

□ NATIONAL COMMISSION

DATA PROTECTION

Case No. 2018/10778

THE

RESOLUTION/2019/21

I - The National Data Protection Commission (CNPd) prepared, on December 18, 2018, a draft deliberation, in which the Defendant was charged with the practice of a foreseen and punishable offence, in accordance with the combined provisions of paragraph 1 of the Article 35 of the Constitution of the Portuguese Republic (CRP), Article 15(1) and Article 83(5)(b) of Regulation (EU) 2016/679, of 27 December April 2016 (General Data Protection Regulation - RGPD), punishable by a fine of up to 20 million euros or 4% of annual turnover, whichever is higher.

Pursuant to article 50 of Decree-Law No. 433/82, of 27 October, the Defendant was notified of the content of the project and, if she so wished, to present her defence, having alleged, in short, the Following:

1. It was unable to timely identify whether the Complainant recordings of telephone calls made on 29 June, 8 and 24 August and 30 October, all in 2018, which is why the Complainant did not provide such access;
2. After the ninety-day period has elapsed and having not identified the holder of said email/ deleted the recording of the call of June 29, 2018;
3. On 22 October 2018, the CNPD was notified of the Complainant's submission of a complaint and, as the ninety-day period for its elimination had not yet elapsed, it kept the recordings of the remaining calls;
4. Complied with CNPD Deliberation No. 1154/2018, of 18 December, issued within the scope of Process No. 10978/2018, which determined that the Complainant be granted, within fifteen days, access to the recordings of the telephone calls made between that holder and the Defendant's call center on August 8 and 24 and October 30;
5. Believes not to have violated the data subject's right of access regarding the erased recording because it was impossible to identify the data subject in a timely manner and, as for the others, because access was finally granted, and therefore no unlawful conduct is attributable to him;

*

was the sender of the emails in which access to the

AV. D. CARLOS I. 134- lo I 1200-651 LISBOA i WWW.CNPD.PT I TF.I:+351 213 928 400 I Fax: +351 213 976 832

Case No. 2018/10778

1 v.

r

6. He consulted the CNPD on the form of action in the specific case, which he did in the email in which, after being notified for this purpose, he responded to the matter of the complaint (page 30 of the file), such consultation constituting an exclusion of the illegality of his conduct;

7. If it is deemed to be unlawful, it states that there is still no repeated conduct, and no fine has ever been imposed for an infraction relating to the processing of personal data;

8. It claims that the special categories of data provided for in article
9 of the GDPR;

9. It still claims that there were no damages because the data subject exercised his right to the guarantee by exposing his claims to the respective concessionaire;

10. It also states that it did not derive any financial or other benefit from the facts described;

11. Declares further that the small seriousness of the possible infringement and the absence of fault could only justify the imposition of the sanction of admonition;

12. Finally, it concluded by advocating for the special reduction of the fine, should such punishment be decided because there is no intention to act contrary to the Law and for having taken the necessary steps to repair the situation.

Attached two documents.

II - Appreciation

1) Contrary to what the Defendant alleges in her defence, the reasons invoked to deny the

The complainant of access was not the difficulty in identifying him as the sender of the emails in which access to the recordings of the telephone calls made was requested; the reason for the refusal is contained in the email of the Defendant's Data Protection Officer, along with pgs. 30 and 31 of the case file, in which it is specifically reported that the Defendant gave instructions to , its subcontractor,

in the sense that copies of telephone calls are only provided "by court order or request from an official entity or body, such as the CNPD, police body, etc."

2) The Defendant, therefore, was not unaware of the sender of the email, a fact that had already been confirmed to the Complainant in phone calls made by the Defendant's services on a date prior to the submission of the complaint to the CNPD and the sending of the email on pgs. 30 and 31 of

Case No. 2018/10778

two

t

NATIONAL COMMISSION

DATA PROTECTION

records and in which he was told that only with judicial authorization could he have access to the recording of the calls;

3) Nor was it out of a desire to comply with the law and ensure the rights of the holder that the Defendant did not destroy all the recordings of the calls: it limited itself to complying with the terms of CNPD Deliberation No. 1154/2018, of December 18th;

4) As for the CNPD's challenge to reduce the Defendant's guilt, one cannot forget the paradigm transition operated by the RGPD from the heteroregulation regime (whose most visible face consisted of the prior assessment and authorization of the processing of personal data) to self-assessment , and it is now up to those responsible for the treatments and subcontractors to ensure the legality of the processing of personal data they carry out, without any intermediation from the control authorities. Furthermore, Article 5(2) of the GDPR expressly provides that the controller is not only obliged to comply with all the principles set out in paragraph 1 of that same article, but must also be able to demonstrate (in particular the competent supervisory authorities) that compliance. Once the facts described in the complaint, the correspondence addressed to the CNPD by the defendant and the written defense of the latter, clearly result in the inability of her to demonstrate the effectiveness of the right of access expressly required by the data subject, therefore, of a treatment loyal, contrary to the provisions of article 5, paragraph 1, al. a) GDPR;

5) For all these reasons, the CNPD cannot accept that the wrong interpretation or lack of knowledge of the law benefit the Defendant and, at the same time, restrict the Complainant's fundamental right of access to his own data;

6) The aforementioned conduct also caused concrete damage to the Complainant's personal data protection insofar as a call

recording (from 29 June) was effectively destroyed, making it impossible for him to use it for the purposes of evidence in business relations with the Defendant. . Thus, even if it is admitted that the defendant embarked on a path to correct this situation, the fact is that she did not minimally respect the right of access of the holder enshrined in the CRP and the RGPD.

7) It positively highlights compliance with the determinations contained in Deliberation No. 1154/2018 of the CNPD, which were intended precisely to safeguard the complainant's right of access to call recordings not yet destroyed.

AV. D. CARLOS! . !34 - lo | 1200-651 LISBON | WWW.CNPD.PT | TEL:+351 213 928 400 | FAX: +351 213 976 832

Case No. 2018/10778

2v.

The matter of fact was generally confirmed and, as to the disputed facts, no disclosed, they do not need further clarification or contradictory.

Considering the defense presented by the defendant and the critical judgment that the CNPD carried out, some of the facts are altered in the light of the information provided therein.

III - With the elements contained in the records, with interest for the decision

we consider the following proven

facts

1. On July 3rd and 16th and August 8th, all of 2018,

sent to , email in which

requested access to a copy of the recordings of the telephone calls made to the Defendant's call center and received it on the following dates:

a) Call of the Defendant's services to the data subject made on June 29, 2018 (cf. emails attached to page 7 of the records of for sent on July 3, 2018 at 12:18 pm

hours, and on July 16, 2018, at 10:06 am, both with the subject "Phone Calls - Request for a Copy of Recording");

b) Call made by the data subject to the Defendant's services on August 8, 2018 (cf. email from the Defendant's Data Protection Officer, along with pages 30 and 31 of the case file);

2. The Complainant did not receive a written response to his requests;

3. Subsequently, on an indefinite day and month of 2018, the data subject was

contacted by telephone by the services of the person who received the
information that requested copies could only be made available to you by court order;

4. On August 24, 2018, he filed a complaint with the

National Data Protection Commission (CNPd) regarding denial of access to copying recordings;

5. On October 22, 2018, the CNPD notified to

pronounce on the aforementioned complaint;

6. In an email received on November 2, 2018 (cf. pages 30 to 31 of the case file), the Defendant, through her Data Protection
Officer, informed that she subcontracted to

Case No. 2018/10778

3

NATIONAL COMMISSION

DATA PROTECTION

/

the management of your call center the company

on your behalf and in fulfillment of your orders;

which acts

7. The Defendant further informed that he gave instructions to the

at the

in the sense that copies of telephone calls are only provided "by court order or request from an official entity or body, such as
the CNPD, police body, etc."

8. Also by order of the Defendant, the recordings of telephone calls are kept for ninety days, being destroyed after that period;

9. As a result of this procedure, the recordings of calls requested by the Complainant were destroyed, with the exception of
those made on 8 and 24 August and 30 October, all of 2018;

10. The Defendant kept the recordings of the calls of August 8 and 24 and October 30 until a decision was rendered by the
CNPd (cf. email from the Defendant's Data Protection Officer, along with pages 30 to 31 of the case file), having subsequently
provided them to the Complainant in compliance with CNPD Deliberation No. 1154/2018, of 18 December;

11. The Defendant was well aware that she was obliged to grant the Complainant access to her personal data and, therefore, to the telephone calls requested by him, by copying or transcribing them;

12. The Defendant acted freely, voluntarily, consciously and knowing that her conduct is prohibited and punished by law.

IV - Reasoning of the decision in fact

The facts given as established resulted:

- From the emails together on pgs. 7 of the cars for

on July 16, 2018, at 10:06 am, both with the subject "Telephone Calls - Request for a Copy of Recording";

- From the email of the Defendant's Data Protection Officer, along with fls. 30 and 31 of the records;

® The defendant's written defense, which recognizes the effective destruction of the recording of the call of June 29, 2018 and the non-destruction of the remaining ones only because the lapse of the ninety-day period has not taken place, considering the sent on July 3, 2018 at 12:18 pm, and

AV. D. CAIU.OS I. 134-Io I 1200-651 LISBON | WWW.CNPD.PT | TEL:+351 213 928 400 | FAX: +351 213 976 832

Case No. 2018/10778

3v.

r

intervention by the CNPD through the determinations contained in Deliberation No. 1154/2018, of 18 December.

V - It is verified, in the face of the verified fact, that it appears sufficiently

indicted the practice by the defendant of a foreseen infraction and

punishable under the combined provisions of paragraph 1 of article 35 of the Constitution

of the Portuguese Republic (CRP), Article 15(1) and Article 5(5)(b)

83 of Regulation (EU) 2016/679, of April 27, 2016 (General Regulation of

Data Protection - RGPD), punishable by a fine of up to 20 million euros or 4% of the

annual turnover, whichever is the higher.

*

Pursuant to Article 83(1) s. a) to k) of the GDPR, the determination of the amount of the fine is based on the following criteria:

- The nature, gravity and duration of the infringement, taking into account the nature, scope or purpose of the data processing

in question, as well as the number of data subjects affected and the level of damage suffered by them - this is a offense punishable with the most serious frame provided for by the GDPR, given that, at least, from 25 May to 18 December 2018 it was committed. The exact number of holders affected by the Defendant's procedure is not known, since it was based on a general guideline applicable to any telephone contact that the Defendant's customers established with the Defendant, via the call center. Even so, the damage to the right of access of a holder, who presented the complaint that gave rise to the present case, was specifically established;

- The intentional or negligent nature of the infraction - the conduct related to the detected infractions is considered to be willful, even if as a possible intent, since the defendant represented the practice of the infraction as a possible consequence of the conduct and was satisfied with it ;
- The initiative taken by the person responsible for the treatment to mitigate the damages suffered by the data subjects - the conduct of the Defendant who, since Decision No. access by the data subject to call recordings;

Case No. 2018/10778

4

NATIONAL COMMISSION

DATA PROTECTION

- The degree of responsibility of the controller or processor taking into account the technical or organizational measures implemented by them under the terms of Articles 25 and 32 - matter that is not the subject of this case;
- Any relevant infringements previously committed by the controller or processor - which do not occur;
- The degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate its possible negative effects - which is considered appropriate, not only for correcting the procedures adopted in the meantime, but also for complying with the determinations of the Resolution No. 1154/2018, of December 18;
- The specific categories of personal data affected by the infringement -
content of telephone communications from the Defendant's customers, which are constitutionally (Article 34(1) of the CRP) and above constitutionally protected (Article 7 of the Charter of Fundamental Rights of the European Union). The denial of access to the respective holder constitutes a serious interference with a basic right of the current personal data protection regime;
- The way in which the supervisory authority became aware of the infringement, in particular whether the controller or

processor notified it, and if so, to what extent they did so - the infringement committed came to the knowledge of the CNPD through a complaint by the data subject Dice;

- Compliance with the measures referred to in Article 58(2) if they have been previously imposed on the controller or processor concerned in relation to the same matter - this criterion not being applied, as there were no any predetermined corrective measures;

- Compliance with codes of conduct approved under the terms of article 40 or the certification procedure approved under the terms of article 42 - a criterion that also does not apply, as there is no code of conduct or certification procedure, under the aforementioned terms; and

- Any other aggravating or mitigating factor applicable to the circumstances of the case, in light of Article 83(2)(k) of the GDPR, such as financial benefits

AV. D. CARI.OS I. I34 - lo I 1200-651 LISBON | WWW.CNPD.BT | TEL: +351 213 928 400 | FAX: +351 213 976 832

Case No. 2018/10778

4v.

obtained or the losses avoided, directly or indirectly, through the infraction - highlights here, as an aggravating factor, the effective and irreparable destruction of the call of June 29, 2018, with prejudice to the possibility of its use by the holder in the relations commercial transactions with the Defendant.

- Application of the fine

Bearing in mind the aforementioned criteria, the CNPD considers it necessary to impose, in the specific case, a fine on the Defendant, considering that this is the effective proportionate and dissuasive measure that is imposed given the specific circumstances in which the infringement occurred, namely because have made irreversible or mitigated, by any other corrective measure, the concrete violation of the data subject's right, as well as the necessary and uncontroversial knowledge of the law and the CNPD's deliberations that the Defendant held.

As stated in the draft determination, the offense provided for under the combined provisions of Article 15(1) and Article 83(5)(b) of Regulation (EU) 2016/ 679, of April 27, 2016 (General Data Protection Regulation - RGPD), is punishable by a fine abstractly applicable up to 20 million euros or 4% of annual turnover, whichever is higher.

It was not possible to determine the annual worldwide turnover corresponding to the Defendant's previous financial year

(2017), so the maximum limit of the applicable fine is set at € 20,000,000.00 (twenty million euros). Valuing the facts found in the light of the criteria mentioned above and considering the circumstance that the Defendant had taken steps to regularize the situation, the CNPD, under the terms of article 58, no. 2, al. i) of the RGPD, considers the application to the Defendant of a fine in the amount of € 20,000.00 (twenty thousand euros) for the practice of the foreseen and punishable offense in accordance with the combined provisions of paragraph 1 of article 35 of the Constitution of the Portuguese Republic (CRP), Article 15(1) and Article 83(5)(b) of Regulation (EU) 2016/679, of 27 April 2016.

NATIONAL COMMISSION
OF PROTECTION DL DATA

Case No. 2018/10778 5

VI - Conclusion

In view of the above, the CNPD resolves:

1. Will apply Defendant I

observing the provisions of paragraph 3 of article

83 of the RGPD, a fine in the amount of € 20,000.00 (twenty thousand euros) due to the violation of the data subject's right of access to their data.

2. Pursuant to Articles 58, No. 2 and 3 of Decree-Law No. 433/82, of October 27, in the current wording, inform the defendant that:

The. The conviction becomes final and enforceable if it is not judicially challenged, under the terms of article 59 of the same diploma;

B. In the event of a judicial challenge, the Court may decide by means of a hearing or, if the Defendant and the Public Prosecutor do not object, by means of a simple order.

The Defendant must pay the fine within a maximum period of 10 days after its final nature, sending the respective payment slips to the CNPD. In case of impossibility of the respective timely payment, the defendant must communicate this fact, in writing, to the CNPD.

Lisbon, February 5, 2019

Luís Barroso

Maria Candida Guedes de Oliveira

Pedro Mourão

AV. D. CARLOS I. 134-Io I 1200-651 LISBON I www.cnpd.pt I Ta:+351 213 928 400 | FAX:+351 213 976 832

Case No. 2018/10778

5v

Teresa Naia

Filipa Calvão (President)