

□ File No.: PS/00375/2021

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: A.A.A. (hereinafter, the complaining party) dated February 10, 2021 filed a claim with the Spanish Data Protection Agency.

The claim is directed against GARLEX SOLUTIONS, S.L. with NIF B67392266 (in hereafter, the party claimed).

The reason on which the claim is based is that the claimant receives a call from the telephone number \*\*\*PHONE.1 by the claimed entity to "renew" your electricity supply contract.

Subsequently, he receives an SMS with a link to an electricity supply contract with ALDRO ENERGÍA, S.A., in which your personal data appears, not knowing where have been obtained, which would entail a processing of personal data without the consent of its owner.

SECOND: In accordance with article 65.4 of Organic Law 3/2018, of 5 December, of Protection of Personal Data and guarantee of digital rights (in hereinafter LOPDGDD), on May 25, 2021 said claim was transferred to the claimed party, so that it proceeded to its analysis and inform this Agency within the term of a month, of the actions carried out to adapt to the requirements foreseen in the data protection regulations.

On June 25, 2021, this Agency received a written response indicating that the entity claimed is a marketing entity of ALDRO ENERGIA, that contacted the claimant by telephone, explaining an offer and initiating the

Distance contracting procedure for the electricity supply service with ALDRO

ENERGY.

Next, an SMS with certified notification was sent to the mobile phone provided by the claimant, which contained the pre-contract containing the data provided by is.

This message must be accepted and answered by the potential client to finalize the contracting, in this specific case the claimant does not confirm the SMS sent on 09 February 2021, and therefore the hiring process is not finalized.

THIRD: On July 12, 2021, the Director of the Spanish Agency for Data Protection agreed to admit for processing the claim presented by the party claimant.

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FOURTH: On October 29, 2021, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimed party, for the alleged infringement of article 6 of the RGPD, typified in article 83.5 of the RGPD.

FIFTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations in which, in summary, it stated that the claimant was contacted with the objective of offering you an offer that contained very good conditions in your supply of electricity to the company ALDRO ENEGRÍA, for which the defendant is an entity marketer.

The usual procedure is to explain the offer and only if the person is interested party provides their data, data that the claimed, uses to be able to make

the pre-contract that, as the claimant herself says, she received via SMS on her phone mobile.

The claimed entity does not have access to the personal data of the interested parties unless that they themselves provide them because they are interested in contracting with ALDRO ENERGÍA.

It states that if these data were available, it was because the claimant provided them.

A different fact is that he later changed his mind and did not want to formalize the offered contract. Circumstance in which the claimed entity does not have such information because by not formalizing the contract, the claimant never became a client, for Therefore, the data that it provided at the time is not available.

SIXTH: On December 3, 2021, the instructor of the procedure agreed to the opening of a period of practice tests, considering incorporated the previous investigation actions, as well as the documents provided by the reclaimed.

SEVENTH: On December 7, 2021, a resolution proposal was formulated, proposing that the Director of the Spanish Data Protection Agency sanction GARLEX SOLUTIONS, S.L. with NIF B67392266, for an infringement of article 6 of the RGPD, typified in article 83.5 of the RGPD and for prescription purposes, by article 72.1 b) of the LOPDGDD, with a fine of €15,000 (fifteen thousand euros).

Of the actions carried out in this procedure and the documentation in the file, the following have been accredited:

#### PROVEN FACTS

FIRST: The claimant received a call from the entity claimed to "renew" her electricity supply contract and subsequently receives an SMS with a link to a electricity supply contract with ALDRO ENERGÍA, S.A., in which your data appears not knowing how they have been obtained, since she has not provided them, which that would suppose a treatment of personal data without the consent of its owner.

SECOND: The entity claimed is a marketing entity of ALDRO ENERGIA,  
who contacted the claimant by telephone to offer her a supply contract  
with said company and that subsequently sent him an SMS with the pre-contract with  
the data provided by it, but without the process of  
hiring.

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## 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 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 resolve this  
process.

II

Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee  
of digital rights, in its article 4.11 defines the consent of the interested party as  
“Any manifestation of free, specific, informed and unequivocal will by which the  
The interested party accepts, either by means of a declaration or a clear affirmative action, the  
processing of personal data concerning you”.

In this sense, article 6.1 of the LOPDGDD, establishes that “in accordance with the dis-  
put in article 4.11 of Regulation (EU) 2016/679, consent is understood  
of the affected all manifestation of free, specific, informed and unequivocal will by  
the one that he accepts, either by means of a declaration or a clear affirmative action, the treat-

processing of personal data concerning you.

For its part, article 6 of the GDPR establishes the following:

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

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 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 person.

physical sound;

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

public or in the exercise of public powers conferred on the data controller;

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

the data controller or by a third party, provided that said interests are not

prevail the interests or the fundamental rights and freedoms of the interested party that

want the protection of personal data, in particular when the interested party is a child.

The provisions of letter f) of the first paragraph shall not apply to the treatment carried out

by public authorities in the exercise of their functions.

III

In the present case, the claimant received an SMS with a link to a supply contract

electricity with ALDRO ENERGÍA, S.A., in which their personal data appeared

not knowing how they had been obtained.

The Spanish Agency for Data Protection addresses the claimed entity, which

explained that it is a marketing entity of ALDRO ENERGIA, which contacted

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telephone with the claimant, explaining an offer and initiating the procedure of distance contracting of the electricity supply service with ALDRO ENERGÍA.

The contractual procedure to carry out the conclusion of a contract with the entity claimed, is to send an SMS to the mobile phone provided by the claimant, sending as an attached document a pre-contract, so that to finalize the contract, requires that said message be accepted and answered by the potential client.

It should be noted at this point that while the respondent entity states that the data data were provided by the claimant, the latter denies this.

In this sense, the respondent entity has argued that the burden of proof must fall on in the claimant.

To respond to this allegation, it is convenient to indicate first of all that the RGD, In its article 4.11, it defines the "consent of the interested party" as any manifestation of free, specific, informed and unequivocal will by which the interested party accepts, the processing of personal data concerning you.

Secondly, in relation to whether or not consent has been given by the owner of personal data for its use, in accordance with article 7 of the RGD, the

The burden of proof falls on the data controller, stating that "when the treatment is based on the consent of the interested party, the person in charge must be able to demonstrate that he consented to the processing of his personal data.

Therefore, for the processing of personal data to be lawful, requires the express, informed and unequivocal consent of the owner of the data personal, that is, of the claimant in this case, so that they can be

used by the claimant.

Said consent must be obtained by the person in charge, in this case the party claimed, at the time the personal data of the claimant were obtained.

If the claimed entity cannot provide documentation proving that it has the consent of the claimant to use their personal data and send them a pre-contract, it is understood that even if he obtained the claimant's data, he did not obtain her consent for its treatment and therefore incurs a violation of article 6 of the GDPR.

On the other hand, this Agency on March 15, 2021, has addressed ALDRO ENERGIA to obtain information about the origin of the personal data processed, but it has not been received a response.

In accordance with the available evidence, it is considered that the facts denounced, that is, carry out an illicit treatment of personal data to send a contract proposal, by the claimed entity, without the consent of the claimant, or any other cause of legitimacy of the treatment,

Despite the claimant being the owner of the personal data used, it is an infringement of art. 6 of the GDPR.

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Article 72.1 b) of the LOPDGDD states that “according to what is established in article 83.5 of Regulation (EU) 2016/679, are considered very serious and will prescribe the three years the infractions that suppose a substantial violation of the articles

mentioned therein and, in particular, the following:

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

v

Article 58.2 of the RGPD provides the following: "Each control authority will have all of the following corrective powers indicated below:

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;

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

i) impose an administrative fine under article 83, in addition to or instead of the measures mentioned in this section, according to the circumstances of each case particular;

Thus, the claimed party may be ordered to proceed within the designated period to perform the necessary actions so that the processing of personal data used complies with the provisions of the RGPD.

SAW

This infraction can be sanctioned with a fine of €20,000,000 maximum or, in the case of a company, 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, in accordance with article 83.5 of the RGPD.

Likewise, it is considered appropriate to graduate the sanction to be imposed in accordance with the following criteria established by article 83.2 of the RGPD:

In this case, we are dealing with the negligent action of the claimed entity (article 83.2

b) when the personal data of the claimant is transferred without the prior consent of the owner of



said data.

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

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE GARLEX SOLUTIONS, S.L., with NIF B67392266, for a infringement of article 6 of the RGPD, typified in article 83.5 of the RGPD, a fine of €15,000 (fifteen thousand euros)

SECOND: NOTIFY this resolution to GARLEX SOLUTIONS, S.L.

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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 voluntary payment period established in art. 68 of the General Collection Regulations, approved by Real Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003, of 17 December, 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 Spanish Agency of Data Protection in the banking entity CAIXABANK, S.A.. Otherwise, the will proceed to its collection in executive period.

Received the notification and once executed, if the date of execution is between on the 1st and 15th of each month, both inclusive, the deadline to make the voluntary payment

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

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

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 Spanish Agency for Data Protection within a period of one month from the

day following the notification of this resolution or directly contentious appeal

before the Contentious-Administrative Chamber of the National High Court, with

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 two months from the day following the notification of this act,

according to the provisions of 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

In this case, the interested party must formally communicate this fact in writing addressed to

the Spanish Agency for Data Protection, presenting it through the Registry

Electronic 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 1

october. You must also transfer to the Agency the documentation that accredits the

effective filing of the contentious-administrative appeal. If the Agency did not have

knowledge of the filing of the contentious-administrative appeal within two

months from the day following the notification of this resolution, I would consider

The precautionary suspension has ended.

Sea Spain Marti

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