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DELHI BERAÇÃO/2019/297

I - Report

The National Data Protection Commission (CNPd) prepared a draft deliberation on February 19, 2019, in which the defendant was charged with

conjugated of article 22, with subparagraph b) of paragraph 1 and paragraph 4, both of article 37 of Decree-Law no. 7/2004, of 7 January, amended by Decree-Law 62/2009, of March 10, with a fine of €2,500.00 to €50,000.00, increased by one third of the minimum and maximum limits, as well as the practice of forty offences, p. and p., pursuant to paragraph 1 of subparagraph f) of paragraph 1 and paragraph 5, both of article 14 of Law no. 41/2004, of 18 August, in the current wording, with a fine of €5,000.00 to €5,000,000.00.

The defendant was notified of the content of said project and, pursuant to the provisions of article 50 of the General Regime for Administrative Offenses and Fines, to present her defense, she claimed, in short:

1. The inexistence of sufficient evidence on the facts imputed to the defendant, since it is not possible to infer the specific processing of personal data, considering that there is no evidence in the case file that allows the defendant to be charged with carrying out any processing of personal data.

2. Then, the defendant invokes the lack of documentary evidence, having asked the CNPD to forward the electronic communications in question to her, for analysis and response, a request that was never satisfied by the CNPD, thus refuting the probative value of the private documents.

3. Next, the defendant alleges that the electronic addresses from which they were

sent the electronic communications contained in the file - sítio^{^^^^^^}, site and site - you as

also understands that the entities that operate these sites are the entities responsible for the processing of personal data, since they are the ones that collect the personal data and that determine the purpose for such collection, as well as decide which discounts they will promote to their customers, and also , the offers you send to each of your customers.

the practice of forty-six offences, p. and p., in terms

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4. The defendant also maintains that the basis of legitimacy for the processing in question is the pursuit of the legitimate interest of the controller, highlighting, once again, the three websites, and that in this way the sending of such communications would be legitimized , without any need for the express consent of the owner.

5. Finally, the defendant claims that she did not have effective access to the communications in question, but only to the respective printouts on paper, thus failing to determine, with certainty, who promoted such sending, and thus being deprived of access to a means of defence, he understands that any accusation against him is null and void.

The defendant presented two documents, and did not request the production of any other means of evidence, nor did she provoke the production of any means of obtaining evidence.

II - Appreciation

The CNPD is competent under the terms of article 36 and paragraph 2 of article 41, both of Decree-Law No. 7/2004, of 7 January, amended by Decree-Law No. 62 /2009, of 10 March, because it was and is the sectoral supervisory entity to know the object of the case, in the terms still conjugated, with paragraphs 1 and 2 of article 21 and paragraph 1 of article 22 .°, both of Law No. 67/98, of October 26 (Personal Data Protection Law, hereinafter LPDP).

It is also competent, under the terms of article 13 - G, in conjunction with paragraph 1 of article 15, of Law No. 41/2004, of 18 August, amended by Law No. 46/ 2012, of the 29th of August.

In view of the written defense presented by the defendant, it is necessary to assess the arguments of fact and the respective legal grounds presented. Starting with the last plea in defense, which is based on the alleged breach of the defendant's defense guarantees, translated into the lack of access to electronic communications, which is restricted only to the respective printouts on paper, it is important to proceed with the assessment that is necessarily prior to the analysis of the merits of the defense, noting that the defendant is not right. So, let's see.

The evidence supporting the imputation of the facts contained in the draft deliberation to the defendant, in addition to the

testimonies of the participant and the legal

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representative of the defendant, are also based on the electronic communications received by the defendant.

The General Regime for Administrative Offenses and Fines, as well as the Criminal Procedure Code, applicable ex vin. original documents to the procedural subjects.

In addition, it is important to note that the administrative offense procedure is subject to the principle of legality.

Therefore, the defendant, through her Defender, had access to the case file and the evidence contained therein, on at least two occasions, preceded by requests for consultation of the case file, which were effectively and fully granted by the CNPD.

Furthermore, the defendant could have asked for the corresponding extracts, copies and certificates to be obtained, under the terms of Article 89(1) of the Criminal Procedure Code, ex. General Regime of Administrative Offenses and Fines; however, he did not, sibi imputai

In addition, the defendant claims that the prosecution will be void, for the above reason. However, it does not even indicate a rule that supports the imputation of such alleged defect, much less that it is legally sanctioned with such invalidity, reasons for which the argument of non-compliance with the defense guarantees invoked by the defendant is rejected.

Having said that, it is important to look into the merits of the case, going on to appreciate the grounds of the written Defense.

As for the argument that there is no sufficient evidence about the facts alleged against the defendant, it is evident from the available elements that the defendant sent unsolicited communications for direct marketing and advertising purposes to the participant, without prior consent. of the same - facts contained in points 7 to 52 of the draft resolution - and without the prior and express consent of the holder - facts 53 to 92 of the draft resolution.

Such facts reveal a type of processing of personal data, the sending of electronic communications with promotional content to natural persons, as they include the use of personal data - in casu, the name of the holder and his email address - within the meaning of point a) of article 3 of the LPDP, as they are information relating to an identified natural person - in casu, the

participant.

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Having defined such concepts, it is important to relate them to the defendant's administrative misdemeanor liability, and to the respective terms, anchored in the specifically applicable sanctioning diplomas - Decree-Law no. 7/2004, of 7 January, amended by Decree-Law no. 62/2009, of March 10, and Law No. 41/2004, of August 18, amended by Law No. 46/2012, of August 29.

The application of such diplomas cannot be carried out without framing the concepts and principles of the Personal Data Protection Law, insofar as it specifies and complements the LPDP (cf. paragraph 2 of article 1).

Therefore, in light of point d) of article 3 of the LPDP, the controller is any natural or legal person who determines the purpose and means of processing personal data and, in accordance with point e) of the same legal precept, the processor is the natural or legal person who processes the personal data on behalf of the controller.

Such concepts were not subject to any change, through Regulation (EU) 2016/679, of the European Parliament and of the Council, of 27 April 2016 (General Regulation on Data Protection, henceforth RGPD), as inferred from the subparagraphs 7) and 8) of its article 4.

Thus, the person responsible for the treatment may not coincide with the material author of the sending of the unsolicited communication for promotional purposes, as in the case of Subidice. In fact, it is quite common nowadays for companies to turn to external entities for the development of marketing campaigns. However, this does not deprive them of their status as controller.

With arguida^^^^^^^^^^^^^^^^^^^^ that

to attract new customers, thus defining the purpose of the processing of personal data - marketing campaign aimed at potential customers (lead creation) - and established for this purpose the means for its accomplishment - through the contracting of for the provision of an email sending service through the use of the database that this company holds.

The fact that the defendant does not have the database in question does not mean that she is not responsible for the

Thus, defendant^^^^^^^^^^^^^^^^^fdoes not intend to exempt

the responsibility that falls on it, when resorting to a subcontractor who acts under its instructions and on its behalf to promote its products, without taking care of the scrupulous compliance with the current legal framework. This results from the combined provisions of Article 3(e), Article 14(3) and Article 16 of the LPDP,

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which establish that the performance of the processor results from instructions from the controller, entitled by contract.

Also noteworthy is the content of paragraph 2 of article 14 of the LPDP, which determines that it falls on responsible, in this case,

the obligation to choose

a processor that offers sufficient guarantees in relation to the technical security measures and the organization of the treatment to be carried out, and must ensure compliance with these measures.

Thus, the defendant should, in choosing the subcontractor, have ensured that the

marketing actions carried out by

complied with all legal obligations

in terms of data protection and, at the same time, verify compliance in practice, which obviously did not happen.

As such, the defendant's failure to comply with the duties to which he was legally obliged - verification of the existence of the express and prior consent of the recipient of the communication for the defendant's marketing to be sent

- leads to the liability of the latter, contributing in a causal and decisive manner to the occurrence of the infractions in question in these cases.

Indeed, as has already been shown, it is on the controller that the obligation to guarantee its lawfulness falls.

The defendant could not ignore that the personal data processing operation in question presupposed the use of personal data and depended, as a condition of lawfulness, on the prior and express consent of the data subject, in the context of sending unsolicited communication for the purpose of direct marketing.

Thus, even the defendant's allegation based on the fact that it has no relation to the electronic addresses from which the 86 electronic communications contained in the case file were sent, for the reasons mentioned above, still do not exonerate her

from liability for the administrative offence.

And this is because, in addition to the arguments already exposed, at no time does the defendant allege, much less add any evidence that entitles the prior provision of the participant's consent, for the sending of unsolicited communications, for direct marketing or advertising purposes. , on the one hand.

On the other hand, at no time in the written Defense, the defendant denies that the advertising content contained in the electronic communications belongs to her - vg. the brand used, the words, or the advertising campaigns inserted in electronic communications.

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In fact, the defendant did not react by judicial means to any unauthorized use of the graphic elements protected by her rights.

More, conclusion that the defendant^{^^^^^^^^^^^^^^^^^^} who decided to carry out marketing actions to attract new customers, thus defining the purpose of processing personal data - marketing campaign aimed at potential customers (lead creation) - and for that purpose established the means for its realization - by contracting for the provision of a service of sending e-mails through the use of the database that this company holds -, evidently results from the statements made by the legal representative of the defendant, as well as from the 86 electronic communications that entitle the carrying out of unsolicited communications, for advertising or direct marketing purposes.

Too much, on pages 237 of the case file, the participant made it known that after submitting the respective participation to the CNPD against the defendant in these cases, he never received any unsolicited electronic communication, for direct marketing or advertising purposes, regarding the provision of goods or provision of services. , via the electronic addresses in question, which demonstrates that the defendant was and is responsible for the processing of personal data, and not the entities operating the websites that used the electronic addresses to send communications to the participant.

Then, it is important to dwell on the question regarding the probative force of the documents contained in the case file, which embody the electronic communications received by the participant.

Paragraph 1 of article 164 of the Code of Criminal Procedure, applicable here ex vi.0 1 of article 41 of the General Regime for

Administrative Offenses and Fines, provides: statement, sign or notation embodied in writing or any other technical means, under the terms of criminal law"

Since paragraph 2 of the aforementioned precept admits that the addition of documentary evidence is made of its own motion or upon request.

Electronic communications are, objectively, statements made in writing, integrating the concept enshrined in paragraph 1 of article 164 of the Code of Criminal Procedure. In this sequence, and concretely, such communications fall under the concept of electronic document, which corresponds to one that is prepared through electronic data processing (item a) of article 2 of Decree-Law No. 290-D/99 , in

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August 2, diploma republished with amendments attached to Decree-Law No. 88/2009, of April 9).

Article 4 of the aforementioned diploma provides that: "Copies of electronic documents, on the same or different type of support, are valid and effective under the general terms of law and have the probative force attributed to photographic copies by n.º 2 of article 387.º of the Civil Code and by article 168.º of the Code of Criminal Procedure, if the requirements set forth therein are observed."

In turn, article 168 of the Criminal Procedure Code establishes that the mechanical reproduction has the same probative value as the original, if it has been identified with it in that or another process.

In this regard, PAULO PINTO DE ALBUQUERQUE¹ highlights that, "The mechanical reproduction of documents can be carried out when the originals cannot be preserved or added to the process. The law even admits that this reproduction is carried out in the process in which the reproduction is attached or in another process, not establishing any requirement as to the nature of the authority that confirms the identification of the mechanical reproduction with the originals."

Once the records are reviewed, it can be seen on pgs. 195 and 196 that the CNPD asked the participant to send the electronic communications, which have been mechanically reproduced, having the same probative value as the original.

In addition, the defendant alleges, conclusively, that she challenges the validity, veracity and authenticity of the documentary evidence contained in the case file.

It so happens that the defendant does not allege any fact that indicates or demonstrates, in conjunction with others, that the validity, veracity or authenticity of the documentary evidence is in crisis.

In fact, the defendant does not allege material falsity, or ideological falsity, of the documents contained in the case file, identified and related to the facts proven in the draft deliberation.

Furthermore, there are no reasons to doubt the genuineness and veracity of the documentary evidence in question, which is why the CNPD has valued them and built the deliberation project based on them.

See Commentary on the Code of Criminal Procedure, 3rd, updated edition, p. 451.

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Finally, the defendant claims that the basis of legitimacy for the processing of personal data consisting of sending unsolicited communication, for direct marketing or advertising purposes, lies in the pursuit of the legitimate interest of the person responsible for the processing of personal data. In this argument, too, there is no reason for the defendant. If not, let's see. Legitimate interest may underlie the legitimacy of processing personal data under the terms set out in article 6 of the LPDP. It so happens that, in this case, because a specific legal regime applies to the treatments that correspond to the sending of electronic communications for the purposes of direct marketing, its basis can only be that provided for in that special regime. In other words, by restricting the special law to the grounds of legitimacy of this processing of personal data, other grounds provided for in that general law are not applicable.

As a result, article 22 of Decree-Law no. 7/2004, of 7 January, amended by Decree-Law no. sending unsolicited communications for direct marketing purposes with the prior consent of the holder.

Likewise, paragraph 1 of article 13 - A of Law no. 41/2004, of 18 August, amended by Law no. 46/2012, of 29 August, maintained consent as the basis of legitimacy for the aforementioned treatment, alluding to the prior and express consent of the subscriber who is a natural person, even extending, in comparison with the aforementioned diploma, and in an exemplary way the various means through which the communication can be sent. And, with the exception of the hypothesis provided for in paragraph 3 of article 13-A, which is not applicable here (since it is invoked by the participant and not contested by the

defendant that he is not and has never been a customer or subscriber of products or commercial content of the defendant), consent is the only legitimate ground for this type of data processing.

In any case, it should be noted that the Defendant's invocation of a legitimate interest in the sending unsolicited electronic communications to the participant is a demonstration and implicit acknowledgment that you consider yourself responsible for the data processing.

For the reasons set out above, the defense's allegations do not call into question the facts contained in the draft deliberation, nor the legal framework made by what we intend to maintain the position assumed in that project.

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Thus, in light of the elements contained in the case file, of interest for the deliberation, we consider the following to be proven:

I - Facts

is the holder of the NIPC/NIF

he has

1. The defendant

its registered office (cf. page 1 of the case file)

2. The participant

owns the email address | (cf. pages 275 and 276 of the case file)

3. This is a personal email address, (cf. pages 275 and 276 of the case file)

4. The participant has never been, nor is he a client of the defendant, (cf. pages 275 and 276 of the case file)

5. The participant never provided his identification and contact details, or his e-mail address, to the defendant (cf. pages 275 and 276 of the case file)

6. The participant never gave his prior consent to the defendant, so that she could send him unsolicited electronic

communications for direct marketing purposes (cf. pages 275 and 276 of the case file)

7. On October 11, 2011, at 9:25 am, the participant with the address

electronic received an electronic communication

from the email address ^^^^^^^^^^^^^^^^^ with the subject: "Discover ^^^^^^^^^^ Receive a camera", (cf. pages 166, 165 and 164 of the records).

8. On October 11, 2011, at 9:35 am, owner of the email address

received an electronic communication from the email address with the subject: "Discover [§

and receive a camera", (cf. fls. 169, 168 and 167 of

cars).

9. On October 27, 2011, at 9:11 am, owner of the email address

'>vi£.';£/ received an electronic communication from the email address ^^^^^^^^^^^^^^^^^ with the subject: "Important message for", (cf. cars).

10. On October 27, 2011, at 9:17 am, ^^^^^^J, owner of the email address

provided electronic communication from the

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having as subject:

email address "Important message for you", (cf. page 171 of the case file)

11. On November 3, 2011, at 5:07 am, ^^^^^^J holder of the email address

received an electronic communication from the electronic with the subject:

It has a very important message." (cf. pages 172, 173 and 174 of the case file)

12. On November 14, 2011, the 1holder of the email address

| received an electronic communication from the electronic address with the subject: "Order your digital camera now", (cf. pages 175 and 176 of the case file)

13. On November 29, 2011, at 8:48 am, ^^^^^^| email address holder

received an electronic communication from the electronic with the aim of

“Discover your free offers here”, (cf. pages 177 and 178 of the case file)

14. On November 29, 2011, at 8:52 am, ^^^^^^|, owner of the email address

received an electronic communication from the email address^^^^^^^^^^^^^^^^, with the subject: “Take advantage of these 3 welcome offers now”, (cf. page 179 of the case file)

15. On December 5, 2011, at 11:20 am, ^^^^^^|, owner of the email address

received an electronic communication from the electronic ^^^^^^^^^^^^^^^^^^^^^, having as already his digital camera”, (cf. pages 182 to 180 of the case file)

16. On December 5, 2011, at 11:23 am, ^^^^^^J, owner of the email address

received an electronic communication from the electronic address^^^^^^^^^^^^^^^^J, with the subject: “Order your digital camera now”, (cf. pages 185 to 183 of the case file)

17. On December 15, 2011, at 11:10 am, ^^^^^^| email address holder

received an electronic communication from the electronic with the subject:

It has a very important message", (cf. pgs. 186 of the case file)

18. On December 20, 2011, at 6:14 pm, holder of the email address

received an electronic communication from the electronic as

“Important message to the attention of”, (cf. pages 188 and 187 of the case file)

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19. On December 20, 2011, at 6:07 pm,

e-mail

owner of the email address received an electronic communication from the subject: “Message

important the attention of”, (cf. page 189 of the case file) 20. On December 28, 2011, at 10:15 am,

owner of the e-mail address received an electronic communication from the

with the subject: “Ask

e-mail address already your digital camera", (cf. pages 192 to 190 of the case file)

21. On December 29, 2011, at 12:20 pm

e-mail

owner of the e-mail address received an electronic communication from the

having as subject:

| It has a very important message", (cf. pgs. 193 of the case file) 22. On January 5, 2012, at 4:53 pm,|^

e-mail

____ email address holder

received an electronic communication from the

having as subject:

"Have they violated your rights? We help!", (cf. page 138 of the case file) 23. On January 5, 2012, at 4:56 pm,|^

| owner of the electronic address received an electronic communication from the subject: "They have harmed the

email address your rights? We help!", (cf. pages 141, 140 and 139 of the case file)

owner of the e-mail address received an electronic communication from the

having as subject:

24. On January 23, 2012, at 10:07 am, email address

thousands of euros per year", (cf. fls. 142

of the cars)

25. On January 23, 2012, at 10:12 am,

owner of the electronic address received an electronic communication from , with the subject:

thousands of euros per year", (cf. page 143 of the case file)

26. On January 30, 2012, at 8:15 am,

e-mail

owner of the e-mail address received an electronic communication from the

has as its subject: "Offer

limited: a set of multimedia and wireless headphones", (cf. pages 146 to 144 of the case file)

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27. On January 30, 2012, at 8:20 am, owner of the email address

received an electronic communication from the

by having

limited: a set of multimedia and wireless headphones", (cf. pages 149 to 147 of the case file)

28. On February 2, 2012, at 10:30 am, owner of the email address

received an electronic communication from electronics with the subject: for you, 1 Multimedia Set and Wireless Headphones",

(cf. pages 151 and 150 of the case file)

29. On March 1, 2012, at 1holder of the electronic address

received an electronic communication from the electronic with the subject:

for you, 1 set of multimedia and wireless headphones", (cf. pages 153 and 152 of the case file)

30. On March 7, 2012, at 11:00 pm, owner of the email address

1 received an electronic communication from the

email address^^^^^^^^^^^^^^^^^^^^J, with the subject: "Limited offer: a set of multimedia and wireless headphones", (cf. cars)

31. On March 8, 2012, at 6:04 am, owner of the email address

received an electronic communication from the email address with the subject: "Offer

limited: a set of multimedia and wireless headphones", (cf. pages 159 to 157 of the case file)

32. On March 26, 2012, at 1:54 pm, owner of the email address

received an electronic communication from the electronic with subject: 'HI

It has a very important message", (cf. pgs. 160 of the case file)

33. On April 6, 2012, at 9:26 am, owner of the email address

received an electronic communication from the email address with the subject: "Receive a

multimedia set, all without compromise", (cf. fls. 107 of the

cars)

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34. On April 9, 2012, at 9:33 am,

address

multimedia set plus autos)

35. On April 17, 2012, at 1:06 pm,

| owner of the electronic address received an electronic communication from the subject: "Receive a |, all without commitment",

(cf. fls. 108 of the

email address holder

received an electronic communication from the

address

, with the subject: "|

isabia

that we have 2 gifts for you?", (cf. page 109 of the case file) 36. On May 2, 2012, at 09:46, ^H^H

owner of the e-mail address received an electronic communication from

a set of mediamore^^^^j!"jcf. pages 111 and 110 of the records)

37. On May 8, 2012, at 11:32 am, owner of the email address

*~Z-1"I received an electronic communication from the

e-mail

, did you know that we have 2 gifts and fls. 113 and 112 of the records)

38. On May 28, 2012, at 10:23 am,

having as a subject: for yourself. No compromise" (cf.

email address "Receive a multimedia set plus 114 of the records)

39. On May 28, 2012, at 10:28 am,

owner of the e-mail address received an electronic communication from the

having as subject: , without commitment!", (cf. pages 116 to

multimedia set email more^^^H autos)

40. On May 31, 2012, at 10:51 am,

The holder of the electronic address received an electronic communication from the subject: "Receive one without obligation",

(cf. pages 119 to 117 of the

e-mail

|, owner of the electronic address received an electronic communication from the

with the subject: "H

has a very important message", (cf. pgs. 120 of the case file)

41. On June 19, 2012, at 6:04 am,

email address holder

received an electronic communication from the

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with the subject: "Have you received the

email address^_____

your offers?" (cf. pages 122 and 121 of the case file)

42. On June 19, 2012, at 6:03 am, owner of the email address

| received an electronic communication from the electronic with the aim of

received your offers?" (cf. pages 124 and 123 of the case file)

43. On June 19, 2012, at 11:40 am, owner of the email address

_____ received an electronic communication from the

electronic having subject: j

We still have 2 gifts reserved for you. No compromise." (cf.

pages 130 and 129 of the records)

44. On July 6, 2012, at 11:10 am, ^^^^^^| email address holder

received an electronic communication from the electronic with the subject:

Did you know that we have 2 gifts e^^^^^|for you. No purchase obligation." (cf. pages 132 and 131 of the case file)

45. On July 9, 2012, at 8:28 am, ^^^^^^J owner of the email address ^^^^■^■| received an electronic communication from the email address ^^^^^^^^^ ^mjjjj^H with the subject: "Exceptional offer: a multimedia set + wireless headphones", (cf. fls. 135 to 133 of the case file)

46. On July 9, 2012, at 8:32 am, owner of the email address received an electronic communication from the email address with the subject: "Offer exceptional: a multimedia set + wireless headphones", (cf. pages 71 to 69 of the case file)

47. On July 24, 2012, at 11:43 am, ^^^^^^, owner of the email address received an electronic communication from the email address with the subject: "Attention has a notice to receive your offers." (cf. page 72 of the case file)

48. On July 30, 2012, at 12:52 pm, ^^^^^^J holder of the email address received an electronic communication from the email address ^^^^^^^^^^^^^^^^^^| with the subject: "Offer

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limited: a set of multimedia and wireless headphones", (cf. pages 75 to 73 of the case file)

49. On July 30, 2012, at 12:56 pm, owner of the email address received an electronic communication from the subject: "Limited offer: e-mail

a set of multimedia and wireless headphones", (cf. pages 78 to 76 of the case file)

50. On August 6, 2012, at 11:50 am, e-mail address

|, owner of the electronic address received an electronic communication from the with the subject: "Offer

limited: a multimedia set and wireless headphones”, (cf. pages 81 to 79 of the case file)

51. On August 6, 2012, at 11:53 am,

e-mail

owner of the e-mail address received an electronic communication from the

with the subject: “Offer

limited: a multimedia set and wireless headphones”, (cf. pages 84 to 82 of the case file)

52. On August 28, 2012, at 10:58 am |^^^H

e-mail

lhIHB, owner of the electronic address received an electronic communication from the HHBHHHHH with the subject:

Did you know that we have 2 Gifts and 3 Magazines for you. No purchase obligation.” (cf. pages 86 and 85 of the case file)

53. On September 10, 2012, at 8:37 am,

e-mail

owner of the e-mail address received an electronic communication from the

having as subject:

"We have an exceptional proposal for you", (cf. pages 88 and 87 of the case file) 54. On September 10, 2012, at

09:06,^^^^H””””

e-mail

| owner of the email address received an electronic communication from the subject: “We have a

exceptional proposal for you”, (cf. pages 90 and 89 of the case file) 55. On September 25, 2012, at 10:58 am^vií&

e-mail address

_____, owner of the email address

received an electronic communication from the

I, with the subject: “Attention

has a notice to receive its offers”, (cf. page 91 of the case file)

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56. On 16 October 2012, to the owner of the email address

received an electronic communication from the email address^^^^^^^^^^^^^^^^^J, with the subject: "Attention, you have a notice to receive your offers", (cf.)

57. On November 13, 2012, at 9:51 am,^^^^^^| email address holder

received an electronic communication from the email address^^^^^^^^^^^^^^^^^J with the subject: "Attention you have been selected to receive 2 gifts. Confirm delivery", (cf. page 93 of the case file)

58. On November 15, 2012, at 9:18 am, ^^^^^|, owner of the email address

received an electronic communication from the electronic with the subject: "No

lose this health card with exceptional conditions", (cf. pages 99 to 97 of the case file)

59. On November 15, 2012, at 9:21 am,^^^^^^| email address holder

received an electronic communication from the email address with the subject: "Don't miss

this health card with exceptional conditions", (cf. pages 96 to 94 of the case file)

60. On November 26, 2012, at 8:33 am, ^^^^^|, owner of the email address

received an electronic communication from the electronic as

"Discover for free^^^^^^^^^and receive a set of Multimedia". (cf. page 100 of the case file)

61. On November 26, 2012, at 8:49 am, ^^^^^|, owner of the email address

received an electronic communication from the email address with the subject: "Discover

for free^^^^^^^^|and receive a set of Multimedia". (cf. page 101 of the case file)

62. On December 6, 2012, at 11:04 am, ^^^^^J, owner of the email address

received an electronic communication from the email address^^^^^^^^^^^^^^^^^H, with the subject: "Attention, we have 2 gifts for^^^^^J^Confirm delivery", (cf. page 102 of the case file)

63. On December 10, 2012, at 8:25 am, owner of the email address

received an electronic communication from the electronic H

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"Discover for free^m^H| pages 103 of the records)

64. On December 10, 2012, at 8:42 am,

receive a set of media." (cf.

email address free of charge^^M cars)

65. On December 31, 2012, at 8:22 am,

owner of the electronic address received an electronic communication from the subject: "Discover and receive a set of multimedia.1' (cf. fls. 104 of the

email address "Discover for free | page 105 of the case file)

66. On December 31, 2012, at 8:30 am,|

owner of the e-mail address received an electronic communication from the

having as subject: and receive a set of multimedia". (cf.

email address free of charge^^J records)

67. On January 5, 2013, at 9:55 am,

owner of the e-mail address received an electronic communication from the subject: "Discover and receive a set of multimedia". (cf. pages 106 of

owner of the e-mail address received an electronic communication from the

on the subject: "No

e-mail

lose this health card with exceptional conditions", (cf. pages 31 to 29 of the case file)

68. On January 5, 2013, at 10:03 am

e-mail address

_____ email address holder

received an electronic communication from , with the subject: "Don't miss this

health card with exceptional conditions", (cf. pages 34 to 32 of the case file) 69. On January 10, 2013, at 10:56 am,

email address 2 offers for|

owner of the e-mail address received an electronic communication from the

having as subject: "Attention: Confirm the delivery", (cf. page 35 of the case file)

70. On January 17, 2013, at 12:18 pm

owner of the e-mail address received an electronic communication from the

having as subject: "Attention: your gifts are awaiting confirmation", (cf. page 36 of the case file)

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71. On January 21, 2013, at 8:20 am, owner of the email address

received an electronic communication from the email address with the subject: "We have a
exceptional proposal for you", (cf. pages 38 and 37 of the case file)

72. On January 21, 2013, at 8:32 am, owner of the email address

^^^^^^^^^^^I^^^^ received an electronic communication from the
electronic having as

"We have an exceptional proposal for you", (cf. pages 40 and 39 of the case file)

73. On February 13, 2013, at 5:04 am,^^^^^^J holder of the email address

received an electronic communication from electronics^^^^^^^^^^^^^^^^^^^^^^J with the subject: "Limited offer: a multimedia MP5
player plus^^^^^^". (cf. pages 43 to 41 of the case file)

74. On February 13, 2013, at 11 am holder of the email address

received an electronic communication from the email address with the subject: "To:
Free, Multimedia MP5 player all without compromise!", (cf.
pages 46 to 44 of the records)

75. On March 4, 2013, at 8:36 am, owner of the email address

received an electronic communication from the email address with the subject: "Offer
limited: one more multimedia MP5 player^^^^^j". (cf. pages 49 to 47 of the case file)

76. On March 4, 2013, at 9:05 am, owner of the email address

received an electronic communication from the email address ^^^^^^^^^^^^^^^^^^J, with the subject: "Limited offer: one more multimedia MP5 player^^^^!". (cf. pages 52 to 50 of the case file)

77. On March 7, 2013, at 11:14 am, owner of the email address

received an electronic communication from the email address with the subject: "To:

^^HGratis, MP5 Multimedia player all without compromise!", (cf. fls.

55 to 53 of the records)

78. On March 18, 2013, at 8:46 am, owner of the email address

received an electronic communication from the

email address with "Offer

limited: one more multimedia MP5 player^^^^H". (cf. pages 58 to 56 of the case file)

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79. On March 18, 2013, at 10:22 am,

owner of the email address received an electronic communication from the email address ^^^^^^^^^^^^^^^^^^J, with the subject:

"Limited offer: a multimedia MP5 player plus^^^^B". (cf. pages 61 to 59 of the case file)

80. On April 1, 2013, at 11:33 am, ^^^^^^H, owner of the email address

received in an electronic communication from the

having as subject: and receive an MP5 Multimedia player".

e-mail

"Discover free of charge (cf. pages 63 and 62 of the case file)

81. On April 1, 2013, at 11:38 am,

e-mail address free of charge)

82. On April 15, 2013, at 1:13 pm,

| owner of the e-mail address received an electronic communication from the subject: "Discover and receive an MP5 player".

(cf. pages 65 and 64 of

email address "Receive the car for FREE)

83. On April 15, 2013, at 1:23 pm,

owner of the e-mail address received an electronic communication from the

having as subject:

. (cf. pages 68, 67 and 66 of

owner of the e-mail address received an electronic communication from the

with the subject: "Receive". (cf. pages 4 to 2 of the case file)

| owner of the electronic address [received an electronic communication from the

having as subject:

"LIMITED OFFER: a multimedia MP5 player plus | of the cars)

85. On April 29, 2013, at 9:34 am,

FREE email address o|

84. On April 29, 2013, at 8:56 am,

e-mail

(cf. pages 6 and 5

e-mail

LIMITED: one maisl 86 multimedia MP5 player. On May 9, 2013 at 11:00 am

owner of the e-mail address received an electronic communication from the subject: "OFFER ". (cf. pages 9 to 7 of the case file)

email address holder

received an electronic communication from the

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address with the subject: "Attention:

H confirm reception of your MP5 player". (cf. pages 12 to 10 of the case file)

87. On May 17, 2013, at 8:16 am, owner of the email address

received an electronic communication from the electronic with the aim of

FREE or (cf. 15 to 13 of

cars)

88. On May 27, 2013, at 8:44 am, owner of the email address

received an electronic communication from the electronic with the aim of

Discover for free get an MP5 Multimedia player". (cf. pages 17 and 16 of the case file)

89. On May 27, 2013, at 8:52 am, owner of the email address

received an electronic communication from the email address^^^^^^^^^^^^^P with the subject: "Discover for free i l inm multimedia MP5 player!". (cf. page 19

and 18 of the records)

90. On June 3, 2013, at 8:27 am, owner of the email address

received an electronic communication from the email address^^^^^^^^^^^^^^^^^^^^, with the subject: "Do not lose this health card with exceptional conditions", (cf. . 25 to 23 of the records)

91. On June 3, 2013, at 8:35 am,^^^^^^^^| email address holder

received an electronic communication from the email address with the subject: "Don't miss this health card with exceptional conditions", (cf. pages 22 to 20 of the case file)

92. On June 5, 2013, at 2:12 pm, owner of the email address

received an electronic communication from the electronic address^^^^^^^^^^^^^^^^^^^^J, with the subject: "Warning: you have an MP5 player waiting for you." (cf. pages 28 to 26 of the case file)

93. The participant never asked the defendant to send the previously listed and described electronic communications (cf. pages 275 and 276 of the case file)

94. All electronic communications referred to above are alluding to products or services provided by the defendant.

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95. The defendant processed personal data in the exercise of a specific activity, which necessarily results in an impact on the privacy of individuals and had an obligation to seek to know the legal framework in which it could actually be carried out.

96. Thus, the defendant had a duty to know that the basis of legitimacy for carrying out unsolicited communications operations for the purposes of direct marketing of data subjects who were not their customers resides in the consent of these subjects, which must be obtained prior to the processing of personal data to which it relates.

97. As such, the defendant acted freely, voluntarily and consciously, with the purpose of carrying out unsolicited communications for promotional and direct marketing purposes, without taking care of the existence of the participant's prior and express consent, representing as possible that it would harm privacy, not using the care to which it is obliged and of which it was capable, well knowing that it was acting against the Law.

IV - Motivation for the formation of conviction about de facto decisions

- Electronic communications attached to the case file;
- The statements made by the participant;
- The statements made by the legal representative of the defendant; and,
- Written defense presented by the defendant.

It is thus verified, in view of the factual evidence, that the practice is sufficiently indicted, in the consummated form, by the with conscious negligence, of forty-six offenses foreseen and punished, under the terms of the combined provisions of article 22, with subparagraph b) of paragraph 1 and paragraph 4, both of article 37 of the Decree-Law No. 7/2004, of January 7, amended by Decree-Law No. 62/2009, of March 10, with a fine of € 2,500.00 to € 50,000.00, increased by one third of the maximum limits and minimum, as the offenses in question were committed by a legal person, pursuant to paragraph 5 of the aforementioned provision.

From what has been expended above, it appears that the defendant committed several offences, having harmed the legal interest protected by the aforementioned administrative offense rules, on forty-six occasions.

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administrative offences, therefore imposing the application of paragraph 1 of article 19 of the General Regime of Administrative Offences and Fines, applicable ex iure article 35 of the LPDP, justifying the execution of the legal accumulation of fines, based on the limits set out in paragraphs 2 and 3 of that precept.

In this way, and prior to making the legal summation, it is important to determine the criteria that allow determining the concrete value of each fine, in accordance with the provisions of paragraph 1 of article 18 of the General Regime for Administrative Offences and Fines, namely :

- the seriousness of the infraction - assessed by the factual circumstances described above as to the manner and form of execution of the infraction;
- the degree of guilt of the defendant - understood as an element of subjective imputation to the agent, and, in casu, as the result of a negligent act insofar as the defendant acted with the purpose of carrying out unsolicited communications for promotional and direct marketing, without taking care of the existence of the participant's prior consent, representing as possible that it would harm the privacy of the participant, not using the care to which it is obliged and of which it was capable, well knowing that it was acting against the Law;
- the defendant's economic situation - in relation to which, in the sub iudice case, nothing was found;
- economic benefit taken by the accused - for which the pecuniary assessment or quantification is insusceptible; and,
- the minimum and maximum amounts provided for by law as regards the amounts of fines.

Thus, what about the foreseen and punished offences, under the terms of the combined provisions of article 22, with subparagraph b) of paragraph 1 and paragraph 4, both of article 37 of Decree-Law no. 7/2004, of 7 January, amended by Decree-Law No. 62/2009, of 10 March, with a fine of €2,500.00 to €50,000.00, increased by one third of the maximum and minimum limits, in terms of no. 5 of that last precept, which amounts to a minimum amount of € 3,333.00 to € 66,666.00, thus constituting the abstractly applicable administrative offence.

In fact and specifically, taking into account the criteria described above, the CNPD sets the amount of the fine, for each infraction, the amount of: € 4,000.00.

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The minimum limit of the tender framework is therefore € 4,000.00, with the maximum limit corresponding to the amount of € 133,332.00, as results from the application of paragraphs 1 and 2 of article 19 of the General Regime for Administrative Offenses and Fines, ex vi.0 3 of article 41 of Decree-Law No. 7/2004, of 7 January, amended by Decree-Law No. 62/2009, of 10 March.

Valuing the facts established in the light of the criteria set out above and duly considered, the imposition of a single fine, in legal terms, in the amount of € 7,000.00 (seven thousand euros) for the practice of forty-six offenses foreseen and punished, under the terms of the combined provisions of article 22, with subparagraph b) of paragraph 1 and paragraph 4, both of article 37 of Decree-Law no. 7/2004, of 7 January, amended by Decree-Law No. 62/2009, of March 10, legal framework whose grounds were expressed in the draft resolution that we hereby consider fully reproduced for due and legal purposes.

It is also verified, in view of the factual evidence, that it appears to be sufficiently indicted in the form consummated by the defendant^^^^^^^^^^^^^^^^^^J

with conscious negligence, of forty offenses foreseen and punished, under the terms of the combined provisions of paragraph 1 of article 13-A and paragraph f) of paragraph 1 and paragraph 5 both of article 14 of the Law No. 41/2004, of August 18, in the current wording, with a fine of €5,000.00 to €5,000,000.00.

Furthermore, under the terms of Article 17(4) of the RGCO, applicable ex vi Article 35 of the LPDP, acts committed with negligence are punishable by a fine, with the abstractly applicable minimum and maximum limits being reduced by half - €2,500.00 to 2,500,000.00.

Also in the specific determination of the fine(s) to be imposed, the aforementioned criteria must be mobilized, namely:

- the seriousness of the infraction - assessed by the factual circumstances described above as to the manner and form of execution of the infraction;
- the degree of guilt of the defendant - understood as an element of subjective imputation to the agent, and, in casu, as the result of a negligent act insofar as the defendant acted with the purpose of carrying out unsolicited communications for purposes

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promotional and direct marketing, without taking care of the existence of the participant's prior consent, representing as possible that it would harm the participant's privacy, not using the care to which it is obliged and capable of, well knowing that it was acting against the Law;

- the defendant's economic situation - in relation to which, in the sub iudice case, nothing was found;
- economic benefit taken by the accused - for which the pecuniary assessment or quantification is insusceptible; and,
- the minimum and maximum amounts provided for by law as regards the amounts of fines.

Valuing the facts found in the light of the criteria set out above and duly weighted, the amount of the fine for each infraction is set at: € 2,500.00.

However, contrary to the infractions foreseen and punished by Decree-Law no. 7/2004, of 7 January, amended by Decree-Law no. General Regime of Administrative Offenses and Fines, which establishes the rule of legal overlap -, with regard to violations of Law No. 41/2004, of 18 August, in the current wording, the rule contained in its article 16 establishes, as subsidiary legislation, the LPDP, especially the rules of articles 33 to 39. In turn, paragraph 2 of article 39 of the LPDP determines that the sanctions applicable to administrative offenses in competition - which happens in the sub iudice case - are always materially cumulated. This is a regime that determines that the single fine to be imposed is reduced to the arithmetic sum of the fines applied to each of the administrative offences, with no reduction.

In compliance with this rule, by virtue of the principle of legality enshrined in article 43 of the General Regime for Administrative Offenses and Fines, ex vi article 35 of the LPDP, the CNPD is bound to apply the cumulative regime defined by the Law, in casu, the LPDP, thanks to the specific regulation of the competition of infractions and sanctions regime contained therein. Therefore, and considering, as already mentioned, that there is a competition in the application of the single fine of €7,000.00 (seven thousand euros) - for the practice of forty-six foreseen and punished offences, in accordance with the combined provisions of the

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article 22, with paragraph b) of no. 1 and no. 4, both of article 37 of Decree-Law no. 7/2004, of 7 January, amended by Decree-Law no. 62/2009, of 10 March -, together with the forty fines of €2,500.00 (two thousand five hundred euros) each for the practice of forty foreseen and punished offences, in accordance with the combined provisions of no. Article 13-A and paragraph f) of paragraph 1 and paragraph 5, both of article 14 of Law no. 41/2004, of 18 August, in the current wording, the CNPD sets, material accumulation, a fine of: € 107,000.00 (one hundred and seven thousand euros).

V - Conclusion

In view of the above, the CNPD resolves:

a fine of €107,000.00

1. Apply to the defendant (one hundred and seven thousand euros);
2. Pursuant to paragraphs 2 and 3 of article 58 of the General Regime for Administrative Offenses and Fines, inform the defendant that:
 - a) The sentence becomes final and enforceable if it is not judicially challenged under the terms of article 59;
 - b) In the event of a judicial challenge, the Court may decide by means of a hearing or, if the defendant and the Public Prosecutor do not object, by means of a simple order.

The defendant must pay the fine within a maximum period of 10 days after its final nature, sending the respective payment slip to the CNPD. In case of impossibility of the respective timely payment, the defendant must communicate this fact, in writing, to the CNPD.

Lisbon, May 6, 2019

1 [With

José Grazina Machado (reportj

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Maria Candida Guedes de Oliveira

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• '\. Maria Teresa Naia

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