 Procedure No.: PS/00210/2019

RESOLUTION OF PUNISHMENT PROCEDURE

In the sanctioning procedure PS/00210/2019, instructed by the Spanish Agency for Data Protection to EUSKALTEL, S.A. (hereinafter the claimed), given the complaint filed by Ms. A.A.A. (hereinafter the claimant), and based on the following

BACKGROUND

FIRST: The affected party on 01/25/2019 filed a claim with the Agency Spanish Data Protection. The letter is directed against the defendant being the reasons on which you base your claim, in summary, the following: on 12/17/2018 acquired a telephone in the aforementioned company, also requesting a duplicate of the SIM card of your phone number; on 12/19/2018 he received a delivery note with the data of a lady from Vitoria, so I called the company to tell them, requesting the one that destroyed it and informing him that they would send him the correct delivery note; for the above filed a claim with the entity's Claims Department at assume that his delivery note would have been sent to Mrs. Vitoria; on 12/22/2018 received a whatsapp from a man informing him that he had received his delivery note, sending you a photo of it; on 12/28/2018 received a phone call from Claims Department to resolve your claim and apologize for what happened, although they refused to send the resolution in writing; subsequently received an envelope with a delivery note but from his mobile phone, since the delivery note of the The duplicate of the SIM is the one in the photo that the third party had sent him by whatsapp.

Provides:

- Copy of whatsapp
- Claim before Euskaltel

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

Data Inspection proceeded to carry out the following actions:

On 02/26/2019, the claim submitted was transferred to the defendant for analysis

and communication to the claimant of the decision adopted in this regard. Likewise, it

required so that within a month it would send to the Agency determined

information:

- Copy of the communications, of the adopted decision that has been sent to the

claimant regarding the transfer of this claim, and proof that

the claimant has received communication of that decision.

- Report on the causes that have motivated the incidence that has originated the

claim.

- Report on the measures adopted to prevent the occurrence of

similar incidents.

- Any other that you consider relevant.

On the same date, the claimant was informed of the receipt of the claim and

its transfer to the claimed entity.

On 05/22/2019, in accordance with article 65 of the LOPDGDD, the Director of the

Spanish Agency for Data Protection agreed to admit the claim for processing

filed by the claimant against the respondent.

THIRD: On 07/09/2019, the Director of the Spanish Protection Agency

of Data agreed to initiate a sanctioning procedure against the defendant, for the alleged

infringement of Article 5.1.f) of the RGPD, typified in Article 83.5 of the RGPD.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations on 07/23/2019 stating, in summary: that the requirement of information received on 02/27/2019 was answered by the DPD of the entity; that he The incident that occurred was caused by the actions of a supplier, adopting the timely measures at the time the claim was filed; that he claimed has no responsibility in the incident being responsible the provider as the person in charge of the treatment who has recognized his responsibility in the facts.

FIFTH: On 08/21/2019, the instructor of the procedure agreed to open a period of practical tests, agreeing on the following:

- Consider reproduced for evidentiary purposes the claim filed by the claimant and his documentation, the documents obtained and generated by the Inspection services that are part of the file.
- Consider reproduced for evidentiary purposes, the allegations to the initial agreement PS/00210/2019 presented by EUSKALTEL and the documentation that they accompanies.
- Request from the claimant documentation that is in their possession related to sanctioning procedure that for any reason had not been provided in the time of the complaint or any other manifestation in relation to the facts denounced.

SIXTH: On 11/18/2019, a Resolution Proposal was issued in the sense of that the Director of the Spanish Data Protection Agency sanctioned EUSKALTEL for violation of the article for a violation of article 5.1.f) of the RGPD, typified in article 83.5.a) of the aforementioned Regulation a fine of €50,000 (fifty thousand euros). Likewise, an Annex was attached containing the list of the

documents in the file in order to obtain a copy of those deemed

convenient.

On 12/12/2019, the EUSKALTEL representation presented a letter in which it reiterated

the allegations made during the procedure and in addition to the responsibility and

of the measures adopted by the entity emphasizing that everything had been due to a

unintentional and isolated human error; the bad faith act of the claimant

initially demanded a payment not to file a claim with the Agency; the

origin of the file of the file, subsidiarily the warning and if not

the previous requests were considered the reduction of the amount to be imposed.

SEVENTH: Of the actions carried out in this procedure, they have been

accredited the following:

PROVEN FACTS

FIRST: On 12/03/2018 it has entry in the Spanish Agency for the Protection of

Written data of the affected party in which she claims to the entity, in summary, the absence of

confidentiality in the treatment of your data.

SECOND: A copy of the claimant's ID number ***NIF.1 has been provided.

THIRD: Whatsapp record received by the claimant on 12/22/2018 sent from

the number ***TELEPHONE.1 in which the following text appears:

"Hello! I am writing to tell you that he has bequeathed me a SIM card with a

documentation in which your data appears. The card is mine, but they will have

confused with the sheet they send next to it. I attach it to you. Not if they will have you

sent mine”

Likewise, there is a WhatsApp of 12/27/2018 in which the following texts appear:

“I don't think so, now I'll look at it when I get home”

“Excuse me, in order to file a claim with the AEPD I need to attach a

screenshot that you received my data, I have to ask your permission so that

can attach it. Do you give me your permission?”

"Yes for me perfect"

"Thank you very much"

FOURTH: There is a screenshot provided in which there is a photograph of Albaran

of delivery in which the personal data of the claimant appears: name and

surnames, address, NIF, landline and mobile phone; the data of the shipment: delivery note number,

shipment, number of packages, shipping warehouse, delivery note date, etc.; entity data

sender EUSKALTEL; Shipping concept: 2FF/3FF/4 triple cut SIM card

FOUNDATIONS OF LAW

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 Data Protection Agency is competent to

resolve this procedure.

Yo

II

The facts denounced are specified in the sending by the claimed of the

personal data, included in the delivery note of the duplicate of the

SIM card, to a third party violating the duty of confidentiality.

Article 5, Principles related to the treatment, of the RGPD that establishes that:

"1. The personal data will be:

(…)

f) treated in such a way as to ensure adequate security of the

personal data, including protection against unauthorized or unlawful processing and

against its loss, destruction or accidental damage, through the application of measures

appropriate technical or organizational ("integrity and confidentiality").

(…)"

Article 5, Duty of confidentiality, of the new Organic Law 3/2018, of 5

December, Protection of Personal Data and guarantee of digital rights

(hereinafter LOPDGDD), states that:

"1. Those responsible and in charge of data processing as well as all

people who intervene in any phase of this will be subject to the duty of

confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.

2. The general obligation indicated in the previous section will be complementary

of the duties of professional secrecy in accordance with its applicable regulations.

3. The obligations established in the previous sections will remain

even when the relationship of the obligor with the person in charge or person in charge had ended

of the treatment".

From the documentation provided, it can be deduced that the respondent sent a

third party SIM card with documentation containing the data of the claimant

(name, surnames, NIF, telephone, address, etc).

III

It is necessary to underline that the third party to which EUSKALTEL sent such

documentation had access and knowledge of the personal data communicated,

since -as stated in the proven facts- the third party contacted

telephone with the claimant to inform her of what happened.

Thus, the claimant stated that on 12/22/2018 she received a whatsapp from a man

in which he was informed that he had received his delivery note, sending him an image of it;

incident that has also been confirmed by the claimed.

However, in a letter of allegations, EUSKALTEL has stated its lack of

responsibility in the facts claimed since the loss of confidentiality

of the claimant's data is due to the action attributable to the delivery provider

of SIMs.

The defendant, once the appropriate investigations have been carried out on the

incidence produced, it was determined that there had not been a massive crossing

of data but a specific and involuntary event as a result of the actions of the

DHL EXEL SUPLY CHAIN supplier contracted for these functions and only

responsible for the facts, who confirmed the error produced during the process

manual inserting when inserting the delivery notes in the wrong envelope.

It must be stated that in a case similar to the one claimed, the High Court

Nacional upheld the Appeal filed, in Judgment dated 12/23/2013, indicating

the following: "The facts for which the fine appealed here was imposed are contracted

that, on January 5, 2011, a person (who later filed a complaint with the

Data Protection Agency), had received in your email account

an insurance policy, accompanied by the particular conditions, in the name of a

third party and issued by MAPFRE.

And so, for this reason, the Data Protection Agency considered the

Article 10 of Organic Law 15/1999, of December 13, on Data Protection

of a Personal Nature, for contravention of the duty of secrecy and proper custody

of the personal data, given that the data of that third party came to

knowledge of the complainant.

In opposition to the aforementioned decision, the appellant indicates that the

sending an insurance policy referring to a third party, in the email of the

complainant, there was an involuntary error in the process of mechanizing the data of

the address of the former at the time of complying with your request for referral of

a duplicate of your insurance policy.

Specifically, it indicates that there was a mere punctual and isolated mistake by

part of the processing company that managed that request for a duplicate policy. And says

that said error did not cause any damage to either the claimant or the policyholder

nor did it benefit MAPFRE." (…)

Adding, in turn, in its Fourth Law Basis the following:

"In a case similar to the one raised in this appeal, in which we have to

put in relation the concurrence of a human error, concrete and isolated, and the

principle of guilt (even under the title of "simple non-compliance") has been pronounced

this Chamber in its Judgment of December 14, 2006 (appeal orders 136/2005).

In said Judgment we stated that:

«The resolution of this appeal involves remembering, first of all, that the

Guilt is an indispensable element for the sanction that has been imposed on the

plaintiff, as prescribed by article 1301.1 of Law 30/1992 of 26

November, which establishes that they can only be sanctioned for constitutive acts

of administrative infraction those responsible for them, even as a simple

non-observance

It must be emphasized that this simple non-compliance cannot be

understood that in the sanctioning administrative law governs the responsibility

objective. Indeed, in sanctioning matters the principle of culpability governs

(SSTC 15/1999, of July 4; 76/1990, of April 26; and 246/1991, of April 19).

December), which means that there must be some kind of fraud or guilt. What

says the judgment of the Supreme Court of January 23, 1998, "... one can speak of

a decided jurisprudential line that rejects in the sanctioning scope of the

Administration strict liability, requiring the concurrence of fraud or

fault, in line with the interpretation of the STC 76/1990, of April 26, when stating that

the principle of culpability can be inferred from the principles of legality and prohibition

of excess (article 25 of the Constitution) or of the demands inherent to the State of

Law".

In this same line, the Supreme Court considers that there is imprudence

whenever a legal duty of care is neglected, that is, when the subject

offender does not behave with due diligence. And the degree of diligence required

shall be determined in each case in view of the concurrent circumstances,

such as the special value of the protected legal asset, the professionalism required of the

offender etc.

Well, the application of the aforementioned Doctrine to the specific and unique case

prosecuted in this proceeding has led this Chamber to conclude that in the aforementioned

conduct of the plaintiff outlined in the proven facts of the original resolution

challenged does not concur the aforementioned element of guilt when determining whether

it has incurred in a breach of the duty of secrecy of article 10 of the Law

Organic Law 15/1999 imputed to it, since that is how it should be understood when said

appellant makes the mere mistake of sending the contract to the address of a client

signed with another client, without fault being appreciated, even to that minimal degree

provided for in the aforementioned Law 30/1992, in what refers to the essential data of disclosing to

a third party the personal data that it treats in its files of that client

holder of said contract who was not even the one who denounced it, but that other, and, as

above has been exposed, for other reasons. Consequently, there is no lack of

diligence in the appellant with respect to the imputed conduct of

breach of the duty of secrecy, since it only made the mistake of sending the

contract of a client to a domicile that was not his".

The question, therefore, must be resolved in accordance with the principles of the

punitive law given that mere human error cannot give rise, by itself (and

especially when it occurs in isolation), to the attribution of consequences

sanctioning; because, if done in this way, a liability system would be incurred.

objective prohibited by our constitutional order.(...)

This conclusion is, in the opinion of the Chamber, contrary to the principle of presumption

of innocence…and the principle of guilt, which leads us to the estimation of the

this appeal and the annulment of the contested act."

Therefore, as things are, it is not appreciated, in this case, breach of duty

secret. However, the reported entity is reminded that it must

take extreme precautions and admonish your supplier in order to avoid conduct

as described in the submitted claim.

Therefore, in accordance with the applicable legislation and having assessed the criteria of graduation of sanctions whose existence has been proven,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: FILE EUSKALTEL, S.A., with NIF A48766695, for the alleged infringement of article 5.1.f) of the RGPD, typified in Article 83.5 of the RGPD.

SECOND: NOTIFY this resolution to EUSKALTEL, S.A.

In accordance with the provisions of article 50 of the LOPDPGDD, the This Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the LOPDPGDD, and in accordance with the provisions of article 123 of the LPACAP, the interested parties may optionally file an appeal for reconsideration before the Director of the Spanish Agency for Data Protection within a period of month 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 art. 90.3 a) of the LPACAP, the firm resolution may be provisionally suspended in administrative proceedings

if the interested party expresses his intention to file a contentious appeal-

administrative. If this is the case, the interested party must formally communicate this

made by writing to the Spanish Agency for Data Protection,

introducing him to

the agency

[https://sedeagpd.gob.es/sede-electronica-web/], or through any of the other

records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also

must transfer to the Agency the documentation that proves the effective filing

of the contentious-administrative appeal. If the Agency were not aware of the

filing of the contentious-administrative appeal within two months from the

day following the notification of this resolution, it would end the

precautionary suspension.

Electronic Registration of

through the

Sea Spain Marti

Director of the Spanish Data Protection Agency

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es