

□ Procedure No. PS/00106/2021

## RESOLUTION OF PUNISHMENT PROCEDURE

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

based on the following:

### BACKGROUND

FIRST: Don A.A.A. (hereinafter, the claimant), dated November 16,

2020, filed a claim with the Spanish Data Protection Agency.

The claim is directed against INSTAPACK, S.L., with NIF B46836565 (in

later, the claimed one). The reasons for it is the reception of thousands of SMS to

month on your mobile phone line informing you about the reception of orders and

deliveries. It also states that, on October 20, 2020, it submitted a request for

deletion to "hola@instapack.es", contact address that the person in charge indicates in

your website, without receiving a reply. The privacy policy does not contain

information about the data controller or their contact details.

It accompanies images of his mobile phone, in which it can be seen on the screen

numerous emails, all of them similar, in which it appears: "the service has been en-

delivered, we ask you to rate it at <https://tinyurl.com/....> Thank you for using Instapack"

SECOND: Upon receipt of the claim, the Subdirector General for Inspection

tion of Data proceeded to carry out the following actions:

On January 18, 2021, the claim filed was transferred to the claimant.

given for analysis, being reiterated on the 29th of the same month and year. Likewise, it

required him to send certain information to the Agency within a period of one month.

mation:

- Copy of the communications, of the adopted decision that has been sent to the

claimant regarding the transfer of this claim, and proof that

the claimant has received communication of that decision.

- Report on the causes that have motivated the incidence that has originated the claim.

- Report on the measures adopted to prevent incidents from occurring.

similar quotes.

- Any other that you consider relevant.

The respondent has not responded to any of the requests for information formulated by the AEPD.

THIRD: On March 3, 2021, in accordance with article 65 of the LO-

PDGDD, the Director of the Spanish Data Protection Agency agreed to admit process the claim filed by the claimant against the respondent.

On March 12, 2021, the claimant submits a document indicating

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that in the last two months has received almost 5000 emails, accompanying image of a few emails in which it is indicated, after the name of the person to whom it is addressed, gido, “the service has been delivered, we ask you to rate it at <https://tinyurl.com/....> Gra- Thank you for using Instapack”

FOURTH: On April 12, 2021, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimant, for the alleged infringement of Article 6.1 of the RGPD, typified in Article 83.5 of the RGPD.

FIFTH: The initiation agreement was electronically notified to the respondent. This is how ge article 14.2 of Law 39/2015 of Common Administrative Procedure of the

Public Administrations (LPACAP) according to which “In any case, they will be obliged two to relate through electronic means with the Public Administrations to carry out any procedure of an administrative procedure, at least, the following subjects: a) Legal persons”.

Works in the file the Certificate issued by the Notification Service Electronic and Authorized Electronic Address of the FNMT-RCM, which records the sending of the initiation agreement, notification of the AEPD addressed to the claimed, through that means being the date of availability in the electronic headquarters of the agency on April 13, 2021 and the automatic rejection date on April 24, 2021.

SIXTH: In accordance with article 73.1 of the LPCAP, the term to formulate allegations to the Home Agreement is ten days computed from the day following the of the notification.

Article 64.2. LPACAP, indicates that the defendant will be informed of the right to formulate allegations, the "right to be heard in the procedure and the deadlines for its exercise, as well as the indication that in case of not making allegations in the term established on the content of the initiation agreement, it may be considered proposed resolution proposal when it contains a precise pronouncement about the imputed responsibility". (The underlining is from the AEPD)

The agreement to initiate the sanctioning file that concerns us contained a precise statement on the responsibility of the claimed entity: in the aforementioned agreement specified what was infringing conduct, the sanctioning type in which it was subsumable, the circumstances of the responsibility described and the sanction that in the judgment of the AEPD proceeded to impose.

In consideration of the foregoing and in accordance with the provisions of article Article 64.2.f) of the LPACAP, the initiation agreement of PS/00106/2021 is considered Pro-

Resolution: Once the initiation agreement has been notified, the one claimed at the time of the

This resolution has not submitted a brief of arguments, so it is

application of what is stated in article 64 of Law 39/2015, of October 1, of the

Common Administrative Procedure of Public Administrations, which in its

section f) establishes that in the event of not making allegations within the stipulated period

on the content of the initiation agreement, it may be considered a proposal for

resolution when it contains a precise statement about the responsibility

imputed, reason why a Resolution is issued.

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In view of everything that has been done, by the Spanish Protection Agency

of Data in this procedure the following are considered proven facts,

## FACTS

FIRST: The claimant submits a written claim, dated November 16

of 2020, which he directs against INSTAPACK, S.L., motivated by the receipt of thousands of

SMS per month, on your mobile telephone line \*\*\*TELÉFONO.1, informing you about the

reception of orders and deliveries and the possibility of assessing the service.

SECOND: On March 12, 2021, a new written claim is filed,

in which he indicates that in two months he has received more than 4,800 emails from the entity

cried out, accompanying some screenshots of her mobile phone.

THIRD: The emails provided by the claimant are very similar, all of them

have the following text:

“Hello A.A.A., the service has been delivered, we ask you to rate it at <https://tin->

yurl.com/.... Thank you for using Instapack. Date...".

## FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGDPR recognizes to each authority, and according to the provisions of articles 47 and 48 of the LOPDGD, the Director of the Spanish Agency for Data Protection is competent to initiate and to solve this procedure.

II

The RGDPR deals in article 5 with the principles that must govern the treatment of personal data, provision that provides:

"1. The personal data will be:

a) treated lawfully, loyally and transparently with the interested party (<<lawfulness, loyalty and transparency>>)

(...)

2. The data controller will be responsible for compliance with the provided in section 1 and able to demonstrate it (<<proactive responsibility>>)"

Article 6 of the RGDPR, "Legality of the treatment", defines in section 1 the assumptions 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 his consent for the treatment of his personal data-them for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the resado is part or for the application at its request of pre-contractual measures

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tuales;

c) the treatment is necessary for the fulfillment of an applicable legal obligation.

cable to the data controller;

d) the treatment is necessary to protect the vital interests of the interested party or of another natural person.

e) the treatment is necessary for the fulfillment of a mission carried out in public interest or in the exercise of public powers vested in the controller of the treatment;

f) the treatment is necessary for the satisfaction of legitimate interests permitted by the data controller or by a third party, provided that on balance such interests do not override the interests or fundamental rights and freedoms of the interested party that require 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 performed by public authorities in the exercise of their functions.

2. Member States may maintain or introduce more specific provisions specific in order to adapt the application of the rules of this Regulation with regard to Regarding the treatment in compliance with section 1, letters c) and e), setting in a way more precise specific treatment requirements and other measures that guarantee a lawful and fair treatment, including other specific situations of treatment under Chapter IX. (...)”

Article 4 of the RGPD, “Definitions”, offers in section 2 a legal concept of “processing”: “any operation or set of operations carried out on

personal data or set 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, interconnection, limitation, suppression or destruction".

Likewise, article 4 of the RGPD, section 1, understands "personal data"

"any information about an identified or identifiable natural person (<<the interested>>); An identifiable natural person shall be deemed to be any person whose identity can be determined directly or indirectly, in particular by means of an identifier, such as a name, an identification number, location data, a online identifier or one or more elements of physical identity, physiological, genetic, psychic, economic, cultural or social of said person;"

The infraction for which the defendant is held responsible is provided for in article

83.5 of the RGPD that states: "Infringements of the following provisions are

will be sanctioned, in accordance with section 2, with administrative fines of 20,000,000

Eur maximum or, in the case of a company, an amount equivalent to 4%

as a maximum of the overall annual total turnover of the financial year

above, opting for the highest amount:

a) The basic principles for the treatment, including the conditions for the consent under articles 5,6,7 and 9."

The LOPDGDD in its article 72.1.b) qualifies as a very serious infraction "The

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

III

The conduct for which the defendant is held responsible consists of treating the number claimant's telephone number, sending him thousands of emails informing him name of the person, natural or legal, to whom a service has been provided (in general, the delivery of a package), offering you the possibility of assessing said service through a web page that includes a singular number that identifies each service; without the concurrence of any of the conditions of legality provided for in the article 6.1 RGPD for said treatment.

In accordance with the RGPD, article 6.1, the processing of personal data will only be legal.

I quote if it is covered by any of the conditions detailed in sections a) to f) of the precept. In the matter at hand, the data processing contrary to the RGPD is specified in the use of your telephone number informing you of the provision of a package delivery service, in general, including, in the received message, the recipient's name.

The processing of personal data through the use of the telephone number of the claimant or the data information of the providers of the delivery service, not can be legally protected in any of the reasons for legitimation collected in article 6.1 RGPD.

In accordance with article 5.2 RGPD, it is the responsibility of the data controller to obligation to prove that the treatment respected the principle of legality, that is, had its legal basis in any of the conditions of article 6.1. GDPR. Without

However, the defendant has not proven anything, since, as has been stated in the An-background of the resolution, rejected the notification of the agreement to initiate the file tea.



It must be emphasized, on the other hand, that it has been proven that the conduct of the offender has persisted over time for at least six months.

The documentation in the file shows that the defendant is the one responsible for the processing of data subject to the sanctioning procedure.

Article 58 of the RGPD, "Powers", states:

IV

"2 Each control authority will have all the following corrective powers:

you listed below:

(...)

d) order the person responsible or in charge of treatment that the operations of treatment comply with the provisions of this Regulation, where appropriate, in a certain way 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, depending on the circumstances of the

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particular case

(...)"

In determining the administrative fine to be imposed, the

provisions of articles 83.1 and 83.2 of the RGPD, precepts that provide:

"Each control authority will guarantee that the imposition of the administrative fines

proceedings under this Article for infringements of this Regulation

indicated in sections 4, 9 and 6 are in each individual case effective, proportionate

nothing 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 an admissible fine

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 interested parties affected and the level of damages and losses.

who 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 data controller or data processor.

taking into account the technical or organizational measures that have been 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 re-

medium to the infringement and mitigate the possible adverse effects of the infringement;

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 ordered

previously against the person in charge or the person in charge in question in re-

relationship with 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.

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b) The link between the activity of the offender and the performance of treatments

of personal data.

c) The profits obtained as a result of committing the offence.

d) The possibility that the conduct of the affected party could have induced the

commission of the offence.

e) The existence of a merger by absorption process after the commission

of the infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when not mandatory, a data protection delegate.

cough.

h) The submission by the person in charge or person in charge, voluntarily to alternative conflict resolution mechanisms, in those positions in which there are controversies between them and any interested do."

In determining the amount of the sanction of an administrative fine that proceeds to impose the claimed person as responsible for an infringement of article 83.5.a) RGPD, it is appreciated, in light of the transcribed precepts and taking into consideration the documentation that works in the file, the concurrence of the following elements that operate as aggravating factors:

- The illicit treatment of personal data carried out by sending the number mobile phone number of thousands of messages informing him of the receipt of a package or provision of a service and the name of the recipient, without legitimacy for it is notoriously malicious or intentional (article 83.2.b RGPD) Even more so if it is taken into consideration that the claimant addressed the re-claimed requesting the deletion of your personal data and explaining the reason of it.

- The infringement of the principle of legality has been maintained over time for more six months. There is no news that on the date of issuing this resolution the claimant has stopped receiving the reported emails (article 83.2 k, of the RGPD in relation to article 76.2.a) of the LOPDGDD)

The RGPD, article 83.1, requires that, in the imposition of administrative fines for infringement of the RGPD, the control authority guarantees that they are, in each case, "effective, proportionate and dissuasive". These criteria that govern the determination of the amount of the sanction of a fine require, in the case at hand, to appraise. Examine all the circumstances that could reflect a lesser culpability of the infraction. or a decrease in the unlawfulness of their conduct, without thereby ceasing to

effectively protect the violated fundamental right.

The claimed entity is a small business.

Based on the foregoing, it is agreed to sanction the defendant with an administrative fine.

whose amount is set at 3,000 euros.

Among the corrective powers that article 58.2 of the RGPD attributes to the authorities

In addition to the administrative fine provided for in section i), control data includes

that of "ordering the controller or processor that the processing operations

treatment comply with the provisions of this Regulation, where appropriate, in accordance with

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a certain way and within a specified period", section d).

Article 83.2 of the RGPD allows them to be imposed, together with the penalty of

ta, some of the remaining corrective measures included in article 58.2 RGPD.

Thus, article 83.2 establishes that, depending on the circumstances of each case, "the

administrative fines will be imposed" "in addition to or as a substitute for the measures

contemplated in article 58, section 2, letters a) to h) and j)".

Thus, "in addition" to the sanction of a fine, under article 58.2.d)

RGPD, the claimed party is ordered to stop sending service provision messages.

cios to the telephone number of the claimant because, as long as the claimed does not proceed to

For this, it will continue to perpetrate the infringement of article 6.1.a) RGPD for which it is responsible.

saber.

The term granted to the claimed party to proceed to cease sending messages

messages to the claimant's mobile phone number is 10 calendar days to be

They will take effect from the date in which this resolution is enforceable.

It is recalled that failure to comply with the sanctions imposed in this regulation solution could constitute a new infringement of data protection regulations typified in article 83.6 of the RGPD, a rule that provides: "The breach of the resolutions of the control authority in accordance with article 58, section 2, sanction in accordance with section 2 of this article with administrative fines of 20,000,000 Euros maximum or, in the case of a company, an equivalent amount. valent to a maximum of 4% of the total global annual turnover of the financial year previous financial statement, opting for the highest amount".

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

The Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE INSTAPACK, S.L., with NIF B46836565, for an infringement of the article 6.1.a), in relation to article 5.1.a), of the RGPD, typified in Article 83.5.a) of the RGPD, a fine of €3,000 (three thousand euros).

SECOND: ORDER INSTAPACK, S.L., with NIF B46836565, which, within a period of ten calendar days from the execution of this resolution, proceed to CESAR in the sending messages to the mobile phone number of the claimant.

THIRD: NOTIFY this resolution to INSTAPACK S.L.

FOURTH: Warn the sanctioned party that the sanction imposed must be made effective once

Once this resolution is enforceable, in accordance with the provisions of article 98.1.b) of Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations, within the voluntary payment period indicated in article 68 of the General Collection Regulations, approved by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003, of December 17, through its deposit in the restricted account number ES00 0000 0000 0000 0000, open to

name of the Spanish Agency for Data Protection in the banking entity CAIXA-

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BANK, S.A. or otherwise, it will be collected in the executive period.

Received the notification and once executed, if the date of execution is

between the 1st and 15th of each month, both inclusive, the term to make the payment

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

between the 16th and last day of each month, both inclusive, the payment term

It will be until the 5th of the second following month or immediately after.

In accordance with the provisions of article 50 of the LOPDGDD, this Re-

The solution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative procedure (article 48.6 of the LO-

PDGDD), and in accordance with the provisions of articles 112 and 123 of the Law

39/2015, of October 1, of the Common Administrative Procedure of the Administrations

Public tions, the interested parties may optionally file an appeal for repossession.

petition 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-administrative appeal before the Contentious-Administrative Chamber

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

do 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

ferent legal text.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations public authorities, 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 the 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 city of Madrid Law 39/2015, of October 1. You must also transfer to the Agency the documentation certifying the effective filing of the contentious-administrative appeal. Yes, the Agency was not aware of the filing of the contentious-administrative appeal within two months from the day following the notification of the precautionary suspension. This resolution would end the precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

812-151020

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