

Procedure No.: PS/00356/2019

938-051119

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: Mr. A.A.A. (hereinafter, the claimant) dated October 5, 2018

filed a claim with the Spanish Data Protection Agency. The

claim is directed against GUIAS ON LINE, S.C. with NIF J93498392 (hereinafter,

the claimed). The reasons on which the claim is based are that they have owed in their

bank account online advertising services that you have not authorized on August 3,

2018, for an amount of 260.15 euros. That this charge comes from supposed services

of Yellow Pages that the claimant has not contracted

The documentation provided by the claimant consists of the extract from the

account issued by the bank, where the aforementioned operation is reflected and in the

complaint filed with the General Directorate of Police, Madrid-

Tetuán, on \*\*\*DATE.1, for these events.

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 October 30, 2018, the claim was transferred to the claimed, in the proceedings with reference E/8077/2018.

Subsequently, on December 13, 2018, the respondent states the

Next:

1 The claimant has contracted two services with this entity. The first of them, called "Basic Advertising", on \*\*\*DATE.2; and the second "Google My Business" on \*\*\*DATE.3.

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1. In addition, they state that they provide the recordings that prove the contracting, but they only provide the invoices corresponding to the hired services.

2. They add that, after learning of the complaint filed by the claimant, they have tried to contact him, not answering the call made, and noting that the only time the claimant attended the claimed was on the 19th October 2018, in which he limited himself to indicating that he had nothing to say with the company.

THIRD: On October 16, 2019, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimed entity,

by virtue of the powers established in article 58.2 of the RGPD and in articles 47, 64.2 and 68.1 of Organic Law 3/2018, of December 5, on Data Protection Personal and Guarantee of Digital Rights (LOPDGDD), for the infringement of the article 6.1 of the RGPD typified in article 83.5.a) of the RGPD.

FOURTH: Once the initiation agreement has been notified, the entity claimed, by means of a letter of dated October 28, 2019, made, in summary, the following allegations:

“The recording of the contracting of the services was sent by regular mail certificate, given the impossibility of being able to attach it through the Electronic Registry as was done with the pleadings brief and with the invoices of the two services contracted by D. A.A.A.

They are attached again by ordinary mail, Pen with the recording with the two services hired by D.A.A.A. (“Basic Advertising” dated \*\*\*DATE.2 and “Google My Business” dated \*\*\*DATE.3), requests the Spanish Agency for the Protection of Data, in response to the requested documentation and proceed to file it.

FIFTH: On November 20, 2019, the respondent was notified of the opening of the testing period, taking into account the previous actions of investigation E/1437/2019, as well as the documents provided by the entity claimed.

#### PROVEN FACTS

1º On October 5, 2018, the claimant states that they have owed in their bank account online advertising services that you have not authorized on August 3, 2018, for an amount of 260.15 euros. That this charge comes from supposed services of Yellow Pages that the claimant has not contracted

The documentation provided by the claimant consists of the extract from the account issued by the bank, which reflects the aforementioned operation and the complaint filed with the General Directorate of Police, Madrid-

Tetouan, on October 5, 2018.

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2º On October 28, 2019, the respondent states that the bank details were provided by the claimant. Proof of this are the recordings of the calls maintained by the commercial department of this entity and the claimant, confirming the customer's compliance with the contracts offered and confirms the bank details provided, and it was for the specific purpose of contract the services of this entity and make the payment required for this purpose.

3º In the recording in which the consent was granted, it is verified that the manager indicates the date and asks for the name and surname of the contracting party, as well as the payment of the services that will be through two receipts of 199 and 215 euros plus VAT in the account provided, to which the interlocutor responds with the data of the claimant, and Confirm your bank account details.

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 arts. 47 and 48.1 of the LOPDPGDD, the Director of The Spanish Agency for Data Protection is competent to resolve this process.

II

Law 39/2015, of Common Administrative Procedure of the Administrations (LPACAP) establishes in its article 89.1 that "the termination of the

procedure, with filing of the actions, without the need to formulate

of the proposed resolution, when in the instruction of the procedure it is stated

I declare that any of the following circumstances exist:

a The non-existence of the facts that could constitute the infraction”.

III

The defendant is imputed the commission of an infraction for violation of Article 6 of the

RGPD, “Legality of the treatment”, which indicates in its section 1 the cases in which

the processing of third party data is considered lawful:

“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

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;

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(...)”

The infringement is typified in Article 83.5 of the RGPD, which considers as such:

“5. Violations of the following provisions will be sanctioned, in accordance

with section 2, with administrative fines of a maximum of EUR 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 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 particular 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.”

IV

In the case at hand, the data processing carried out by the entity claimed was carried out using reasonable diligence. In this sense, it has to take into account that in the systems of the claimed party the data related to the claimant.

Likewise, the defendant provides a copy of the telephone recordings through which consent was granted, on behalf of the claimant, for the hiring of services. These recordings were made on the 27th of June and September 21, 2018, where the following information is provided: name of the claimed entity, as well as name and surname of the claimant, price of the service, duration, term of revocation and bank account of the claimant and informs of various aspects of recruitment.

Therefore, the degree of culpability existing in the present must be analyzed.

case. The jurisprudence has been requiring those entities that assume in their becoming, a constant processing of data from customers and third parties, which in the management of the same, prove compliance with an adequate level of diligence, due to the increasing casuistry in terms of fraud in the use of data

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personal. In this sense, it is manifested, among others, the judgment of the High Court National Law of April 29, 2010, establishing that “The question that arises in the present case, in view of the approach of the claim, it is not so much to elucidate if the appellant processed the personal data of the complainant without her consent, such as whether or not you used reasonable diligence in trying to identify the person with whom the financing contract was signed” or as included in the ruling of the National High Court of March 10, 2015 when pointing out that: “therefore, no reproach can be made to the actions of Telefónica Móviles Spain S.A. in this sanctioning area, because as has already been stated, he acted with the due diligence, treating the data of the complainant from the appearance of legitimacy of the contracting of the line in question that was granted by the recording telephone (...)

In short, it is not possible to assess culpability in the actions of the entity appellant, so it cannot be charged or sanctioned ex article 130 LRJPAC for violation of the principle of consent nor, and in correlation, of the principle of data quality since the prior request for payment was made in the

address that according to the aforementioned telephone recording corresponded to the owner of the line”

According to these criteria, it can be understood that the defendant used a reasonable diligence, since it took the necessary measures to identify the person who made the contract.

Considering the aforementioned precepts and others of general application, the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: FILE sanctioning procedure PS/00356/2019, instructed to ONLINE GUIDES, S.C. with NIF J93498392, for having proven that he used a reasonable diligence, since it took the necessary measures to identify the person who made the contract.

SECOND: NOTIFY this resolution to GUIAS ON LINE, S.C.

THIRD: 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 month from

counting 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.

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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

Electronic Register of the Agency [[https://sedeagpd.gob.es/sede-electronica-](https://sedeagpd.gob.es/sede-electronica-web/)

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.

Sea Spain Marti

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