- File No.: PS/00395/2021

RESOLUTION OF PUNISHMENT PROCEDURE

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

to the following

BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the complaining party), on September 21

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

claim is directed against CAFFE VECCHIO, S.L., with NIF B15571680 (in

hereafter, the party claimed). The grounds on which the claim is based are

following:

Specifically, you denounce the publication of your personal data on the Internet. manifest

that the party complained against responds to the negative reviews that customers put in

Google to the establishment where he works, saying that the reason for the review is

that they are friends of the claimant whom she identifies by name and surname, revealing

also the circumstances of his labor sanction.

Together with the claim, it provides four screenshots in which, with the title of

"Owner's response", the response to different reviews is displayed with the

same text, which contains the following verbatim: “The fact that you are a friend of A.A.A.

that in addition to being dismissed (...), she was sanctioned from employment and salary for having

committed serious and very serious offenses for dishonorable reasons, according to

establishes the state collective agreement for hospitality, it does not give you the right to damage the

reputation…"

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

December, Protection of Personal Data and Guarantee of Digital Rights

(hereinafter LOPDGDD), said claim was transferred to the respondent, 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.

On the date of October 30, 2020, and with check-out number

O00007128s2000016046, is transferred to the claimed, through electronic notification,

the claim presented by the claimant, in accordance with article 65.4 of the

Organic Law 3/2018, of December 5, on the Protection of Personal Data and

guarantee of digital rights (LOPDGDD), to proceed with its analysis and

respond to this Agency within a month. This notice was returned on

November 10, 2020, due to automatic rejection, due to the fact that

ten calendar days from its availability without it having been accessed.

On the date of November 10, 2020, and with check-out number

O00007128s2000017669, sent by post to the address CALLE REAL 74-76 -

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15001 A CORUÑA (A CORUÑA), which is the domicile of the person claimed in accordance with the

information collected from the Central Mercantile Registry, a notice that the

notification by electronic means and that notification was attached, which had as a number of

output register O00007128s2000016046. CORREOS certifies that this notice was

returned to the origin, on November 16, 2020, by “Unknown”.

On the date of December 16, 2020, and with check-out number

O00007128s2000024851, sent by post to the address of the establishment

of the claimed, located in the royal street of A Coruña, a notice that the

notification by electronic means, attaching said notification that it had as a number of

output register O00007128s2000016046. CORREOS certifies the delivery of this

notice, on January 8, 2021, at RÚA REAL, 55 - 15003 A CORUÑA (A CORUÑA).

No response has been received to this transfer letter.

THIRD: On April 6, 2021 in accordance with article 65 of the

LOPDGDD, the claim filed by the claimant was admitted for processing.

FOURTH: The General Subdirectorate for Data Inspection proceeded to carry out

of previous investigative actions to clarify the facts in

matter, by virtue of the investigative powers granted to the authorities of

control in article 57.1 of Regulation (EU) 2016/679 (General Regulation of

Data Protection, hereinafter RGPD), and in accordance with the provisions of the

Title VII, Chapter I, Second Section, of the LOPDGDD, having knowledge of the

following ends:

The data was published at the time of submitting the claim.

On the date of April 14, 2021, and with check-out number

O00007128s2100025731, is made available to the claimed, electronically,

a notification with a request for information in which you are also

transferred the claim presented by the claimant so that it proceeded to its

analysis and respond to this Agency within ten business days. Is

notification was returned on April 25, 2021, due to automatic rejection, due to

that ten calendar days have elapsed since it was made available, without

I would have agreed to it.

On the date of June 1, 2021, and with check-out number

O00007128s2100038987, a notice is sent by post that the

notification by electronic means and that notification is attached, which had as a number of

output register O00007128s2100025731. There is proof of delivery of this

notification, on June 16, 2021, at RÚA REAL, 55 - 15003 A CORUÑA (A

CORUÑA).

As of the date of signing this report, no response has been received to these

notifications by the claimant.

The existence of responses to reviews similar to those mentioned by the complainant

It follows from the result of the consultation carried out on July 20, 2021 in the

web page ***URL.1 entering in the search “caffe vecchio in Rúa Real, 55,

15003 A Coruña”, clicking on the reviews and selecting the option (…).

This result shows a review with an “Owner Response” of

"9 months ago" which contains, among others, the following text: "The fact that you are

friend of A.A.A., who in addition to being fired (...), was sanctioned from employment and salary

for having committed serious and very serious offenses for dishonorable reasons,

According to the state collective agreement for hospitality, it does not give you the right to damage

reputation…”

FIFTH: On September 13, 2021, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimed party,

for the alleged infringement of article 5.1.f) and 6.1 a) of the RGPD, typified in article

83.5 of the GDPR.

SIXTH: After the term granted for the formulation of allegations to the agreement

of the beginning of the procedure, it has been verified that no allegation has been received

by the claimed party.

Article 64.2.f) of Law 39/2015, of October 1, on Administrative Procedure

Common Public Administrations (hereinafter LPACAP) -provision of which

the party claimed was informed in the agreement to open the proceeding-

establishes that if allegations are not made within the stipulated period on the content of the

initiation agreement, when it contains a precise statement about the

imputed responsibility, may be considered a resolution proposal. In the

present case, the agreement to initiate the disciplinary proceedings determined the

facts in which the imputation was specified, the infraction of the RGPD attributed to the

claimed and the sanction that could be imposed. Therefore, taking into account that

the party complained against has made no objections to the agreement to initiate the file and

In accordance with the provisions of article 64.2.f) of the LPACAP, the aforementioned agreement of

beginning is considered in the present case resolution proposal.

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

In this proceeding, the following are considered proven facts:

PROVEN FACTS

FIRST: On September 21, 2020, the claimant filed

claim before the Spanish Agency for Data Protection, denouncing the

publication of your personal data on the Internet by the complained party, the

which, by responding to the negative reviews that customers left the establishment

in which he worked through Google, he identified her with a first and last name,

also revealing the circumstances of his labor sanction.

SECOND: There are four screenshots in which, with the title of

"Owner's response", the response to different reviews is displayed with the

same text, which contains the following literal:

“The fact that you are a friend of A.A.A., which in addition to being fired (…), was

sanctioned of employment and salary for having committed two serious and very

serious for dishonorable reasons, as established by the state collective agreement of

hospitality, does not give you the right to damage the reputation ... ".

THIRD: The existence of responses to reviews similar to those mentioned by the

claimant follows from the result of the consultation held on July 20,

2021, on the ***URL.1 website by entering “caffe vecchio en Rúa” in the search

Real, 55, 15003 A Coruña”, clicking on the reviews and selecting the option (…).

This result shows a review with an “Owner Response” of

"9 months ago" which contains, among others, the following text: "The fact that you are

friend of A.A.A., who in addition to being fired (...), was sanctioned from employment and salary

for having committed serious and very serious offenses for dishonorable reasons,

According to the state collective agreement for hospitality, it does not give you the right to damage

reputation…”

FOUNDATIONS OF LAW

FIRST: In accordance with the powers that article 58.2 of the 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."

SECOND: Article 5.1.f) of the RGPD, Principles related to treatment, indicates the

Next:

"1. The personal data will be:

(…)

f) processed in such a way as to ensure adequate security of the data

including protection against unauthorized or unlawful processing and against

its loss, destruction or accidental damage, through the application of technical measures

or appropriate organizational ("integrity and confidentiality").

Article 5 of the LOPDGDD, Duty of confidentiality, states the following:

"1. Those responsible and in charge of data processing, as well as all

people who intervene in any phase of this will be subject to the duty of

confidentiality referred to in article 5.1.f) of Regulation (EU) 2016/679.

2. The general obligation indicated in the previous section will be complementary to the

duties of professional secrecy in accordance with its applicable regulations.

3. The obligations established in the previous sections will be maintained even when

the relationship between the obligor and the person in charge or in charge of the transaction had ended.

treatment".

The documentation in the file proves that the claimed party violated the

article 5 “Principles related to treatment” of the RGPD, section 1.f), in relation to

Article 5 “Duty of confidentiality” of the LOPGDD, when disclosing information and data

of a personal nature to third parties, when responding to negative customer reviews

in Google, publishing the name and surnames of the claimant, as well as the

circumstances of your labor sanction.

This duty of confidentiality, previously the duty of secrecy, must be understood

whose purpose is to avoid those leaks of data not consented to by the users.

holders of these This is an obligation that falls to the person in charge and in charge

treatment, as well as anyone who intervenes in any phase of the

treatment; and that it is complementary to the duty of professional secrecy.

THIRD: Article 6 of the RGPD, "Legality of the treatment", establishes that:

"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;

c) the treatment is necessary for the fulfillment of a legal obligation

applicable to the data controller;

d) the processing is necessary to protect the vital interests of the data subject or

of another natural person;

e) the treatment is necessary for the fulfillment of a mission carried out

in the public interest or in the exercise of public powers vested in the

data controller;

f) the treatment is necessary for the satisfaction of legitimate interests

pursued by the data controller or by a third party, provided

that the interests or rights do not prevail over said interests and

fundamental freedoms of the interested party that require the protection of

personal data, in particular when the data subject 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 issue of the legality of the treatment, Recital 40 also affects

of the aforementioned RGPD, when it states that "In order for the treatment to be lawful, the

personal data must be processed with the consent of the interested party or

any other legitimate basis established in accordance with Law, either in the present

Regulation or by virtue of another Law of the Union or of the Member States to which

referred to in this Regulation, including the need to comply with the legal obligation

applicable to the data controller or the need to execute a contract with

which the interested party is a party or in order to take measures at the request of the

concerned prior to the conclusion of a contract.

Article 4 of the GDPR, Definitions, in section 11, states that:

"11) «consent of the interested party»: any manifestation of free will, specific,

informed and unequivocal by which the interested party accepts, either through a

declaration or a clear affirmative action, the treatment of personal data that

concern".

Also article 6, Treatment based on the consent of the affected party, of the new Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD), states that:

"1. In accordance with the provisions of article 4.11 of the Regulation (EU) 2016/679, consent of the affected party is understood to be any manifestation of will free, specific, informed and unequivocal by which he accepts, either through a declaration or a clear affirmative action, the treatment of personal data that concern.

2. When it is intended to base the processing of the data on the consent of the affected for a plurality of purposes, it will be necessary to state specific and unequivocal that said consent is granted for all of them.

3. The execution of the contract may not be subject to the affected party consenting to the processing of personal data for purposes unrelated to the maintenance, development or control of the contractual relationship".

Therefore, from the documentation in the file, it appears that the party claimed violated article 6.1 a) of the RGPD, since the processing of data is carried out without legitimating cause, as there was no consent for the treatment of said data.

Thus, it is considered that the known facts constitute an infraction, attributable to the claimed party, for violation of article 5.1.f) of the RGPD and of the article 6.1.a) of the RGPD, as there is no consent for the processing of data carried out or any other cause that legitimizes said treatment, for which it is of application of the provisions of art. 83.5 of the GDPR.

FOURTH: Article 83.5 of the RGPD provides the following:

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

paragraph 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)

basic principles for treatment, including conditions for con-

sentiment under articles 5, 6, 7 and 9;”

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For its part, article 71 of the LOPDGDD, under the heading "Infringements" determines what

following: Violations constitute the acts and conducts referred to in the

sections 4, 5 and 6 of article 83 of Regulation (EU) 2016/679, as well as those that

are contrary to this organic law.

For the purposes of the limitation period for infringements, article 72 of the

LOPDGDD, under the rubric of infractions considered very serious, the following:

"1. Based on the provisions of article 83.5 of Regulation (EU) 2016/679,

considered very serious and will prescribe after three years the infractions that suppose

a substantial violation of the articles mentioned therein and, in particular, the

following:

(…)

a)

b)

Yo)

The processing of personal data violating the principles and guarantees established

established in article 5 of Regulation (EU) 2016/679.

The processing of personal data without the concurrence of any of the conditions

legality of the treatment established in article 6 of the Regulation

(EU) 2016/679.

The violation of the duty of confidentiality established in article 5 of

this organic law.

In the present case, the infringing circumstances provided for in article

83.5 of the GDPR, transcribed above.

FIFTH: In order to determine the administrative fine to be imposed, the

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

"1. Each control authority will guarantee that the imposition of fines

administrative actions under this article for violations of this

Regulation indicated in sections 4, 5 and 6 are in each individual case

effective, proportionate and dissuasive.

2. 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 a fine

administration 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

nature, scope or purpose of the processing operation in question, as well as the number

number of interested parties affected and the level of damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor to pa-

allocate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the treatment,

gives an account of the technical or organizational measures that have been applied by virtue of the

articles 25 and 32;

e) any previous infringement 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 remedy 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

whether the person in charge or the person in charge notified the infringement and, if so, to what extent.

gives; i) when the measures indicated in article 58, section 2, have been ordered

given previously against the person in charge or the person in charge in question in relation to

the same matter, compliance with said measures;

j) adherence to codes of conduct under Article 40 or to certification mechanisms

approvals approved in accordance with article 42,

k) any other aggravating or mitigating factor applicable to the circumstances of the case,

such as financial benefits obtained or losses avoided, directly or indirectly.

mind, through infraction."

For its part, article 76 "Sanctions and corrective measures" of the LOPDGDD

has:

"1. The penalties provided for in sections 4, 5 and 6 of article 83 of the Regulation

(EU) 2016/679 will be applied taking into account the graduation criteria

established in section 2 of the aforementioned article.

2. 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.

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 it is not mandatory, a delegate for the protection of

h) The submission by the person in charge or person in charge, with

voluntary, to alternative conflict resolution mechanisms, in those

assumptions in which there are controversies between those and any

interested."

data.

In accordance with the precepts transcribed, in order to set the amount of the penalty for

infringement of article 5.1 f) and 6.1 a) of the RGPD to the claimed party, as responsible for the

cited infraction typified in article 83.5 of the RGPD, it is appropriate to graduate the fine

taking into account, as an aggravating circumstance:

Article 83.2 a) RGPD: the nature, seriousness and duration of the infringement, taking

taking into account the nature, scope or purpose of the processing operation to be carried out.

concerned, as well as the number of interested parties affected and the level of damages

that they have suffered; since the information has been published on the internet for eleven

months.

Considering the exposed factors, the valuation that reaches the amount of the fine

is €1,500 for violation of article 5.1 f) and 6.1 a) of the RGPD.

SIXTH: Establishes Law 40/2015, of October 1, on the Legal Regime of the Sector

Public, in Chapter III on the "Principles of the power to sanction", in the

Article 28 under the heading "Responsibility", the following:

"1. They may only be sanctioned for acts constituting an infraction.

natural and legal persons administratively, as well as, when a Law

recognize capacity to act, affected groups, unions and entities

without legal personality and independent or autonomous estates, which

are responsible for them by way of fraud or negligence."

SEVENTH: Likewise, in accordance with the provisions of the aforementioned article 58.2.d) of the

RGPD, in the resolution the claimed party is required, as the data controller,

that the treatment operations comply with the provisions of this

Regulation, in a certain way and within a specified period.

The text of the resolution establishes the infractions committed and

the facts that have given rise to the violation of the regulations for the protection of

data, from which it is clearly inferred what measures to adopt, without prejudice

that the type of procedure, mechanisms or specific instruments for

implement them corresponds to the sanctioned party, since it is responsible for the

treatment who fully knows your organization and has to decide, based on the

proactive responsibility and risk approach, how to comply with the RGPD and the

LOPDGDD.

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 CAFFE VECCHIO, S.L, with NIF B15571680, for a infringement of article 5.1.f) of the RGPD and article 6.1 a) of the RGPD, typified in the article 83.5 of the RGPD, a fine of ONE THOUSAND FIVE HUNDRED EUROS (€1,500).

SECOND: REQUEST CAFFE VECCHIO. S.L, with NIF B15571680, which implements the necessary corrective measures to adapt their actions to the regulations of protection of personal data that prevents events from happening in the future similar, among them, the elimination of personal data published on the Internet.

THIRD: NOTIFY this resolution to CAFFE VECCHIO, S.L.

FOURTH: Warn the sanctioned party that he must make the imposed sanction effective once Once this resolution is enforceable, in accordance with the provisions of the art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure Common Public Administrations (hereinafter LPACAP), within the payment term voluntary established in art. 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 entry, indicating the NIF of the sanctioned and the number

of procedure that appears in the heading of this document, in the account restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency

Spanish Department of Data Protection in the banking entity CAIXABANK, S.A.. In case

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

voluntary 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

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.

Sea Spain Marti

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