

938-0419

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and in consideration to the following

BACKGROUND

FIRST: Dated 08/27/2018, it is entered in the Registry of the Spanish Agency of Data Protection (AEPD) a claim from D. A.A.A. (hereinafter the claimant) in which it states that the page ***URL.1 violates the regulations of Data Protection.

The entity responsible for the website banderacatalana.cat is the GRUP BC company, S.L., with NIF B65880916 (hereinafter, the claimed).

SECOND: In view of the claim made, the AEPD, within the framework of the file with reference E/7148/2018, by letter dated 10/09/2018, notified electronically, transferred the claim to the respondent and requested information on the measures it has taken to put an end to the situation denounced wrongdoing.

The certificate issued by the FNMT in the file certifies that the transfer document was made available to the respondent in the electronic office on 10/09/2018 and that the automatic rejection occurred on 10/20/2018.

The AEPD reiterated the notification to the respondent on 10/25/2018, this time through postal mail that appears delivered - this is confirmed by the certificate issued by the Correos y Telégrafos State Society, S.A.- on 10/29/2018 at 10:37 a.m.

The claimant was notified by postal mail of a document accusing receipt of the claim and the claimant was informed of the transfer. On date 10/31/2018 this document is returned to the AEPD as it has not been withdrawn from the office

of Correos in which it was deposited after two delivery attempts with absent.

In accordance with the provisions of article 65.5 of Organic Law 3/2018, Protection of Data and Guarantee of Digital Rights (LOPDGDD), on the date 12/12/2018 the agreement for admission to processing of this claim is signed.

Under article 67.1 of the LOPDGDD, the Data Inspection of the AEPD carries out the following actions in order to determine the facts and the circumstances that justify the processing of the procedure.

On 01/31/2019 you access the Privacy Policy of the page ***URL.1 and the following extremes are found.

- The website ***URL.1 offers in the section called information ("Information") and within it in the legal text subsection ("Legal Text"), access to your Privacy Policy.

- The Privacy Policy that is accessed informs that the person responsible for the Data processing is "Grupo Bandera Catalana", Grup BC, S.L., (B65880916), with address at calle Venus 86 B, Terrassa 08228.

- The Privacy Policy of the claimed party dedicates two separate sections to these issues: The responsible (i); the purposes, legitimacy and conservation of the treatment of the data sent through contact forms, emails emails and subscription to your newsletter (ii); the recipients of the data (iii); the rights in relation to your personal data (iv); cookie(v); safety of your personal data (vi) and update of your personal data (vii).

- In turn, the second of the aforementioned sections - purposes, legitimacy and conservation of the treatment of the data sent through forms of contact, emails and subscription to your newsletter- details, depending on the means by which the holder has provided them, what is the purpose of the treatment and what

the legitimacy for the processing of personal data.

It is stated for each of the means of data collection used the following legitimization ("Legitimació"):

The user's consent when requesting information from us through our contact form.

The user's consent when requesting information through the Email address.

The user's consent when subscribing to our commercial mailings or newsletters.

Later, the legal information of the website ***URL.1, in the same section destined to purposes, legitimacy and conservation of the treatment of the data sent through contact forms, emails and subscription to the newsletter, indicates that the provision of personal data requires a minimum age 13 years old or, if applicable, have sufficient legal capacity to contract (the underlined is from the AEPD).

Since the website ***URL.1, and therefore also the Privacy Policy, exclusively uses one of the co-official languages of Catalonia, Catalan, transcribes the information referred to as it is offered, that is, written in Catalan:

"The provision of personal data requires a minimum age of 13 years or, if s`escau, have sufficient legal capacity to contract") (The underlining is of the AEPD)

THIRD: On 02/06/2019, the Director of the Spanish Protection Agency of Data agrees to initiate a sanctioning procedure against the person claimed for the alleged infringement of article 13.1, in relation to articles 6.1.a) and 8.1 of the RGPD and in relation to article 7 of Organic Law 3/2018, on Data Protection and Guarantees of Digital Rights (LOPDGDD). Infraction contemplated in the

article 83.5 of the RGPD.

FOURTH: The initiation agreement was notified to the claimed party electronically, as to the provisions of article 14 of Law 39/2015 on Administrative Procedure Common Public Administrations (LPACAP). The certificate issued by the Electronic Notification Service and Authorized Electronic Address of the FNMT, that is in the file, proves that the initiation agreement was made available to the entity on 02/07/2019 being rejected on 02/18/2019.

This Agency reiterated the notification of the agreement to initiate the file through postal mail addressed to the registered office of the claimant. The certificate issued by the State Post and Telegraph Society certifies that the opening agreement was notified to the claimant appearing as delivery date 03/04/2019 at 10:33 hours.

In accordance with article 73.1 of the LPACAP "The procedures that must be filled in by the interested parties must be made within a period of ten days from the day following the notification of the corresponding act", except when the norm sets a different deadline.

In the initiation agreement of PS /0006/2019, a period of ten days was granted able to formulate allegations and it was also stated, as provided by the article 64.2.f) of Law 39/2015 that, in the event of not formulating within the established term allegations about the content of the initiation agreement, it may be considered motion for a resolution when it contains a precise pronouncement on the imputed responsibility.

There is no news in this Agency that the respondent had formulated allegations to the agreement to open the sanctioning procedure.

Through diligence dated 10/31/2019, the instructor of the record of the result of the access made on that date to the Privacy Policy

Privacy of the website banderacatalana.cat.

The screenshots obtained from that website show that in the section "Purpose, legitimacy and conservation of data processing sent through: Contact form (...) Sending emails (...) Subscription to our newsletter" of the legal information continues to exist identical information that appeared on 01/31/2019: The provision of data personal will require a minimum age of 13 years or, where appropriate, have Sufficient legal capacity to contract.

Also, the screenshots incorporated into the record diligence raised on 10/31/2019 prove that the page ***URL.1 informs that "the new person in charge of the website hosted at ***URL.2 and of data processing personal" is Mr. B.B.B. with tax identification number ***NIF.1 and address prosecutor on street *** ADDRESS.1

Given that the respondent did not make any objections to the initial agreement sanction file, under article 64.2.f) of the LPACAP and whenever that the initiation agreement contained a specific pronouncement and determined on the responsibility of the accused, the proposal process is omitted of resolution and the corresponding resolution is dictated

The following are considered tested in this procedure:

FACTS

1.- On 01/31/2019 the site ***URL.2 informs that Grup BC, S.L., with NIF B65880916, is responsible for the processing of personal data. Facilitate your postal address (Calle Venus 86 B, Terrassa 08228) and an email address: ***EMAIL.1

2. On that date, 01/31/2019, the privacy policy that can be accessed from the aforementioned website refers, among other matters, to the "Purposes, legitimacy and

Conservation of data processing sent through: forms of

contact (...) Sending emails (...) Subscription to our Newsletter (...)"

In this subsection - "Subscription to our Newsletter" - the following is indicated:

"Purpose: Sending our commercial bulletin, informative communications and advertising about our products or services that are of interest to you, including by electronic means (email, SMS, etc.).

Legitimation: The user's consent when subscribing to our mailings commercials or newsletters.

service drop.

Conservation: Until the interested party revokes the consent and requests the

Obligation to provide your personal data and consequence of not doing so.

"The provision of personal data requires a minimum age of 13 years or, in where appropriate, have sufficient legal capacity to contract. (The underlining is from the AEPD)

3. The notification to the respondent of the agreement to start the file PS/0006/2019 will be made electronically on 02/07/2019 (date of availability) and was automatically rejected on 02/18/2019. This is confirmed by the FNMT certificate what works in the file.

4. On 03/04/2019, at 10:30 a.m., the respondent picked up the initiation agreement of PS/006/2019 given that the AEPD reiterated the notification through post mail. Works in the file the certificate issued by the State Company Correos y Telegrafos that proves it.

5. There is no record in the AEPD Registry that the respondent has made allegations to the initiation agreement of PS/006/2019.

6. On 10/31/2019, the website banderacatalana.cat offers in terms of privacy policy this information. In the section "Purpose, legitimacy and

conservation of data processing sent through: Form of

contact (...) Sending emails (...) Subscription to our newsletter”

There is still information identical to that which appeared on 01/31/2019:

The provision of personal data will require a minimum age of 13 years or, in its case, have sufficient legal capacity to contract.

7. On 10/31/2019 the page ***URL.1 informs that “the new person in charge of the web hosted at ***URL.2 and the processing of personal data” is Mr. B.B.B.

with tax identification number ***NIF.1 and fiscal address in street ***ADDRESS.1

FOUNDATIONS OF LAW

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

II

The defendant is charged with the violation of article 13.1 of the RGPD, in relation to with articles 6.1.a, and 8 of the aforementioned Regulation 2016/679. Infraction typified in the article 83.5 of the RGPD and, for the purposes of prescription, qualified by the LOPDGDD as a very serious offense (article 72.1.h).

Article 13 of the RGP, under the heading “Information that must be provided when the personal data is obtained from the interested party”, establishes:

“1. When personal data relating to him is obtained from an interested party, the responsible for the treatment, at the time they are obtained, will provide all the information indicated below:

a The identity and contact details of the person in charge and, where appropriate, of their representative;

a The contact details of the data protection delegate, if any;

a) The purposes of the treatment to which the personal data is destined and the basis
legal treatment; (The underlining is from the AEPD)

In accordance with the transcribed precept, the data controller is obliged to
inform the interested party whose personal data is collected of what is the "legal basis
of the treatment" that is going to be carried out; which implies informing of the legitimacy that it has
the entity that collects the data for the specific treatment that it intends to carry out
cape. In this regard, article 5.1.a) of the RLOPD mentions among the principles that
The processing of personal data is governed by that of "legality".

The "Legality of the treatment" is regulated in article 6 of the RGPD that indicates:

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

the interested party gave their consent for the processing of their data
for one or more specific purposes.

(...) (The underlining is from the AEPD)

The transcribed provision is complemented by article 8 of the same legal text
-RGPD- which deals with the "Conditions applicable to the consent of the child in
relation to the services of the information society":

"1. When article 6, paragraph 1, letter a) applies in relation to the offer
directly to children from services of the information society, the treatment of
personal data of a child will be considered lawful when they are at least 16 years old.

If the child is under 16 years of age, such consent will only be considered lawful if
the consent was given or authorized by the holder of parental authority or guardianship over the child,
and only to the extent given or authorized.

Member States may establish by law a lower age for such purposes,
provided that it is not less than 13 years.

2. The controller will make reasonable efforts to verify in

such cases that the consent was given or authorized by the holder of the country authority or guardianship over the child, taking into account the available technology.

3. Section 1 shall not affect the general provisions of the Law

of the Member States, such as the rules relating to the validity,

formation or effects of contracts in relation to a child". (The underlining is from the AEPD)

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

Personal and Guarantee of Digital Rights (hereinafter, LOPDGDD), which entered into

force on December 7 (Sixteenth Final Provision) has made use of the authorization

that article 8.1., last paragraph, of the RGPD grants the Member States to

determine the age at which it is lawful for a minor under 16 years of age to grant their

consent to the processing of your data in relation to the direct offer of

information society services.

The LOPDGDD, within the limits of Regulation 2016/697, sets the age for

consent to the processing of data at the age of 14. Article 7 of the

LOPDGDD under the heading "Consent of minors", says:

"1. The treatment of the personal data of a minor only

may be based on your consent when you are over fourteen years of age.

The cases in which the law requires the attendance of the holders are excepted.

of parental authority for the celebration of the legal act or transaction in the context of which consent for treatment is obtained.

2. The treatment of the data of minors under fourteen years of age, based on the

consent, it will only be lawful if the consent of the holder of parental authority or guardianship is recorded, with the scope determined by the holders of parental authority or guardianship." (The underline is

of the AEPD)

III

The ***URL.1 website offers online sales of various products and offers the possibility to those who wish to subscribe to its commercial bulletin or newsletter in order to receive informative and advertising communications about your products or services; communications that -he says- will also be received through electronic means "(Email, SMS, etc)".

The website details that the legal basis for the processing of personal data by sending the commercial newsletters is the consent given by the user when subscribing to these mailings. The website says below:

"Obligation to provide your personal data and consequences of not doing so.

The provision of personal data requires a minimum age of 13 years or, in where appropriate, have sufficient legal capacity to contract.

The requested personal data is necessary to manage your requests and/or provide the services that you may contract, so that, if you do not provide them to us, We will not be able to serve you correctly or provide the service you have requested..."

It seems appropriate to remember -for the purpose of applying article 8 of the RGPD- that commercial bulletins sent through electronic means constitute a information society service. In this sense, we refer to the definition that Law 34/2002, on Services of the Information Society (LSSI) offers in its Exhibit:

"For the purposes of this Law, it shall be understood as:

a. Services of the information society or services: all services provided normally for consideration, remotely or electronically and at individual request of the recipient. (...) They are services of the information society, among others and provided that they represent an economic activity, the following:

The contracting of goods and services electronically

(...)

4. Sending commercial communications.

(...)” (The underlining is from the AEPD)

The Privacy Policy of the website banderacatalana.cat, in

compliance with the obligation imposed by article 13.1 of the RGPD, facilitates

information on the identity and contact details of the data controller

(section a, of the precept). Responsible that on the date of opening of the agreement of

The start of the disciplinary proceedings was Grup BC, S.L., with NIF B65880916.

It also informs -as required by section b, of article 13.1, of the RGPD- of the

purposes of data processing and the legitimacy for the treatment it performs. Is

information is provided by distinguishing three hypotheses that correspond to the three

forms through which the Privacy Policy of the page provides that

collect data from third parties: contact forms, sending emails

or subscription to the news magazine (newsletter).

The examined Privacy Policy always identifies as the origin or cause of

the legitimacy for the treatment of the data -for the three assumptions or hypotheses that

contemplates the “consent”. Therefore, he states, respectively for each of

those assumptions, that the legitimacy is based on consent "when requesting

information through the contact form”, or “when requesting information from

through your email address” or “by subscribing to your mailings

commercial”.

It is thus that the legality of the processing of personal data of third parties

It is protected by article 6.1.a) of the RGPD.

At this point, it must be emphasized that article 6 of the RGPD is in

relation to article 8 of the aforementioned legal text that warns that when the

consent of the interested party (section a, of article 6.1 RGPD) in relation to the

direct offer of services of the information society to children, the treatment is lawful only if the minor is 16 years of age, and Member States may set a lower age provided that they had reached the age of 13. Let us remember that the LOPDGDD has set that age at 14 years (article 7 of the LOPDGDD). However, the Privacy Policy of the website states that the provision personal data requires a minimum age of 13 years or if applicable, have Sufficient legal capacity to contract (emphasis is from the AEPD). According to such a statement, apparently, the older than thirteen and younger than 14 can consent to your personal data being processed. information that is contrary to the provision of article 8 of the RGPD, in relation to its article 6.1.a, and the Article 7.1 of the LOPDGDD.

The information provided by the website coincides with the criteria that had initially adopted the project for the Organic Law on data protection and that, finally, was not reflected in the Law. On the contrary, the LOPDGDD, of 5 of December, which came into effect on December 7, sets the lower limit for the lowest of age consents to the processing of their data in 14 years of age.

It must be added to the foregoing that the respondent, in addition to not having formulated allegations to the agreement to initiate the file, despite the fact that their reception (see Proven Facts) has not rectified the information offered in its Privacy Policy.

In short, while article 13.1.c) of the RGPD requires that the person responsible for the processing of the data, when they are obtained directly from the interested party, report on the legal basis of the treatment and, taking into account that the information that the Privacy Policy of the website banderacatalana.cat provides in relation to the legal basis for the processing of personal data for commercial -data that is collected when filling in the newsletter form-

contravenes the RGPD -articles 6.1.a in relation to article 8.1- and the LOPDGDD

-article 7-, the information offered by the web page ***URL.1, whose person in charge in the date on which the start agreement was notified was GRUP BC, S.L., violates article 13.1.c) of the RGPD.

Article 58.2 of the RGPD says:

IV

“Each supervisory authority shall have all of the following corrective powers

listed below:

(...)

a Punish any person responsible or in charge of treatment with a warning

when the treatment operations have infringed the provisions of the

this Regulation.

Impose an administrative fine under article 83, in addition to or instead of

of the measures mentioned in this section, depending on the circumstances

of each particular case,

(...)

(...)”

On the admissibility of opting, in the present case, for the sanction of a fine

provided for in article 83.5 RGPD or by the penalty of warning of article

58.2.b, Recital 148 of Regulation 2016/679 must be brought up, which

offers the following thought:

“In the event of a minor offence, or if the fine likely to be imposed

would constitute a disproportionate burden for a natural person, rather than

sanction by means of a fine, a warning may be imposed. must however

Special attention should be paid to the nature, seriousness and duration of the infringement, its

intentional nature, to the measures taken to alleviate the damages suffered,

the degree of liability or any relevant prior violation, the manner in which that the control authority has been aware of the infraction, compliance of measures ordered against the person responsible or in charge, adherence to codes of conduct and any other aggravating or mitigating circumstance” (Emphasis added).
the AEPD)

After analyzing the circumstances that occur in the case at hand, all

Once the examination of the Privacy Policy of the claimed party it is verified that in

December 2018, in general, had been updated to the terms of the

GDPR and that the wrong information you provided regarding the age at which a

minor could consent to the processing of their personal data could be

originated by the fact that it adopted the criterion that the project of the Organic Law of

Data Protection initially set -under which the age limit was 13 years-

and did not rectify it later -when the LOPDGDD was approved and changed

the criteria of the project establishing a minimum age of 14 years-, it is estimated

appropriate to sanction for the infraction of the RGPD for which it is responsible with

warning and not with the fine provided for in article 83.5 RGPD, for being more

This decision is consistent with the spirit of the GDPR in light of Recital 148.

Therefore, in accordance with the applicable legislation,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE GRUP BC S.L. (BANDERACATALANA.CAT), with NIF

B65880916, for an infringement of article 13.1, in relation to articles 6.1.a and 8

of Regulation (EU) 2016/679, General Data Protection (RGPD), and with the

article 7 of the LOPDGDD, typified in article 83.5 of the RGPD, a sanction of

warning provided for in article 58.2.b, of the RGPD)

SECOND:

NOTIFY

(CATALAN FLAG.CAT).

this resolution to

GRUP BC S.L.

THIRD: In accordance with the provisions of article 50 of the LOPDPGDD, the

This Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the

LOPDPGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the

Director of the Spanish Agency for Data Protection within a month from

counting from the day following the notification of this resolution or directly

contentious-administrative appeal before the Contentious-Administrative Chamber of the

National Court, in accordance with the provisions of article 25 and section 5 of

the fourth additional provision of Law 29/1998, of July 13, regulating the

Contentious-administrative jurisdiction, within a period of two months from the

day following the notification of this act, as provided in article 46.1 of the

aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP,

may provisionally suspend the firm resolution in administrative proceedings if the

The interested party expresses his intention to file a contentious-administrative appeal.

If this is the case, the interested party must formally communicate this fact by

writing addressed to the Spanish Agency for Data Protection, presenting it through

Electronic Register of the Agency [[https://sedeagpd.gob.es/sede-electronica-](https://sedeagpd.gob.es/sede-electronica-web/)

web/], or through any of the other registers provided for in art. 16.4 of the

aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the

documentation proving the effective filing of the contentious appeal-

administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative within a period of two months from the day following the

notification of this resolution would end the precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency