

□ Procedure No.: PS/00247/2020

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

In sanctioning procedure PS/00247/2020, instructed by the Spanish Agency for

Data Protection, before the entity, ORGANIC AND NATUR 03, S.L., with CIF.:

B93484913 (hereinafter, "the entity claimed"), by virtue of a complaint filed

by the MINISTRY OF HEALTH AND FAMILIES OF THE JUNTA DE ANDALUCIA

-TERRITORIAL DELEGATION IN ***LOCALITY.1, (hereinafter, "the body

claimant"), and based on the following:

BACKGROUND

FIRST: On 11/28/29, you have entered this Agency, filed a complaint

by the claimant organization in which it indicated, among others, the following:

"In this Consumer Service, the corresponding reference file is processed

to the claims filed against the company ORGANIC AND NATUR 03 S.L.

After examining the documentation provided by the claimant, it is verified that in

the contract of sale the general conditions nº 8 and nº 9 are inserted, which

may contravene the provisions of articles 5 and 6 of Organic Law 3/2018, of 5

December, Protection of Personal Data and guarantee of digital rights.

It is an adhesion contract in which the consumer, when he lends his

consent to be bound, you accept each and every one of the clauses

predisposed by the professional without the possibility of any negotiation. The

stipulations state:

8.— For knowing the scope and content of Organic Law 15/99 on the protection of

personal data, the buyer gives his informed consent so that the

personal data provided under this contract, and those derived from this

relationship may be incorporated into the computerized files or not of ORGANIC

AND NATUR 03 SL. Regardless of the foregoing, the buyer declares to have been informed and consents to:

A) Within the credit and capital solvency studies of ORGANIC AND NATUR 03 SL., or third parties acting on its behalf or to whom it has assigned the credit derived from the sale, can carry out the necessary investigations for the formalization of this contract and scoring procedures may be used.

B) ORGANIC AND NATUR 03 SL, can send as much information as it has convenient, as long as it keeps reference to the corporate purpose of ORGANIC AND NATUR 03 SL, for the exercise of the rights recognized by the law of protection of personal data the buyer must contact ORGANIC AND NATUR 03 SL, in the registered office indicated on the front.

9. — In addition, the buyer expressly authorizes ORGANIC AND NATUR 03 SL. a that you can transfer your personal data to the financial institution to which you transfer this credit where appropriate, in order to manage it, as well as, to send you commercial offers of said financial entity that may be of interest to you. Yes you do not want it or if you want to access, rectify or cancel your personal data, please contact us.

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address ORGANIC AND NATUR 03 SL at the address that appears on the front of this document.

We believe that it is not possible for all consumers who purchase products outside the mercantile establishment of the company ORGANIC AND NATUR

03 SL. previously know the scope and content of Organic Law 3/2018”.

Likewise, it is at all unlikely that the company's sales representatives, in addition to exposing to those attending the event the characteristics and potentialities of the product that intend to sell, fully inform them of the obligations of the company with respect to the treatment of personal data in accordance with the legal regulation contained in the Organic Law. Nor is it credible that a average consumer is not capable of discerning about the meaning or the significance of a scoring procedure. Since we consider that the clauses previously transcribed could be contrary to the provisions of the Organic Law Organic Law 3/2018 cited, a copy of the contract provided is sent by the claimant in order for that Agency to carry out the actions that in Right proceed. Likewise. We are interested in being informed of the result of such performances”.

SECOND: In view of the facts set forth in the claim and the documents provided by the claimant, the General Subdirectorate for Data Inspection proceeded to carry out actions for its clarification, under the powers of investigation granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (GDPR). Thus, on 01/20/20 and 07/24/20, requirements are directed information to the claimed entity.

According to a certificate from the Electronic Notifications Service and Electronic Address Enabled, the request sent to the claimed entity on 01/20/20, through the NOTIFIC@ service, was accepted at destination on 01/31/20.

According to a certificate from the Electronic Notifications Service and Electronic Address Enabled, the request sent to the claimed entity on 07/24/20, through the NOTIFIC@ service, was rejected on 08/04/20.

THIRD: dated 09/09/20, the Director of the Spanish Agency for the Protection of

Data agreed to initiate a sanctioning procedure against the entity claimed, for infraction of articles 13) of the RGD, sanctionable in accordance with the provisions of art. 83 of the aforementioned rule, by not having adapted its personal data processing policy to the new regulations in force and article 7) of the RGD, by not collecting, in a individualized, the client's consent, for the treatment of their data personal, when its purpose is different from that pursued in the execution of the contract.

FOURTH: On 09/20/20, the initiation of the file was notified to the entity claimed, who has not submitted to this Agency, any brief or allegation, within the period granted for this purpose.

PROVEN FACTS

1º.- In article 8 of the "General Conditions", of the adhesion contract between the claimed entity and the user, it is verified that it continues to do

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reference to the repealed Organic Law 15/1999, of December 13, on the Protection of Personal data.

2º.- Regarding the consent given by the user, which is referred to in the Article 9 of the "General Conditions", of the adhesion contract between the entity claimed and the user, it is indicated that: "In addition, the buyer authorizes expressly ORGANIC AND NATUR 03 SL. to which you can transfer your data personal data to the financial institution to which this credit is assigned, if applicable, with the purpose of managing it, as well as, to send you commercial offers of said financial institution that may be of interest to you (...)".

FOUNDATIONS OF LAW

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

Data Protection, in accordance with the provisions of art. 58.2 of the RGPD in the art. 47 of LOPDGDD.

Regarding article 8 of the "General Conditions", of the adhesion contract between the claimed entity and the user, it is verified that it is still doing reference to the repealed Organic Law 15/1999, of December 13, on the Protection of Personal data.

According to article 99 of the RGPD, the entry into force and application of the new RGPD was, "Twenty days after its publication in the Official Journal of the European Union (05/25/16)" and would be applicable as of May 25, 2018." Therefore, as of 05/25/18, the LO was repealed. 15/1999, (LOPD), applying compulsorily, from that date, the current RGPD and as of 12/07/18 the new LOPDGDD.

For its part, article 13 of the RGPD establishes the information that must be provide the interested party at the time of collecting their personal data.

Information that does not appear in the "privacy policy" of the web page in question.

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

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

This infraction can be sanctioned with a maximum fine of €20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the global total annual turnover of the previous financial year, opting for the of greater amount, in accordance with article 83.5.b) of the RGPD.

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In accordance with the precepts indicated and for the purpose of setting the amount of the penalty impose in the present case, it is considered appropriate to graduate the sanction to be imposed in accordance with the following criteria established in article 83.2 of the RGPD:

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

The categories of personal data affected by the infringement.
(paragraph g).

The way in which the supervisory authority became aware of the infringement. The way in which this AEPD has been aware has been through the interposition of the complaint by the claimant body, (section h).

In accordance with the precepts indicated and for the purpose of setting the amount of the penalty impose in the present case, it is considered appropriate to graduate the sanction to be imposed in accordance with the following criteria established in article 76.2 of the LOPDGDD:

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The link between the activity of the offender and the performance of treatment of personal data, (section b).

The balance of the circumstances contemplated in article 83.2 of the RGPD, with Regarding the infraction committed by violating the provisions of article 13 of the RGPD, allows you to set a penalty of 4,000 euros, (four thousand euros).

III

Regarding the consent given by the user, which is referred to in the Article 9 of the "General Conditions", of the adhesion contract between the entity claimed and the user, it is indicated that: "In addition, the buyer authorizes expressly ORGANIC AND NATUR 03 SL. to which you can transfer your data personal data to the financial institution to which this credit is assigned, if applicable, with the purpose of managing it, as well as, to send you commercial offers of said financial institution that may be of interest to you (...)".

Well, article 6.1. of the RGPD, establishes that the treatment will only be lawful if it is meets at least one of the conditions indicated therein, among which finds, in its section b), if the treatment is "necessary for the execution of a contract in which the interested party is a party or for the application at the request of the latter of pre-contractual measures", in which case, the sending of communications that keep intimate relationship with the purpose of the signed contract, would be endorsed by this precept.

However, for any other type of communication with the client, as in this case, to "send you commercial offers from the entity (...)", without specifying a specific purpose, and where it would fit, therefore, any type of commercial communication whether or not related to the ultimate goal of the signed contract, the provided in section a) of article 6.1 of the RGPD, where it is specified that, "the treatment will only be lawful if the interested party gave their consent for the treatment of your personal data for one or more specific purposes.

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For its part, article 7 of the GDPR establishes, regarding consent, that: “1.

When the treatment is based on the consent of the interested party, the person in charge

You must be able to demonstrate that you consented to the processing of your data

personal. 2. If the data subject's consent is given in the context of a

written statement that also refers to other matters, the request for

consent will be presented in such a way that it is clearly distinguished from other

matters, in an intelligible and easily accessible way and using clear and simple language.

Any part of the declaration that constitutes an infringement of the

this Regulation. 3. The interested party shall have the right to withdraw their consent in

any moment. The withdrawal of consent will not affect the legality of the

treatment based on the consent prior to its withdrawal. Before you give your

consent, the interested party will be informed of it. It will be so easy to remove the

consent how to give it. 4. In assessing whether consent has been freely given,

account shall be taken to the greatest extent possible of whether, among other things, the

execution of a contract, including the provision of a service, is subject to the

consent to the processing of personal data that is not necessary for the

performance of said contract.

In relation to these two cited articles, it is necessary to take into account the recital

(32) of the RGPD, since it indicates that: “Consent must be given through an act

clear affirmative that reflects a manifestation of free will, specific, informed,

and unequivocal of the interested party to accept the processing of personal data

that concern you... Therefore, silence, boxes already checked or inaction do not

must constitute consent. Consent must be given for all

treatment activities carried out with the same or the same purposes. When the

treatment has several purposes, consent must be given for all of them..."

Likewise, article 6.2 of the LOPDGDD establishes, on the treatment based on

the consent of the affected party, that: "When it is intended to base the treatment of the

data in the consent of the affected party for a plurality of purposes will be

It is necessary to state specifically and unequivocally that said consent is

grants for all of them".

Well, in accordance with everything stated above, the processing of data

requires the existence of a legal basis that legitimizes it, as in this case, if it is

necessary for the execution of a contract in which the interested party is a party, in which

case the sending of correspondence, including commercial, that was linked to the

execution of the contract, would be endorsed by this precept. Not so, when sending

commercial correspondence does not have the same purpose as that included in the contract,

in which case, the consent of the interested party validly provided is necessary.

This consent must be given for each of the purposes outside the contract.

signed by the client. It is not valid, therefore, a generic acceptance, such as "the shipment

of commercial correspondence of the entity", without giving the option to give consent

individualized for each of them and above all, if they are unrelated to the purpose of the

contract.

Thus, the known facts could constitute an infraction,

attributable to the claimed, for violation of article 7 of the aforementioned RGPD, to the

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carry out the collection of consent through a generic action for all purposes of data processing.

For its part, article 72.1.c) of the LOPDGDD considers it very serious, for the purposes of prescription, "Breach of the requirements of article 7 of the RGPD".

This infraction can be sanctioned with a maximum fine of €20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the global total annual turnover of the previous financial year, opting for the of greater amount, in accordance with article 83.5.b) of the RGPD.

However, Article 58.2) of the RGPD provides that: "Each supervisory authority will have all the following corrective powers indicated below: b)

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

Regulation; (...); i) impose an administrative fine pursuant to Article 83,

in addition to or instead of the measures mentioned in this section, depending on the circumstances of each particular case, therefore, the sanction that could

to correspond would be a warning, without prejudice to what results from the instruction of this file, because in this case, it has not been verified that the entity

claimed has sent commercial correspondence unrelated to the ultimate purpose of the conditions of the contract.

In accordance with these criteria, it is considered appropriate to impose a sanction on the defendant of "WARNING", for the violation of article 7 of the RGPD.

Therefore, in accordance with the foregoing, by the Director of the Agency

Spanish Data Protection,

RESOLVE

FIRST: IMPOSE the entity, the entity ORGANIC AND NATUR 03, S.L., with

CIF.: B93484913, two penalties, regarding the privacy policy and data collection

consent, consisting of:

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4,000 euros (four thousand euros), for the infringement of article 13) of the RGPD,

regarding its policy of treatment of the personal data of the clients.

- Warning, for the infringement of article 7) of the RGPD, regarding the

collection of customer consent for the processing of their data

personal.

SECOND: REQUEST the entity ORGANIC AND NATUR 03, S.L. so that, in the

within one month from this act of notification, proceed to:

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Take the necessary measures to adapt its policy on the treatment of

personal data, as stipulated in article 13 of the RGPD, adapting it to the

new regulations in force.

Take the necessary measures to obtain the consent of the client to

the processing of your personal data.

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THIRD: NOTIFY this resolution to the entity ORGANIC AND NATUR

03, S.L, and the claimant about the result of the claim.

Warn the sanctioned party that the sanction imposed must be made effective once it is

enforce this resolution, in accordance with the provisions of article 98.1.b) of Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations (LPACAP), within the voluntary payment period indicated in the Article 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 17 December, by depositing it in the 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. or otherwise, it will be collected in the period executive.

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 82 of Law 62/2003, of 30 December, of fiscal, administrative and social order measures, this Resolution will be made public, once it has been notified to the interested parties. The publication will be carried out in accordance with the provisions of Instruction 1/2004, of 22 December, of the Spanish Agency for Data Protection on the publication of their Resolutions.

Against this resolution, which puts an end to the administrative procedure, and in accordance with the established in articles 112 and 123 of the LPACAP, the interested parties may file, optionally, 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 appeal before the Contentious-Administrative Chamber of the National High Court,

in accordance with the provisions of article 25 and paragraph 5 of the provision
additional fourth of Law 29/1998, of 13/07, regulating the Jurisdiction
Contentious-administrative, within two months from the day after
to the notification of this act, as provided in article 46.1 of the aforementioned text
legal.

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
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
of the Electronic Registry of the Agency [<https://sedeagpd.gob.es/sede-electronicaweb/>],
or through any of the other registers 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 of the contentious-administrative appeal. If the
Agency was not aware of the filing of the contentious appeal-

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within a period of two months from the day following the notification of the

This resolution would terminate the precautionary suspension.

Sea Spain Marti

Director of the Spanish Agency for Data Protection.

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