

936-031219

□ Procedure No.: PS/00060/2020

RESOLUTION R/00304/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00060/2020, instructed by the Agency

Spanish Data Protection Agency to IBERIA LÍNEAS AÉREAS DE ESPAÑA, S.A.

UNIPERSONAL OPERATOR, in view of the complaint filed by A.A.A., and based on

the following,

BACKGROUND

FIRST: On March 17, 2020, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against IBERIA LÍNEAS

AIRLINES OF SPAIN, S.A. UNIPERSONAL OPERATOR (hereinafter, the

claimed), through the Agreement that is transcribed:

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Procedure No.: PS/00060/2020

935-090320

AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Agency for the Protection of

Data and based on the following

FACTS

FIRST: D.A.A.A. (hereinafter, the claimant) dated June 29, 2019

filed a claim with the Spanish Data Protection Agency. The

claim is directed against Iberia Líneas Aéreas de España, S.A. operator

Unipersonal with NIF A85850394 (hereinafter, IBERIA).

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The claimant states that they have not sent him the telephone recordings, despite having exercised the right of access and which gave rise to the file TD/01965/2017.

SECOND: On August 12, 2017, the claimant exercised the right to access to your personal data before the Iberia entity. Specifically, it requested access to four recordings of telephone conversations on August 8, 9 and 11, 2017.

On August 15 and August 23, 2017, it answered the claimant's request, stating that "Iberia cannot attend to your request except after submitting a court order."

Well, the claimant filed a claim on August 25, 2017 with this Agency for not having been duly attended to their right of access.

The Board of Directors of the Spanish Data Protection Agency issued on the 5th of February 2018, resolution of legal protection TD/01965/2017, proceeding to estimate the claim.

Thus, IBERIA did not comply with the right of access nor did it notify this Agency the actions carried out, which gave rise to the sanctioning file PS/00399/2018, being sanctioned by Resolution dated March 4, 2019 with €7,500 for committing an infringement of article 37.1.f of the LOPD, typified as serious in article 44.3.i of the LOPD.

THIRD: On July 24, 2019, it is agreed to admit this claim.

After the term granted for compliance with the aforementioned has elapsed

Resolution, compliance is not recorded in this Agency.

FOURTH: In view of the facts denounced in the claim and the documents provided by the claimant and the facts and documents of which he has had knowledge of this Agency, the Subdirector General for Data Inspection proceeded to carry out preliminary investigation actions for the clarification of the facts in question, by virtue of the investigative powers granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter RGPD), and in accordance with the provisions of Title VII, Chapter I, Second Section, of the Law Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD).

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As a result of the research actions carried out, it is confirmed that the data controller is the claimed party.

Requested information from Iberia on the details of the documentation sent to the claimant, dated November 20, 2019, this Agency receives a copy of the letter sent by Iberia to the claimant providing access to the following personal data: Iberia Plus/Iberia Joven Program, Reservation data/flights, Mail exchange because of your claim.

And attach the following documents:

Excel sheet with the data of the Iberia Plus/Iberia Joven Program.

Excel sheet with flight reservation data

Letter indicating that all emails were sent to the claimant

exchanged because of their claims but that the file is very heavy and does not
they have been able to present it through the headquarters of this Agency.

There is no evidence that the recordings were provided to the claimant
telephone calls requested in the exercise of the right of access.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of Regulation (EU) 2016/679, of the
European Parliament and of the Council, of April 27, 2016, regarding the Protection of
Natural Persons with regard to the Processing of Personal Data and the
Free Circulation of these Data (General Data Protection Regulation, in
hereinafter RGPD) recognizes each control authority and, as established in the
Articles 47, 64.2 and 68.1 of Organic Law 3/2018, of December 5, on Protection
of Personal Data and Guarantee of Digital Rights (hereinafter LOPDGDD),
The Director of the Spanish Agency for Data Protection is competent to initiate
this procedure.

II

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Article 58 of the RGPD, “Powers of Attorney”, says:

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

corrections listed below:

(...)

b) sanction any person responsible or in charge of the treatment with a warning

when the treatment operations have violated the provisions of this

Regulation;

(...)

d) order the person in charge or in charge of the treatment that the operations of

treatment comply with the provisions of this Regulation, where appropriate,

in a certain way and within a specified period.

(...)

i) impose an administrative fine under article 83, in addition to or instead of

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

particular.

III

The RGPD deals in its article 58 with the powers of each authority of

control. Section 1.a) provides:

"1. Each supervisory authority will have all investigative powers

listed below:

a) order the person in charge and the person in charge of the treatment and, where appropriate, the

representative of the person in charge or the person in charge, who provide any information

required for the performance of its functions.

The infraction for which the responsible entity IBERIA is held responsible, is

is typified in article 83 of the RGPD that, under the heading "Conditions

for the imposition of administrative fines", states:

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

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with section 2, with administrative fines of a maximum of 20,000,000 Euros or, in the case of a company, an amount equivalent to a maximum of 4% of the global total annual turnover of the previous financial year, opting for the largest amount:

e) non-compliance with a resolution or a temporary or definitive limitation of the treatment or the suspension of the data flows by the authority of control under Article 58(2) or failing to provide access in breach of article 58, section 1.”

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the Digital Rights (LOPDGDD) in its article 72.1 m), under the heading "Infringements considered very serious" provides:

"1. Based on the provisions of article 83.5 of the Regulation (U.E.) 2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in it and, in particular the following:

(...)

m) Failure to comply with the resolutions issued by the protection authority data controller in exercise of the powers conferred by article 58.2 of Regulation (EU) 2016/679.”

IV

In the case analyzed here, it has been proven that the claimant exercised your right of access to the defendant entity, your request did not get a response legally required.

Likewise, after the evidence obtained, it is clear that the party claimed did not

did not comply with the right of access nor communicated to this Agency the actions carried out, which gave rise to the sanctioning file PS/00399/2018, being sanctioned by Resolution dated March 4, 2019 with €7,500 for committing an infraction of article 37.1.f of the LOPD, typified as serious in article 44.3.i of the LOPD.

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The claimant has again stated that they have not sent him the recordings telephone numbers requested, despite the legal guardianship resolution TD/01965/2017 issued by the Director of the Spanish Data Protection Agency.

v

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

“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

case, to what extent;

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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 the financial benefits obtained or the losses avoided, directly or indirectly, through the 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 the Regulation (EU)

2016/679 may also be taken into account:

- a) The continuing nature of the offence.
 - b) The link between the activity of the offender and the performance of treatments of personal data.
 - c) The profits obtained as a result of committing the offence.
 - d) The possibility that the conduct of the affected party could have induced the commission of the offence.
 - e) The existence of a merger by absorption process after the commission of the infringement, which cannot be attributed to the absorbing entity.
 - f) Affectation of the rights of minors.
 - g) Have, when it is not mandatory, a delegate for the protection of data.
 - h) The submission by the person in charge or person in charge, with voluntary, to alternative conflict resolution mechanisms, in those assumptions in which there are controversies between those and any interested party.”
- In accordance with the transcribed precepts, and without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction of fine to impose in the present case on the entity claimed as responsible for a infringement typified in article 83.5.e) of the RGPD, in an initial assessment, the following factors are considered concurrent:
- It has not obtained direct benefits (83.2 k) RGPD and 76.2.c) LOPDGDD).

Any previous infraction committed by the person in charge or in charge of the

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treatment (83.2 e, of the RGPD).

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The lack of cooperation with the AEPD in order to remedy the infraction and

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mitigate its effects (article 83.2.f, of the RGPD).

It is appropriate to graduate the sanction to be imposed on Iberia Líneas Aéreas de España, S.A.

Unipersonal Operator and set it at the amount of €40,000 for the violation of article 58.2

of the GDPR.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

1.

START A SANCTION PROCEDURE against Iberia Líneas Aéreas de

Spain, S.A. Unipersonal Operator with NIF A85850394, for the alleged

infringement of article 58.2 of the RGPD, typified in art. 83.5 e) of the GDPR.

1. APPOINT D.B.B.B. as instructor. and, as secretary, Ms. C.C.C. indi-

whereby any of them may be challenged, as the case may be, in accordance with

established in articles 23 and 24 of Law 40/2015, of October 1, of Ré-

Legal Regime of the Public Sector (LRJSP).

two.

INCORPORATE to the disciplinary file, for evidentiary purposes, the claim-petition filed by the claimant and his documentation, as well as that obtained during the preliminary investigation actions, all of this is part of the expending.

3. THAT for the purposes provided in art. 64.2 b) of Law 39/2015, of October 1 bre, of the Common Administrative Procedure of the Public Administrations, the sanction that could correspond would be 40,000 euros, without prejudice to what resulting from the instruction.

4. NOTIFY this agreement to Iberia Líneas Aéreas de España, S.A.

Unipersonal Operator with NIF A85850394, granting a term of hearing of ten business days to formulate the allegations and present the tests you deem appropriate. In your statement of arguments, you must Provide your NIF and the procedure number that appears in the header of this document.

If within the stipulated period it does not make allegations to this initial agreement, the same may be considered a resolution proposal, as established in article

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64.2.f) of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations (hereinafter, LPACAP).

In accordance with the provisions of article 85 of the LPACAP, in the event that the sanction to be imposed was a fine, it may recognize its responsibility within the term granted for the formulation of allegations to this initial agreement; it

which will entail a reduction of 20% of the sanction to be imposed in this procedure, equivalent in this case to 8,000 euros. With the application of this reduction, the sanction would be established at 32,000 euros, resolving the procedure with the imposition of this sanction.

Similarly, you may, at any time prior to the resolution of this procedure, carry out the voluntary payment of the proposed sanction, which will mean a reduction of 20% of its amount, equivalent in this case to 8,000 euros. With the application of this reduction, the sanction would be established in 32,000 euros and its payment will imply the termination of the procedure.

The reduction for the voluntary payment of the penalty is cumulative with the corresponding reduction for the acknowledgment of responsibility, provided that this acknowledgment of the responsibility is revealed within the period granted to formulate arguments at the opening of the procedure. The voluntary payment of the referred amount in the previous paragraph may be done at any time prior to the resolution. In this case, if it were appropriate to apply both reductions, the amount of the penalty would be set at 24,000 euros.

In any case, the effectiveness of any of the two reductions mentioned will be conditioned to the abandonment or renunciation of any action or resource in via administrative against the sanction.

In case you chose to proceed to the voluntary payment of any of the amounts indicated above (32,000 euros or 24,000 euros), you must make it effective by depositing it in account number ES00 0000 0000 0000 0000 0000 open to name of the Spanish Data Protection Agency at CAIXABANK Bank, S.A., indicating in the concept the reference number of the procedure that appears in the heading of this document and the reason for the reduction of the amount to which welcomes

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Likewise, you must send proof of payment to the General Subdirectorate of Inspection to proceed with the procedure in accordance with the quantity entered.

The procedure will have a maximum duration of nine months from the date of the start-up agreement or, where appropriate, of the draft start-up agreement.

Once this period has elapsed, it will expire and, consequently, the file of performances; in accordance with the provisions of article 64 of the LOPDGDD.

Finally, it is pointed out that in accordance with the provisions of article 112.1 of the LPACAP,

There is no administrative appeal against this act.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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: On July 3, 2020, the claimant has proceeded to pay the

SECOND

sanction in the amount of 24,000 euros making use of the two planned reductions in the Startup Agreement transcribed above, which implies the recognition of the responsibility.

THIRD: The payment made, within the period granted to formulate allegations to the opening of the procedure, entails the waiver of any action or resource in via administrative action against the sanction and acknowledgment of responsibility in relation to the facts referred to in the Initiation Agreement.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGD recognizes to each authority of

control, and as established in art. 47 of the Organic Law 3/2018, of 5

December, of Protection of Personal Data and guarantee of digital rights (in

hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection

is competent to sanction the infractions that are committed against said

Regulation; infractions of article 48 of Law 9/2014, of May 9, General

Telecommunications (hereinafter LGT), in accordance with the provisions of the

article 84.3 of the LGT, and the infractions typified in articles 38.3 c), d) and i) and

38.4 d), g) and h) of Law 34/2002, of July 11, on services of the society of the

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information and electronic commerce (hereinafter LSSI), as provided in article

43.1 of said Law.

II

Article 85 of Law 39/2015, of October 1, on Administrative Procedure

Common to Public Administrations (hereinafter, LPACAP), under the rubric

"Termination in sanctioning procedures" provides the following:

"1. A sanctioning procedure has been initiated, if the offender acknowledges his responsibility, the procedure may be resolved with the imposition of the sanction to proceed.

2. When the sanction is solely pecuniary in nature or fits

impose a pecuniary sanction and another of a non-pecuniary nature but it has been justified the inadmissibility of the second, the voluntary payment by the alleged perpetrator, in any time prior to the resolution, will imply the termination of the procedure, except in relation to the replacement of the altered situation or the determination of the compensation for damages caused by the commission of the infringement.

3. In both cases, when the sanction is solely pecuniary in nature, the competent body to resolve the procedure will apply reductions of, at least 20% of the amount of the proposed sanction, these being cumulative each. The aforementioned reductions must be determined in the notification of initiation of the procedure and its effectiveness will be conditioned to the withdrawal or Waiver of any administrative action or recourse against the sanction.

The reduction percentage provided for in this section may be increased regulations.

According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00060/2020, of in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to IBERIA LÍNEAS AÉREAS DE SPAIN, S.A. UNIPERSONAL OPERATOR.

In accordance with the provisions of article 50 of the LOPDGDD, this

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

Against this resolution, which puts an end to the administrative procedure as prescribed by

the art. 114.1.c) of Law 39/2015, of October 1, on Administrative Procedure

Common of the Public Administrations, the interested parties may file an appeal

contentious-administrative 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.

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Director of the Spanish Data Protection Agency

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