

863-240719

Procedure No.: PS/00091/2019

RESOLUTION: R/00406/2019

In procedure PS/00091/2019, instructed by the Spanish Agency for Data Protection to the entity EDITORIAL DE PERIODISTES, S.L., given the complaint filed by Mr. A.A.A., and by virtue of the following

#### BACKGROUND

FIRST: On January 16, 2019, entry is registered in this Agency claim filed by Don A.A.A. (hereinafter, the claimant), at the Agency Spanish Data Protection, stating the following:

“I have been receiving a newsletter from \*\*\*URL.1 for a long time, to which I have never subscribed. On several occasions I have tried to unsubscribe, both through of the link in the messages (which directs me to a contact form on your web, which I have filled out and sent, showing me a confirmation message of sending the communication) such as sending an email directly. Never I have received a response, and I continue to receive the newsletter.”

The claimant attaches the following documentation:

- Copy of a newsletter from the digital weekly “Últimes notícies d,El Triangle”

(in Spanish, “Latest news from El Triángulo), sent on January 16, 2019

from the email address \*\*\*EMAIL.1 to the email address

\*\*\*EMAIL.2.

- Printing of the Internet headers of the aforementioned shipment.

- Screenshot showing the cancellation request sent on January 16

of 2019 by the claimant to the aforementioned digital newspaper so as not to continue receiving more bulletins, and in which he pointed out that he had already sent that message in several

occasions. Said request was sent through the contact form included in the web page \*\*\*URL.1, whose reception was confirmed that same date with the following message: "Thank you for completing the form! T, write aviat." (in Spanish, Thank you for filling out the form. We'll get back to you right away). In said request the complainant indicates that he had already sent the same message on several occasions.

SECOND: In view of the facts set forth in the claim, on the 12th of February 2019, the Director of the Spanish Data Protection Agency agreed, in accordance with article 65 of Organic Law 3/2018, of December 5, of Protection of Personal Data and guarantee of digital rights and for the purposes provided for in its article 64.2, admit for processing the claim presented by the

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claimant.

THIRD: On February 19, 2019, it is verified, as a result of the consultation made to the application of the AEPD that manages records of sanctions and previous warnings regarding data protection, which the EDITORIAL DE PERIODISTES, S.L., with CIF B57194862, does not have any prior records for breach of data protection.

FOURTH: On March 7, 2019, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against EDITORIAL DE PERIODISTES, S.L., for the infringement of the provisions of article 6.1.a) of the REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of April 27, 2016, regarding the protection of natural persons with regard to

to the processing of personal data and the free circulation of these data and for which Directive 95/46/EC (General Data Protection Regulation) is repealed, (as regards successive RGPD), typified in article 83.5.a) of the same legal text, and qualified as very serious for prescription purposes in article 72.1.b) of Organic Law 3/2018, of December 5, Protection of Personal Data and guarantee of the rights (hereinafter LOPDGDD), giving a deadline for allegations.

The notification of the start agreement to the company EDITORIAL DE PERIODISTES, S.L., was made through the Electronic Notifications Service and Electronic Address Enabled, stating March 8, 2019, as the date of made available to the aforementioned act and March 19, 2019 as the date of rejection automatic, Expired, of said notification.

The notification to the claimed one was tried to practice through the State Company Post and Telegraph, S.A. on Avenida Joan March, in Palma de Mallorca, address in which the claimed party was unknown, as stated in the Certificate issued by said Society.

#### PROVEN FACTS

FIRST: On January 16, 2019, the claim is received at this Agency filed by the claimant, for receiving a newsletter sent from www.\*\*\*URL.1, which I have never subscribed to. On several occasions he tried to unsubscribe, both through the link in the as well as by sending an email directly electronic. He never received a response, and he continues to receive the newsletter

SECOND: The claimant attaches a copy of a weekly news bulletin digital "Últimes notícies d,El Triangle" (in Spanish, "Latest news from El Triángulo), sent on January 16, 2019 from the email address \*\*\*EMAIL.1 to email address\*\*\*EMAIL.2 ; the internet headers of that submission; Y, screenshot showing the request for withdrawal sent on January 16,

2019 by the claimant to the aforementioned digital newspaper so as not to continue receiving more bulletins, and in which he pointed out that he had already sent that message in several occasions. Said request was sent through the contact form included in the web page \*\*\*URL.1, whose reception was confirmed that same date with the

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following message: “Thank you for completing the form! T, write aviat.” (in Spanish, Thank you for filling out the form. We'll get back to you right away). In said request the complainant indicates that he had already sent the same message on several occasions.

## 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 as established in art. 47 of LOPDGDD, the Director of the Spanish Data Protection Agency is competent to resolve this procedure.

II

Article 43 of Law 39/2015, of October 1, on the Procedure

Common Administrative Law of Public Administrations, provides:

“Article 43. Practice of notifications through electronic means.

1. Notifications by electronic means will be made through appearance at the electronic headquarters of the Administration or Acting Body, through the single enabled electronic address or through both systems, depending on provided by each Administration or Agency.

For the purposes provided in this article, it is understood by appearance at the headquarters electronically, access by the interested party or his duly identified representative to the notification content.

2. Notifications by electronic means shall be understood to have been made in the moment in which access to its content occurs.

When notification by electronic means is mandatory, or has been expressly chosen by the interested party, it will be understood as rejected when Ten calendar days have elapsed since the notification was made available without accessing its content.

3. The obligation referred to in article 40.4 shall be deemed fulfilled with the made available for notification in the electronic headquarters of the Administration or Acting body or at the unique authorized electronic address.

4. Interested parties may access the notifications from the Point of General electronic access of the Administration, which will function as a portal of access." (The underlining is from the AEPD)

Article 41.5 of the same rule, states in relation to the "Conditions guidelines for the practice of notifications" that:

"5. When the interested party or his representative rejects the notification of a administrative action, it will be recorded in the file, specifying the circumstances of the notification attempt and the means, considering the procedure completed and

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following procedure."

In view of what is stated in articles 43.2 and 41.5 of the aforementioned Law 39/2015, the practice of notification of the agreement to initiate this process.

### III

Since May 25, 2018, the Regulation (EU) is applicable 2016/679 of the European Parliament and of the Council, RGD.

Article 4 of the GDPR, under the heading "Definitions", provides that:

“For the purposes of this Regulation, the following shall be understood as:

1) "personal data": any information about an identified natural person or identifiable ("the interested party"); An identifiable natural person shall be deemed to be any person whose identity can be determined, directly or indirectly, in particular by an identifier, such as a name, an identification number,

location, an online identifier or one or more elements of the identity physical, physiological, genetic, psychic, economic, cultural or social of said person;

2) "processing": any operation or set of operations carried out about personal data or sets of personal data, either by procedures automated or not, such as the collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, broadcast or any other form of enabling of access, collation or interconnection, limitation, suppression or destruction;”

“11) «consent of the interested party»: any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a statement or a clear affirmative action, the processing of personal data that concern you;”

In accordance with these definitions, the treatment of the address of e-mail address of the claimant to send him a newsletter constitutes a

automated processing of that personal data of the interested party. In this case the e-mail address used for the referral of the aforementioned shipment contains and provides information about an identified natural person, since it is made up of the first name, part of the compound first surname and second surname of the claimant.

### III

Article 6.1 of the RGPD establishes the specific assumptions under which considers the processing of the personal data of the interested parties to be lawful, establishing in section a) the following:

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“Article 6. Legality of the treatment

"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 for one or more specific purposes. “

Said precept is complemented by the provisions of article 7 of the same legal text, which provides the following:

“Article 7. Conditions for consent

1. When the treatment is based on the consent of the interested party, the responsible must be able to demonstrate that he consented to the treatment of his personal information.

2. If the data subject's consent is given in the context of a declaration writing that also refers to other matters, the request for consent will be

presented in such a way as to be clearly distinguishable from other matters, in a manner intelligible and easily accessible and using clear and simple language. It will not be binding any part of the declaration that constitutes an infringement of these Regulations.

3. The interested party shall have the right to withdraw their consent at any moment. The withdrawal of consent will not affect the legality of the treatment based on consent prior to withdrawal. Before giving your consent, the Interested party will be informed of this. It will be as easy to withdraw consent as it is to give it.

4. In assessing whether consent has been freely given, account will be taken to the greatest extent possible whether, among other things, the execution of a contract, including the provision of a service, is subject to the consent of the processing of personal data that is not necessary for the execution of said contract."

For its part, article 17.1 b) of the RGPD establishes:

"Article 17. Right of deletion ("the right to be forgotten")

1. The interested party shall have the right to obtain, without undue delay, from the controller of the treatment the deletion of the personal data that concerns you, which will be obliged to delete personal data without undue delay when any of the following circumstances: (...)

b) the interested party withdraws the consent on which the treatment of in accordance with Article 6(1)(a) or Article 9(2)(a) and it is not based on another legal basis;"

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#### IV

By virtue of the provisions of article 58.2 of the RGD, the Spanish Agency of Data Protection, as a control authority, has a set of corrective powers in the event of an infraction of the precepts of the GDPR.

Article 58.2 of the RGD provides the following:

“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 warning when the processing operations have violated the provisions of this Regulation;”

(...)

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

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

In the present case, it is taken into account that on January 16, 2019, the claimant received in his email account a newsletter from the digital weekly "El Triangle" without evidence that said treatment, carried out carried out by EDITORIAL DE PERIODISTES, S.L., complies with the principle of legality by having denied by the interested party the existence of consent on his part for the treatment of your email address for this purpose.

This conduct constitutes, on the part of EDITORIAL DE PERIODISTES, S.L.,

infringement of the provisions of article 6.1.a) of the RGPD.

Article 83 section 5 of the RGPD provides that: "The infringements of the following provisions will be sanctioned, in accordance with section 2, with fines administrative fees of EUR 20,000,000 maximum 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 processing, including conditions for consent under articles 5, 6, 7 and 9.

The LOPDGDD, for prescription purposes, typifies in its article 72: "Infringements considered very serious:

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"1. Based on the provisions of article 83.5 of the Regulation (EU)

2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in that and, in particularly 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.

(...)"

Therefore, the RGPD, without prejudice to the provisions of its article 83, contemplates in its article 58.2 b) the possibility of going to the warning to correct the

processing of personal data that do not meet your expectations. About

when it is appropriate to opt for one or the other route, the application of article 83 of the RGPD

or the corrective measure of warning of article 58.2.b), the rule itself in its

Recital 148 of Regulation 2016/679, which establishes the following:

“In the event of a minor offence, or if the fine likely to be imposed

would constitute a disproportionate burden for a natural person, rather than

sanction by means of a fine, a warning may be imposed. must however

Special attention should be paid to the nature, seriousness and duration of the infringement, its

intentional nature, to the measures taken to alleviate the damages suffered,

the degree of liability or any relevant prior violation, the manner in which

that the control authority has been aware of the infraction, compliance

of measures ordered against the person responsible or in charge, adherence to codes of

conduct and any other aggravating or mitigating circumstance.”

This infraction is sanctioned with a warning, in accordance with article

58.2.b) of the RGPD, as it is a small company and considers that the fine

administrative that could fall in accordance with the provisions of article 83.5.a) of the

RGPD would constitute a disproportionate burden for it, in addition to the fact that at the

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said company is not aware of the commission of any previous infraction in

matter of data protection.

Considering the aforementioned precepts and others of general application,

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE EDITORIAL DE PERIODISTES, S.L, for an infringement of the article 6 of the RGPD, sanctioned in accordance with the provisions of article 83.5.a) of the cited RGPD and, qualified as very serious in article 72.1.b) of the LOPDGDD to the effects of its prescription, a sanction of WARNING in accordance with the provided for in article 58.2.b) of the RGPD.

SECOND: ORDER the entity EDITORIAL DE PERIODISTES, S.L., as responsible for the treatment, the deletion of the personal data of the claimant in order to of not continuing to receive the newsletter, as well as the contribution to it of means of evidence accrediting compliance with the requirements.

THIRD: NOTIFY this resolution to the entity EDITORIAL DE PERIODISTES, S.L.

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-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 Electronic Register of the Agency [<https://sedeagpd.gob.es/sede-electronica-web/>], 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 proving the effective filing of the contentious appeal-administrative. If the Agency was not aware of the filing of the appeal contentious-administrative within a period of two months from the day following the notification of this resolution would end the precautionary suspension.

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