

□ Procedure No.: PS/00310/2020

RESOLUTION OF PUNISHMENT PROCEDURE

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

FIRST: Ms. A.A.A. (hereinafter, the claimant) dated February 26, 2020

filed a claim with the Spanish Data Protection Agency. The

claim is directed against DMS Transporte de Viajeros, S.L. with NIF B88358668 (in
later, the claimed one).

The claimant states in her claim that the hairdresser where she works

has prepared and distributed an advertising brochure in which his image has been incorporated
without your consent.

Provide advertising with your image.

SECOND: In accordance with article 65.4 of the LOPGDD, which has provided for a

mechanism prior to the admission to processing of the claims that are formulated before

the AEPD, consisting of transferring them to the Data Protection Delegates

designated by those responsible or in charge of the treatment, for the purposes foreseen

in article 37 of the aforementioned rule, or to these when they were not designated, it was given

transfer of the claim to the claimed entity so that it proceeded to its analysis and

respond to the complaining party and to this Agency within a month.

THIRD: On June 3, 2020, the respondent was asked to contribute to

this Agency the following information:

1. The decision made regarding this claim.

2. In the event of exercising the rights regulated in articles 15 to

22 of the RGPD, accreditation of the response provided to the claimant.

Report on the causes that have motivated the incidence that has originated

the claim.

Report on the measures adopted to prevent the occurrence of similar incidents, dates of implementation and controls carried out to check its effectiveness.

3.

Four.

5. Any other that you consider relevant.

The writing was notified to the claimed electronically being the date of acceptance of the notification on June 5, 2020, as evidenced by the certificate issued by the FNMT that is in the file.

After the term granted to the defendant without having responded to the request for information, in accordance with the provisions of article 65.2 of the LOPDGDD, signed on September 17 of this year the admission agreement to processing of this claim.

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FOURTH: On October 16, 2020, 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 RGD, typified in Article 83.5 of the RGD. Said agreement was notified electronically on the same day, month and year to the reclaimed.

FOURTH: Formal notification of the initiation agreement, 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.

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

In this proceeding, the following are considered proven facts:

FACTS

FIRST: On February 26, 2020, the claimant states that in the hairdresser where he works has produced and distributed an advertising brochure in which Your image has been incorporated without your consent.

SECOND: It is stated in the documentation that accompanies your claim the advertising with your image.

THIRD: On October 16, 2020, this sanctioning procedure was initiated by the alleged infringement of article 6.1) of the RGPD, being notified on October 16, 2020. Not having made allegations, the respondent, to the initial agreement.

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each control authority, and as established in arts. 47 and 48.1 of the LOPDGDD, the Director of the Spanish Data Protection Agency is competent to resolve this procedure.

II

The defendant is imputed the commission of an infraction for violation of the Article 6 of the RGPD, "Legality of the treatment", which indicates in its section 1 the

assumptions 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

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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;

(...)"

III

Sections b), d) and i) of article 58.2 of the RGD provide 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;

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
particularly the following:

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(...)

a) 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

The documentation in the file offers evidence that the claimed, violated article 6.1 of the RGPD, since it processed the image of the claimant, worker of the claimed, for advertising purposes, without had no legitimacy to do so.

It is noteworthy that required information on these facts to the claimed, Although it is known that the notification was delivered on June 5, 2020, it has not replied to this Agency.

Likewise, on October 16, 2020, this sanctioning procedure was initiated for the alleged infringement of article 6.1) of the RGPD, being notified on October 16, 2020. Not having made allegations, the respondent, to the initial agreement.

However, and this is essential, the defendant does not prove legal standing to the processing of the claimant's data.

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The exposed facts constitute, on the part of the defendant, an infraction to the provided in article 6.1 a) of the RGPD.

This infraction sanctioned with a warning, in accordance with article 58.2.b) of the RGPD, when collecting through said advertising brochure the image of the claimant and consider that the administrative fine that could be levied pursuant to the provisions of article 83.5.b) of the RGPD would constitute a disproportionate burden for the claimed, whose main activity is not directly linked to the processing of personal data, since there is no record of the commission of any infringement above regarding data protection.

Likewise, in accordance with the provisions of the aforementioned article 58.2.d) of the RGPD, the claimed party, as data controller, may be ordered to adopt

of the necessary measures to remove said advertising brochures where the image of the claimant appears, in accordance with the provisions of article 6.1 a), as well as the provision of supporting evidence of compliance with what is required.

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Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of the sanctions whose existence has been proven, the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE DMS TRANSPORTE DE VIAJEROS, S.L., with NIF

B88358668, for an infringement of Article 6.1 of the RGPD, typified in Article 83.5 of the RGPD, a sanction of warning.

SECOND: REQUEST DMS TRANSPORTE DE VIAJEROS, S.L., with NIF

B88358668, so that within a month he proves to this body the compliance that proceeds to:

☐ the adoption of the necessary measures so that said brochures are withdrawn advertisements where the image of the claimant appears, in accordance with the established in article 6.1 a), as well as the provision of evidence proof of compliance with what is required.

SECOND: NOTIFY this resolution to DMS TRANSPORTATION OF PASSENGERS, S.L., with NIF B88358668

In accordance with the provisions of article 50 of the LOPDGDD, 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 LOPDGDD, 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.

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-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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Director of the Spanish Data Protection Agency

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