

□ File No.: PS/00083/2021

## RESOLUTION OF PUNISHMENT PROCEDURE

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

### BACKGROUND

FIRST: A.A.A. (hereinafter, the claimant) filed a claim on 06/12/2020

before the Spanish Agency for Data Protection. The claim is made against the travel agency ENIGMA TRAVEL, although it points to B.B.B., for having sent a message on WhatsApp to "different parents of a class of students who had hired a trip", listing those who had not paid a fee in this regard.

Provides screen print of her daughter's mobile phone, right side B.B.B., "today", I don't know see any date The message: "XXXXXX ", phone number \*\*\*PHONE.1, "we don't have proof that the following people have made the deposit on the past 6th of March, so they will have to make the deposit of XXX € before March 22 or their place will be cancelled." There is a list of names and surnames ordered by name, in total eleven, one of them in the first surname presumably coincides with that of the claimant, of his daughter.

SECOND: In view of the facts denounced in the claim and the documents provided by the claimant, the claim is transferred on 06/25/2020 to:

ENIGMA TRAVEL TRAVEL AGENCY, with the result of absent and notice was left in mailbox after delivery attempt on two different days. The attempt is repeated resulting in shipments returned due to surplus, by leaving notice and not going to pick up the letter

To the person referred to in the claim, with the result of two delivery attempts on the 6th and 07/08/2020, absent and a notice was left in the mailbox.

It tries again on 09/11/2020 without obtaining a result.

THIRD. On 11/3/2020, the claim is admitted for processing.

FOURTH: On 12/04/2020, an inspection procedure is carried out, leaving a copy on the record. Among other issues, it is verified with respect to the website \*\*\*URL.1:

1. Annex 1. \*\*\*URL.1 privacy policy.

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2. Information Annex of the domain \*\*\*URL.1, in which the owner is C.C.C. (in successively the one claimed) linked in the report extracted in Axesor to the exercise of activities as a freelancer, exercise of travel agency activities.

In addition, on the web, in the contact section, there is the mobile phone line that sent the message WhatsApp that matches the \*\*\*PHONE.1.

3. C.C.C. Axesor Report Annex. and B.B.B.

4. Attachment of the result of the url query \*\*\*URL.1.

5. Annex capture of the contact website of \*\*\*URL.1.

6. Capture annex of the conditions of sale of \*\*\*URL.1.

7. \*\*\*URL.1 Terms of Use Capture Addendum.

FIFTH: On 12/4 and 12/2020, a letter is sent to the ENIGMA TRAVEL AGENCY OF VIAJES and C.C.C., and dated 01/18/2021, a response is received from the latter, stating according to the report of previous actions:

- She is the person who commercially exploits the travel agency. Contribute as CIF of the agency, copy of your NIF.

- The WhatsApp message was sent within the organization of a weekend trip.

course requested by customers. The WhatsApp group was created by one of the clients in

within your domestic activity.

-The phone number \*\*\*PHONE.1 is not an Administrator of that group, but a user plus.

Provides a screenshot of the WhatsApp group components where the user "\*\*\*\*USER.1" with the identification of "B.B.B. En?gma" not being this user the administrator. The user "\*\*\*\*USER.2" appears as administrator of the group, the 08/20/2019. They are counted according to the label "31 participants".

-In response to the consent granted by the recipients of the message for the reception of the same, provides contract of the combined trip. List the date, accommodation, price and payment schedule in different months to an account owned by the claimed party.

There is no consent to receive messages.

-Regarding the message sent "it is a one-time event and is not the usual operation of the company carry out communications in this way with customers."

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-The cause that has motivated the incidence is to use the same communication channel used by customers.

-The users themselves wrote messages about the status of their payments.

ENIGMA TRAVEL

WhatsApp group screenshot with name "

XXXXX" consists of the denounced message as well as other messages sent by users of the group stating that they have paid.

-They have appointed a DPD.

-“The denounced message has been visible for a limited time and has not caused a communication of data that were not already known by the participants.” Indicates that it deleted, attached Annex IV from which the date of the message's deletion is not clear, being a message that is sent indicating that "You do not need to go indicating who has paid out. I will go by...as we review the payments”.

SIXTH: On 05/21/2021, the director of the AEPD agreed:

“INITIATE PUNISHMENT PROCEDURE against C.C.C., (TRIPS ENIGMA TRAVEL) with NIF \*\*\*NIF.1, for the alleged infringement of articles 5.1.f) and 32 of the RGPD, in accordance with point out articles 83.5.a) and 83.4.a) of the RGPD.

For the purposes specified in the art. 64.2 b) of Law 39/2015, of 1/10, of the Procedure Common Administrative Law of Public Administrations, the sanction that could to reciprocate would be a warning.

SEVENTH: On 06/04/2021, allegations were received from the respondent, stating that

Article 28.1 of Law 40/2015 of 1/10 on the

liability and 89.1 d) of Law 39/2015. It ends indicating that it does not attend

voluntariness in the act, and there has been no particularly harmful result, taking

Note that the WhatsApp group was not controlled by the claimed party and the message was only

It was visible for a short time.

EIGHTH: On 12/17/2021, a resolution proposal is issued, of the literal:

"That by the Director of the Spanish Agency for Data Protection is sanctioned with

warning to C.C.C., with NIF \*\*\*NIF.1, for:

-an infringement of article 5.1.f) of the RGPD, in accordance with article 83.5.a) of the GDPR.

-an infringement of article 32 of the RGPD, in accordance with article 83.4.a) of the RGPD.”

No claims were received.

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NINTH: Of the actions carried out in this procedure and the documentation in the file, the following have been accredited:

#### PROVEN FACTS

FIRST: The respondent is the owner of a travel agency activity (trademark ENIGMA TRAVEL) and a group of students had booked an end-of-year trip, taking charge of the claimed organization, which contained in the contract a program of monthly payments.

In the search on the web of [enigmatravel.es](http://enigmatravel.es), it appeared as the owner, the one claimed in the exercise of activities, such as self-employment, travel agency activities. On your website, contact section, the \*\*\*PHONE.1 appears, which coincides with the mobile phone line sender of the WhatsApp message.

SECOND: The claimant, father of a girl, provides a printed copy of the telephone screen her daughter's mobile, in which you can see: B.B.B., and a message: "XXXXX", associated with the number of telephone \*\*\*TELEPHONE.1, in which it informs that there are people who did not make the deposit on past 6/03, accompanied by a list of eleven names and surnames, one of them that of his daughter. According to a printout of the info screen of the mobile group that provided the claimed person, the message was sent on 03/09/2020.

THIRD: The respondent stated:

- The WhatsApp message was sent during the end-of-course trip.
- The WhatsApp group of 31 participants was created by one of the clients on 08/20/2019, according to mobile screen impression, group info, provided by claimed, in whose relationship the claimant's daughter appears.

-The telephone number \*\*\*TELÉFONO.1, owned by the claimed party and which appears on its website as a contact, who sends the message, he is not an Administrator of that group, he is a user more, according to mobile screen printing, group info, provided by claimed.

-The message has been deleted.

## FOUNDATIONS OF LAW

Yo

In accordance with and as established in articles 47 and 48.1 of Organic Law 3/2018, of 5/12, of Protection of Personal Data and guarantee of digital rights (in hereinafter, LOPDGDD), the Director is competent to initiate and resolve this procedure. of the Spanish Agency for Data Protection.

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 of the

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Regulation (EU) 2016/679, in this organic law, by the provisions regulations issued in its development and, as long as they do not contradict them, with a subsidiary, by the general rules on administrative procedures."

II

The consequences of the denounced facts materialize in the sending through the WhatsApp messaging service, formed by, among others, a group of students who make an end-of-course trip and a message was sent by a person from the entity organizer of the trip to the whole group with information on names and surnames of children and girls who needed to pay amounts for the trip, of those who were not up to date with the

Payments.

The phone number used for said message is a line related to the claimed one, responsible for the establishment of the travel agency, appearing in the message the line and the person who sends it, who had access and was aware of the payment listings.

Article 4.7 of the RGPD defines data controller as the natural or legal person that alone or jointly with others determines the purposes and means of the treatment.

Treatment that is defined in article 4.2 of the RGPD as any operation set of operations performed on personal data or data sets personal, whether by automated procedures or not. In this case the data of the traveling students, who could coincide with those who formed the WhatsApp group, adding the payment information of each child, being the one claimed, the only one that stored and managed these data linked to each person, and which were disseminated in the said group, in which, according to the respondent, the participants commented on matters related to it.

The claimed party, as data controller, a natural person is responsible for the alleged infringement committed, as responsible for the data of the children who are going to travel, deciding the use of the data, making it known to the entire group through a person listed as "B.B.B." who has access to payment data.

III

The defendant (VIAJES ENIGMA TRAVEL) is charged with an infraction of article 5.1.f) of the RGPD, which establishes the principles that must govern the processing of personal data and mentions among them that of "integrity and confidentiality".

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The cited article states that:

"1. The personal data will be:

f) processed in such a way as to ensure adequate security of personal data, including protection against unauthorized or unlawful processing and against loss, accidental destruction or damage, through the application of technical or organizational measures appropriate ("integrity and confidentiality").

This article appears connected with article 5, duty of confidentiality, of the LOPDGDD,

That points:

"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 of the obligor with the person in charge or in charge of the treatment".

This duty of confidentiality, as a duty of secrecy, must be understood to have the purpose to prevent leaks of data not consented to by the holders of the same. For this, it does not matter whether the claimed party is the administrator of the group or not, what is decisive is that the person claimed had the data of the boys and girls to whom organized the trip and knew the data of those who were not up to date in the program of scheduled payments.

Although the duty of confidentiality is not absolute, in this case there is no consent of the claimant nor is it contemplated in the travel contract the dissemination of the information of the non-payments communicated to all the members of the group, and it does not seem necessary that in the



contractual relationship between the parties is notified of this fact to third parties.

In addition, this duty of confidentiality is an obligation that falls not only on the responsible and in charge of the treatment but to everyone who intervenes in any phase treatment and complementary to the duty of professional secrecy. In this case, it can be the employee "B.B.B." which is within the scope of the data controller.

The distinction between data controller and employee is derived from the GDPR, for example when referring to the Data Protection Officer, in its recital 97: "...

Such data protection officers, whether or not they are employees of the data controller treatment", and its functions in article 39 of the RGD "a) inform and advise the responsible or in charge of the treatment and the employees who deal with the treatment of the obligations incumbent on them under this Regulation and other data protection provisions of the Union or of the Member States;" .

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By this, it is meant that the employees of the data controller, when carrying out carry out processing of personal data in the performance of their duties by account and on behalf of the person in charge, are in the circle of the person in charge of the treatment, which is the one that must establish guidelines and disseminate information so that achieve a uniform application in your field of the data protection policy of customers.

The commission of the infringement of the claimed article 5.1.f) of the RGD is accredited.

IV

Article 83.5 a) of the RGD, considers that the infringement of "the basic principles for the

treatment, including the conditions for consent under articles 5, 6, 7 and

9" is punishable, in accordance with section 5 of the aforementioned article 83 of the aforementioned

RGPD, "with administrative fines of a maximum of €20,000,000 or, in the case of a

company, of an amount equivalent to a maximum of 4% of the total turnover

annual global of the previous financial year, opting for the highest amount.

On the other hand, the LOPDGDD, for prescription purposes, in its article 72 indicates:

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) The processing of personal data violating the principles and guarantees

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

v

The defendant (VIAJES ENIGMA TRAVEL) is charged with an infraction of article 32 of the

GDPR, which establishes:

"1. Taking into account the state of the art, the application costs, and the

nature, scope, context and purposes of the treatment, as well as risks of

variable probability and severity for the rights and freedoms of natural persons, the

responsible and the person in charge of the treatment will apply technical and organizational measures

appropriate to guarantee a level of security appropriate to the risk, which in its case

include, among others:

a) pseudonymization and encryption of personal data;

b) the ability to ensure confidentiality, integrity, availability and resilience

permanent treatment systems and services;

c) the ability to restore the availability and access to personal data in a

fast in the event of a physical or technical incident;

d) a process of regular verification, evaluation and assessment of the effectiveness of the

technical and organizational measures to guarantee the security of the treatment.

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2. When evaluating the adequacy of the security level, particular account shall be taken of take into account the risks presented by the processing of data, in particular as a consequence of the accidental or unlawful destruction, loss or alteration of transmitted personal data, stored or otherwise processed, or unauthorized communication or access to such data.

3. Adherence to an approved code of conduct under article 40 or to a certification mechanism approved under article 42 may serve as an element for demonstrate compliance with the requirements established in section 1 of this Article.

4. The person in charge and the person in charge of the treatment will take measures to guarantee that any person acting under the authority of the person in charge or the person in charge and access to personal data can only process said data following instructions from the responsible, unless it is obliged to do so by virtue of Union Law or the Member states".

Recital 74 of the RGPD indicates: "The responsibility of the responsible for the treatment for any treatment of personal data carried out by him- me or on your own. In particular, the person responsible must be obliged to apply measures timely and effective and must be able to demonstrate compliance of the processing activities compliance with this Regulation, including the effectiveness of the measures. These measures of must take into account the nature, scope, context and purposes of the treatment as well as

the risk to the rights and freedoms of natural persons.” It is a pure approach

determination of measures exclusively based on the risk, in which there is no pre-

the specific security measures to be applied end.

In accordance with the RGPD, it is mandatory to have the technical and organizational measures es-

established to protect the integrity, authenticity or confidentiality of the personal data

processed, through a prior design of the data processing itself, which considers

re really an effective application of data protection principles. In addition to

have the measures, they must be executed correctly and not least, verify

that effective compliance with these measures has been carried out when

that treatment.

In this case, it is not accredited by the claimed party at the time of consummation

of the facts, of measures related to the data processing that was carried out and

attend to the usual production risks in the groups that share the matter in-

concrete formation of a trip in this case. Established a legal obligation, it corresponds

to the claimed the burden of proof of proving that it had such measures tending to

the purposes referred to in said article

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In this sense, the fact of participating in the dialogues of the messages in a group should

avoid the dissemination of identifying or identifiable allusions with respect to the affected party in which

contains information that affects your right. The infringement of the aforementioned article is proven

for the claimed

The violation of article 32 of the RGPD, is typified in article 83.4.a) of the

cited RGPD in the following terms:

"4. Violations of the following provisions will be sanctioned, in accordance with the section 2, with administrative fines of a maximum of EUR 10,000,000 or, in the case of a company, of an amount equivalent to a maximum of 2% of the total turnover annual global of the previous financial year, opting for the highest amount:

a) the obligations of the person in charge and of the person in charge pursuant to articles 8, 11, 25 a 39, 42 and 43."

For its part, the LOPDGDD in its article 73.f), determines, for prescription purposes:

"Based on the provisions of article 83.4 of Regulation (EU) 2016/679, considered serious and will prescribe after two years the infractions that suppose a substantial violation of the articles mentioned therein and, in particular, the following:

"f) The lack of adoption of those technical and organizational measures that result appropriate to guarantee a level of security appropriate to the risk of the treatment, in the terms required by article 32.1 of Regulation (EU) 2016/679."

v

Without prejudice to the provisions of its article 83, the RGPD contemplates in its article 58.2 that

"Each control authority will have all the following corrective powers indicated

next:

"b) send a warning to any person responsible or in charge of the treatment when the treatment operations have violated the provisions of this Regulation;"

"i) impose an administrative fine in accordance with article 83, in addition to or instead of the measures mentioned in this section, according to the circumstances of each case particular;"

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The message occurred in the course of a messaging application, with previous messages exchanged in the group about the end-of-course trip, of which the claimed as organizer. The dissemination of the message has not transcended the group in which occurred, and there is no evidence of intentionality, which is why the warning is warranted.

Therefore, according to the law,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: ADDRESS a warning to C.C.C., (VIAJES ENIGMA TRAVEL) with NIF

\*\*\*NIF.1, for an infringement of article 32 of the RGPD and article 5.1.f) of the RGPD, typified in articles 83.4 a) and 83.5 a) of the same regulation, and in the LOPDGDD, articles 73. f) and 72.1.a), respectively-.

SECOND: NOTIFY this resolution to C.C.C.

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

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 period of one month from the day

following the notification of this resolution or directly contentious appeal

before the Contentious-Administrative Chamber of the National High Court, with

in accordance with the provisions of article 25 and section 5 of the fourth additional provision

of Law 29/1998, of 13707, regulating the Contentious-administrative Jurisdiction, in the

period of two months from the day following the notification of this act, as

provided for 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, it may be

precautionary suspension of the firm decision in administrative proceedings if the interested party expresses its intention to file a contentious-administrative appeal. If this is the case, the

The interested party must formally communicate this fact in writing addressed to the Agency

Spanish Data Protection, presenting it through the Electronic Registry of the

Agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or through one of the

remaining records provided for in art. 16.4 of the aforementioned LPACAP. You will also need to transfer to the Agency the documentation that accredits the effective filing of the appeal

contentious-administrative. If the Agency was not aware of the filing of the

contentious-administrative appeal 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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