

968-150719

Procedure No.: PS/00292/2019

RESOLUTION R/00050/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00292/2019, instructed by the Agency

Spanish Data Protection Authority to AUTOMOCION X.X.X. S.L., C.C.C., seen the

claim filed by A.A.A., and based on the following,

BACKGROUND

FIRST: On October 30, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against AUTOMOCION X.X.X.

S.L., C.C.C.. Notified of the initiation agreement and after analyzing the allegations

presented, on January 10, 2020, the resolution proposal was issued that

is transcribed below:

<<

Procedure no.: PS/00292/2019

926-101219

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

to the following:

BACKGROUND

FIRST: D.B.B.B. in the name and representation of Ms. A.A.A. (hereinafter, the

claimant) dated August 20, 2018 filed a claim with the Agency

Spanish Data Protection. The claim is directed against D. C.C.C. with NIF

***NIF.1 (hereinafter, the claimed one).

For the following facts according to statements by the claimant:

He states that they have included his photograph, name and telephone number in a

web of contacts for adults offering their services, without their consent, and that for this reason he is receiving numerous calls from people who want to have sex with she.

It indicates that the photograph published on the web has been obtained from the intranet of the work, given that it is ***POSITION.1 and provides its services in ***COMPANY.1.

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Add that the website is mileroticos.com and it has no responsibility.

The website that hosted the ad immediately removed it.

And, among other things, it provides the following documentation:

Screenshots of the ad from mileroticos.com

□

SECOND: In view of the facts denounced in the claim and the documents provided by the claimant, the Subdirector General for Inspection of Data proceeded to carry out preliminary investigation actions for the clarification of the facts in question, by virtue of the investigative powers granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter RGPD), and in accordance with the provisions of Title VII, Chapter I, Second Section, of the Law Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD).

As a result of the research actions carried out, it is confirmed that the data controller is the claimed party.

In addition, the following extremes are noted:

On January 21, 2019, MAJESTIC SOLUTIONS S.L. refer to this

Agency the following information:

1 That the ad was created from the IP ***IP.1 on August 13, 2018 at 11:19:30 p.m.

2 States that when the ad was reported, it was removed.

Provide a screenshot of your systems with the information in point 1.

On February 1, 2019, VODAFONE ONO, S.A.U. refer to this Agency the next information:

1. States that the owner of the IP ***IP.1 as of August 13 and 14, 2018 is AUTOMOTIVE X.X.X. S.A. with CIF A47031034 and address ***ADDRESS.3.

Dated June 13, 2019, AUTOMOCIÓN X.X.X. S.A. refer to this Agency the next information:

1. States that the registered office of AUTOMOCIÓN X.X.X., S.A. It is not ***ADDRESS.3. Said domicile is owned by ***PARENTESCO.2 of the partners of said company without carrying out any type of activity of said merchant and be a private domicile of two persons of old age.

2. States that the invoice for telecommunications services is in the name of this company, which is the one who pays it, but its center of activity and domicile social is ***ADDRESS.2.

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3. States that neither this company nor its representative have had anything to do with such unpleasant incident and that it has been committed by a person particular, specifically Mr. D.D.D., domiciled at said family home and who lives with ***PARENTESCO.2, which has taken advantage of the said day of the stay in the family home of ***KINSHIP.2 to proceed to the facts that they narrate in their letter.

Provides notarial deed dated June 22, 2018 in which the address is stated of ***ADDRESS.2,.

Dated June 14, 2019, AUTOMOCIÓN X.X.X. S.A. refer to this Agency the next information:

1. State that you have made a mistake in identifying the person and the correct person is D.C.C.C. and not D.D.D.D.

On June 25, 2019, AUTOMOCIÓN X.X.X. SL refer to this Agency the next information:

1. Identification data and address of D.

C.C.C.,

incorporated in the Investigated Entities section.

which are left

2. States that D.C.C.C. he's older.

3. States that D.C.C.C. is ***RELATIONSHIP.1 of D. E.E.E., administrator of AUTOMOTIVE X.X.X. SL

4. States that in the past AUTOMOCIÓN X.X.X. S.A. was located in the family address of ***RELATIONSHIP.2. Dated June 22, 2018

(prior to the events denounced) the company was transformed into S.L. and changed its registered office. Tried to change the line to name

***KINSHIP.2, but for technical reasons it has not been possible and that is why

They continue to invoice in the name of AUTOMOCIÓN X.X.X. S.A.

5. States that currently D. C.C.C. resides in the family home with

***KINSHIP.2 and use the line for private use that is not there at all

related to AUTOMOTIVE X.X.X. S.A.

6. States that D.C.C.C. has no employment or contractual relationship with

AUTOMOTIVE X.X.X. SL

7. States that he does not know the reason why said

publication.

On July 30, 2019, D.C.C.C. sends this Agency the following

information. Manifests:

1. That different people related to the complainant told her that she was making disparaging comments about him, for no reason.

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2. That when feeling insulted and vexed by the information received, totally uncertain, it was considered legitimate to, with the public data of the complainant on the net, proceed to question her, as she was doing.

3. That he never should have done it but lost control and apologizes.

That he never wanted to harm the complainant, he was just trying to make her uncomfortable

4. That he considered that the website would address the complainant on her phone before authorizing the publication and with it it would not be published.

5. That the photograph of the complainant used is a public photograph of her internet profile.

6. That the complainant's telephone number was due to some crossed call with the same.

7. That he knew the complainant exclusively as a co-worker at ***COMPANY.1.

On August 1, 2019, it is verified that:

1. The same photograph used in the advertisement is published on the internet in the public LinkedIn profile of the complainant.

2. The content of the privacy policy and conditions of use of the platform mileroticos.com in which, among other terms, it is specified:

“THE ADVERTISER is responsible for everything it publishes, for

a.

their actions and any damage they may cause.

b.

can publish an ADVERTISER”.

“THE SERVICE PROVIDER is not responsible for what

THIRD: On October 30, 2019, the Director of the Spanish Agency

of Data Protection agreed to initiate sanctioning procedure to the claimed,

in accordance with the provisions of articles 63 and 64 of Law 39/2015, of 1

October, of the Common Administrative Procedure of the Public Administrations

(hereinafter, LPACAP), for the alleged violation of Article 6.1 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 in which, in summary, it stated: "which complements those made

on July 30, 2019 and provides medical documentation, in which you can

check that you are diagnosed with Paranoid Personality Disorder

(F60.0), Social Anxiety Disorder (F40.0), and Persistent Depressive (F34.1)

based on DSM 5.

It states that at the time of the events that justify this

file, he had a psychotic break, which he could not control due to

Your background.

He adds that he is very sorry for what happened, but understands that his situation and his

diagnosis make him unimputable at the time of a sanction of this nature, by

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not have been something done voluntarily and in fullness of their faculties

physical and psychological, but the result and consequence of a psychotic outbreak that occurred

what was this unpleasant outcome.

That, in any case, in the event that the incompetability

due to my medical situation, at least be taken into account as an excuse to

the graduation effects of the sanction.

FIFTH: On December 3, 2019, the instructor of the procedure

agreed to open a period of practice tests, taking into account

incorporated the previous investigation actions, E/00109/2019, as well as the

documents provided by the respondent, and the documentation that they

accompanies.

SIXTH: Of the actions carried out, the following have been accredited

facts:

PROVEN FACTS

Of the information and documentation provided by the parties in this procedure,
the following facts are proven:

1º On August 20, 2019, the claimant files a claim
before the Spanish Data Protection Agency, stating that they have included
your photo, name and phone number on an adult dating website
offering your services, without your consent, and that you are therefore receiving
numerous calls from people who want to have sex with her.

It indicates that the photograph published on the web has been obtained from the intranet
of work, given that it is ***POSITION.1 and provides its services in ***COMPANY.1.

2nd That the ad was created from the IP ***IP.1 on August 13,
2018 at 11:19:30 p.m.

3º That the owner of the IP ***IP.1 as of August 13 and 14, 2018 is
AUTOMOTIVE X.X.X. S.A. with CIF A47031034 and address at ***ADDRESS.2..

4º That the person responsible for these facts is D. C.C.C.

SEVENTH: Attached as an Annex is a list of documents in the
process.

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FOUNDATIONS OF LAW

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

Spanish Data Protection, in accordance with the provisions of art. 58.2

of the RGPD and in art. 47 and 48.1 of LOPDGDD.

II

The defendant is imputed the commission of an infraction for violation of the

Article 6.1 of the RGPD, which indicates in section 1 the cases 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 their consent for the processing of their data

personal for one or more specific purposes;

b) 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 measures pre-contractual;

(...)"

The infraction for which the defendant is held responsible is typified in

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 section 2, with administrative fines of a maximum of 20,000,000 Eur 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 largest 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 the Regulation (U.E.)

2016/679 are considered very serious and the infractions that

suppose a substantial violation of the articles mentioned in it 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."

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III

The documentation in the file shows that the respondent treated

various personal data of the claimant (her name, telephone, mobile, photograph with

the image of it, as well as descriptions of a sexual nature) without legitimization

violating the principle of legality, loyalty and transparency in the treatment referred to

Article 5.1.a) of the RGPD.

In the present case, the respondent has recognized that the data of a

claimant's personal name, telephone, mobile, photograph with the image of the

itself, as well as descriptions of a sexual nature), have been treated on the website

contact MILEROTICOS.COM, on August 13, 2018, without the consent

of the claimant, being accessible by any user of this website of

Contact. The defendant acknowledges that he carried out said treatment without legitimacy.

It is clear that the defendant published a false advertisement on a web portal of

contacts for adults in MILLEROTICOS.COM, containing a photograph of the claimant and other personal data, data processing of the claimant who performed without her consent.

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 RGPD.

IV

In accordance with the provisions of the RGPD in its art. 83.1 and 83.2, when deciding the imposition of an administrative fine and its amount in each individual case will be taking into account the aggravating and mitigating factors listed in the article indicated, as well as any other that may be applicable to the circumstances of the case:

“Each control authority will guarantee that the imposition of fines administrative actions under this article for violations of this Regulation indicated in 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 contemplated in the Article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine administration and its amount in each individual case will be duly taken into account:

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 as the number of stakeholders affected and the level of damage and

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damages they 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 have

applied under articles 25 and 32;

e) any previous infraction 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 put remedying the breach and mitigating the possible adverse effects of the breach;

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 if the person in charge or the person in charge notified the infringement and, in such case, to what extent;

i) when the measures indicated in article 58, paragraph 2, have been previously ordered 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 certificates 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 realized or losses avoided, direct or indirectly, through 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 led to the commission of the 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.

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- 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, and for the purpose of setting the amount of the sanction fine to be imposed in the present case for the infraction typified in article 83.5.a) of the RGPD, for which D.C.C.C. is responsible, the following are considered concurrent factors:

-

In the present case we are facing an intentional action (article 83.2 b) RGPD).

Basic personal identifiers (your name, phone number,

-

mobile, photography, as well as descriptions of a sexual nature) (article 83.2 g RGPD).

At the same time, it is valued as extenuating it does not have the link of the activity of the

offender with the processing of personal data art. 76.2 b) LOPDGDD, no

has obtained no benefit as a result of committing the infringement art. 76.2 c)

of the LOPDGDD and the measures taken by the claimed art. 83.2 c) of the GDPR.

In view of the foregoing, the following is issued:

MOTION FOR A RESOLUTION

That by the Director of the Spanish Agency for Data Protection

sanction D.C.C.C. with NIF ***NIF.1 for a violation of Article 6.1 of the

RGPD, typified in Article 83.5 of the RGPD, with a fine of €1,000.00 (THOUSAND

euros).

Likewise, in accordance with the provisions of article 85.2 of the LPACAP,

You are informed that you may, at any time prior to the resolution of the

present procedure, carry out the voluntary payment of the proposed sanction,

which will mean a reduction of 20% of the amount of the same. With the

application of this reduction, the penalty would be established at 800 euros and its

payment will imply the termination of the procedure. The effectiveness of this reduction

will be conditioned to the abandonment or renunciation of any action or resource in

administrative route against the sanction.

In case you chose to proceed with the voluntary payment of the amount

specified above, in accordance with the provisions of article 85.2 cited,

You must make it effective 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 at Banco CAIXABANK, S.A., indicating in the concept the

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reference number of the procedure that appears in the heading of this

document and the reason, for voluntary payment, of reducing the amount of the

sanction. Likewise, you must send proof of payment to the Subdirectorate

General Inspection to proceed to close the file.

By virtue thereof, the foregoing is notified, and the

procedure so that within TEN DAYS you can allege as much

consider in his defense and present the documents and information that

consider pertinent, in accordance with article 89.2 of the LPACAP).

F.F.F.

INSPECTOR/INSTRUCTOR

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: On January 16, 2020, AUTOMOTION X.X.X. S.L., C.C.C. he has

SECOND

proceeded to pay the sanction in the amount of 800 euros using the
reduction provided for in the motion for a resolution transcribed above.

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THIRD: The payment made entails the waiver of any action or resource in via
against the sanction, in relation to the facts referred to in the
resolution proposal.

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 art. 47 of the Organic Law 3/2018, of 5 December, of Protection of Personal Data and guarantee of digital rights (in hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection is competent to sanction the infractions that are committed against said Regulation; infractions of article 48 of Law 9/2014, of May 9, General Telecommunications (hereinafter LGT), in accordance with the provisions of the article 84.3 of the LGT, and the infractions typified in articles 38.3 c), d) and i) and 38.4 d), g) and h) of Law 34/2002, of July 11, on services of the society of the information and electronic commerce (hereinafter LSSI), as provided in article 43.1 of said Law.

II

Article 85 of Law 39/2015, of October 1, on the Procedure Common Administrative of Public Administrations (hereinafter LPACAP), under the heading "Termination in sanctioning procedures" provides the following:

"1. A sanctioning procedure has been initiated, if the offender acknowledges his responsibility, the procedure may be resolved with the imposition of the sanction to proceed.

2. When the sanction is solely pecuniary in nature or fits impose a pecuniary sanction and another of a non-pecuniary nature but it has been justified the inadmissibility of the second, the voluntary payment by the alleged perpetrator, in any time prior to the resolution, will imply the termination of the procedure, except in relation to the replacement of the altered situation or the determination of the compensation for damages caused by the commission of the infringement.

3. In both cases, when the sanction is solely pecuniary in nature, the competent body to resolve the procedure will apply reductions of, at least 20% of the amount of the proposed sanction, these being cumulative each. The aforementioned reductions must be determined in the notification of initiation of the procedure and its effectiveness will be conditioned to the withdrawal or Waiver of any administrative action or recourse against the sanction. The reduction percentage provided for in this section may be increased regulations."

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According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00292/2019, of in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to AUTOMOCION X.X.X. S.L., C.C.C.

In accordance with the provisions of article 50 of the LOPDGDD, 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 process as

prescribed by art. 114.1.c) of Law 39/2015, of October 1, on Procedure

Common Administrative of Public Administrations, interested parties may

file a contentious-administrative appeal before the Contentious Chamber

of the National High Court, in accordance with the provisions of article 25 and

in section 5 of the fourth additional provision of Law 29/1998, of July 13,

regulation of the Contentious-Administrative Jurisdiction, within a period of two months to count from the day following the notification of this act, as provided in the Article 46.1 of the aforementioned Law.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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