

936-031219

□ Procedure No.: PS/00068/2020

## RESOLUTION R/00279/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

### VOLUNTEER

In sanctioning procedure PS/00068/2020, instructed by the Agency

Spanish Data Protection Authority to BANCO BILBAO VIZCAYA ARGENTARIA, S.A.,

In view of the complaint filed by A.A.A., and based on the following,

### BACKGROUND

FIRST: On March 12, 2020, the Director of the Spanish Agency for

Data Protection agreed to initiate sanctioning proceedings against BANCO BILBAO

VIZCAYA ARGENTARIA, S.A. (hereinafter, the claimed party), by means of the Agreement that

is transcribed:

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Procedure No.: PS/00068/2020

935-240719

### AGREEMENT TO START A SANCTION PROCEDURE

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

Data and based on the following:

### FACTS

FIRST: D.A.A.A. (hereinafter, the claimant) dated September 17,

2019 filed a claim with the Spanish Data Protection Agency. The

claim is directed against Banco Bilbao Vizcaya Argentaria, S.A. with NIF

A48265169 (hereinafter, "BBVA").

The claim states that the financial institution BBVA has consulted

your data in the Asnef and Badexcug files without there being any contractual relationship

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prior with them.

Attached to the claim is a response from Equifax and Experian to the right to access exercised by the claimant dated September 16, 2019, where it is stated in the history of consultations, of the last six months, that the entity BBVA made a consultation dated September 6, 2019.

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

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

In addition, the following extremes are noted:

On November 26, 2019, BBVA states that the events that have grounds for this claim are:

1.- "On January 30, 2019 BBVA sent to the AEPD the communication that on 29

January 2019, the entity sent the claimant in writing informing him, among other things, that on February 19, 1998 you signed a Loan policy with Argentaria, currently BBVA, and on February 12, 1993 a contract of Preciados Galleries Card in which you intervene as a Person Authorized". This writing is provided.

2.- Since the claimant did not agree with the contracts

cited, requested information and documentation in this regard. The Customer Service

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BBVA customer, told him that they were looking for the loan agreement, that

until that moment it had not been located, and as for the card contract

Galerías Preciados, where the claimant appeared as authorized and not as owner, the

Customer Service asked him to facilitate his representation in order to

respond to your claim. This document is attached.

3.- In addition, before the claim filed by the claimant before the Bank of

Spain. BBVA, presented a brief of allegations proving that it no longer appeared as

person authorized in the card contract and blocking the personal data of the

claimant. These writings are provided.

4.- In relation to the claim filed with the AEPD, they state that the

On September 27, 1999, the loan contract was canceled and on September 18

of 2019, the Galerías Preciados Card contract was cancelled, since the claimant did not

acknowledged having any relationship with this last contract.

5.- They add that, "after analyzing the specific case, it has been proven that on the 6th of

September 2019 BBVA consulted the personal data of the claimant in the asset and credit solvency information files in order to guarantee the better resolution of the claims presented to the Entity by the claimant. Consequently, given that until September 18, 2019 the claimant maintained a contractual relationship with BBVA, the consultation of the information files capital and credit solvency was carried out within the operating margins usual contractual, and within and within the strictest legality in force”.

## FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each control authority, and according to the provisions of articles 47 and 48 of the LOPDGDD, The Director of the Spanish Agency for Data Protection is competent to initiate and to solve this procedure.

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II

Article 58 of the RGPD, “Powers of Attorney”, says:

“2 Each supervisory authority shall have all of the following powers  
corrections listed below:

(...)

b) sanction any person responsible or in charge of the treatment with a warning when the treatment operations have violated the provisions of this

Regulation;

(...)

d) order the person in charge or in charge of the treatment that the operations of treatment comply with the provisions of this Regulation, where appropriate, in a certain way and within a specified period.

(...)

i) impose an administrative fine in accordance with article 83, in addition to or instead of the measures mentioned in this section, depending on the circumstances of the case particular

(...)”

III

The RGPD deals in its article 5 with the principles that must govern the treatment of personal data and mentions among them that of "lawfulness, loyalty and transparency". The provision provides:

"1. The personal data will be:

a) Treated in a lawful, loyal and transparent manner in relation to the interested party (<<legality, loyalty and transparency>>);”

Article 6 of the RGPD, "Legality of the treatment", details in its section 1 the assumptions in which the processing of third party data is considered lawful:

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"1. The treatment will only be lawful if at least one of the following is met conditions:

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

personal for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of the latter of measures pre-contractual;

(...)"

The infraction for which the claimed entity is held responsible is typified in article 83 of the RGPD that, under the heading "General conditions for the imposition of administrative fines", states:

"5. Violations of the following provisions will be sanctioned, in accordance with section 2, with administrative fines of a maximum of EUR 20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the global total annual turnover of the previous financial year, opting for the largest amount:

a) The basic principles for the treatment, including the conditions for the consent under articles 5,6,7 and 9."

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

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

(...)

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

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IV

The documentation in the file offers evidence that BBVA,  
violated article 6.1 of the RGPD.

Likewise, article 20 of the LOPDGDD, provides in its section e) "that the

Data referring to a specific debtor can only be consulted when

who consults the system maintains a contractual relationship with the affected party that  
implies the payment of a pecuniary amount or this would have requested the celebration

of a contract that involves financing, deferred payment or periodic billing as

occurs, among other cases, in those provided for in the legislation of contracts of  
consumer credit and real estate credit contracts.

Therefore, based on the foregoing, in order to consult the data it is necessary to

that the interested party has contracted or requested the contract, which is not the case.

It appears in the file that the claimant intervenes as a Person

Authorized; and in this sense does not sign any contract with the entity.

Based on the foregoing, in the case analyzed, it is questionable

the diligence used by BBVA.

The Contentious-Administrative Chamber of the National High Court, in

assumptions such as the one presented here, has considered that when the owner of the

data denies the hiring, the burden of proof corresponds to those who affirm their

existence, and the third-party data controller must collect and

keep the necessary documentation to prove the consent of the holder.

We cite, for all, the SAN of 05/31/2006 (Rec. 539/2004), Basis of Law

Fourth.

However, and this is essential, BBVA does not accredit the legitimacy for the treatment of the claimant's data.

Respect for the principle of legality that is in the essence of the fundamental right of protection of personal data requires that it be accredited that the responsible for the treatment displayed the essential diligence to prove that extreme. Failure to act in this way -and this Agency, who is responsible for ensuring for compliance with the regulations governing the right to data protection of personal character - the result would be to empty the content of the principle of legality.

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v

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

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

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



- a) the nature, seriousness and duration of the offence, taking into account the nature, scope or purpose of the processing operation in question as well as the number of stakeholders affected and the level of damage and damages they have suffered;
- b) intentionality or negligence in the infringement;
- c) any measure taken by the controller or processor to alleviate the damages suffered by the interested parties;
- d) the degree of responsibility of the person in charge or of the person in charge of the treatment, taking into account the technical or organizational measures that have applied under articles 25 and 32;
- e) any previous infraction committed by the person in charge or the person in charge of the treatment;
- f) the degree of cooperation with the supervisory authority in order to put remedying the breach and mitigating the possible adverse effects of the breach;
- g) the categories of personal data affected by the infringement;
- h) the way in which the supervisory authority became aware of the infringement, in particular if the person in charge or the person in charge notified the infringement and, in such case, to what extent;
- i) when the measures indicated in article 58, paragraph 2, have been previously ordered against the person in charge or the person in charge in question in relation to the same matter, compliance with said measures;
- j) adherence to codes of conduct under article 40 or mechanisms certificates approved in accordance with article 42, and

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k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits realized or losses avoided, direct or indirectly, through infringement.”

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

“Sanctions and corrective measures”, provides:

“two. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679 may also be taken into account:

- a) The continuing nature of the offence.
- b) The link between the activity of the offender and the performance of data processing personal.
- c) The profits obtained as a result of committing the offence.
- d) The possibility that the conduct of the affected party could have led to the commission of the infringement.
- 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 delegate.
- 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 accordance with the transcribed precepts, and without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction of fine to be imposed in the present case, the party claimed is considered responsible for an infringement typified in article 83.5.a) of the RGPD, in an initial assessment, concurrent

the following factors.

As aggravating the following:

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The intentionality or negligence in the infringement (article 83.2 b).

Basic personal identifiers (name, surname, NIF) are affected

-

(article 83.2 g).

This is why it is considered appropriate to adjust the sanction to be imposed on the person claimed and set it at the amount of €30,000 for the infringement of article 6.1 of the RGPD.

Therefore, based on the foregoing,

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By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

1.

START SANCTION PROCEDURE against Banco Bilbao Vizcaya

Argentaria, S.A. with NIF A48265169, for the alleged infringement of article

6.1. of the RGPD, in relation to article 20 e) of the LOPDGDD, typified

in article 83.5.a) of the aforementioned RGPD.

2. APPOINT D.B.B.B. as instructor. and as secretary to Ms. C.C.C.,

indicating that any of them may be challenged, where appropriate,

in accordance with the provisions of articles 23 and 24 of Law 40/2015, of 1

October, of the Legal Regime of the Public Sector (LRJSP).

3.

INCORPORATE to the disciplinary file, for evidentiary purposes, the claim filed by the claimant and its attached documentation, the information requirements that the General Subdirectorate of Inspection of Data sent to the claimed entity in the preliminary investigation phase and their respective acknowledgments of receipt.

4. THAT for the purposes provided in art. 64.2 b) of Law 39/2015, of 1 October, of the Common Administrative Procedure of the Administrations Public, the sanction that could correspond would be 30,000 euros (thirty thousand euros), without prejudice to what results from the instruction.

5. NOTIFY this agreement to Banco Bilbao Vizcaya Argentaria, S.A. with NIF A48265169, granting a hearing period of ten days able to formulate the allegations and present the evidence that deem convenient. In your statement of arguments, you must provide your NIF and the procedure number that appears in the heading of this document.

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

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

sanction to be imposed was a fine, it may recognize its responsibility within the term granted for the formulation of allegations to this initial agreement; it which will entail a reduction of 20% of the sanction to be imposed in the present procedure. With the application of this reduction, the sanction would be established at 24,000 euros, resolving the procedure with the imposition of this sanction.

Similarly, you may, at any time prior to the resolution of this procedure, carry out the voluntary payment of the proposed sanction, which will mean a reduction of 20% of its amount. With the application of this reduction, the sanction would be established at 24,000 euros and its payment will imply the termination of the process.

The reduction for the voluntary payment of the penalty is cumulative with the corresponding apply for the acknowledgment of responsibility, provided that this acknowledgment of the responsibility is revealed within the period granted to formulate arguments at the opening of the procedure. The voluntary payment of the referred amount in the previous paragraph may be done at any time prior to the resolution. In this case, if it were appropriate to apply both reductions, the amount of the penalty would be set at 18,000 euros.

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

In case you chose to proceed to the voluntary payment of any of the amounts indicated above, 24,000 euros or 18,000 euros, you must make it effective by depositing it in account number ES00 0000 0000 0000 0000 0000 open to name of the Spanish Data Protection Agency at CAIXABANK Bank, S.A., indicating in the concept the reference number of the procedure that appears in

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

Likewise, you must send proof of payment to the General Subdirectorate of Inspection to proceed with the procedure in accordance with the quantity entered.

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

Once this period has elapsed, it will expire and, consequently, the file of performances; in accordance with the provisions of article 64 of the LOPDGDD.

Finally, it is pointed out that in accordance with the provisions of article 112.1 of the LPACAP,

There is no administrative appeal against this act.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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: On June 18, 2020, the claimant has proceeded to pay the

SECOND

sanction in the amount of 18,000 euros making use of the two planned reductions in the Startup Agreement transcribed above, which implies the recognition of the responsibility.

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

## FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, and as established in art. 47 of the Organic Law 3/2018, of 5 December, of Protection of Personal Data and guarantee of digital rights (in hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection is competent to sanction the infractions that are committed against said Regulation; infractions of article 48 of Law 9/2014, of May 9, General Telecommunications (hereinafter LGT), in accordance with the provisions of the article 84.3 of the LGT, and the infractions typified in articles 38.3 c), d) and i) and 38.4 d), g) and h) of Law 34/2002, of July 11, on services of the society of the information and electronic commerce (hereinafter LSSI), as provided in article 43.1 of said Law.

II

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

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

to proceed.

2. When the sanction is solely pecuniary in nature or fits

impose a pecuniary sanction and another of a non-pecuniary nature but it has been justified

the inadmissibility of the second, the voluntary payment by the alleged perpetrator, in

any time prior to the resolution, will imply the termination of the procedure,

except in relation to the replacement of the altered situation or the determination of the

compensation for damages caused by the commission of the infringement.

3. In both cases, when the sanction is solely pecuniary in nature,

the competent body to resolve the procedure will apply reductions of, at

least 20% of the amount of the proposed sanction, these being cumulative

each. The aforementioned reductions must be determined in the notification of

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

Waiver of any administrative action or recourse against the sanction.

The reduction percentage provided for in this section may be increased

regulations.

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According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00068/2020, of

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

SECOND: NOTIFY this resolution to BANCO BILBAO VIZCAYA

ARGENTARIA, S.A.



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

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

Against this resolution, which puts an end to the administrative procedure as prescribed by

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

Common of the Public Administrations, the interested parties may file an appeal

contentious-administrative before the Contentious-administrative Chamber of the

National Court, in accordance with the provisions of article 25 and section 5 of

the fourth additional provision of Law 29/1998, of July 13, regulating the

Contentious-Administrative Jurisdiction, within a period of two months from the

day following the notification of this act, as provided in article 46.1 of the

aforementioned Law.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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