

□ File No.: EXP202101732

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: A.A.A. (hereinafter, the complaining party) dated June 22, 2021  
filed a claim with the Spanish Data Protection Agency. The  
claim is directed against BICLAMEDIA, S.L. with NIF B87022117 (hereinafter, the  
claimed party or BICLAMEDIA). The grounds on which the claim is based are  
following:

The complaining party states that he received commercial calls on his line of  
mobile telephony: \*\*\*TELÉFONO.1, on behalf of IBERDROLA and REPSOL, in which  
indicated that the data had been obtained from the respondent, BICLAMEDIA.

The complaining party provides a data collection certificate granted by the party  
claimed, noting that the data had been obtained on April 13, 2017  
by receiving them through the participation form in the  
draw on the website \*\*\*URL.1, and informing that in the participation form  
received, it is stated that the user granted BICLAMEDIA the free and express consent  
for the processing of your personal data for marketing purposes, through the  
acceptance of the privacy policy, the conditions of use and the bases of the draw  
applicable at that time. The claimant denies that he has completed that  
form and have participated in the contest.

Along with the claim is provided:

- Certificate of obtaining personal data issued by

BICLAMEDIA, S.L.

SECOND: In accordance with article 65.4 of Organic Law 3/2018, of 5

December, of Protection of Personal Data and guarantee of digital rights (in

hereinafter LOPDGDD), said claim was transferred to BICLAMEDIA, so that

proceed to its analysis and inform this Agency within a month of the

actions carried out to adapt to the requirements set forth in the regulations of

Data Protection.

And more specifically on the following extremes:

1. The decision made regarding this claim.

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

2/10

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.

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

4. Report on the measures adopted to prevent the occurrence of

similar incidents, dates of implementation and controls carried out to verify

its effectiveness.

5. Any other that you consider relevant.

Also informing you that in the event that the claim is related to

with advertising and commercial or promotional communications, some

Documents that would be convenient to provide with the response to the request

of information:

- Document accrediting the consent of the affected party. Data source

data of the affected party in their systems and how to obtain them

- Document justifying the cancellation of personal data for treatment

for advertising purposes, where appropriate.

- Others.

The transfer, which was carried out in accordance with the regulations established in Law 39/2015, of

October 1, of the Common Administrative Procedure of the Administrations

Public (hereinafter, LPACAP), was collected on 09/09/2021 as recorded in the

acknowledgment of receipt that works in the file.

After the period of one month granted for the reply to the transfer of the

claim, dated 10/25/2021, this Agency receives a written response from

BICLAMEDIA, S.L. in which it states that:

- Has proceeded to collect the information concerning it.

- Provides supporting documentation of the response provided to the

claimant:

- ☐ Document number One that accredits the response provided to the

claimant (emails)

- ☐ Documents number Two and Three, certificates of access and

deletion of the claimant's data, respectively

- And reports that:

- o The incident that gave rise to the claim was that the person affected

filed a claim with the AEPD denying that there was

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

C/ Jorge Juan, 6

28001 – Madrid

completed this form and has participated in the contest,

enabled at the time on the website \*\*\*URL.1.

o On June 16, 2021, the claimant exercises the right to access to your personal data before the claimed party, stating expressly the withdrawal of consent for any treatment other than to respond to your request.

o On June 17 and 22, 2021, BICLAMEDIA answers the claimant confirming receipt of your email and responding to your request respectively.

o On the same day, June 22, 2021, the claimant files with the AEPD the claim that gave rise to this file.

or BICLAMEDIA, as is the case with the rest of the companies in the digital marketing and other sectors, cannot guarantee with absolute certainty that the data received is correct.

o BICLAMEDIA informs in its privacy policy that in the case of Providing data from third-party companies is the responsibility of the user. that supplies them to inform of such circumstance to the third party whose data will communicate to us.

o BICLAMEDIA proceeded to delete the personal data of the claimant in their files, thus guaranteeing the full exercise of the rights fundamental rights of the claimant in the digital reality.

o This decision is made in order to ensure the performance of a proactive attitude required by the legal system before any evidence about the veracity and/or ownership of the data received, in guarantee of the rights recognized in articles 15 to 22 of the GDPR. And, in addition, the exclusion of the draw associated with the

claimant record.

o BICLAMEDIA has not breached the existing regulations regarding data protection and that it has adopted the necessary measures and to its scope to satisfy the claimant's request.

o BICLAMEDIA has demonstrated that it has adopted the corrective measures aimed at putting an end to the possible and alleged breach of the data protection regulations, and no damage has been caused to the interested.

o Requests that a resolution be issued agreeing the inadmissibility of the claim filed by the claimant, and consequently the

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

4/10

dismissal and filing of this proceeding initiated without imposition of any sanction, also expressing the absence of any responsibility on the part of BICLAMADIA, for having been its action in accordance with the regulations on data protection

THIRD: On December 1, 2021, in accordance with article 65 of the LOPDGDD, the claim filed by the claimant was admitted for processing.

FOURTH: On March 17, 2022, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimed party, in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations (in hereinafter, LPACAP), for the alleged violation of Article 6 of the RGPD, typified in the

Article 83.5 of the RGPD.

FIFTH: Notification of the aforementioned start-up agreement in accordance with the rules established in Law 39/2015, of October 1, on the Common Administrative Procedure of the Public Administrations (hereinafter, LPACAP), the respondent filed in dated 04/07/2022 brief of allegations in which, in summary, it stated that:

FIRST.- The opening of this sanctioning procedure, based only in a manifestation of the affected in which he affirms that he does not filled out a form or participated in a contest, without providing evidence rational any of the existence of infraction, supposes a clear violation of the principle of presumption of innocence recognized in our constitutional text.

SECOND.- On the part of BICLAMEDIA, in a timely manner, the request of the user and a certificate of access to their personal data was provided and the request made by the Spanish Data Protection Agency.

In addition to the provision of the certificate of obtaining personal data and response to the request made, attached to this document is provides the following documentation, accrediting the obtaining of the consent of the affected party as a basis of legitimacy for the treatment of your personal data for direct marketing purposes:

Documents One to Three, log files with the registration data and the activity of the claimant at the time of browsing/registration on the responsible party's website of the file.

Document Four, registration table certificate issued by the person in charge of the personal data file.

THIRD.- BICLAMEDIA understands that, with the documentation provided by the data controller, it is sufficiently demonstrated that

BICLAMEDIA has carried out a correct treatment of the personal data of the

affected under the protection of the legitimating cause set forth in article 6.1.a) of the RGPD, and has carried out this in a way that respects the regulations in protection of personal data in force at any time.

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

5/10

Therefore, BICLAMEDIA requests that, having submitted this document and your attached documents, are admitted, have evacuated, in a timely manner, the procedure conferred, and, by virtue of the allegations made in the body of the this writing, is served to issue a resolution agreeing to the dismissal and file of the Sanctioning Procedure EXP202101732, without imposition of any sanction, also expressing the absence of any responsibility by BICLAMEDIA, S.L.U.

SIXTH: On 04/29/2022, a request for additional information is addressed to the claimant. on whether on 04/13/2017 you accessed the website \*\*\*URL.1, and filled out the form partition river in the draw for the trip to Milan, and accepted the conditions of the policy of website privacy; Likewise, information about your IP was required.

That same day, the claimant filed a brief answering the request in the reiterating that he had never accessed that website or accepted its consent. conditions, nor given their consent for their data to be processed.

The reply brief does not contain any information about your IP.

SEVENTH: On May 25, 2022, a resolution proposal was formulated, proposing the file of the actions derived from the sanctioning procedure followed against BICLAMEDIA.

Bearing in mind that despite the obligation imposed on the person responsible for demonstrate that the interested party consented to the processing of their data as collected in section 1 of article 7 of the RGPD that establishes that. "1. When the treatment is based on the consent of the interested party, the person in charge must be able to demonstrate that the person consented to the processing of their personal data.

And recognized by the reiterated doctrine of the National High Court (for all recent Judgment of May 5, 2021, of the Contentious-Administrative Chamber, Section 1, Rec.1434/2020) in the F.D. 6 of this Judgment states that: "This Chamber has repeatedly pointed out (SAN of April 23, 2015, Rec. 97/2014, for all) which corresponds to the person carrying out the treatment to certify that they have obtained the consent of the affected party when – as is the case here – he denies having granted it, and to this end, it must arbitrate the necessary means to do so" (emphasis added).

Being the reason for the opening of the sanctioning procedure the lack of accreditation having obtained the consent of the claimant for the processing of data of the claimant.

Later, in the pleadings brief to the initial agreement, it was when BICLAMEDIA provided new additional documents that show that from IP \*\*\*IP.1 on 04/13/2017 from 6:19:26 p.m. to 6:23:11 p.m.

visited the website \*\*\*URL.1 entering the claimant's personal data (name, surnames, email, telephone, address, gender) appearing in conditions c1, c2, c3 and c4 the value "1" in the User Registration Table and the IP Activity Log" which, according to explanatory note contained in said Table, would mean the acceptance, by the person that used said IP of the conditions regarding the privacy policy of

BICLAMEDIA and the bases of the draw, as well as the reception of communications

C/ Jorge Juan, 6

28001 – Madrid



[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

6/10

commercials both by BICLAMEDIA and by sponsors of

this, and, also, to the transfer of your data to third companies related to the

sectors of activity that are detailed in the privacy policy of BICLAMEDIA.

The presentation of this documentation supposes the contribution of new indications that

could involve obtaining the consent of the interested party for the treatment of

the data, despite the fact that the interested party has repeatedly stated that they do not

never having accessed the URL object of the sanctioning procedure by which

issued the initiation agreement.

What entails the existence of a reasonable doubt about obtaining the

consent of the claimant or a third party to the processing, notwithstanding the

Repeated manifestations of the claimant in the sense of not having lent his

consent to the processing of the data that gave rise to the initiation agreement,

therefore, the judgment of subjective blameworthiness would decline as a subjective element for

the imposition of administrative sanctions.

Therefore, in application of the administrative sanctioning procedure of the principle of

innocence recognized in article 24.2 of the Spanish Constitution, which prevents

impute an administrative infraction when an administrative infraction has not been obtained and

proof of charge that accredits the facts that motivate the imputation or the intervention

in the same of the alleged offender, the file of the procedure was proposed

penalty initiated against BICLAMEDIA.

Of the actions carried out in this procedure and the documentation

in the file, the following have been accredited:

PROVEN FACTS

FIRST: A.A.A. (hereinafter, the complaining party) dated June 22, 2021

filed a claim with the Spanish Data Protection Agency. The

claim is directed against BICLAMEDIA, S.L. with NIF B87022117 (hereinafter, the

claimed party or BICLAMEDIA). The grounds on which the claim is based are

following:

The complaining party states that he received commercial calls on his line of

mobile telephony: \*\*\*TELÉFONO.1, on behalf of IBERDROLA and REPSOL, in which

indicated that the data had been obtained from the respondent, BICLAMEDIA.

The claimant denies that he has completed the participation form in the

draw on the \*\*\*URL.1 website, and who has participated in the contest.

SECOND: After the period of one month granted for the response to the transfer

of the claim, dated 10/25/2021, this Agency receives a letter from

response from BICLAMEDIA, S.L. with the content that is collected in the antecedent

second of this motion for a resolution.

THIRD: Along with the brief of allegations to the agreement to initiate this

sanctioning procedure, presented on 04/07/2022, BICLAMEDIA provides,

as new documents to the file, a series of log files with the data of

[www.aepd.es](http://www.aepd.es)

C/ Jorge Juan, 6

28001 – Madrid

[sedeagpd.gob.es](http://sedeagpd.gob.es)

7/10

registration and activity at the time of browsing/registration on the website of the person in charge

of the file, as well as a registration table certificate issued by the person in charge of the

personal data file.

These documents reflect that through the IP \*\*\*IP.1 on 04/13/2017 between the

6:19:26 p.m. and 6:23:11 p.m. the website \*\*\*URL.1 was visited, entering the data personal details of the claimant (name, surnames, email, telephone, address, gender) and appearing in the conditions c1, c2, c3 and c4 the value "1" (which would mean the acceptance of the condition, according to explanatory note) in the "User Registration Table and the Log of IP activity.

The provision of this new documentation introduces a reasonable doubt about the existence of a valid obtaining of the consent of the claimant or a third party for the treatment, despite the repeated statements of the claimant in the sense of not having given your consent for the treatment of the data that gave rise to the initial agreement, so the judgment of reproachability would decline objective as an element for the imposition of administrative sanctions.

## FOUNDATIONS OF LAW

Yo

In accordance with the powers that article 58.2 of Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter RGPD), grants each control authority and as established in articles 47 and 48.1 of the Law Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter, LOPDGDD), is competent to initiate and resolve this procedure the Director of the Spanish Data Protection Agency.

Likewise, article 63.2 of the LOPDGDD determines that: "The procedures processed by the Spanish Agency for Data Protection will be governed by the provisions in Regulation (EU) 2016/679, in this organic law, by the provisions regulations issued in its development and, as long as they do not contradict them, with a subsidiary, by the general rules on administrative procedures."

II

Obtaining or capturing data for participation in a draw and its

subsequent assignment to a third party for marketing purposes, pursuant to article 4.2 of the RGPD, constitute "treatments" of personal data and their protection, therefore, is object of said Regulation.

Furthermore, independent data processing, that is, for different purposes, one the processing of applications for participation in the draw; and the other, the performance of marketing activities by a third party.

III

Article 6.1 of the RGPD establishes the assumptions that allow considering lawful processing of personal data:

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

8/10

"1. The treatment will only be lawful if it meets at least one of the following conditions:

a) the interested party gave their consent for the processing of their data personal for one or more specific purposes;

d)

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;

c) the treatment is necessary for the fulfillment of a legal obligation applicable to the data controller;

the processing is necessary to protect the vital interests of the data subject or 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 pursued by the data controller or by a third party, provided that over said interests do not prevail the interests or the rights and freedoms fundamental data 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 processing carried out by public authorities in the exercise of their functions.

On this question of the legality of the treatment, it also affects the Recital 40 of the aforementioned RGPD, when it states that "For the processing is lawful, personal data must be processed with the consent of the interested party or on any other legitimate basis established in accordance with Law, either either in this Regulation or by virtue of other law of the Union or of the Member States covered by this Regulation, including the need to comply with the legal obligation applicable to the data controller or the need to to execute a contract to which the interested party is a party or in order to take measures at the request of the interested party prior to the conclusion of a contract.»

Article 7 of the RGPD establishes the conditions for consent:

"1. When the treatment is based on the consent of the interested party, the responsible must be able to demonstrate that he consented to the treatment of his personal information.

2. If the data subject's consent is given in the context of a statement writing that also refers to other matters, the request for consent will be presented in such a way as to be clearly distinguishable from other matters, in a manner

intelligible and easily accessible and using clear and simple language. It will not be binding any part of the declaration that constitutes an infringement of these Regulations.

3. The interested party shall have the right to withdraw their consent at any moment. The withdrawal of consent will not affect the legality of the treatment based on consent prior to withdrawal. Before giving your consent, the Interested party will be informed of this. It will be as easy to withdraw consent as it is to give it.

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

9/10

4. In assessing whether consent has been freely given, account will be taken to the greatest extent possible whether, among other things, the execution of a contract, including the provision of a service, is subject to the consent of the processing of personal data that is not necessary for the execution of said contract".

In relation to this aspect of consent, Recital 32 of the mentioned RGPD, provides that "Consent must be given through an act clear affirmative that reflects a manifestation of free will, specific, informed, and unequivocal of the interested party to accept the processing of personal data that concern you, such as a written statement, including by means electronically, or a verbal statement. This could include checking a box on a website on the internet, choose technical parameters for the use of services of the information society, or any other statement or conduct indicating clearly in this context that the interested party accepts the proposal of treatment of your personal information. Therefore, silence, boxes already checked or inaction will not

must constitute consent. Consent must be given for all treatment activities carried out with the same or the same purposes. When the treatment has several purposes, consent must be given for all of them. If he The consent of the interested party must be given as a result of a request by means electronically, the request must be clear, concise and not unnecessarily disrupt the use of the service for which it is provided.”

In relation to the above, it is considered that although initially there were evidence that the data processing of the person who allegedly filled out the draw form and its transfer to third parties, object of this claim, would have been carried out without legitimate cause of those included in article 6 of the RGPD, the provision of new documentation by the respondent means that such evidence, if not are completely refuted if they are at least questioned, which makes it impossible reach certainty about the commission of the offence.

The GDPR applies to personal data, which is defined as "data personal" means 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.

BICLAMEDIA provides as proof of obtaining consent for carrying out the treatment activities, referred to in the claim, new documents (log files and certificate of the registration table) that could involve the verification of activities to obtain the consent of the people who access the website that is the subject of the claim.

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

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)

RESOLVES:

10/10

FIRST: FILE procedure PS/00578/2021, initiated to the entity

BICLAMEDIA, S.L., with NIF B87022117.

SECOND: NOTIFY this resolution to D. A.A.A. and to BICLAMEDIA, S.L.

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.

Sea Spain Marti

Director of the Spanish Data Protection Agency



938-050522

C/ Jorge Juan, 6

28001 – Madrid

[www.aepd.es](http://www.aepd.es)

[sedeagpd.gob.es](http://sedeagpd.gob.es)