

Procedure No.: PS/00357/2019

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

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

filed a claim with the Spanish Data Protection Agency. The

claim is directed against GUIA TELEFONICA PUBLICIDAD, S.L. with NIF

B93399004 (hereinafter, the claimed one). The grounds on which the claim is based are

who have debited their bank account for online advertising services that have not

authorized on July 2, 2018, for an amount of 290.40 euros. that this charge

comes from alleged Yellow Pages services that the claimant has not

hired

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-

Tetuán, on October 5, 2018, for these facts.

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 March 29, 2019, the respondent states the following:

1. That the contact information held by the claimed party was obtained through the Internet, therefore dealing with public data and within the reach of any interested party for which the express consent of the same is not necessary.

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2. Regarding bank details, they were provided voluntarily by the claimant, as reflected in the recording that, as stated, they will send to the Agency.

3. Provide the response sent to the claimant, dated December 4, 2018, in which they inform you that your contact details and those of the entity to which represents have been obtained through the internet, with respect to the rest of the data (banks, etc...), he has provided them himself, through a telephone conversation maintained and that was recorded by the company, in which it accepts the hiring of the services they offer you.

4. They have not provided this Agency with the recording that proves the service

hired by the claimant.

THIRD: On October 23, 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 November 14 of this year, made, in summary, the following allegations:

“The personal contact information of the complainant was obtained through internet, specifically, through advertisements that the complainant himself had contracted on another web page, whose content is similar to that of our entity, advertisements that today are not found on the internet, according to the search engine of Google, because they have been eliminated in accordance with the applicable regulations regarding personal data protection.

Said data, limited to the name, profession and telephone number of D.A.A.A., are data professionals, and should be considered as company data, and, therefore, data not protected or covered by current regulations on data protection.

That the use that has been given to said contact data has been limited to the implementation of contact with it to offer our advertising services, services that at that time it had contracts with our direct competitor.

The treatment must therefore be considered lawful, since they are not even data protected or protected by current data protection regulations and, in any case, their treatment was done lawfully taking into account of the legitimate interest of this entity to offer its services to potential clients, condition contained in art. 6.1. section f) of the RGPD.

Separate mention deserves the bank details D. AAA, which were provided by him to this entity. Proof of this is the recording of the call held by the commercial department of this entity and the D. A.A.A. itself, confirming the customer's compliance with the offered contract and confirms bank details previously provided, and it was for the specific purpose of contracting the services of this entity and make the payment required for that purpose.

Therefore, the bank details were obtained with the express consent of Mr. AAA, in accordance with art. 5 GDPR.

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On this occasion and parallel to the sending of this letter, through the registry electronically, and the shipment will be made, by certified mail, with a CD containing the recording".

FIFTH: On November 29, 2019, the respondent was notified of the opening of the testing period, taking into account the previous actions of investigation E/01437/2019, 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 July 2, 2018, for an amount of 290.40 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-Tetuán, on October 5, 2018, for these facts.

2º On November 14, 2019, the respondent states that the data bank accounts were provided by the claimant. Proof of this is the recording of the call maintained by the commercial department of this entity and the claimant, in which confirms the customer's compliance with the offered contract and confirms the bank details provided, and it was for the specific purpose of contracting 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 service that will be through a single receipt of 240 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

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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 RGD, "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;

(...)"

The infringement is typified in Article 83.5 of the RGD, 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:

(...)

b) The processing of personal data without the concurrence of any of the

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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

to the claimant.

Likewise, the respondent provides a copy of the telephone recording through the

consent was granted, on behalf of the claimant, for the hiring of

services. This recording was made on June 21, 2018, where

provides the following information: name of the claimed entity, as well as name and

surnames of the claimant, price of the service, duration, term of revocation and account

claimant's bank account and reports on various aspects of the contracting.

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

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:

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FIRST: FILE sanctioning procedure PS/00357/2019, instructed to

GUIA TELEFONICA PUBLICIDAD, S.L., with NIF B93399004, for having accredited

that it used reasonable diligence, since it adopted the necessary measures to

identify the person who made the contract.

SECOND: NOTIFY this resolution to PUBLICITY TELEPHONE GUIDE,

SL,

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.

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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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