

Procedure No.: PS/00148/2021

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the claimant) dated August 22, 2020

filed a claim with the Spanish Data Protection Agency. The

claim is directed against GERCO FIT, S.L. with NIF B86306206 (hereinafter, the claimed).

The claimant states that she signed a contract with the Basque-Andalusian society Inversiones, S.L., owner of the Fitness Place sports centers.

Well, Vasco-Andaluza Inversiones, S.L. I communicate your personal data to the claimed, not being informed of said circumstance. Add that I don't know either. communicated with her to tell her who is now responsible for her data and what is their treatment.

And, among other things, it provides the following documentation:

- Contract for the use of the sports facilities of the Fitness establishment

Place Sport Center signed with the owner, Vasco-Andaluza Inversiones, S.L., of the Fitness Place sports centers, on December 30, 2011.

- Complaint sheet delivered at the Fitness Place Sport Center establishment

where the seal of the claimed entity appears, a different entity with which it contracted.

On February 14, 2021, the claimant states to this Agency that

A charge has arrived from a third company with the name Body Tonic Shop S.L. which you suspect has also been the recipient of your data.

The claimant states that she exercised the right of access to her personal data to the

company with which you signed the contract.

And among others, attach the following documents:

Return of the bank receipt issued by Body Tonic Shop S.L.

Respondent's response to the claim made to Vasco-Andaluza Inversiones,

SL

Printing of the email sent to fp@fitness-place.com exercising the right

of access to your personal data.

SECOND: Prior to this claim being admitted for processing, the

to the one claimed on September 28, 2020, in accordance with the provisions of

Article 65.4 of Organic Law 3/2018, of December 5, on Data Protection

Personal and guarantee of digital rights (hereinafter, LOPDGDD), in the

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actions with reference E/07530/2020. Notification is done electronically,

and it appears as an automatic rejection date of October 9, 2020.

THIRD: In accordance with the provisions of article 65.2 of the LOPDGDD, in

On December 23, 2020, the agreement for admission to processing of the application was signed.

claim.

FOURTH: The General Subdirectorate for Data Inspection proceeded to carry out

of previous investigative actions to clarify the facts in

matter, by virtue of the investigative powers granted to the authorities of

control in article 57.1 of Regulation (EU) 2016/679 (General Regulation of

Data Protection, hereinafter RGPD), and in accordance with the provisions of the

Title VII, Chapter I, Second Section, of the LOPDGDD.

Information requested from the proprietary company Vasco Andaluza, on the possible relationship of this with Gerco Fit and Body Tonic Shop, dated March 17, 2021 is received at this Agency, in writing informing that all companies mentioned have the same sole administrator.

The same ownership of the three entities is verified in the Mercantile Registry Central (hereinafter, RMC).

It is verified that in the thirteenth clause of the contract for the use of the sports facilities of the Fitness Place Sport Center establishment signed by the claimant with Vasco Andaluza on December 30, 2011, it is established:

“In accordance with the provisions of Organic Law 15/1999, the client is informed and accepts the incorporation of your data to the automated files, property of the company that owns the center, whose data and address appear on the seal stamped on the front of this document; address they can write to accompanied by a photocopy of the DNI or document proving your identity, to exercise their Rights of access, rectification, cancellation and opposition.”

FIFTH: On May 14, 2021, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimed, for the alleged infringement of Article 6 of the RGPD, typified in Article 83.5.a) of the aforementioned GDPR.

SIXTH: Having been notified electronically, the start agreement. Being the date of availability on May 14, 2021 and the date of rejection automatic on the 25th of the same month and year.

SEVENTH

: Formal notification of the start agreement, the claim at the time of the

This resolution has not submitted a brief of arguments, so it is

application of what is stated in article 64 of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations, which in its section f) establishes that in the event of not making allegations within the stipulated period on the content of the initiation agreement, it may be considered a proposal for resolution when it contains a precise statement about the responsibility imputed, reason why a Resolution is issued.

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In view of everything that has been done, by the Spanish Protection Agency of Data in this procedure the following are considered proven facts:

FACTS

FIRST: It is recorded that the claimant signed a contract for the use of the facilities with Vasco Andaluza Inversiones, S.L., owner of the sports centers Fitness Place.

SECOND: The thirteenth clause of the contract for the use of the facilities facilities at the Fitness Place Sport Center establishment signed by the claimant with Vasco Andaluza on December 30, 2011, says:

“In accordance with the provisions of Organic Law 15/1999, the client is informed and accepts the incorporation of your data to the automated files, property of the company that owns the center, whose data and address appear on the seal stamped on the front of this document; address they can write to accompanied by a photocopy of the DNI or document proving your identity, to exercise their Rights of access, rectification, cancellation and opposition.”

It is verified that the claimant agreed to communicate her data only to the company that owns the Basque Andalusian sports center.

THIRD: It is recorded that the claimant filed a claim with the owner company.

However, the person who processed it was the one claimed.

FOURTH: On May 14, 2021, this sanctioning procedure was initiated by the violation of article 6 of the RGD, being notified on the 25th of the same month and year.

Not having made allegations, the claimed, to the initial agreement.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGD recognizes to each control authority, and according to the provisions of articles 47 and 48 of the LOPDGD, The Director of the Spanish Agency for Data Protection is competent to initiate and to solve this procedure.

II

The defendant is accused of committing an infraction for violation of the Article 6 of the RGD, "Legality of the treatment", which indicates in its section 1 the assumptions in which the processing of third party data is considered lawful:

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"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, which considers as such:

"5. Violations of the following provisions will be sanctioned, in accordance with section 2, with administrative fines of a maximum of EUR 20,000,000 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:

a) The basic principles for the treatment, including the conditions for the consent under articles 5,6,7 and 9."

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the Digital Rights (LOPDGDD) in its article 72, 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:

(...)

a) The processing of personal data without the concurrence of any of the conditions of legality of the treatment established in article 6 of the Regulation (EU) 2016/679."

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 claimant without having any legitimacy to do so.

The thirteenth clause of the contract for the use of the facilities

facilities at the Fitness Place Sport Center establishment signed by the claimant

with Vasco Andaluza on December 30, 2011, says:

“In accordance with the provisions of Organic Law 15/1999, the client is

informed and accepts the incorporation of your data to the automated files,

property of the company that owns the center, whose data and address appear on the seal

stamped on the front of this document; address they can write to

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accompanied by a photocopy of the DNI or document proving your identity, to

exercise their Rights of access, rectification, cancellation and opposition.”

Well, the claimant agreed to communicate her data to the owner company

of the Basque Andalusian sports center, not to the rest of the companies belonging to the

same.

The file shows that the claimant filed a claim with the

proprietary company. However, the person who processed it was the one claimed. From here

that there has been a treatment without legitimacy.

Regarding the exercise of rights that the claimant claims to have made,

It is not proven that he identified himself correctly, and furthermore, he does so at a

email address that is not the place specified in the contract and to a

address that is not enabled for it.

IV

The determination of the sanction to be imposed in this case requires observe the provisions of articles 83.1 and 83.2 of the RGPD, precepts that, respectively, provide the following:

“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 financial benefits realized or losses avoided, direct or indirectly, through infringement.” (The underlining is from the AEPD)

In order to specify the amount of the sanction to be imposed on the one claimed by violation of article 83.5.a) of the RGPD, it is essential to examine and assess whether the circumstances described in article 83.2 of the RGPD concur and if they intervene mitigating or aggravating the responsibility of the responsible entity.

In accordance with the precepts transcribed, in order to set the amount of the sanction of a fine to be imposed in this case is considered to be the party claimed as responsible for an infringement typified in article 83.5.a) of the RGPD, in a initial assessment, the following factors are considered concurrent.

As aggravating the following:

- In the present case we are facing a negligent action on significant data that

allow the identification of a person (article 83.2 b).

- Basic personal identifiers are affected (article 83.2 g).

This is why it is considered appropriate to adjust the sanction to be imposed on the claimed and set it at the amount of €2,000 for the infringement of article 6 of the RGPD.

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of the sanctions whose existence has been proven, the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE GERCO FIT, S.L. with NIF B86306206, for an infringement of the Article 6.1 of the RGPD, typified in Article 83.5.a) of the RGPD, a fine of 2,000 euros (two thousand euros).

SECOND: NOTIFY this resolution to GERCO FIT, S.L. with NIF B86306206.

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 Department of Data Protection in the banking entity CAIXABANK, S.A.. In case Otherwise, it will be collected in the executive period.

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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

[<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.

Electronic Registration of

through the

Sea Spain Marti

Director of the Spanish Data Protection Agency

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