2.b, RGPD) or, failing that, reduce

significantly the amount of the fine provided for in the agreement to open the

procedure, in response to what was stated in his fourth allegation.

In defense of their respective claims, they adduce the following arguments:

The first allegation of his brief is headed “From the defenselessness produced to [the

claimed] as a consequence of setting the amount of the sanction in the agreement

Of start".

In short, it states that the opening agreement is invalidated by the

helplessness generated by the fact that the amount of the sanction has been set in the agreement

from the beginning, instead of expressing only the limits of the possible sanction; because they haven't been

motivated the aggravating circumstances and because through the initial agreement a

assessment of his guilt without having had the opportunity to pronounce on the matter.

It adds that the initial agreement exceeds the content provided for in article 68 of the

LOPDGDD and that, since the decision-making body has set the amount of the penalty in the

agreement to open the procedure compromises the impartiality of the body

instructor, which determines in his opinion a "clear breach of the principle of

separation of the instruction phase and the sanction phase”. It affirms that the rules of article 85 of

the LPACAP are not applicable to this case but to the cases in which the

sanctioning rule imposes a fixed and objective fine and that the application

that has been made in the initial agreement does not respect its literal meaning, according to which the

amount of the pecuniary sanction may be determined “once the proceeding

sanctioning”,

In the second allegation, “Of the concurrent circumstances in the present case”, the

claimed makes a list of the facts of the file. In particular, it relates

following:

-On 11/04/2018 the claimant sent a communication to the respondent

electronically in which you exercise your right of opposition and request that they not be "used for

commercial communications of any kind” the data related to your email,

telephone number and postal mail.

- On 11/21/2018 the respondent responds to the request to exercise the right of

opposition and informs you that in relation to "your desire not to receive information from

commercial or advertising nature of this Entity, as well as that your data is not

communicated to other entities or investees of the Bankia group or collaborators with

commercial purpose”, “his request has been fully attended to and [he has] proceeded to

adopt the necessary measures for its fulfillment”. (emphasis ours)

-On 02/11/2020 the claimant receives a letter in his name from the claimed party “in whose

cover page refers to certain credit products offered by [the

claimed]”

- It appears among the documentation provided by the claimant "another letter", dated

02/24/2020, addressed to a person other than the claimant, “with similar graphics on

the cover of the envelope [...]”.

- On 06/03/2020 the AEPD asks you to report on the claim filed.

He points out that the AEPD did not send him the claim but only the documents

attached to it. The respondent responds on 07/03/2020.

The third allegation of the allegation brief is headed “About the non-existence of

any violation of article 6.1. of the RGPD” and in it he exposes the arguments

center of his defence.

He points out that the AEPD attributes an infringement of article 6.1.f of the RGPD "for having

proceeded, in its opinion, to data processing for marketing purposes without having the

sufficient legal basis for this, as it cannot protect the treatment in the interest

legitimate” of the entity” (Underlining is ours)

Next, he warns that such imputation is based on an error by the AEPD. Thus, he states

that the opening agreement makes an error by confusing the “existence of publicity

of [the claimed] on the cover included in the envelope addressed to the claimant” with “the

processing for direct marketing purposes”.

He reiterates the same idea in the course of his third argument. It says, for example, that the

AEPD confuses "direct marketing" with "data processing for marketing purposes".

direct marketing”, “since it is about two completely different realities.

differentiated" Or that "The AEPD incurs in an evident contradiction by confusing [...]

the existence of advertising with the performance of data processing with that

purpose”, to specify below that, only in this second case,

the regulations governing the fundamental right to the protection of

personal data and the AEPD could exercise the powers that, as an authority

of control is entrusted.

The defendant says that "the referral of said envelope with the advertising inserted" is not the

“result of data processing for advertising purposes. In the same way,

it would not be possible to consider that we would be faced with data processing with

such purposes in the event that on the cover of the envelope only the

trade name of my client, even when the AEPD, forcing the concept

contained in the Home Agreement could come to consider the mere representation

of that logo as advertising.”

For the claim, the personal data of the claimant were treated, exclusively,

in order to inform you about the products you had contracted with her.

In this regard, it indicates that the only treatment it has carried out in relation to the

personal data of the claimant "has been printed, on the same cover of the envelope

sent to all of its clients, of the Complainant's data, with the sole and

exclusive purpose of sending the same information about the status of the products

and services contracted by the same with [the entity claimed]".

Also add:

"As can be verified, [the respondent] clearly distinguishes the treatments of

data necessary for the maintenance of the contractual relationship that links you with the

client, among which is the referral of the documentation related to the

evolution of the contracted products and services (for example, an extract of

account, the situation of a contracted savings or credit product, etc.), protected

clearly in article 6.1 b) of the RGPD, and the sending of commercial communications

of own products or services or those of third parties, protected, when it is carried out by

postal means in the legitimate interest of the Entity (article 6.1 f) of the RGPD)." (Folios

11 and 12 of the brief)

"That is to say, [the respondent] did not carry out any treatment of the data of the interested party with

the purpose of sending you information about its products, but only with the

to provide the information related to those hired by him, without the fact

that the cover of the envelope in which the information was sent implies treatment

any of your data for the purpose intended by the AEPD.

And it is that, in this sense, [the respondent] does not deny that the information included in the

cover can be considered advertising for the purposes provided in the regulations that

mentions the Initiation Agreement, what cannot be considered is that the fact that

that information is included in the cover implies data processing for purposes of

direct marketing, which is what is attributed to my client." (Folio 12 of the brief of

allegations) (emphasis added)

The respondent states that she is fully aware of the scope of the right

contemplated in article 21.2 of the RGPD and that it supposes a counterweight to the

application of the rule of legitimate interest for the processing of data for the purpose of

direct marketing, but considers that this precept does not apply to

this matter since the aforementioned treatment has not taken place.

It affirms, "against what was invoked by the AEPD in its Initiation Agreement, that it has not

carried out a processing of the Claimant's data whose "reason for being", "objective"

or "ultimate intention" is to carry out direct marketing activities. He says

that "has proceeded to the treatment of the Complainant's data with the sole and exclusive

purpose of sending to the same the information related to the evolution and situation of

the products and services contracted by him, under the exclusive protection of the provisions

in article 6.1 b) of the RGPD, since this communication is necessary for the adequate

management and development of the contractual relationship that binds [the respondent] with her

customers. And it is that, as anticipated, the fact that the envelope in which this

information may imply the existence of publicity, common on the other hand to the

all the clients of [the claimed], but not a treatment of the data of those

clients with the "objective", "reason for being" or "ultimate intention" of carrying out actions of

direct marketing." (emphasis ours)

The privacy policy document that the respondent has provided with their

allegations to the initial agreement, informs in the section dedicated to the "conditions

of privacy" in relation to the personal data of its clients that, without prejudice

of the special conditions established in relation to each product

contracted by them, will be processed for six determined and specific purposes,

namely:

"1. Attend, manage and answer queries, questions and requests made by

users through the service or communication channels enabled by

Bankia (Legitimation of the treatment: user consent).

2. Maintain, comply with and control the contractual and pre-contractual relationship between the

users and Bankia (Legitimation of the treatment: Execution of a contract).

3. Improve the web pages or tools owned by Bankia, as well as their

products and services, in order to offer better quality and service to the user,

develop new products/services or improve the entity's internal processes

(Legitimation of the treatment: Consent of the user (cookies) and Legitimate interest).

4. Send commercial communications about products and services, own or of

third parties (Legitimation of the treatment: Consent of the user).

5. Carry out studies for statistical purposes that may be of interest to Bankia or

third parties (Legitimation of the treatment: Legitimate interest).

6. Comply with the legal obligations of Bankia (Legitimation of the treatment:

Compliance with a legal obligation)." (emphasis ours)

The fourth allegation of the allegation brief deals with the circumstances

appreciated by the AEPD for the quantification of the sanction.

The respondent alleges that the AEPD has violated the principle of proportionality in the

determination of the sanction, since the amount of the administrative fine established

in the initial agreement "does not adjust to the assessment of the mitigating and aggravating

that the agreement itself takes into consideration."

In this regard, he explains that the initial agreement appreciated the concurrence of two

aggravating circumstances and a mitigating circumstance and set a sanction of a fine of 50,000 euros when, says

that is the amount that the AEPD usually imposes as a sanction for violation

of article 6.1 RGPD in cases that “do not deserve a sanctioning reproach

especially high” and when, unlike what happens in this case, the

resolutions in which a fine of such an amount is imposed usually assess the

concurrence of multiple aggravating factors and do not usually appreciate the concurrence of any

extenuating.

The respondent makes a comparison between the modifying circumstances of the

responsibility that the AEPD appreciated in the resolution issued in PS/00076/2020,

followed also against her, and those that appear in the agreement of opening of the

procedure, and notices two differences: That in the resolution of PS/00076/2020 there is no

the circumstance was taken into consideration, which can be seen in this case as

aggravating circumstance, of the link between the activity that the entity carries out with the treatment of

Personal data. That in the aforementioned resolution it was clarified that the lack of

diligence of the defendant was "significant", which, he explains, is not indicated in the

present case. We anticipate that, as can be seen by reading the

agreement to initiate the file, the expression "The serious lack of diligence

[...]”.

It also argues that, given that in this case the concurrence of

a mitigating factor, it is striking that the sanction is the same -50,000 euros- as in the

PS/0076/2020. Considerations that in his opinion are an exponent of the one invoked violation of the principle of proportionality.

SEVENTH: The agreement to initiate the procedure, in point 3 of the operative part, agreed to "INCORPORATE to the disciplinary file, for evidentiary purposes, the claim filed by the claimant and its attached documentation, as well as the documents obtained and generated by the Subdirectorate General for Inspection of Data during the phase prior to the claim being processed."

Through diligence of the instructor dated 06/14/2021, a record was made for the purposes proof that, by virtue of what was agreed by the Director of the AEPD in the agreement of opening of the procedure, the claim was incorporated into it presented and its attached documentation, as well as the documentation generated and obtained by the General Subdirectorate of Data Inspection in the framework of the E/03708/2020, in the information request process prior to admission for processing of the claim.

EIGHTH: The proposed resolution is signed by the instructor of the procedure in date 06/16/2021 and on that same date it is notified electronically by contacting disposition of the claimant. The notification was accepted on 06/15/2021. Both of them ends are accredited through the certificate of the FNMT that works in the proceedings.

The proposed resolution was formulated in the following terms:

<<FIRST: That the Director of the Spanish Agency for Data Protection sanction BANKIA, S.A., with NIF A14010342, for an infraction of article 6.1.f) of the RGPD, typified in article 83.5.a of the RGPD, with an administrative fine of €50,000 (fifty thousand euros)

SECOND: That the Director of the Spanish Data Protection Agency

orders BANKIA, S.A., with NIF A14010342, for an infringement of article 6.1.f) of the

RGPD, typified in article 83.5.a of the RGPD, which adopts, within a maximum period of

one month, the necessary measures to adjust its treatment operations to the

GDPR provisions; in such a way as to put an end to data processing

for direct marketing purposes with respect to those customers who

they had opposed the processing of their data for this purpose.>>

NINTH: On 06/25/2021 there is an entry in the AEPD registry with a letter of

CAIXABANK, S.A., in which it communicates the subrogation, in this proceeding

sanctioning party, in the legal position of BANKIA, S.A., by virtue of the merger by

absorption agreed between it, as absorbing company, and BANKIA, S.A., as

of absorbed company.

In the same letter, it requests that it be extended, for the maximum legally permitted, 5 days,

the term initially granted to formulate allegations to the proposed resolution.

The brief sent by the respondent was accessible in the computer application on

Monday 06/28/2021, last day of the term initially granted to present

arguments to the proposed resolution. In a letter of the same date addressed to the

claimed, the request for an extension of the period for pleadings is denied.

TENTH: The defendant -previously BANKIA, S.A., now CAIXABANK, S.A.- submits its

allegations to the proposed resolution on 06/28/2021. Ask them to

declare the nullity of full law of the sanctioning procedure for the reasons

which he describes in his first allegation. In the alternative, it requests that the

archive of the procedure “since it does not constitute the conduct of BANKIA (currently

CAIXABANK) any violation of the personal data protection regulations.” Y,

subsidiarily with respect to the previous requests, which is warned according to the

article 58.2.b) of the RGPD, or, failing that, significantly reduce the amount

of the sanction of an administrative fine in response to the arguments set forth in his

fourth claim.

In defense of their respective claims, they adduce the following arguments:

-On a preliminary basis, in addition to verifying that on 06/14/2021 he was notified

the motion for a resolution, reiterates the statements made in its brief of

allegations to the initial agreement, presented on 11/03/2020, “since, in our opinion,

Apparently, the content of the Motion for a Resolution does not refute in any way what

pointed out in the aforementioned allegations.

-The first allegation is headed “On setting the amount of the penalty in

the initial agreement.

This allegation is, in essence, identical to the one formulated in the pleadings brief to the

agreement to initiate the procedure. In it, he reiterates the “manifest defenselessness” that

generated as a result of the AEPD setting the amount of the

sanction in the agreement to open the file.

The defenselessness that he claims to have suffered is based, in his opinion, on the fact that the AEPD “has

proceeded to assess the degree of guilt of my client and the

circumstances that affect him, in audita parte, without my principal having

had the possibility to make any allegation or to carry out the slightest proof in

defense of his right, thus seriously harming his right to

defense" and that such assessment was made by the competent body to resolve,

which supposes an interference of the sanctioning body in the inspection action and

“a dilution between the investigation and resolution phases of this proceeding

sanctioning, with the consequent damage to my principal.”

The respondent maintains that the "manifest helplessness" suffered occurred when

“dispense with the guarantees granted by the regulations governing the procedure

sanctioning" and the bankruptcy of the "right to effective judicial protection", all of which

a defect of absolute nullity of article 47.1.a) of the LPACAP due to the injury of the

rights and freedoms subject to constitutional protection

He then goes on to make the following comments that he puts in relation to

some of the statements contained in the proposed resolution:

It affirms that the proposal indicates “that the evaluation in audit part of the circumstances

concurrent in the case and, consequently, the determination by the

competent to sanction the amount of the sanction proceeding prior to the

investigation of the matter derived directly and immediately from what was established in the

article 64 of Law 39/2015 [...], although, then, there is a manifest

contradiction, by indicating, as is done in the Resolution, that the actions of the

AEPD “goes beyond” what is foreseen in the norm.”

That “the AEPD indicates in the Proposal that the setting of the amount of the sanction that

would proceed to impose on the defendant is a requirement of the provisions of the Law, but at the

same time considers that it is not, since it seems to indicate that, in a way

completely ex gratia and beneficial for the defendant, the AEPD has decided to "go further

beyond" of what is established in the norm, granting a kind of benefit to the administered,

even when this is at the cost of undermining the rights enshrined in article

24 of the Constitution.”

Likewise, based on the particular interpretation that the defendant has been making of article 85 of the LPACAP, affirms that "the literalness of the norm" does not imply a enabling the sanctioning body to prejudge the case, proposing ab initio the amount of the sanction, "since this breaks the most elementary principles of sanctioning procedure.

It insists that article 85.1 of the LPACAP "does not require a prior determination of the sanction, since it refers to the “imposition of the appropriate sanction”; that the norm is applicable, in any case, "initiated the procedure". It adds that article 85.3. foresees that the reductions must be adopted on the "proposed" sanction, of which concludes that it is necessary to have determined what that amount is within the procedure, after hearing the administrator, since the initial agreement "is not the suitable place to “propose” the imposition of a sanction”.

Taking as a starting point the considerations made in the proposal of resolution about what could be the circumstance of article 47.1. of the LPACAP in which the respondent intended to base the nullity of the procedure invoked, makes the following comments which, due to their importance -every time

differ substantially from what this Agency stated in the proposal for resolution-, deserve to be reproduced:

“[...] from the foregoing it follows that the legislator has not appreciated with respect to the sanctioning administrative procedure the necessary separation of the phases of instruction and resolution and the necessary intervention in the same of two organs

different, without the sanctioning body being able to intervene or “direct”, as it has

happened in this case, the independent action of the examining body.

“And to the greater surprise, the Resolution Proposal not only considers that the aforementioned

principle of separation of the phases of investigation and resolution is not predicable to the

sanctioning procedure, thus contradicting what is expressly established in the

LPACAP and remembered by very reiterad jurisprudence of the Constitutional Court (for

all in the STC 9/2018, of February 5), but also affirms without any hesitation

that the principle “according to which the instructor does not decide, is not applicable to the

administrative procedure”, on the basis of an alleged jurisprudence

constitutional law that has nothing to do with such a conclusion.”

Regarding the aforementioned SSTC, he says: “Without wishing to dwell on this point,

it is enough to make a mere reference to the jurisprudence invoked to determine without the

the slightest hint of doubt, its absolute irrelevance:

“In effect, the STC 175/2005 that invokes the Proposal is not even related

some with the fundamental right enshrined in article 24 of the Constitution,

but with the principle of equality enshrined in its article 14.”

“For its part, STC 74/2004 does refer to the right to effective judicial protection,

but regarding the non-application to the administrative procedure of the right to a judge

predetermined by the Law, which also bears no relation to what

analyzed in this proceeding.”

-The second allegation is headed “On the legality of Bankia's conduct

(currently Caixabank) and the non-existence of infringement of article 6.1 of the RGPD”.

The defendant reaches the conclusion, announced in the title of this section, that in

the matter at hand has not been a processing of personal data for purposes

of direct marketing for which "it is idle to go to article 6.1 of the RGPD

to assess whether said non-treatment has a sufficient legal basis, and therefore

therefore appreciate that there has been a violation of any of the sections of

the rule".

In short, the respondent considers that the data processing carried out was carried out

within the framework of the contractual relationship that linked the claimant and the claimed whose

The purpose was to provide you with information related to the status of the products

contracted, for which it maintains that "the fact that the cover of the envelope in which

produces the aforementioned reference incorporates information referring to products marketed

by the entity, without having carried out treatment activity linked to the

determination of the content of said document cannot in any case imply the

existence of a specific treatment aimed at carrying out actions of

direct marketing, but the mere adoption of a business decision about the

format of the envelopes addressed to the entity's clients". (The underlining is from the

AEPD)

In the course of the second allegation, the respondent details the various elements on

which builds its conclusion.

It begins by stating that the proposed resolution considers that it "has led to

carry out a treatment of the Claimant's data for direct marketing purposes" and

that, also considers the proposal that "the mere fact of printing the data

Claimant's contact number on the cover of an envelope which, in a predefined format

incorporates information about the products of my client, implies the use and

processing of data for the aforementioned purpose."

He insists that the proposal considers that the mere fact that the title page contains
the information on the aforementioned product is sufficient to appreciate the existence of "a
personalized delivery" to the claimant "in order to promote the acquisition of the
mentioned product of the entity"; although "[...] it did not involve the realization of a
prior action by Bankia to determine whether said advertising
may or may not correspond to the preferences of the interested party".

He also affirms that the "proposal considers" that the fact of having sent him the letter
to the claimant, which contains the contact information to which it is addressed "implies the
carrying out two personal data processing: one related to the development
of the contractual relationship and the other derived from the pure and simple fact that the cover
of the envelope incorporates the aforementioned information". As a counterpoint, he exposes what his
position: that there was and carried out "a single data processing and with the sole and
exclusive purpose of sending the claimant the extracts of the contracted products,
treatment protected therefore in article 6.1.b, of the RGPD."

He endorses this last statement by saying that under no circumstances could it be qualified
data processing of the interested party, in the terms in which it is defined in article
4.2 of the RGPD (precept that he transcribes in his letter of allegations), the fact of
having incorporated on the cover of the envelope "information about the entity and even
of the products and services it sells.

In order to argue that there was no data processing for marketing purposes
directly states the following:

That, even in the hypothesis that it admits that "the inclusion on the title page of a
about the cited information could be considered direct marketing" – what
on the other hand flatly denies-, which "in no way can prove ... the AEPD
is that a treatment of the data of the interested party related to
with the purpose of sending advertising, neither general nor specific." (The

underlining is ours)

That, as stated in his pleadings to the opening agreement "does not deny that the

information contained in the cover of the envelope may be considered advertising of the

entity, but what it does deny and reiterate is that there has been data processing

for direct marketing purposes carried out without having a legal basis for it

as a consequence of the exercise by the interested party of his right of opposition".

It adds that "The decision about the format of the envelopes in which an entity

company incorporates its documentation is a mere business decision, which in

any may involve the processing of personal data, since it does not imply the

carrying out any of the operations included in the aforementioned

concept."

"[...] as was also indicated in the allegations of my principal to the Agreement of

Start, the inclusion of information about a certain product of my client

on the cover of the envelope to which the aforementioned communication is addressed may

considered an advertising activity, but not a direct marketing action

[...]" And he goes on to say: "That action [of direct marketing] would take place if the

content, that not the "container" of the communication sent to the interested party contained

information related to a product of the entity, but not in those cases in which

which is the envelope, which will be accessible by an indeterminate plurality of people

throughout the process of processing and sending the communication contains said

information."

“[...] for the AEPD it seems that only the addressee of the communication will have an effective knowledge of the advertising message contained in the cover of the envelope sent, and, consequently, will be the only recipient of the aforementioned message, the envelope remaining hidden from the other operators, which converts its referral in a direct marketing action.” And he adds that, “even in the denied assumption that it is considered that only the addressee will have access to the said message”, this does not imply that a treatment has been carried out for the purpose of direct marketing because it will not have been carried out with the personal data of the interested party none of the processing operations referred to in article 4.2 of the GDPR.”

The respondent also states that the AEPD, having found an infringement of the RGPD in the facts object of the claim, has "artificially expanded its competences” “to the point of considering subject to its supervision” “decisions companies unrelated to any data processing”.

It also mentions Law 34/2002, of July 11, on services of the society of information and electronic commerce (LSSI) and the concept of communication commercial that the law offers to, next, raise a factual assumption: that, within the framework of the activity regulated by the LSSI, a banner would have been included in the to be informed of a new product. To which he says the following:

“Well, following the reasoning of the AEPD, the mere inclusion of a banner generic and non-targeted, after carrying out a segmentation or profiling activity, to each client of the entity would suppose a data treatment of each and every one of customers with access to the private area in order to send them a communication commercial, consisting of the advertising of the mentioned product”. "Thus, any entity would be obliged either to implement complex processes of delimitation of the clients in whose personal area the aforementioned could be incorporated

banner or to establish two or more personal areas differences (with or without banner)

[...]" (emphasis added)

-Third allegation, "On the application of the measure contained in article 58.2.d)

of the GDPR".

Manifests the claimed that the corrective measure proposed in the second device

of the proposed resolution "results from impossible application, since the

extinction of the personality of the entity against which it is intended by the AEPD to direct

measure". It adds that such a measure "would no longer be applicable", since as

consequence of the disappearance of the legal entity (BANKIA) has ceased

all personal data processing.

-Fourth allegation: "About the circumstances assessed by the AEPD in the conduct

of BANKIA".

The defendant denounces "the irrelevance that the circumstances of the AEPD

concurrent in a specific case, as well as the predetermination of the sanction for

part of it that does not result from the application of the aforementioned circumstances." Add

that the Agency, in determining the amount of the sanction, proceeds "with a

sort of automatism that generally leads to the imposition of sanctions of

identical amount in cases that cannot be related to each other, provided

who considers that the seriousness of the event reaches a predetermined threshold…"

Regarding the aggravating circumstance, appreciated in the resolution proposal, of article 83.2.a)

RGPD, criticizes that it was qualified as mitigating in the initial agreement and that in the

motion for a resolution such a change occurs.

Regarding the aggravating circumstance of article 83.2.b) draws attention to the

fact that the motion for a resolution refers, to substantiate this circumstance

aggravating circumstance, to the fact that “it can be presumed that in its activity the treatment of

data for direct marketing purposes and the cases in which customers

oppose for that purpose”. He affirms that we are before a presumption devoid of

evidentiary support that violates the right to the presumption of innocence.

Regarding the aggravating circumstance of article 83.2.e) RGPD, it criticizes, on the one hand, that

appreciate on the basis of the appointment to a single sanctioning procedure directed against the

claimed and related to facts that are unrelated to those that are

object of the current sanctioning file, with the aggravating circumstance that the mention of the

PS/0076/2020 has been included in the motion for a resolution as a result of it having been

cited the one claimed in the exercise of its right of defense in its brief of

allegations to the initiation agreement. On the other hand, it affirms that the AEPD acts in a

arbitrary because, in general, it does not make use of this in its resolutions.

aggravating circumstance, except when the entity has been "sanctioned in a

reiterated and habitual” and mentions as an example the procedure PS/00030/2021.

Thus, it considers that, by appreciating this circumstance, in the present case a

situation of prejudice and discrimination for the entity, especially when the resolution to

the one alluded to (PS/00076/2020) in the motion for a resolution is the only one issued

compared to that claimed since the entry into force of the RGPD.

Regarding the mitigation of article 83.2.k) GDPR in relation to article 76.2. and)

of the LOPDGDD, considers it irrelevant since its application has not led

to modify the amount of the sanction of a fine provided for in the proposal with respect to the

which was fixed in the startup agreement. All of which leads him to reiterate his opinion about

the "absolute arbitrariness in the assessment of the circumstances of the case."

Within this fourth allegation, a section is devoted to justifying the origin of

that an economic sanction (administrative fine) is not imposed. start your

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15/48

allegation saying that already in the initial agreement he recalled that the AEPD has, according to

of article 58.2 of the RGPD, “of a great plurality of powers other than the

imposition of an economic sanction. He criticizes that the motion for a resolution, compared to

his claim that a warning be imposed, has been limited to transcribing the

Recital 148 of the RGPD since the aforementioned recital takes into consideration

only two elements: that we are faced with a minor infraction and that the

fine that should be imposed would constitute a disproportionate burden for the

natural person, for which, says the respondent, although the latter is not applicable

condition, yes, in his opinion, the condition of the lightness of the infraction of which

he is held responsible. Add to this effect that the lightness to which the RGPD refers

has nothing to do with the classification that the LOPDGDD makes of infractions in

mild, serious and very serious – since this rule is after the RGDPD-. Thus, it indicates

that “When recital 148 refers to the seriousness or lightness of the

sanction refers to the cases in which there has been or has not been a commitment

particularly relevant to the fundamental right to data protection [...]”.

To this end, he cites document WP253 of the Article 29 Working Group,

“Guidelines on the application and setting of administrative fines for the purposes of

Regulation 2016/679” from which the following is transcribed:

“In recital 148, the notion of “minor infringements” is presented. sayings

Violations may constitute violations of one or more provisions of the
Regulation cited in article 83, paragraphs 4 or 5. However, the
evaluation of the criteria provided for in Article 83, paragraph 2, can give
result in the supervisory authority deeming, for example, that in the circumstances
circumstances of the case the violation does not entail a significant risk for the
rights of the interested parties and does not affect the essence of the obligation in
question. In such cases, the fine may (although not always) be replaced by
a warning."
(emphasis ours)
He completes his argument by pointing out that in this case "there is only one
singular claim. "That is, only one person among those who have opposed the
processing of your data for direct marketing purposes has reached the
conclusion, which that Agency seems to share, that the adoption of a format
standard cover of the envelope in which the information on the evolution of the
the products contracted with my client supposes an additional treatment of his
personal data for direct marketing purposes." And that "the damage that could
cause such conduct to the recipients of the shipments, we reiterate that only
related to the evolution of the contracted products is simply
non-existent".
In view of everything that has been done, by the Spanish Data Protection Agency
the following are considered tested in this procedure
FACTS
1. The claimant, client of the claimed party, received a complaint by mail
postcard, a letter with information about your accounts that also included information
business of the entity.

2. The document with commercial information received by the claimant, from which he provides a copy, bears in its lower right corner the date "11.02.2020" and has these features:

At the bottom right are the claimant's personal details -name, two surnames and full postal address - and below a barcode. The position in that the personal data is located in that document coincides with the one that occupies the window or transparent space of a type of envelope commonly used in postal mail and that allows you to see the recipient's information printed inside the envelope.

In the upper right corner of the document appears the anagram of the claimed with your name. This legend appears in the body of the document:

"It is very difficult to find the house of your dreams. That's why WE TAKE THEM FROM YOU COMMISSIONS OF YOUR NEW MORTGAGE. Just for having your payroll domiciled and nothing more. We remove the commissions from:" Next, in two columns parallel, figure: "OPENING"; "EARLY AMORTIZATION"; "CANCELLATION ADVANCED"; "MAIL COSTS". Immediately below it is indicated: "So that Dreaming costs less. *Check conditions at Bankia branches or bankia.es".

3. On 11/04/2018, the claimant sent an email addressed to protecciondedatos@bankia.es, in which he communicated to the respondent his wish "not to receive information of a commercial or advertising nature". This is recognized by the entity claimed in its arguments to the initial agreement.

The respondent responded to her request by means of a letter dated 11/21/2018 -which is in the file - in which he replied:

“In relation to your request for which you [the claimant], with D.N.I. [the one from

claimant], informs us of your wish not to receive information of a commercial nature or

advertising of this Entity, as well as that your data is not communicated to other

entities or investees of the Bankia group or collaborators, we inform you that we have

fully attended your request and we have proceeded to adopt the measures

necessary for its fulfillment.” (emphasis ours)

4. The DPD of the respondent responded to the informative request of the Subdirectorate

General Data Inspection, prior to the claim being processed, which

“No personalized commercial communication has been addressed to the claimant at

having exercised his right of opposition to receive this type of

communications.” (emphasis ours)

5. Regarding the commercial information sent to the complainant, the DPD responded to the

informative request of the General Subdirectorate of Data Inspection that "No

[...] is a personalized commercial communication or addressed to the claimant by

your profile but of a generic and common cover for all clients, [...].”

6. Regarding the legal basis for this treatment, the DPD responded to the request

informative made by the General Subdirectorate of Data Inspection:

“It must be understood that it is a shipment protected by the legitimate interest of [?] such

and as reported in the entity's privacy policy, when referred to with

general character to products or services marketed by the entity and similar to

the products contracted by its clients (financial products).” (The underline is

our)

7. The respondent has stated in her pleadings brief (folios 11 and 12 of the written):

"As can be verified, [the respondent] clearly distinguishes the treatments of data necessary for the maintenance of the contractual relationship that links you with the client, among which is the referral of the documentation related to the evolution of the contracted products and services (for example, an extract of account, the situation of a contracted savings or credit product, etc.), protected clearly in article 6.1 b) of the RGPD, and the sending of commercial communications of own products or services or those of third parties, protected, when it is carried out by postal means in the legitimate interest of the Entity (article 6.1 f) of the RGPD)." (The underlining is ours)

8. The privacy policy of the claimed party that appears in the document attached to the allegations to the initial agreement informs that the personal data of the clients is shall be treated, without prejudice to the special conditions established in relation with each product contracted by them, for six specific purposes and specific and, for each of them, specifies what is the legal basis of the treatment:

"1. Attend, manage and answer queries, questions and requests made by users through the service or communication channels enabled by Bankia (Legitimation of the treatment: user consent).

2. Maintain, comply with and control the contractual and pre-contractual relationship between the users and Bankia (Legitimation of the treatment: Execution of a contract).

3. Improve the web pages or tools owned by Bankia, as well as their products and services, in order to offer better quality and service to the user, develop new products/services or improve the entity's internal processes (Legitimation of the treatment: Consent of the user (cookies) and Legitimate interest).

4. Send commercial communications about products and services, own or of

third parties (Legitimation of the treatment: Consent of the user).

5. Carry out studies for statistical purposes that may be of interest to Bankia or

third parties (Legitimation of the treatment: Legitimate interest).

6. Comply with the legal obligations of Bankia (Legitimation of the treatment:

Compliance with a legal obligation)." (emphasis ours)

FOUNDATIONS OF LAW

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The Director of the Spanish Agency is competent to resolve this procedure.

of Data Protection, in accordance with the provisions of article 58.2 of the RGPD

and in articles 47 and 48.1 of the LOPDGDD.

II

For reasons of argumentative logic, the questions that

the respondent has raised in her two pleadings and that they are unrelated to the

substance of the matter on which the sanctioning procedure at hand deals.

In its allegations to the proposed resolution the one claimed, in addition to expressing

that “reiterates” in full the allegations that it made in the face of the agreement to open the

procedure, affects again the questions, unrelated to the merits of the matter, that

already raised in his first pleadings brief.

This Agency also reiterates what it stated in the motion for a resolution in

response to the allegations put forward by the respondent against the initiation agreement.

Response that we reproduce:

<<In the opinion of the respondent, the opening agreement is vitiated by

annulment due to the defenselessness generated by the fact that the AEPD has

fixed in it the amount of the sanction, instead of expressing only the limits of the

possible sanction; because the aggravating circumstances have not been motivated and because through the

initial agreement, an assessment of the guilt of the claimed party is made without

who has had occasion to speak on the matter. He also adds that the

initial agreement exceeds the content provided for in article 68 of the

LOPDGDD and that, since the decision-making body has set the amount of the penalty in the

agreement to open the procedure, the

impartiality of the investigating body, which thus knows, before initiating the

procedure, the criterion of the body to which the file must be submitted, what

determines in his opinion a “clear break in the principle of phase separation

instructor and sanction”.

The respondent understands that the rules of article 85 of the LPACAP are not

applicable to the present case but to the cases in which the norm

sanctioning imposes a fixed and objective fine and that the application that

this precept has been made in the initial agreement does not respect its literal tenor,

according to which the amount of the pecuniary sanction may be determined “when the

sanctioning procedure", for which, the entity maintains, "it would be

assimilating” “the very act of initiation with the fact that the procedure is

get started."

The arguments put forward by the respondent cannot be admitted.

The opening agreement is in accordance with the provisions of article 68 of the LOPDGDD,

according to which it will suffice to specify the facts that motivate the opening,

the person or entity against whom the procedure is directed is identified, the

infraction that could have been committed and its possible sanction. in the same sense
Article 64.2 of the LPACAP is expressed, which refers to the minimum content
of the initiation agreement. According to this precept, among other details, you must
contain “the facts that motivate the initiation of the procedure, its possible
legal qualification and the sanctions that may correspond, without prejudice to
whatever results from the instruction. Therefore, in this case, not only the
requirements mentioned in the cited precepts, but goes further,
offering reasoning that justifies the possible legal classification of the

facts and circumstances are mentioned that may influence the determination
of the sanction.
It cannot be ignored that article 85 of the LPACAP - which contemplates the
possibility of applying reductions on the amount of the sanction in the case of
that the offender recognizes his responsibility and in case of voluntary payment of the
sanction- obliges to determine these reductions in the notification of the agreement of
initiation of the procedure, which necessarily implies that it must be fixed in
said agreement the amount of the sanction corresponding to the imputed facts.
Extreme that amply justifies that the circumstances refer to it
modifiers of responsibility, since these directly affect the
determination of the amount of the penalty.
Contrary to the thesis defended by the defendant, article 85 of the LPACAP does not
Nor does it provide for the amount of the penalty to be determined once the trial has begun.

process. On the contrary, it is the acknowledgment of responsibility and the

voluntary payment of the penalty which must occur after that

time, but not fixing its amount.

Regarding the opinion of the respondent according to which article 85 LPACAP

could only be applied to cases in which the sanctioning rule

imposes a fixed and objective fine and that the application that has been made

of this precept in the initial agreement does not respect its literal meaning, it must be

indicate that the AEPD has been applying article 85 LPACAP in the same way since

the entry into force of the aforementioned law without the Contentious Chamber

Administrative Court of the National High Court, before which a contentious appeal is possible

administrative against its resolutions, has never been pronounced online

with the criterion that that entity defends.

Nor can it be admitted that having indicated in the initial agreement the

sanctions that could correspond to the one claimed for the infractions

imputed is determinant of defenselessness or supposes a breach of the principle

separation of the instruction and resolution phases, since this Agency is

limited to thereby complying with one of the requirements set forth in the

outlined standards. Furthermore, articles 68 of the

LOPDGDD and 64.2 of the LPACAP require as content of the opening agreement

that the corresponding sanction be established.

Thus, the alleged rupture "of the principle of separation of the instructional phase

and sanction" that the claimant alleges -an extreme that this Agency denies- would be,

of existing, the consequence of the correct application that this Agency comes

making of a legal precept, article 85 of the LPACAP.

Regarding what was stated by the respondent that, having established the agreement of

opening the amount of the sanction and the modifying circumstances of the

responsibility that could be appreciated, she has not had occasion to

pronounce, we limit ourselves to pointing out that the administrative procedure is

begins precisely with the opening agreement and it is from then on -

before- when article 53 of the LPACAP recognizes the interested party a series of

rights, among them the one foreseen in article 53.1.e).

Lastly, as regards the vice of nullity which, in the opinion of the

claimed, suffers from the procedure as a result of the defenselessness that

claims to have suffered, the following should be indicated: First of all, the respondent did not

specifies in which section of article 47.1 of the LPACAP bases the nullity that

invoke.

Secondly, the invoked nullity of the procedure in no case

could be based on section a) of article 47.1. of the LPACAP, in connection

with the alleged rupture of the separation between the instruction phase and the resolution phase

in accordance with article 24.2 of the C.E. This, because according to the SSTC

74/2004 and 175/2005, the principle enshrined in article 24.2 of the C.E. according to

of which the instructor does not resolve, is not applicable to the procedure

administrative, so that in this area we are not dealing with a right with

constitutional status.

And finally, thirdly, in the event that it is intended to found the nullity

of the procedure in the reason included in section e) of article 47.1 of the

LPACAP seems appropriate to bring up the STC 78/1999, of April 26,

that in its Legal Basis 2, it says:

“Thus, according to reiterated constitutional doctrine that is synthesized in the legal basis 3 of the STC 62/1998, "the estimation of a resource of protection for the existence of infractions of the procedural norms 'it is not simply from the assessment of the eventual violation of the right by the existence of a more or less serious procedural defect, but it is necessary prove the effective concurrence of a state of material or real defenselessness' (STC 126/1991, 5th legal basis; STC 290/1993, 4th legal basis).

So that a defenselessness with constitutional relevance can be estimated, which places the interested party outside any possibility of pleading and defending in the process their rights, a merely formal violation is not enough, being necessary that a material effect be derived from this formal infringement helplessness, an effective and real impairment of the right of defense (STC 149/1998, legal basis 3rd), with the consequent real and effective damage for the interested parties affected (SSTC 155/1988, legal basis 4th, and 112/1989, legal basis 2nd)".

In view of the foregoing, the request of the respondent to declare the nullity of the sanctioning administrative procedure that concerns us must be rejected.>>

(emphasis ours)

In view of the allegations to the proposed resolution that the respondent has presented, it is evident that the response of the AEPD, previously transcribed, not only has not cleared up the doubts raised by the application that this body has been making of article 85 of the LPACAP since the entry into force of the aforementioned Law, but has seized the opportunity to distort some of the arguments that were then exposed.

The alleged nullity of the administrative procedure that the respondent invokes -which,

As it has seen fit to specify in this brief of allegations to the proposal, it would be

covered by section a) of article 47.1 of the LPACAP- derives, in his opinion, from the

application that the AEPD makes of article 85 LPACAP, having set the amount of the

sanction in the opening agreement.

Of the extensive exposition that he has dedicated to matters unrelated to the merits of the matter

that concerns us - first allegation of the brief of allegations to the proposal, which is

reproduced in essence in the tenth antecedent of this resolution - the most

striking, and that forces us to make the necessary points, is the attribution to the

AEPD of statements that it has never made and also the attribution to this Agency

of conclusions that cannot be drawn from what is stated in the proposal document.

This peculiar way of exercising the legitimate and sacred right of defense leads to the

paradoxical situation in which the claimed party dedicates a large part of its efforts

plots to refute statements that this Agency never made and to distort

conclusions to which the defendant reaches on her own, since they cannot be derived from

what is stated in the motion for a resolution provided, of course, that the reader does not have

a particular interest in distorting what is written there.

The claimed, taking as a starting point the examination made by the proposal for

resolution of the consequences of founding the invoked nullity of the procedure in

one or another circumstance of article 47.1 LAPAC -every time the claimed one does not

specified in his allegations to the initial agreement what was, in his opinion, the vice of

radical nullity that concurred, limiting itself to affirming that the procedure was nullified - makes the following comments that due to their importance deserve be reproduced:

“[...] from the foregoing it follows that the legislator has not appreciated with respect to the sanctioning administrative procedure the necessary separation of the phases of instruction and resolution and the necessary intervention in the same of two organs different, without the sanctioning body being able to intervene or “direct”, as it has happened in this case, the independent action of the examining body.

“And to the greater surprise, the Resolution Proposal not only considers that the aforementioned principle of separation of the phases of investigation and resolution is not predicable to the sanctioning procedure, thus contradicting what is expressly established in the LPACAP and remembered by very reiterad jurisprudence of the Constitutional Court (for all in the STC 9/2018, of February 5), but also affirms without any hesitation that the principle “according to which the instructor does not decide, is not applicable to the administrative procedure”, on the basis of an alleged jurisprudence constitutional law that has nothing to do with such a conclusion.” (The underlined is ours)

Regarding the aforementioned SSTC, the respondent adds: "Without wishing to extend At this point, it is enough to make a mere reference to the jurisprudence invoked to determine without the slightest hint of doubt, its absolute irrelevance:” (Underlining is ours) “In effect, the STC 175/2005 that invokes the Proposal does not even keep any relationship with the fundamental right enshrined in article 24 of the Constitution, but with the principle of equality enshrined in its article 14.” "For his On the other hand, STC 74/2004 does refer to the right to effective judicial protection, but regarding the non-application to the administrative procedure of the right to a judge

predetermined by the Law, which also bears no relation to what

analyzed in this proceeding."

Well, these allegations make it essential to reproduce again, even at the risk of

be repetitive, the following fragments of the proposed resolution:

"Lastly, as regards the vice of nullity which, in the opinion of the

claimed, suffers from the procedure as a result of the defenselessness that

claims to have suffered, the following should be indicated: First of all, the respondent did not

specifies in which section of article 47.1 of the LPACAP bases the nullity that

invoke.

Secondly, the invoked nullity of the procedure in no case

could be based on section a) of article 47.1. of the LPACAP, in connection

with the alleged rupture of the

between the instruction phase and the resolution phase

in accordance with article 24.2 of the C.E. This, because according to the SSTC

74/2004 and 175/2005, the principle enshrined in article 24.2 of the C.E. according to

of which the instructor does not resolve, is not applicable to the procedure

administrative, so that in this area we are not dealing with a right with

constitutional status."

separation

It seems evident that what this Agency is referring to in that paragraph is that in the

administrative procedure the guarantee of the separation between the investigative phase and

resolution has no constitutional status

, but its rank is that of legality

ordinary – guarantee expressly included in article 63.1 of the LPACAP and

indirectly in article 53.2.a, of the LPACAP; article 134.2 of the repealed Law

30/1992 and 10.1 of the Procedural Regulation of the sanctioning power,

also repealed.

The argument put forward was that it would be difficult to rely on section a) of the

article 47.1 of the LPACAP, for violation of the principle of separation of the phase

instructor and resolution, the nullity of the procedure invoked otherwise because "it does not

we are before a right with constitutional rank" -remember that section a, is

refers to the violation of rights that are subject to constitutional protection- and

no, as the respondent likes to imply, that this guarantee does not exist in the

administrative Procedure.

The recognition in the administrative procedure of the constitutional status of this

right -implicit in article 24.2 of the CE- is a matter debated in the doctrine

administrative and on which the Constitutional Court has been carrying out important

qualifications in their sentences to end with a clear pronouncement against

that in this area such a guarantee has constitutional status. We refer to the STC

174/2005, of July 4, which was cited in the resolution proposal.

For this reason, transferring the doctrine of the High Court regarding the fundamental right to the

separation of the instruction and resolution phases and their application to the procedure

administrative sanction, we must also conclude now, in the resolution phase, what

that was stated in the proposal: that the nullity of the procedure that the claimed

claims "in no case could it be based on section a) of article 47.1. of the

LPACAP, in connection with the alleged breakdown of the separation between the phase

instructor and the decision in accordance with article 24.2 of the C.E.". In other words, don't could integrate the vice of absolute nullity provided for in article 47.1.a, of the LPACAP.

Article 24.2 of the CE that the defendant understands violated refers to eleven rights which in turn constitute a set of procedural guarantees. The SSTC have been delimiting which of them are applicable and which are not to the administrative Procedure. As far as the phase separation principle is concerned instructor and sanctioning – principle that has its origin in that the impartiality of the judge is incompatible or is compromised by his performance as an instructor (STC 145/1988, of July 12) - the T.C. has ruled on its application to the sanctioning administrative procedure in the following terms:

In the STC of 02/15/1990 (RTC 1990/22) it says that "It is a reiterated doctrine of this Court that it cannot be claimed that the Instructor in an administrative proceeding sanctioning body, and even less, the body called to resolve the file, enjoy the same guarantees as judicial bodies; because in this type of procedure the Instructor is also an accuser as soon as he formulates a resolution proposal sanctioning and, on the other hand, the body called to decide is the same one that initiates the file and, therefore, does not stop being Judge and party at the same time." (The underline is our)

In the STC of 04/26/1990 (RTC 1990/76) it states that "Due to the very nature of the administrative procedures, in no case can a separation be required between instruction and resolution equivalent to the one that must be given in respect of the Judges. jurisdictional processes. The right to the ordinary judge predetermined by law and to a process with all the guarantees -among them, the independence and impartiality

of the judge- is a characteristic guarantee of the judicial process that does not extend to administrative procedure, since the strict impartiality and independence of the organs of the judiciary is not, by essence, applicable with the same meaning and in the same measure to the administrative bodies." (emphasis ours)

In the STC of 03/17/1995 the High Court says the following:

"In relation to this fundamental right not to be judged by someone who has been previously investigating the case, this Court has declared that, due to its purpose consists exclusively in avoiding, by the court in charge of knowing the oral trial and of dictating Judgment of certain prejudices about the guilt of the accused [...] Also, and from a point of view objective, we have also said that, as it falls within the guarantees of the accusatory criminal process, is not necessarily extensible to other processes of similar nature as is the case of the sanctioning administrative procedure (STC 22/1990 [RTC 1999, 22]

In any case, the accumulation of instructing and sentencing functions does not cannot be examined in the abstract, but must be descended to the concrete cases and verify whether the impartiality of the judge has been effectively violated (STC 98/1990), it must be taken into account that not every investigative act compromises said impartiality, but only those who, by assuming the Judge a judgment on the participation of the accused in the punishable act, may produce in his mind certain prejudices about the defendant's guilt that disqualify him from hear the oral trial phase (SSTC 106/1989; 136/1992, 170 and 320 1993)".

(emphasis ours)

Of the STC 174/2005, of July 4, to which the AEPD made mention in the proposal of resolution and on which the respondent has affirmed exhaustively that nothing has to To do with this previous question, we reproduce the following fragments:

"1. The purpose of this amparo remedy is to determine, on the one hand, whether in the sanctioning administrative procedure, which has led to the imposition of the sanction to the appellant entity, their right to a process has been violated with all the guarantees (art. 24.2 CE), as the due separation between the organ of instruction and the sanctioning body; [...]

2. The complaint regarding the violation of the right to a process with all the guarantees (Art. 24.2 CE), from the perspective of the requirement of impartiality, it is necessary understand it articulated by way of art. 43 LOTC, since the appellant entity argues that it would have occurred in the sanctioning administrative procedure for not respect the due separation between the administrative organ of investigation and the sanctioning, derived from the fact that the Mayor of the City Council was the instructor of the procedure and, in addition, president of the Government Commission that imposed the sanction.

In this regard, it should be remembered that, although this Court has reiterated that, in principle, the requirements derived from the right to a process with all the guarantees are applied to the sanctioning administrative procedure, however, it has also been special emphasis on the fact that said application must be carried out with the modulations required to the extent necessary to preserve the essential values that are found at the base of art. 24.2 CE and the legal certainty guaranteed by art. 9.3 CE, as long as they are compatible with their own nature (for all, STC 197/2004, of November 15, FJ 2). More specifically, and with regard specifically to the

guarantee of impartiality, it has been pointed out that it is one of the cases in which it is necessary to modulate its projection in the sanctioning administrative procedure, all time that said guarantee "cannot be predicated of the sanctioning Administration in the same sense as with respect to judicial bodies" (STC 2/2003, of January 16, FJ 10), therefore, "without prejudice to the prohibition of all arbitrariness and the subsequent judicial review of the sanction, the strict impartiality and independence of the of the judiciary is not, by essence, predictable to the same extent as an organ administrative" (STC 14/1999, of February 22, FJ 4), concluding that the independence and impartiality of the judge, as a requirement of the right to a trial with all the guarantees, it is a characteristic guarantee of the judicial process that is not extends without more to the sanctioning administrative procedure (STC 74/2004, of 22 of April, FJ 5).

In view of this, the principle of the sanctioning procedure established in art. 134.2 of Law 30/1992, of November 26, on the legal regime of Public administrations and the common administrative procedure, according to which "The procedures that regulate the exercise of the sanctioning power must establish the proper separation between the instructing phase and the sanctioning phase, entrusting them to different bodies", is a legal principle whose protection corresponds to the judicial bodies through the corresponding resources, without that the requirement of impartiality of the sanctioning administrative body be, as the appellant entity intends, a derived guarantee, with the character of right

fundamental, of art. 24.2 CE, whose requirements, relating to judicial impartiality,

They only apply to the judicial body that must decide on the legality of the action

administrative.

In this way, the eventual infraction in an administrative sanctioning procedure

of the principle of entrusting to different bodies the investigative phase and the

penalty lacks constitutional relevance for the purposes of art. 24.2 CE and, [....]"

(emphasis ours)

The STC 74/2004 of April 22 (F.J. 5) - in the proposal the number

175/2004- stated the following:

"5. It is also alleged by the plaintiff for amparo the infringement of the right to a

process with all the guarantees (art. 24.2 CE) [...] alleging that the command that imposed

the sanction, who was the one who carried out the hearing procedure, had been denounced by

the appellant before the General Director of the body for the commission of certain

irregularities.

[...]

In accordance with our doctrine, we must remember that the right to [...]

process with all the guarantees -among them, the independence and impartiality of the

judge- is a characteristic guarantee of the judicial process that does not extend to

administrative procedure, since the strict impartiality and independence of the

organs of the judiciary is not, by essence, predicable with the same meaning and in the

same measure of the administrative bodies (SSTC 22/1990, of February 15, FJ 4,

and 76/1990, of April 26, FJ 8.a; AATC 320/1986, of April 9, FJ 4, and 170/1987, of

February 11, FJ 1). As already expressed in the STC 22/1990, of February 15 (FJ 4),

it is not idle to bring up the caution with which it is convenient to operate when

transfer constitutional guarantees extracted from the criminal order to the Law

administrative sanctioning is about; this delicate operation cannot be done

automatically, because the application of said guarantees to the procedure administrative is only possible to the extent that they are compatible with your nature. Thus, on different occasions, the Constitutional Court has maintained that it cannot be claimed that neither the instructor of a procedure administrative sanctioning, much less the body called to resolve the file, enjoy the same guarantees as the judicial bodies (STC 14/1999, of 22 February, FJ 4).

Consequently, the interpretation and application of the regime of abstention and recusal of those who make up the administrative bodies belongs to the scope of the ordinary legality, without being able to use the remedy of amparo to review the one carried out by the Courts, in this case by the military jurisdiction, since the appeal for amparo does not constitute a third judicial instance in which they can discussing problems of mere ordinary legality (ATC 170/1987, of February 11, FJ two)." (emphasis ours)

Thus, in light of the preceding exposition, the so many times invoked by the claimed "clear rupture of the principle of separation of the instruction phase and sanction" that would have affected the impartiality of the examining body, with the consequent violation of the essential guarantees of the procedure protected in the Constitution, "lacks constitutional relevance for the purposes of art. 24.2 CE."

On the other hand, it is worth underlining another aspect of the invoked guarantee that does nothing but further evidence the radical inconsistency of the arguments that the claimed

wields to support the nullity of the procedure.

Whether we look at the origin of this procedural guarantee, recognized in the

judicial field by article 24.2 of the C.E., as well as its subsequent development by the

T.C., its content is intended to guarantee the impartiality of the judge; well what

pursues this that this impartiality is not affected by the fact of having

previously acted as an instructor.

Note that the claimed what it has been holding since its first

allegations is the alleged contamination or “direction” suffered by the instructor as

consequence of the decision-making body setting in the opening agreement the amount of

the sanction, an extreme that has nothing to do with the content of the fundamental right

to which we have been referring.

In short, even if there were no clear pronouncements of the

TC that the principle of separation of the instruction and decision phase does not

has constitutional rank in the field of administrative procedure, in no

In this case, that supposed "direction" or "contamination" of the instructor could be fitted into the

violation of a right whose content tries to protect the impartiality of the

judge avoiding their interference in acts of instruction.

To end the chapter on the alleged radical nullity of the procedure that the

claimed adduces in its defence, the following considerations should be added.

One of them related to the fundamental right to an impartial judge guaranteed in the

article 24.2 of the C.E. The respondent has referred in her two writings of

allegations that the action of the AEPD has determined that it has "seen

substantially affected the impartiality of the investigating body”, which is why

We take this opportunity to specify that this alleged affectation of the impartiality of the

instructor does not fit into that fundamental right guaranteed by article

24.2 of the C.E., for which reason the nullity of the procedure could not be founded on it either.

under section a) of article 47.1 of the LPACAP.

Regarding the right to an impartial judge, it should be noted that, furthermore, it is not

that this guarantee is not transferable to the instructor - who is the one about whom the claimed

pivots the much-desired nullity of the procedure - but not even

recognizes this right within the framework of the administrative procedure. The STC 76/1990,

legal basis 8, could not be clearer:

“The right to [...] and to a process with all the guarantees -among them, the independence

and impartiality of the judge - is a characteristic guarantee of the judicial process that does not

extends to the administrative procedure, since the strict impartiality and

independence of the organs of the judiciary is not, by essence, predicable with

equal meaning and to the same extent of the administrative bodies (SSTC

175/1987 and 22/1990...”. (emphasis ours)

Lastly, regarding the minimum content of the opening agreement foreseen in the

article 64 of the LPACAP and the "manifest contradiction" in which, according to the entity,

would have been incurred by saying that it "goes beyond" that minimum content, it is enough

point out that article 64.2 indicates that "it must contain at least

”, “b) [...] the

sanctions that may correspond, without prejudice to what results from the investigation.

So, as stated at the time, the agreement to open this

procedure not only met the requirements of article 64.2 LPACAP - it established the facts

that motivate the initiation of the procedure, its possible qualification and the sanctions that

could correspond - but "went further" because it detailed, among other things,

the modifying circumstances of the responsibility that were appreciated in that phase.

With this, neither "a kind of benefit is granted to the company" nor are they "undermined"

“the rights enshrined in article 24 of the Constitution.”, as we

reproaches the claimed. Comment that is still striking if we take into account

that one of the arguments put forward by the respondent in her allegations to the

opening agreement was the poor argumentation of the circumstances

modifications of the responsibility set forth in the aforementioned agreement.

In short, the guarantees granted to the defendant in the administrative procedure

sanctioning and the rules governing the procedure have been respected

scrupulously. The extremes mentioned by the claimed in its two writings

of allegations do not entail the violation of any fundamental right recognized

in article 24.2 of the C.E. in which to support the concurrence of the reason for

radical nullity of article 47.1.a) LPACAP.

With respect to the remaining issues raised regarding the nullity of the

procedure, which are nothing more than a reiteration of what the respondent alleged against the

agreement to initiate the file, we refer to what was stated in the brief of

proposal, which is reproduced at the beginning of this Basis.

Based on the foregoing, the claim of the respondent to declare the

nullity of the procedure.

III

The RGPD dedicates article 5 to the principles that govern the processing of data

personal and has:

"1. The personal data will be:

a) treated lawfully, loyally and transparently with the interested party (<<lawfulness, loyalty and

transparency>>)

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

subsequently in a manner incompatible with those purposes; according to article 89,

paragraph 1, the further processing of personal data for archiving purposes in

public interest, scientific and historical research purposes or statistical purposes are not

deemed incompatible with the original purposes ("purpose limitation");

(…)

2. The controller will be responsible for compliance with the provisions

in section 1 and able to demonstrate it (<<proactive responsibility>>)"

Article 6 of the RGPD, "Legality of the treatment", specifies in section 1 the

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

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

conditions:

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

for one or more specific purposes;

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

is part of or for the application at the request of the latter of pre-contractual measures;

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

data controller;

d) the treatment is necessary to protect the vital interests of the interested party or another

Physical person.

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

public or in the exercise of public powers vested in the data controller;

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

by the person in charge of the treatment or by a third party, provided that on said

interests do not override the interests or fundamental rights and freedoms of the

interested party that require the protection of personal data, in particular when the

interested is a child.

The provisions of letter f) of the first paragraph shall not apply to the processing

carried out by public authorities in the exercise of their functions."

Recital 47 of the RGPD states:

"The legitimate interest of a data controller, including that of a data controller

that personal data, or that of a third party, may be communicated may constitute a

legal basis for the treatment, provided that the interests or interests do not prevail.

rights and freedoms of the data subject, taking into account reasonable expectations

of the interested parties based on their relationship with the person in charge. Such legitimate interest

could occur, for example, when there is a relevant and appropriate relationship between the

data subject and controller, such as in situations where the data subject is a customer or

is at the service of the person in charge. In any case, the existence of a legitimate interest

would require careful evaluation, even if a stakeholder can reasonably anticipate

reasonable, at the time and in the context of the collection of personal data, which

processing may occur for that purpose. In particular, the interests and rights

interests of the interested party could prevail over the interests of the person in charge

of treatment when proceeding to the treatment of personal data in

circumstances in which the data subject does not reasonably expect that a

further treatment. Since it is up to the legislator to establish by law the basis

law for the processing of personal data by public authorities,

this legal basis should not apply to processing carried out by authorities

public in the performance of their duties. The processing of personal data

strictly necessary for the prevention of fraud also constitutes an interest

of the data controller in question. Data processing

personal information for direct marketing purposes may be considered made by

legitimate interest.” (emphasis ours)

IV

The person claimed in this sanctioning procedure is attributed an infraction

of article 6.1.f) of the RGPD materialized in having sent by postal mail a

commercial communication to the claimant, his client, almost two years after

he had stated that he did not wish to receive commercial communications or

advertising and that the respondent replied that she had adopted the measures

necessary to meet your request.

1. In general, notwithstanding the necessary weighing judgment that the

responsible for the treatment must do and "provided that the interests do not prevail

or the rights and freedoms of the interested party”, their legitimate interest may constitute the basis

legal treatment of personal data for direct marketing purposes

with respect to those who are their clients, given that it is considered that

there is a reasonable expectation of such customers to receive advertising, based on the

commercial relationship that unites them with the data controller. This is inferred from

article 6.1.f) of the RGPD in connection with article 21.3 and Considerations 47, 69 and

70 of the RGPD,

Article 21 of the RGPD regulates the right of opposition in the following terms:

"1. The interested party shall have the right to object at any time, for reasons

related to your particular situation, to which personal data concerning you

are subject to processing based on the provisions of Article 6, paragraph 1,

letters e) or f), including profiling on the basis of these provisions.

The controller will stop processing the personal data, unless

prove compelling legitimate reasons for the treatment that prevail over the

interests, rights and freedoms of the interested party, or for the formulation, the

exercise or defense of claims.

2. When the processing of personal data is for marketing purposes

directly, the interested party shall have the right to object at any time to the processing of

the personal data that concerns you, including the elaboration of profiles in the

insofar as it is related to said marketing.

3. When the interested party opposes the treatment for direct marketing purposes,

personal data will no longer be processed for these purposes.

4. At the latest at the time of the first communication with the data subject, the

right indicated in sections 1 and 2 will be explicitly mentioned to the interested party

and will be presented clearly and apart from any other information.

5. In the context of the use of information society services, and not

Notwithstanding the provisions of Directive 2002/58/EC, the interested party may exercise their

right to oppose by automated means that apply specifications

techniques.

(...)". (emphasis ours)

On the other hand, Recitals 69 and 70 of the RGPD say:

(69) In cases where personal data may be lawfully processed because

[...] or for reasons of legitimate interests of the person in charge or of a third party, the interested party

You should, however, have the right to object to the processing of any data

information regarding your particular situation. It must be the person responsible who proves

that its compelling legitimate interests prevail over the interests or rights

and fundamental freedoms of the interested party. (emphasis ours)

(70) If personal data is processed for direct marketing purposes, the

The interested party must have the right to oppose said treatment, including the

profiling to the extent related to such marketing

directly, whether in respect of initial or subsequent treatment, and this in any

time and at no cost. Said right must be explicitly communicated to the

interested and presented clearly and apart from any other information." (The

underlining is ours)

Regarding the right of opposition provided for in article 21.3 of the RGPD, it is brought to

collation of what is stated in document Wp217 of the Article 29 Working Group,

Opinion 6/2014, on the concept of legitimate interest of the person responsible for the

data processing under Article 7 of Directive 95/46/EC. Starting from

the provisions of article 14.b) of the Directive – "oppose, upon request and free of charge,

to the treatment of personal data that concerns you with respect to the

which the person in charge foresees a treatment destined to the prospection; [...]"- and with the

purpose of illustrating in which cases an opt-out clause could be used

In relation to article 14.a) of Directive 95/46/EC, the Opinion states the following:

"To illustrate […] the example of prospecting is useful, in relation to which

there has traditionally been a specific opt-out provision

included in article 14, letter b), of the Directive. In order to deal with the

new technological advances, this provision has been supplemented after

through specific provisions in the Directive on privacy and

electronic communications.

Under Article 13 of the Privacy and Communications Directive

electronically, for certain, more intrusive types of activities of

prospecting (such as email marketing and

automated calling systems) consent is the norm. What

exception, in existing relationships with clients in which the person responsible for the

treatment advertises its own "similar" products or services, it is sufficient

offer an (unconditional) possibility of “opt-out” without justification.

The evolution of technology has required similar solutions, relatively

simple and that follow a similar logic, for the new practices of

marketing.

Firstly, the way in which training material is delivered has evolved.

marketing: instead of simple emails that reach the

mailboxes, currently appears on the screens of phones

smart phones and computers targeted advertising based on the

behaviour. In the near future, advertising may also be included

in smart devices connected to the Internet of Things.

Second, advertising is increasingly targeted

specific: instead of being based on simple customer profiles, with more

Frequently, the activities of consumers and

Data is stored online and offline, and analyzed with methods

more sophisticated automation.

As a result of this evolution, the object of the balancing test has

varied: the issue is no longer the right to freedom of commercial expression, but

mainly the economic interest of business organizations in

Get to know your customers by tracking and monitoring their activities

online and offline, which must be weighed against the rights

(fundamental) to the privacy and protection of the personal data of these

people and their interest in not being unduly supervised.

This change in the dominant business models and the increase in the value of

personal data as an asset for business organizations explains

the recent requirement of consent in this context, in accordance with the

article 5, paragraph 3, and with article 13 of the Directive on privacy and

electronic communications.

There are, therefore, different specific rules that depend on the form of

marketing, namely:

- the unconditional right to oppose prospecting (conceived in the

context of traditional postal mail for the marketing of products

similar) under Article 14(b) of the Directive; article 7, letter f),

could be the legal basis in that case;

- the requirement of consent under Article 13 of the Directive on

privacy and electronic communications for automated calling systems,

marketing via email, fax and text messages (subject to

exceptions) and the de facto application of Article 7, letter a), of the Directive on

Data Protection.

- the consent requirement under Article 5(3) of the

Directive on privacy and electronic communications (and article 7, letter a),

of the Data Protection Directive) in the case of behavioral advertising

based on tracking techniques such as cookies that store

information in the user's terminal. (emphasis ours)

2. Seated the above, it is necessary to refer to the advertising communication about its

mortgages that the respondent sent to the claimant by mail and to the

determination of its nature, since discrepancies have arisen about it.

The respondent states that the commercial communication sent to the claimant did not

constitutes an assumption of direct marketing. Second, the respondent denies

that, even in the hypothesis of admitting that this commercial communication may

qualify as direct marketing, there would have been a treatment "for purposes" of

direct marketing and maintains that there was only a treatment with a purpose

specifically, that of providing the claimant with information on their products, treatment that

It is protected by article 6.1.b) of the RGPD. He adds that there has been no

“additional” “data processing” that could fall within the definition of

treatment that collects article 4 of the RGPD and that, even if such a

treatment this Agency has no way of proving that “its purpose” was to

direct marketing.

The position defended by the claimant through its DPD first and its writings of

arguments to the opening agreement and proposal later is as follows:

The DPD considered, with regard to the commercial advertising printed on the document

sent to the complainant that was not a "personalized business communication" and that

the claimant was not addressed by profile. For the DPO, the communication received by the

claimant was, only, "a generic and common cover for all clients, similar to

the posters that are exposed in the offices or their facades, and general

for all customers who receive their correspondence physically in paper format.”

In its allegations to the initial agreement, the respondent affirms that the Agency has

incurred an error by confusing the "existence of advertising of [the claimed] in the

cover included in the envelope addressed to the claimant” with “the completion of a

processing for direct marketing purposes. Idea that he reiterates when he says that the AEPD

confuses “direct marketing” with “data processing for marketing purposes

direct”, “since it is about two completely differentiated realities” OR

that “The AEPD incurs in an evident contradiction by confusing [...] the existence of

advertising with the performance of data processing for that purpose.

It also adds in these allegations that "the referral of said envelope with the advertising

insert” is not the

“result of data processing for advertising purposes.

In the same way, it would not be possible to consider that we would find ourselves before a

processing of data for such purposes in the event that on the cover of the envelope

only the commercial name of my client would have appeared, even when the

AEPD, forcing the concept contained in the Start Agreement could reach

consider the mere representation of that logo as advertising.”

It also states: "That is, [the respondent] did not perform any treatment of the data

of the interested party in order to send him information about his products, but

solely with the provision of information related to those hired by

the former, without the fact that the cover of the envelope in which the information was sent

implies any treatment of your data for the purpose intended by the AEPD. And it is

that, in this sense, [the respondent] does not deny that the information included in the title page

may be considered advertising for the purposes set forth in the regulations mentioned

the Initiation Agreement, what cannot be considered is that the fact that that

information included in the cover implies data processing for the purpose of

direct marketing, which is what is attributed to my client." (Folio 12 of the brief of

allegations)

(emphasis ours)

In the allegations to the proposed resolution, the respondent has stated what

Next:

"the fact that the cover of the envelope in which the aforementioned referral is made incorporates

information referring to products marketed by the entity, without having carried out

carry out treatment activity linked to the determination of the content of said

document cannot in any case imply the existence of a treatment

specific aimed at carrying out direct marketing actions, but

the mere making of a business decision about the format of the envelopes

addressed to the entity's clients. (emphasis ours)

He insists that the proposal considers that the mere fact that the title page contains

the information on the aforementioned product is sufficient to appreciate the existence of "a

personalized delivery" to the claimant "in order to promote the acquisition of the

mentioned product of the entity"; although "[...] it did not involve the realization of a

prior action by Bankia to determine whether said advertising

may or may not correspond to the preferences of the interested party".

proposal considers" that the fact of having sent the

It also states that the "

letter to the claimant, containing the contact information to which it is addressed

“involves carrying out two personal data processing: one related to the

development of the contractual relationship and the other derived from the pure and simple fact that

the cover of the envelope incorporates the aforementioned information”. And as a counterpoint he exposes which

is its position: that there was and carried out "a single data processing and with the sole and

exclusive purpose of sending the claimant the extracts of the contracted products,

treatment protected therefore in article 6.1.b, of the RGPD.”

Well then, taking into account that in its allegations to the proposal the claimed

denies that a previous activity had been carried out “to determine whether said

advertising may or may not correspond to the preferences of the interested party”

-comment similar to the refusal expressed by the DPD in its response to the

had sent the claimant personalized advertising - and that both cases

seem to refer to the non-existence of data profiling, the first point

What needs to be done is that, as was already noted in the motion for a resolution, this

Agency has never claimed, directly or indirectly, that the

commercial communication that the respondent sent to the claimant involved or was the result

from previous data profiling. If there has been data profiling -defined in the

article 4.4 of the RGPD- the legal basis of the treatment would not be article 6.1.f) of the

RGPD, but it would be necessary to have the express consent of the owner of the data.

data.

We anticipate that, something different from data profiling is that in the activity of marketing would have selected a group among the target audience Potential recipient of advertising: the one made up of the entity's clients financial. Aspect on which there is no doubt, since the claimed party has insisted on multiple occasions that the content of the communication regarding the mortgages was included on the cover of the envelope used for all its clients with opportunity to provide them with information about the contracted products, this treatment The latter is protected by article 6.1.b) of the RGPD.

(i) The respondent denies that the commercial communication sent to the claimant can qualify as direct marketing.

Law 34/1988, of November 11, General Advertising (LGP) defines the advertising as "all forms of communication carried out by a natural person or legal, public or private, in the exercise of a commercial, industrial, craft or professional, in order to promote directly or indirectly the contracting of movable or immovable property, services, rights and obligations" (article 2).

For its part, Order EHA/1718/2010, of June 11, on the regulation and control of advertising of banking services and products - in force when the events occurred facts that concern us - provided in article 2, paragraph 1 that, for the purposes of established in this order, "any form of advertising is considered advertising activity. communication by which banking products or services are offered, or disclosed information about them, whatever the means of dissemination used: press, radio, television, email, Internet or other electronic media, billboards interior or exterior, billboards, leaflets, circulars and letters that are part of a dissemination campaign, telephone calls, home visits or any other system Of disclosure.

Likewise, advertising activities will be considered those communications

intended to draw public attention to management or other services,

provided by entities additionally or in relation to other products or

banking services, which do not have the status of investment services.

2. They are not considered advertising activities and, therefore, are excluded from this

order:

a) Corporate advertising campaigns, understood as those that contain

exclusively generic information about an entity or its corporate purpose that are

intended to be disclosed to the public.

b) Those informative contents that appear on the entity's own pages

on the Internet, or in another means of diffusion, that are necessary to carry out the

hiring of an operation.

c) The information on the specific characteristics of the operations

appear on the operational pages of the entity on the Internet in which they are carried out.

cape." (emphasis ours)

Advertising is an instrument used by marketing. For this reason, advertising

It's always marketing, but marketing isn't always advertising. marketing

studies and plans and advertising acts accordingly. Marketing focuses on

create a specific image for the company and understand the market and

Potential customers.

Regarding direct marketing, Philip Kotler -considered the father of marketing

modern- defines it in his book 'Fundamentals of Marketing', as "the connections

direct interviews with carefully selected individual consumers to obtain

an immediate response and cultivate lasting relationships with customers".

Unlike mass advertising that is sent to all types of consumers, the

direct marketing is ideally for those who are believed (based on the

information collected about them) who have an interest in one of the products or

services that are offered. Among the advantages attributed to direct marketing

the message is found to be personal, making the customer feel that he is alone

for him or her; that it is possible to make a better segmentation and it is more profitable because

attempts are made to sell to individuals who have already been identified as potential

buyers.

The American Direct Marketing Association and the European Direct Marketing

Association define direct marketing as "an interactive marketing system

that uses one or more advertising media to achieve a measurable response and/or

a transaction at a given point. This concept encompasses all those

means of communication intended to create an interactive relationship with a retailer

individual, a company, client, final consumer or a contributor to a cause

determined."

In the opinion of this Agency, the commercial communication that the claimant received from the

claimed and that has given rise to this sanctioning procedure constitutes a

direct marketing example The commercial communication was sent to the claimant by

your status as a client of the entity, as well as all clients -as the

claimed has been stating from the beginning-, so it would fit into a

direct marketing activity of the financial institution. We are not even before a

mass commercial communication in which the recipient had not been

individualized.

The peculiarity presented in this case by the commercial information sent to the

claimant and the rest of the clients of the respondent is that she was not included in a

separate document, but was included - which is undoubtedly more

economic - in the same documentary support on which the data appears

identifiers of the recipient of the postal item, since the envelope used was one of the

called window in which the recipient's data is printed

inside him. The document that simultaneously supported the information

business and the details of the addressee of the letter - to which the claimed letter refers

as "envelope cover" - is described in Proven Fact 2 of the resolution, to which

we refer The commercial communication in this case informed of the

main characteristics of the product that the entity marketed and invited the

client, to obtain more information, to consult the website or to go to your office

banking.

It is irrelevant for the purposes of the advertising communication sent being

considered direct marketing that would have been printed on the same document that

served as support for the data of the addressee of the letter or cover of the envelope. It

relevant is that the defendant directed the commercial information to a client of hers, since

was included in the envelope with other information sent to the claimant while it was

client; that was used for all the clients of the entity and that was directed, in the case

of the claimant and in that of the rest of the clients, to people who were perfectly

individualized and identified.

As was said at the time, it is a personalized communication; not in the sense

which appears to have been used by the DPD of the entity, linked to the profiling of the data

-an issue to which we have already made reference in previous paragraphs- but because

included in an envelope that was addressed to the claimant, identifying him in a way

unequivocal for your personal data.

(ii) The respondent denies that the personal data of the claimant had been processed

for direct marketing purposes.

The commercial communication about the mortgages that was sent to the claimant by his

condition of client of the entity -since, as the defendant has stated

insistently, he used it without any discrimination for all his clients -, and that for

This Agency is an example of the direct marketing activity of the

claimed, was included in an envelope addressed to the claimant (in his name and address)

together with the information related to the financial products that it had contracted with

she.

It is estimated, therefore, as stated in the motion for a resolution, that the data

personal data of the claimant were treated with a dual purpose: On the one hand, the

claimed processed the data of the claimant in order to provide information

regarding the contracted services. The legal basis of the treatment carried out with such

end is article 6.1.b. RGPD, as this treatment is necessary for the execution of the

contract that linked the claimant and the respondent. In addition, the data of

claimant were processed for a purpose other than the above:

send you advertising about your mortgages. The advertising sent to the clients of

the entity in this way -printed on the cover of the envelope- is not as intended by the

claimed fruit almost of chance since while admitting that it is a

advertising communication denies that it responds to a specific marketing purpose.

In the case examined, the processing of the claimant's data was intended,

in addition to the original purpose, related to the reason for collecting the data

-the conclusion of a contract between claimed and claimant- a purpose other than

that. What that purpose is is evident from the content of the

advertising communication and the circumstance that the defendant has recognized in

at all times that the same communication was included on the cover of the envelope that was

he sent to all his clients. This ulterior purpose -direct marketing- of the

processing of the claimant's data requires a specific legal basis that legitimizes

the treatment that is different from that referred to in article 6.1.b) of the RGPD.

At this point it seems advisable to reproduce what was stated by the claimed

in his arguments to the initial agreement on "what was the interpretation that had to be

be given to the concept of treatment and that of purpose, in accordance with the criteria supported

by the Article 29 Working Group and ratified by the European Committee on

Data Protection.":

[...] it should be remembered that although the defunct Article 29 Working Group (in

hereinafter, "GT29") nor the European Committee for Data Protection (hereinafter,

for its acronym in English, “EDPB”) have not analyzed in any document the

legal notion of “Purpose” from the point of view of the application of the

data protection regulations, they have had the opportunity to refer to this

concept in some of its opinions and documents.

Thus, in its Opinion 03/2013 on purpose limitation, adopted on the 2nd of

April 2013 (hereinafter, the “WP203 Document”) equates the concepts of

purpose and objective of the treatment (“purpose” and “aim” in the English version, only

available from it). Thus, in its section II.2.1, the WP29 states that “Article

6. 1 b) of the Directive requires that personal data is only collected for the purposes

"specific, explicit and legitimate". Data is collected for certain

objectives; these objectives are the "raison d'être" of the operations of

treatment". It follows that the purpose must be understood as the

“objective” or “reason for being” of the treatment. For this reason, continue the

mentioned opinion, “[a]s a prerequisite for other quality requirements

of the data, the specification of the purpose will determine the relevant data

to be collected, retention periods and all other aspects

key to how the personal data will be processed for the chosen purposes”.

For its part, the WG29 also pointed out in section III.3.1. of your opinion

06/2014 [...] (hereinafter, the “WP217 Document”), which “[i]n terms of

data protection, purpose is the specific reason why the data is processed.

data: the purpose or intention of data processing”.

And it is that, as Document WP103 also indicates at the beginning of its section II.2

“[t]he specification of the purpose is an essential condition for the treatment

of personal data and a prerequisite for applying other quality requirements

of data. The specification of the purpose and the concept of compatible use

they contribute to transparency, legal certainty and predictability; its

The goal is to protect the data subject by setting limits on how

Those responsible can use your data and reinforce loyalty in the treatment".

Well then, applying the delimitation of the concept of "purpose" deduced from the

mentioned WG29 documents, my principal considers, in contrast to what

invoked by the AEPD in its Start Agreement, which it has not carried out

carry out a treatment of the Claimant's data whose "reason for being", "objective" or

"ultimate intention" consists of carrying out direct marketing activities."

The quotes obtained from the WG29 documents referred to in the

claimed are perfectly consistent with the thesis of this AEPD. couldn't be from

otherwise, since the RGPD clearly provides in its article 5.1.b), a sensu

contrary, -precept almost identical to article 6.1.b) of Directive 95/46/CE- that the

personal data may be processed for purposes other than the "specified,

explicit and legitimate" for which they were collected, provided that such further processing

not incompatible with the original treatment. To this end, article 6.4 of the RGPD

offers a series of criteria to be taken into consideration to determine if the

processing for another purpose is compatible with the purpose for which the data was collected

initially.

Article 6.4 of the RGPD provides:

"4. When treatment for a purpose other than that for which the data was collected

personal data is not based on the consent of the interested party or on the Law

of the Union or of the Member States which constitutes a necessary and

proportionate in a democratic society to safeguard the stated objectives

in article 23, paragraph 1, the data controller, in order to determine

if processing for another purpose is compatible with the purpose for which they were collected

initially the personal data, will take into account, among other things:

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

data and the purposes of the intended further processing;

b) the context in which the personal data have been collected, in particular by what

regarding the relationship between the interested parties and the data controller;

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

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

relating to criminal convictions and offences, in accordance with article 10;

d) the possible consequences for data subjects of the envisaged further processing;

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

pseudonymization."

3. The treatment of the personal data of the claimant carried out with a purpose

specific to direct marketing, other than the purpose of the initial treatment that

determined the collection of the data, it must be based on a specific legal basis.

As stated, when the purpose of further processing is the

communications for direct marketing purposes addressed to those who maintain a relationship

with the data controller, such as a prior contractual relationship, which generates

a reasonable expectation in the interested party of the subsequent use of their data with that

purpose, the legal basis of the treatment may be the circumstance described in the

article 6.1.f) of the RGPD.

In this sense, it should be remembered that both the DPD, in its informative response to the

Subdirectorate of Data Inspection, prior to the claim being processed,

as the representative of the respondent in their allegations to the initial agreement, have

stated that the legal basis for the processing of personal data of

clients that the entity carries out for commercial purposes is the legitimate interest that

it holds in accordance with article 6.1.f RGPD.

The DPD of the claimed party, in his response to the informative request of the Subdirectorate

of Inspection, stated that the legal basis for processing the claimant's data

for commercial purposes was the legitimate interest (article 6.1.f. RGPD) He then stated:

"And therefore, it must be understood that it is a shipment protected by the interest

legitimate of [¿?] as reported in the privacy policy of the entity, when

be referred in general to products or services marketed by the

entity and similar to the products contracted by its clients (products

financial)."

(The underlining is from the AEPD)

For its part, the respondent, in the process of pleadings to the initial agreement, provided a

privacy policy document that indicated that the personal data of the

clients would be treated, without prejudice to the special conditions established

in relation to each product contracted by them, for six purposes

determined and in which it was specified, with respect to each of those purposes

treatment, what was its correlative legal basis. Points 3 and 4 say what

Next:

"3. Improve the web pages or tools owned by Bankia, as well as their

products and services, in order to offer better quality and service to the user,

develop new products/services or improve the entity's internal processes

(Legitimation of the treatment: Consent of the user (cookies) and Legitimate interest).

4. Send commercial communications about products and services, own or of

third parties (Legitimation of the treatment: Consent of the user)." (The underline is

our)

As can be seen, point 4 of the privacy policy document of the

entity indicates that the legal basis of the treatment, when the purpose is "send commercial communications about products and services, own or third parties" - without make any additional precision that narrows down the very general category of commercial communications - is consent. And in section 3 it says that the Legitimate interest operates as the basis of the treatment -with the exception of the cookies, whose basis is consent- consisting of "improving the pages or web tools owned by Bankia, as well as its products and services, provided that offer better quality and service to the user, develop new products/services or improve the internal processes of the entity".

The apparent contradiction between what the DPD stated in its response to the request for information - which argued that the legal basis for the treatment of customer data for commercial purposes was the legitimate interest - and point 4 of the

privacy policy document provided by the claimed party, it is resolved by the claimed that comes to manifest in its allegations to the initial agreement, with total emphatically, which is protected by the legitimate interest of the entity (article 6.1.f) of the RGPD) "the sending of commercial communications of own products or services or of third parties, [...], when it is carried out by postal means..." (The underlining is our)

Well, as has been stated, for this Agency, the commercial communication that the claimant received from the respondent and which has given rise to this proceeding sanctioning is an example of direct marketing. In the present case, the

treatment carried out by the defendant, in principle, since obviously it does not

there is consent of the interested party, it could only rely on the concurrence

of the circumstance of article 6.1.f) of the RGPD.

However, it has been proven in the file that the claimant, a client of the

claimed, addressed her on 11/04/2018 through the channel enabled for such

order and communicated his desire not to receive commercial information or communications

advertising (Proven fact 3) Likewise, it is proven in the file that the

Responded to the claimant in writing dated 11/21/2018 that it had attended

“Completely” your request not to receive information of a commercial nature or

entity advertising. (Proven Fact 3)

At the same time, it is proven that almost two years later, on 02/11/2020, the

The claimant received a letter by post from the claimant in which he

sent, in addition to information about the products that he had contracted with her -in

compliance with the obligations arising from the contractual relationship between

both- information of a commercial nature about the mortgages it sells. Is

business information was therefore included within the addressed envelope

personally to the claimant; to your name and surnames and to your address.

Thus, as a result of the response to the complainant of 11/21/2018, and in accordance with article

21.3 of the RGPD, the claimed party lacked legitimacy to process personal data

of the claimant for direct marketing purposes.

In short, the processing of the claimant's personal data carried out by the

claimed at a later date, February 2020, for direct marketing purposes, not

could be based on the circumstance of article 6.1.f of the RGPD.

4. In sanctioning matters, the principle of culpability governs in our Law. The

presence of the subjective element as an essential condition to demand responsibility

sanctioning has been recognized by the Constitutional Court, among others, in STC

76/1999, in which it states that administrative sanctions participate in the same nature than criminal ones, being one of the manifestations of the ius puniendi of the State, and that, as a requirement derived from the principles of legal certainty and criminal legality enshrined in articles 9.3 and 25.1 of the CE, it is essential to existence to impose them.

In turn, Law 40/2015, of October 1, on the Legal Regime of the Public Sector provides in article 28.1: "They may only be sanctioned for acts constituting administrative infraction natural and legal persons, [...], that result

responsible for them by way of fraud or negligence." In light of this precept, the sanctioning responsibility can be demanded by way of intent or guilt, being sufficient in this last case the mere non-observance of the duty of care.

If it is taken into consideration that the respondent has not been able to qualify adequately, as an assumption of direct marketing, the treatment that has been carried out with that purpose of the data of its clients, with the consequence of not having respected the right of opposition exercised by the respondent, the lack of diligence shown is very serious.

Regarding the degree of diligence that the data controller is obliged to deploy in the fulfillment of the obligations imposed by the regulations of data protection, the SAN of 10/17/2007 (rec. 63/2006), after referring to the fact that the entities in which the development of their activity entails a continuous treatment of customer data and third parties must observe an adequate level of diligence,

specified that “….the Supreme Court has understood that there is imprudence

whenever a legal duty of care is disregarded, that is, when the offender fails to

behaves with due diligence. And in assessing the degree of diligence,

especially weigh the professionalism or not of the subject, and there is no doubt that,

in the case now examined, when the appellant's activity is constant and

abundant handling of personal data, it must be insisted on the rigor and

exquisite care to adjust to the legal precautions in this regard”. (The underlined

is from the AEPD)

Especially significant is also the SAN of 04/29/2010, which in its Basis

Juridical sixth indicated: "The question is not to elucidate if the appellant treated the data of

personal nature of the complainant without her consent, such as whether or not she used a

reasonable diligence in trying to identify the person with whom you signed

contract".

In view of the foregoing, the treatment carried out by the claimed party of the data of the

claimant with a direct marketing purpose violated the principle of legality in

relation to article 6.1.f) of the RGPD, infraction subsumable in the sanctioning type

of article 83.5 RGPD, which states:

“The infractions of the following dispositions will be sanctioned, in accordance with the

section 2, with administrative fines of a maximum of 20,000,000 Eur or, in the case of

of a company, of an amount equivalent to a maximum of 4% of the volume of

Total annual global business of the previous financial year, opting for the one with the highest

amount:

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

consent under articles 5,6,7 and 9.”

In turn, the LOPDGDD in its article 72.1.b), for prescription purposes, qualifies as

very serious infringement “The processing of personal data without the concurrence of any of the

the conditions of legality of the treatment established in article 6 of the Regulation

(EU) 2016/679."

v

Article 58 of the RGPD, under the heading "Powers", establishes in its section 2 that

"Each supervisory authority shall have all of the following corrective powers

listed below:

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

planned treatment operations may infringe the provisions of this Re-

glament;

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

treatment operations have violated the provisions of this Regulation;

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

exercise of the rights of the interested party under this Regulation;

d) order the controller or processor that the processing operations

compliance with the provisions of this Regulation, where applicable, in accordance with

a certain way and within a specified period;

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

of the security of personal data;

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

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

under Articles 16, 17 and 18 and notification of such measures to the des-

recipients to whom personal data have been communicated pursuant to article

17, section 2, and article 19;

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

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

tion that a certification is not issued if the requirements are not met or are no longer met.

sites for certification;

i) impose an administrative fine in accordance with article 83, in addition to or instead of the

measures mentioned in this section, according to the circumstances of each case

particular;

j) order the suspension of data flows to a recipient located in a third party.

certain country or to an international organization." (The underlining is from the AEPD)

1. Replacement of the sanction of a fine by a warning.

The respondent has requested in her two pleadings that, in substitution of

the administrative fine provided for in the initiation agreement, the AEPD sends a

warning and, subsidiarily, that the amount of the fine sanction be reduced

set in the opening agreement at 50,000 euros. About the first of his

claims we refer to Recital 148 of the RGPD.

The respondent has criticized in the hearing procedure that the response of the AEPD to her

claim has been limited to transcribing Recital 148 of the RGPD because it says that

that recital assesses only two elements: that the fine that could

be imposed constitutes a disproportionate burden for the natural person – element

that is not applicable to the case- or that the infraction is minor. He claims that in the

present assumption the infraction is minor; indicates that the lightness to which the GDPR is

refers has nothing to do with the classification that the LOPDGDD makes of the minor, serious and very serious infractions and that when Recital 148 refers to The seriousness or lightness of the sanction refers to the cases in which it has been produced or not a commitment particularly relevant to the fundamental right to data protection.

In defense of its position, the respondent mentions document WP253 of the Group of Work on article 29, “Guidelines on the application and setting of fines for the purposes of Regulation 2016/679” from which this excerpt is transcribed:

“In recital 148, the notion of “minor infringements” is presented. sayings Violations may constitute violations of one or more provisions of the Regulation cited in article 83, paragraphs 4 or 5. However, the evaluation of the criteria provided for in Article 83, paragraph 2, can give result in the supervisory authority deeming, for example, that in the circumstances circumstances of the case the violation does not entail a significant risk for the rights of the interested parties and does not affect the essence of the obligation in question. In such cases, the fine may (although not always) be replaced by a warning.”

(emphasis ours)

This Agency, however, does not consider that the infraction for which it is responsible to the one claimed is minor, let alone that the substitution of the imposed fine is appropriate for a warning.

In contrast to the factors that the respondent has highlighted, it is worth mentioning other especially relevant: It is appreciated that the behavior of the claimed “yes” entails a serious risk for the rights of the interested parties, in particular for their clients before

the obvious lack of protection in which they find themselves in front of a person in charge who processes your data for direct marketing purposes despite having exercised the interested party the right to oppose said treatment. There is a serious lack of diligence of the entity that, by incorrectly qualifying the data processing that makes, is unable to respect the rights that the RGPD grants to the owners of the data. And we are dealing with an entity (both the absorbed entity and its successor) of great scope from the point of view of the volume of clients and, therefore, consequently, of personal data subject to treatment.

2. Corrective measures additional to the sanction of a fine.

Article 83.2 of the RGPD expressly authorizes the control authority to impose, "in addition" to the administrative fine, the corrective measures provided for in the article 58.2 of the RGPD.

The proposed resolution provided for the AEPD to order the respondent, by infringement of article 6.1.f) of the RGPD, typified in article 83.5.a of the RGPD, which adopt “within a maximum period of one month, the necessary measures to adjust its treatment operations to the provisions of the RGPD; in such a way as to put end to the processing of personal data for direct marketing purposes regarding those customers who have opposed the processing of their data with such purpose.”

In her arguments to the proposed resolution, the respondent says (third argument of your writing) that said requirement is impossible to comply with due to the

the extinction of the entity against which the AEPD intends to direct this measure. And adds

that the disappearance of BANKIA from legal traffic means that it cannot carry out

no processing of personal data.

Faced with what was stated by the respondent, it must be indicated that demanding that the successor of

BANKIA, in whose legal position it has been subrogated, adopt the "necessary measures

to adjust its treatment operations to the provisions of the RGPD; such

way that puts an end to the processing of personal data for marketing purposes

directly with respect to those clients who have opposed the treatment of their

data for this purpose." is fully compliant by the current

claimed in the event that at the present time he was carrying out

data processing analogous to that which is the subject of this disciplinary proceeding.

In any case, it is recalled that article 83.6 of the RGPD expressly sanctions the

Failure to comply with the resolutions of the control authority.

SAW

In consideration of what is indicated in the previous Basis, due to the infraction of article

6.1.f, of the RGPD typified in article 83.5.a, of the RGPD, it is considered appropriate

adopt the following corrective measures against the claimed party:

1. In accordance with article 58.2.d) RGPD, order the claimed party that, in the

period of one month, computed from the time this resolution is enforceable, adopt

the measures that are necessary to adjust its treatment operations to the

GDPR provisions; in such a way as to put an end to data processing

for direct marketing purposes with respect to those customers who

have opposed the processing of their data for this purpose.

2. In accordance with article 58.2.i) of the RGPD, impose a fine sanction

administrative.

The respondent requested in the pleadings to the initial agreement that the

amount of the sanction of a fine and stated that, in determining its amount in

the agreement to open the procedure, the principle of proportionality was violated

because the amount of the administrative fine established in it "does not adjust to the valuation of

the mitigating and aggravating factors that the agreement itself takes into consideration.”

The respondent argued in this sense that the resolution of PS/00076/2020 does not

took into consideration the circumstance, which was appreciated in this case as

aggravating circumstance, of the link between the activity that the entity carries out with the treatment of

personal data and that in the aforementioned resolution it was qualified that the lack of

diligence of the claimed was "significant", which, it says, is not indicated in this

case.

Well then, in the initial agreement, when adjusting the amount of the sanction of a fine,

warned that the circumstances were appreciated "in an initial assessment," and it was made

reference not to a significant lack of diligence but to a “serious lack of diligence”.

diligence". On the other hand, the principle of proportionality requires that there be a

correspondence between the seriousness of a behavior and the sanctioning consequence

attributed to it, so the violation of said principle will occur when such

correspondence does not exist, which does not occur in this case in view of the behavior

offender and the agreed fine and measure.

3. Determination of the amount of the fine sanction.

In determining the fine to be imposed on the person claimed for the infraction

of the RGPD for which it is responsible, article 6.1.f) RGPD, typified in the article

83.5.a RGPD, the provisions of articles 83.1 and 83.2 of the

RGPD, precepts that indicate:

“Each control authority will guarantee that the imposition of administrative fines

under this Article for infringements 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

such as the number of interested parties affected and the level of damages that

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 they have applied under

of articles 25 and 32;

e) any previous infringement 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 remedy the

infringement and mitigate the possible adverse effects of the infringement;

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", establishes:

"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

there are controversies between them and any interested party."

In the case analyzed, the concurrence of the following factors that

They operate by aggravating the responsibility required of the entity because they show a

greater unlawfulness of their conduct or greater culpability:

-Article 83.2.a) of the RGPD: "the nature, seriousness and duration of the infringement

taking into account the nature, scope or purpose of the processing operation,

as well as the number of interested parties affected and the level of damages suffered."

The conduct in which the infringement attributed to the claimed person is specified affects a

basic principle in terms of data protection, the legality of the treatment. The

defendant considers that the commercial communications that it sends to its clients

whose content is printed on the same document that supports the data

of the addressee of the letter - document that the claimed person identifies as the cover of the

about- do not imply a treatment with the purpose of direct marketing. given account

that according to what he declares have been sent to all his clients, he has not discriminated

previously if they have opposed the processing of their data for this purpose. Also,

This point requires taking into consideration the scope of the treatment contrary to the

RGPD carried out by the claimed party, which goes beyond the processing of personal data.

a single person (the claimant). Together with this consideration included in the proposal resolution, it was specified then that such extremes prevented this circumstance from could be applied as a mitigating measure, as had been applied in the agreement of started on the basis that there was no evidence of damages suffered by the person of the claimant.

-Article 83.2.b) the intentionality or negligence of the infraction;

In the proposed resolution it was pointed out, regarding this aggravating circumstance, that "It appreciates a serious lack of diligence in the actions of the defendant because, considering to the volume of its activity and the volume of clients, it can be presumed that in its activity The processing of data for direct marketing purposes is frequent and the assumptions in which customers oppose the processing of their data for that purpose." In the hearing process the respondent has stated that we are facing a presumption lacking evidentiary support that violates the right to the presumption of innocence.

Although, in principle, the reasoning used in the proposal could be inadmissible for the reasons that are pointed out, this is not an obstacle to the appreciation of such circumstance on the basis of considerations about the guilt of the entity and, in particular, its very serious lack of diligence, have been made in the Foundation IV, last section.

It is also highly debatable that it implies a violation of the presumption of innocence the statement that can be presumed, taking into account the volume of activity and the volume of clients, which is not uncommon for the defendant to have made treatment for direct marketing purposes or that would have been exercised by some other client other than the claimant the right to oppose these treatments.

Let us remember that notorious facts do not need to be proven and have that condition the economic size and the millionaire number of clients of the entity claimed.

- The evident link between the business activity of the defendant and the

processing of personal data (article 83.2.k, of the RGPD in relation to article

76.2.b, of the LOPDGDD) The activity of the defendant requires that numerous

personal data of its clients, therefore, given the very important volume

of business of the claimed financial institution when the events occur, the

significance that their offending conduct may have is undeniable.

-Any previous infraction committed by the person in charge or in charge of treatment

(article 83.2.e of the RGPD)

It is worth mentioning to this effect, in addition, the sanctioning resolution relapsed in the

PS/00076/2020 for violation of article 5.1.b) of the RGPD, signed on 08/26/2020,

the sanctioning resolutions issued in procedures PS/00199/2018, for

infringement of article 6.1. of the Organic Law 15/1999, of data protection of

personal character (LOPD) and signed on 06/11/2018 and in PS/00525/2017, by

violation of article 64.3 of the LOPD, signed on 04/26/2018.

The respondent has criticized in the hearing process the application of this aggravating circumstance and

indicates that the facts for which the entity was sanctioned in PS/00076/2020 nothing

they have to do with those that are the object of assessment in this case. To that end

We must remember that the provision of article 83.2.e) of the RGPD has a

other than article 29.3.d) of Law 40/2015.

It operates as a circumstance that mitigates the seriousness of the infraction:

-Article 83.2.k, RGPD, in relation to article 76.2.e) of the LOPDGDD: “The

existence of a merger by absorption process subsequent to the commission of the

infringement, which cannot be attributed to the absorbing entity."

On 03/26/2021 -therefore, after the infraction was committed- the

registered in the Mercantile Registry the public deed with the merger agreement by

absorption between the claimed entity (as absorbed entity) and CAIXABANK, S.A., (as

acquiring entity).

So things, assessed the circumstances provided for in article 83.2 of the RGPD,

sections. a), b), e) and k), the latter in relation to article 76.2.b) LOPDGDD, in

quality of aggravating circumstances of the conduct examined, and the mitigating factor provided for in article

83.2.k) RGPD in relation to article 76.2.e) of the LOPDGDD, it is estimated

appropriate to sanction the claimed for the infringement of article 6.1.f of the RGPD,

typified in article 83.5.a RGPD, with an administrative fine of 50,000 euros.

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 CAIXABANK, S.A., with NIF A08663619 -previously BANKIA, S.A.-,

for an infringement of article 6.1.f) of the RGPD, typified in article 83.5.a of the

RGPD, an administrative fine sanction (article 58.2.i RGPD) for an amount of

€50,000 (fifty thousand euros)

SECOND: ORDER CAIXABANK, S.A., with NIF A08663619 -formerly BANKIA,

S.A.- that, in accordance with article 58.2.d) of the RGPD, within a maximum period of one month from

that the resolution is enforceable, adopt the necessary measures to adapt the

treatment operations that it carries out to the provisions of the RGPD, so that

put an end to the processing for direct marketing purposes of the personal data

staff of those clients who have opposed the processing of their data with

that purpose.

THIRD: NOTIFY this resolution to CAIXABANK, S.A., with NIF

A08663619.

FOURTH: Warn the sanctioned party that he must make the imposed sanction effective once

Once this resolution is enforceable, in accordance with the provisions of the

Article 98.1.b) of Law 39/2015, of the LPACAP, within the voluntary payment period

established in article 68 of the General Collection Regulations, approved by

Royal Decree 939/2005, of July 29, in relation to article 62 of Law 58/2003,

of December 17, through its entry, indicating the NIF of the sanctioned and the number

of procedure that appears in the heading of this document, in the account

restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency

Spanish Department of Data Protection in the banking entity CAIXABANK, S.A.. In case

Otherwise, it will be collected in the executive period.

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

between the 1st and 15th of each month, both inclusive, the term to make the payment

voluntary will be until the 20th day of the following month or immediately after, and if

between the 16th and last day of each month, both inclusive, the payment term

It will be until the 5th of the second following month or immediately after.

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 article 48.6

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

Interested parties may optionally file an appeal for reconsideration before the
Director of the Spanish Agency for Data Protection within a month from
counting from the day following the notification of this resolution or directly
contentious-administrative appeal before the Contentious-Administrative Chamber of the
National Court, in accordance with the provisions of article 25 and section 5 of
the fourth additional provision of Law 29/1998, of July 13, regulating the
Contentious-administrative jurisdiction, within a period of two months from the
day following the notification of this act, as provided in article 46.1 of the
aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of article 90.3 a) of the LPACAP,
The firm resolution may be provisionally suspended in administrative proceedings if the
The interested party expresses his intention to file a contentious-administrative appeal.
If this is the case, the interested party must formally communicate this fact by
writing addressed to the Spanish Agency for Data Protection, presenting it through
Electronic Register of the Agency [https://sedeagpd.gob.es/sede-electronica-
web/], or through any of the other records provided for in article 16.4 of the
aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the
documentation proving the effective filing of the contentious appeal-
administrative. If the Agency was not aware of the filing of the appeal
contentious-administrative within a period of two months from the day following the
notification of this resolution would end the precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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