

Procedure No.: PS/00259/2019

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: The JIJONA CITY COUNCIL - LOCAL POLICE (hereinafter, the
claimant) dated December 28, 2018 filed a claim with the Agency

Spanish Data Protection Agency submitting a report on the intervention carried out.

The claim refers to the fact that on July 3, 2018, the police officers
local had an intervention in the matter of alleged street vending on public roads
with an operator of the company called Quesería Artenal Ameco S.L., without
municipal authorization for said sale, he argued that it was not a sale
itinerant but by request, providing some lists of supposed clients, without
However, when contacting some of them, they stated that they did not know
where they had obtained their data, nor having consented to their treatment.

That these exposed facts gave rise to the preparation of proceedings
police officers to prevention for the alleged crime of document falsification, with a record of
proceedings number 180014264, dated November 6, 2018, of the local Police
of Jijona/Xixona (Alicante), which were sent to the Civil Guard, for their
transfer to the judicial authority.

The claim is directed against QUESERIA ARTESANAL AMECO S.L. with NIF
B73088858 (hereinafter, the claimed one).

The following documentation is provided along with the claim:

List of alleged clients of the defendant identified by name,

Taking statement in relation to the alleged practice of sale

street vendor of Quesería Ameco, enclosing a total of eleven shots of demonstration.

3.-

July 2018.

Extract from the daily part of the local police dated June 26 and December 17.

4.-

Local police report requesting municipal registration data.

SECOND: In view of the facts denounced in the claim and the

documents provided by the claimant, as well as the facts and documents that

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surnames and addresses.

1.-

two.-

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had knowledge of this Agency, the Subdirectorate General for Data Inspection

proceeded to carry out preliminary investigation actions for the

clarification of the facts in question, in accordance with the provisions of the

Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter

RGPD, requiring the claimed the following information.

Copy of the communications and the decision adopted

1.

sent to the claimant in connection with the transfer of this claim.

Report on the causes that have motivated the incidence that has

two.

originated the claim.

Report on the measures adopted to prevent the occurrence of

3.

similar incidents.

Four.

Any other that you consider relevant.

It appears in the file that the defendant was notified through the Service of

Electronic Notifications (SNE) and Authorized Electronic Address (DEH), dated

of availability and acceptance on February 5, 2019.

Once a period of one month has elapsed since the receipt of the previous letter, the
claimed has not sent the requested documentation to this Agency.

On July 4, 2019, it is agreed by the Director of the Agency

Spanish Data Protection, the admission to process of this claim.

THIRD: On November 14, 2019, the director of the AEPD agreed:

"INITIATE PUNISHMENT PROCEDURE for AMECO ARTISAN CHEESE

SL with NIF B73088858, for the alleged violation of article 6.1. GDPR

typified in article 83.5.a) of the aforementioned RGPD" opting for the sanction that

could correspond to 5,000 euros (five thousand euros), being notified on 18

November 2019.

FOURTH: Of the actions carried out in this proceeding, they have been

accredited the following proven facts:

1.-

List of alleged clients of the defendant identified by name,

surnames and addresses.

two.-

Taking statement in relation to the alleged practice of sale

street vendor of Quesería Ameco, enclosing a total of eleven shots of demonstration.

3.-

July 2018.

Extract from the daily part of the local police dated June 26 and December 17.

4.-

Local police report requesting municipal registration data.

The respondent has not submitted arguments to the initial agreement of this

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process.

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.

The defendant is imputed the commission of an infraction for violation of the

article 6.1 of the RGPD, which states:

II

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

conditions:

a) the interested party gave their consent for the processing of their data

personal for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of the latter of measures pre-contractual;

(...)"

The infringement is typified in Article 83.5 of the RGPD and is qualified as very serious in article 72.1 b) of the LOPDGDD.

III

The documentation in the file offers evidence that the claimed, violated article 6.1 of the RGPD, since it carried out the treatment of the personal data of the alleged clients without their consent. The data information of the supposed clients were incorporated into the information systems information of the company, without having accredited that it had its consent to the collection and further processing of your personal data.

The Administrative Litigation Chamber of the National High Court, in cases like the one presented here, has considered that when the owner of the data denies contracting corresponds the burden of proof to who affirms its existence the person responsible for the processing of third-party data must collect and keep the documentation necessary to prove the consent of the holder. We quote, for all, the SAN of 05/31/2006 (Rec. 539/2004), Fourth Law Basis.

The personal data of the alleged clients were registered in lists of claimed and were treated without legitimacy for it. Consequently, it has carried out a processing of personal data without having accredited that it has

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with the consent of the same for its treatment, nor that it has the authorization lawful for it.

However, and this is essential, the defendant does not prove the legitimacy to the treatment of the data of the supposed clients.

In short, the file provided by the local police of Xixona confirms the demonstration of several of the people who appeared on the list, obtaining that the affirmations were repeated in terms of ignoring their figuration in a list of the company, with names, surnames and addresses, when they had never signed any contract, nor provided such data, a total of eleven statements.

Respect for the principle of legality that is in the essence of the fundamental right of protection of personal data requires that it be accredited that the responsible for the treatment displayed the essential diligence to prove that extreme. Failure to act in this way -and this Agency, who is responsible for ensuring for compliance with the regulations governing the right to data protection of personal character - the result would be to empty the content of the principle of legality.

IV

In order to determine the administrative fine to be imposed, the provisions of articles 83.1 and 83.2 of the RGD, precepts that indicate:

“Each control authority will guarantee that the imposition of fines administrative actions under this article for violations of this Regulation indicated in sections 4, 9 and 6 are in each individual case effective, proportionate and dissuasive.”

“Administrative fines will be imposed, depending on the circumstances of each individual case, in addition to or as a substitute for the measures contemplated in the

Article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine

administration and its amount in each individual case will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the

nature, scope or purpose of the processing operation in question

as well as the number of stakeholders affected and the level of damage and

damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

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

treatment, taking into account the technical or organizational measures that have

applied under articles 25 and 32;

e) any previous infraction committed by the person in charge or the person in charge of the

treatment;

f) the degree of cooperation with the supervisory authority in order to put

remedying the breach and mitigating the possible adverse effects of the breach;

g) the categories of personal data affected by the infringement;

h) the way in which the supervisory authority became aware of the infringement,

in particular if the person in charge or the person in charge notified the infringement and, in such

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case, to what extent;

i) when the measures indicated in article 58, paragraph 2, have been

previously ordered against the person in charge or the person in charge in question

in relation to the same matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or mechanisms

certificates approved in accordance with article 42, and

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

case, such as financial benefits realized or losses avoided, direct

or indirectly, through infringement.”

Regarding section k) of article 83.2 of the RGPD, the LOPDGDD, article 76,

“Sanctions and corrective measures”, provides:

“two. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679

may also be taken into account:

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of data processing personal.

c) The profits obtained as a result of committing the offence.

d) The possibility that the conduct of the affected party could have led to the commission of the infringement.

e) The existence of a merger by absorption process subsequent to the commission of the infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when not mandatory, a data protection delegate.

h) Submission by the person in charge or person in charge, on a voluntary basis, to alternative conflict resolution mechanisms, in those cases in which there are controversies between them and any interested party.”

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

fine to be imposed in this case on the person claimed as responsible for an infraction

typified in article 83.5.a) of the RGPD, the following factors are considered concurrent:

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In the present case we are facing an intentional action (article 83.2 b) RGPD).

Basic identifiers are affected (name, surnames and addresses),

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according to art. 83.2g) GDPR.

This is why it is considered appropriate to graduate the sanction to be imposed on the person claimed and set it at the amount of €5,000 for the infringement of article 6.1 of the RGPD.

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of sanctions whose existence has been proven,

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the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE QUESERIA ARTESANAL AMECO S.L., with NIF B73088858,

for an infringement of Article 6.1 of the RGPD, typified in Article 83.5 of the RGPD,

a fine of €5,000 (five thousand euros).

SECOND: NOTIFY this resolution to AMECO ARTESANAL QUESERIA

S.L.

THIRD: Warn the sanctioned party that he must make the imposed sanction effective once

Once this resolution is enforceable, in accordance with the provisions of the

art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common Public Administrations (hereinafter LPACAP), within the payment term

voluntary established in art. 68 of the General Collection Regulations, approved

by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003, of December 17, through its entry, indicating the NIF of the sanctioned and the number of procedure that appears in the heading of this document, in the account restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency Spanish Data Protection at Banco CAIXABANK, S.A. Otherwise, it will be collected during the executive period.

Received the notification and once executed, if the date of execution is is between the 1st and 15th of each month, both inclusive, the term to carry out the voluntary payment will be until the 20th day of the following month or immediately after, and if is between the 16th and last day of each month, both inclusive, the term of the payment will be until the 5th of the second following month or immediately after.

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 month 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, the firm resolution may be provisionally suspended in administrative proceedings

if the interested party expresses his intention to file a contentious appeal-
administrative. If this is the case, the interested party must formally communicate this
made by writing to the Spanish Agency for Data Protection,
introducing him to
the agency

Electronic Registration of
through the

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[<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other
records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also
must transfer to the Agency the documentation that proves the effective filing
of the contentious-administrative appeal. If the Agency were not aware of the
filing of the contentious-administrative appeal within two months from the
day following the notification of this resolution, it would end the
precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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