

□ Procedure No.: PS/00457/2019

938-300320

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the claimant) on May 22, 2019 filed claim before the Spanish Data Protection Agency. The claim is directed against D.B.B.B. with NIF \*\*\*NIF.1 (hereinafter, the claimed one).

The reasons on which he bases his claim are that on May 6, 2019 he received a charge in your bank account of the claimed for an alleged contracting of an insurance of boiler maintenance.

This being the case, check that the person claimed was an administrator of Caloryfugados Masoclima, SL., whose activity ceased in 2015 due to bankruptcy, and in November 2014 signed a boiler maintenance contract with the aforementioned company for four years, establishing in said contract its non-renewal automatically.

The claimant provides the following documents with her written claim:

- 1.- Boiler maintenance contract for the year 2014: "Il Validity: 4 years of duration... After the initial period (4 years from the signing of this document), the service will contact the user to inform him of the termination of the contract and agree by both to renew or not. This contract is NOT automatically renewed.
- 2.- Proof of the charge to the account: Issuer "\*\*\*\*ISSUER.1", "Safe" concept Boiler". The issuer coincides with the NIF of the claimed.

SECOND: First, the claim was transferred to Caloryfugados Masoclima, SL, on July 9 and 22, 2019, and subsequently to D. B.B.B. on August 14 and 12

November 2019. In the delivery certificates issued by S.E. Post and Telegraph, S.A., prove their delivery to the claimant on August 28 and November 18, 2019.

The respondent did not respond to any of the information requests that were they made.

In accordance with the provisions of article 65.2 of Organic Law 3/2018, of Data Protection and Guarantee of Digital Rights (LOPDGDD), on the 30th of October 2019, the agreement for admission to processing of this claim is signed.

THIRD: Dated February 18, 2020, not having received any type of information to the request made within the framework of the preliminary investigation actions by the of the claimed, the Director of the Spanish Data Protection Agency agreed to initiate

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2/7

sanctioning procedure against D. B.B.B., by virtue of the powers established in art.

58.2 of the RGD and in articles 47, 64.2 and 68.1 of Organic Law 3/2018, of December 5, of Protection of Personal Data and Guarantee of Digital Rights (LOPDGDD), by the infringement of article 6.1 of the RGD, typified in article 83.5 a) of the RGD and considered very serious in 72.1.b), for prescription purposes, setting an initial penalty of 3,000 euros (three thousand euros).

FOURTH: The delivery certificate issued by S.E. Correos y Telégrafos, S.A., certifies the delivery of the agreement to initiate the sanctioning procedure on February 24, 2020 year.

: Formal notification of the initiation agreement, the one claimed at the time of this

FIFTH

The resolution has not submitted a written statement of allegations, so what is indicated is applicable in article 64 of Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations, which in its section f) establishes that in case of not carrying out allegations within the period provided on the content of the initiation agreement, it may be considered a resolution proposal when it contains a precise pronouncement about the imputed responsibility, for which a Resolution is issued.

In view of everything that has been done, by the Spanish Data Protection Agency

In this proceeding, the following are considered proven facts:

#### FACTS

FIRST: It is known that the claimant, on May 6, 2019, was charged in her bank account on the part of the claimed for an alleged contracting of an insurance of boiler maintenance.

SECOND: The respondent was an administrator of Caloryfugados Masoclima, SL., whose activity ceased in 2015 due to bankruptcy, and that in November 2014, the claimant signed a boiler maintenance contract with the aforementioned company for four years, establishing in said contract its non-automatic renewal.

THIRD: In the boiler maintenance contract for 2014 signed by the claimant with the part claimed, states: "II Validity: 4 years duration... After the initial period (4 years from the signing of this document), the service will start contact with the user to inform him of the termination of the contract and agree for both renew or not This contract is NOT automatically renewed.

FOURTH: It is verified that in the supporting document for the charge to the claimant's account: Issuer "\*\*\*\*ISSUER.1"; "Boiler Insurance" concept. The issuer coincides with the NIF of the claimed.

FIFTH: On February 18, 2020, this sanctioning procedure was initiated for the infraction of article 6.1 of the RGPD (legality of the treatment), being notified on the 24th of the same month and year. Not having made allegations, the respondent, to the initial agreement.

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3/7

## 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 arts. 47 and 48.1 of the LOPDGDD, the Director of the Spanish Agency for Data Protection is competent to resolve this procedure.

II

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

"1. The personal data will be:

Treated in a lawful, loyal and transparent manner in relation to the interested party

a)

(<<lawfulness, 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:

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

a) the interested party gave his consent for the processing of his 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;

(...)"

The infraction for which the defendant is held responsible is typified in the 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 the section 2, with administrative fines of a maximum of 20,000,000 Eur or, in the case of a company, of an amount equivalent to a maximum of 4% of the total annual turnover of the previous financial year, opting for the highest 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 Regulation (EU) 2016/679, considered very serious and will prescribe after three years the infractions that suppose a substantial violation of the articles mentioned in it and, in particular, the following:

(...)

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4/7

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

III

Examining the documentation in the file, it is evident that the conduct allegedly infringing for which the defendant is held responsible consisted of having treated

the bank details of the claimant without her consent, since the claimant tried various personal data of the claimant (at least, his bank details) without legitimization violating the principle of legality, loyalty and transparency in the treatment referred to in the article 5.1.a) of the RGPD.

In this sense, there is in the file the document that shows that the contract of dated November 26, 2014 in its clause II Validity. "4 years duration ...After the initial period (4 years from the signing of this document), the service will be will contact the user to inform him of the termination of the contract and agree by both renew or not. This contract is NOT automatically renewed. hence not automatic renewal proceeded, which is what happened.

Article 6.1 RGPD says that the treatment "will be lawful if it is necessary for the performance of a contract to which the interested party is a party.

Thus, it is estimated that the facts that are submitted to the assessment of this Agency could constitute an infringement of article 6.1.b), in relation to article 5.1, of the GDPR.

#### IV

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 administrative fines in accordance with this article for the infringements of this Regulation indicated in the 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 referred to in article 58, section 2, letters a) to h) and j). When deciding to impose an administrative fine and its amount In each individual case, due account shall be taken of:

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;

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5/7

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”, 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 induced the commission of the crime. 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 precepts transcribed for the purposes of setting the amount of the sanction of fine to be imposed on D. B.B.B., as responsible for an infraction typified in article

83.5.a) of the RGPD, the following factors are considered concurrent:

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The intentionality or negligence of the infringement (art.83.2. b) of the RGPD).

Basic personal identifiers are affected (personal data and



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banking services (art.83.2. g) of the RGPD).

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6/7

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

Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE D. B.B.B. with NIF \*\*\*NIF.1, for a violation of article 6.1. of

RGPD typified in article 83.5.a) of the aforementioned RGPD, a fine of €3,000 (three thousand euros).

SECOND: NOTIFY this resolution to B.B.B.

THIRD: Warn the sanctioned person that he must make the imposed sanction effective once that this resolution is enforceable, in accordance with the provisions of art. 98.1.b) of

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

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

in art. 68 of the General Collection Regulations, approved by Royal Decree 939/2005,

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

income, indicating the NIF of the sanctioned and the procedure number that appears in the

heading of this document, in restricted account number ES00 0000 0000 0000 0000

0000, opened in the name of the Spanish Agency for Data Protection in the bank

CAIXABANK, S.A.. Otherwise, it will be collected during 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 voluntary payment

will be until the 20th day of the following or immediately following business month, and if it is between the

16th and last day of each month, both inclusive, the payment term will be until the 5th of the second following or immediately following business month.

In accordance with the provisions of article 50 of the 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 art. 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 Agency

Spanish Data Protection Authority within a month from the day following the

notification of this resolution or directly contentious-administrative appeal before the Chamber

of the Contentious-administrative of the National High Court, in accordance with the provisions of the

article 25 and in section 5 of the fourth additional provision of Law 29/1998, of 13

July, regulatory of the Contentious-administrative Jurisdiction, in the term of two months to

count 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,

may provisionally suspend the firm resolution in administrative proceedings if the interested party

states its intention to file a contentious-administrative appeal. If this is the case,

The interested party must formally communicate this fact in writing addressed to the Agency

Spanish Data Protection, presenting it through the Electronic Registry of the

Agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or through one of the

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

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

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of the contentious-administrative appeal. If the Agency were not aware of the filing of the contentious-administrative appeal within two months from the day following the notification of this resolution, it would end the suspension precautionary

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