

Procedure No.: A/00016/2019

RESOLUTION: R/00248/2019

In procedure A/00016/2019, instructed by the Spanish Agency for the Protection of Data to the entity VILAN MESSAGING SERVICE, S.L., given the complaint filed by D.A.A.A. (hereinafter the claimant), by virtue of the following,

BACKGROUND

FIRST: On 12/11/2018, the claimant filed a claim with the Agency Spanish Data Protection. The claim is directed against VILAN MESSAGING SERVICE, S.L., with NIF B87949111 (hereinafter VILAN). The motives on which the claim is based, in short, are: that the company has sent you emails unwanted electronic mail despite being registered on the Robinson List and not having had a relationship with the aforementioned company or authorized to be sent any advertising.

Provide a copy of the email received.

SECOND: Upon receipt of the claim, the Subdirector General for Data Inspection proceeded to carry out the following actions:

On 01/16/2019, reiterated on 01/29/2019, the claim was transferred to the defendant submitted for analysis and communication to the complainant of the decision adopted about. Likewise, it was required that within a month he send to the Agency certain information:

- Copy of the communications, of the adopted decision that has been sent to the claimant regarding the transfer of this claim, and proof that the claimant has received communication of that decision.
- Report on the causes that have motivated the incidence that has originated the claim.

- Report on the measures adopted to prevent the occurrence of similar incidents.

- Any other that you consider relevant.

On 01/06/2019, the claimant was informed of the receipt of the claim and its transfer to the claimed entity.

The respondent has not responded to any of the requirements made by the Spanish Data Protection Agency.

On 04/03/2019, in accordance with article 65 of the LOPDGDD, the Director of the Spanish Agency for Data Protection agreed to admit the claim for processing filed by the claimant against VILAN.

THIRD: On 04/15/2019, the Director of the Spanish Protection Agency

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of Data agreed to initiate a procedure prior to the warning to the

claimed for alleged infringement of article 21 of Law 34/2002, of 11

July, of Services of the Information Society and Electronic Commerce (as

hereafter, LSSI), typified as minor in article 38.4.d) of said regulation, in accordance

with article 39 bis, 2 of said Law.

FOURTH: Once the initial agreement has been notified and the corresponding period has elapsed,

Respondent did not formulate written arguments.

FIFTH: In this procedure the following have been accredited:

PROVEN FACTS

FIRST: On 12/11/2018 it entered the Spanish Data Protection Agency

claim of the affected party motivated by the mail sent by the claimed
unwanted electronic mail despite being registered on the Robinson List and not
having had a relationship with the aforementioned merchant or authorized to be sent
any advertising.

SECOND: The claimant provides an email dated 12/13/2013 sent by
Robinson List Service to the claimant in which it is indicated:

"In response to your request to change data in the Robinson List Service, we

We confirm that on the date 12/11/2013 and time 09:01:24 the

Following data:

MAIN EMAIL:

EMAIL: ***EMAIL.1

VARIATION 1:

EMAIL: ***EMAIL.2

VARIATION 2:

EMAIL: ***EMAIL.3

Any question, please feel free to contact us

Receive a cordial greeting

The adigital team

THIRD: The claimant has provided email of a non-commercial nature.

requested sent on 11/29/2018 by the claimed party to the address ***EMAIL.2.

FOUNDATIONS OF LAW

The Director of the Spanish Protection Agency is competent to resolve

of Data, in accordance with the provisions of article 43.1 of Law 34/2002, of 11

Julio, on services of the information society and electronic commerce (in

forward LSSI).

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In the present case, the defendant is attributed the infringement of article 21.1 of the LSSI that has:

II

"1. Sending advertising or promotional communications is prohibited.

by email or other equivalent means of electronic communication that previously they had not been requested or expressly authorized by the recipients thereof".

On the other hand, section 2 of the aforementioned article provides:

"two. The provisions of the preceding section shall not apply when there is a prior contractual relationship, provided that the provider had obtained lawful contact details of the recipient and will use them to send commercial communications regarding products or services of your own company that are similar to those initially contracted with the client.

In any case, the provider must offer the recipient the possibility of Oppose the processing of your data for promotional purposes by means of a simple and free procedure, both at the time of data collection and in each of the commercial communications that you direct.

When the communications have been sent by email, said means must necessarily consist of the inclusion of a mailing address email or other valid electronic address where you can exercise this right, being prohibited the sending of communications that do not include said

address."

On the other hand, article 22.1 of the LSSI establishes that:

"1. The recipient may revoke consent at any time.

lent to the reception of commercial communications with the simple notification of your wishes to the sender.

To this end, service providers must enable procedures

simple and free so that the recipients can revoke the consent that

they would have lent When the communications have been sent by mail

electronically, said means must necessarily consist of the inclusion of a

email address or other valid electronic address where you can

exercise this right, being prohibited the sending of communications that do not include that address.

Likewise, they must provide information accessible by electronic means.

about these procedures.

The aforementioned infraction is typified as minor in article 38.4.d) of

said rule, which qualifies as such "The sending of commercial communications by

email or other equivalent means of electronic communication when

said shipments do not meet the requirements established in article 21 and do not constitutes a serious offence."

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In the present case, the infringement of article 21.1 of the LSSI that is attributed to

VILAN must be classified as a minor infraction, considering the number of messages

commercial documents that are accredited were forwarded to the claimant.

In article 39 bis of the LSSI, under the heading "Moderation of sanctions", stipulates the following:

III

"1. The sanctioning body will establish the amount of the sanction applying the scale relative to the class of offenses immediately preceding in severity that in which the one considered in the case in question is integrated, in the following assumptions:

- a) When there is a qualified decrease in the guilt of the accused or of the unlawfulness of the act as a consequence of the concurrence significance of several of the criteria set forth in article 40.
- b) When the infringing entity has regularized the irregular situation of
- c) When it can be seen that the behavior of the affected party has been able to induce diligent way.
- the commission of the offence.
- d) When the offender has spontaneously admitted his guilt.
- e) When a merger process by absorption has taken place and the infringement was prior to said process, not being attributable to the absorbing entity.

2. The bodies with sanctioning competence, taking into account the nature of the facts and the significant concurrence of the criteria established in section above, they may agree not to initiate the opening of the sanctioning procedure and, in its place, warn the responsible subject, so that within the period that the body sanctioning determines, proves the adoption of the corrective measures that, in each case, are pertinent, provided that the following presuppositions concur:

- a) That the facts constituted a minor or serious infraction in accordance with the provided in this Law.

b) That the competent body had not sanctioned or warned

prior to the offender as a result of the commission of offenses foreseen

in this Law.

If the warning is not addressed within the period that the sanctioning body

determined, the corresponding procedure will be opened

sanctioned for said non-compliance.”

For its part, article 40 of the LSSI, in relation to the "Graduation of the

amount of the sanctions”, determines the following:

“The amount of the fines that are imposed will be graduated according to the

following criteria:

a) The existence of intentionality.

b) Period of time during which the infraction has been committed.

c) Recidivism due to commission of infractions of the same nature, when

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so it has been declared by firm resolution.

d) The nature and amount of the damage caused.

e) The benefits obtained by the infraction.

f) Billing volume affected by the infraction committed.

g) Adherence to a code of conduct or a system of self-regulation

applicable advertising regarding the infraction committed, which complies with the provisions of

article 18 or in the eighth final provision and that has been informed

favorably by the competent body or bodies.”

In this case, the requirements set out in letters a) and b) of the aforementioned section 2 of article 39 bis. Along with this, there is a qualified reduction of the defendant's culpability, taking into account that the infraction refers to the referral of a single commercial communication and that they concur in a significantly the circumstances of non-existence of damages alleged by the recipient of the messages and lack of evidence of benefits obtained by the commission of the offence.

IV

From the foregoing and in accordance with the provisions of article 39 bis, 2 of the LSSI, the claimed entity is required to adopt the appropriate measures tending to prevent the prohibition of sending communications from being violated again commercial that had not been expressly requested or without giving any course allowed by article 21 of the LSSI.

The respondent is advised that the measures indicated in the preceding paragraph must be adopted by the entity and communicated to the AEPD, because if they are not could incur in a very serious infringement typified in article 72.1.m) of the Law Organic 3/2018, of December 5, on the Protection of Personal Data and Guarantee of Digital Rights (LOPDGDD), in relation to article 58.2 of the RGPD.

Therefore, as stated,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

1. WARN VILAN MESSAGING SERVICE, S.L., with NIF B87949111, with in accordance with the provisions of article 39 bis.2 of Law 34/2002, of July 11, of Services of the Information Society and Electronic Commerce, in relation to the infraction of article 21.1 of the aforementioned rule, typified as minor in its article 38.4. d).

2. REQUEST VILAN MESSAGING SERVICE, S.L., with NIF B87949111, in accordance with the provisions of article 39 bis 2 of the LSSI so that within ONE MONTH from the notification of this resolution:

2.1. COMPLY with the provisions of article 21.1 of the LSSI, for which the denounced entity to implement the necessary measures to prevent recurrence of the offense committed.

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2.2. REPORT to the Spanish Agency for Data Protection of compliance of what is required, providing the documents or other means of proof in the to show compliance.

3. NOTIFY this Agreement to VILAN MESSAGING SERVICE, S.L.

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 (article 48.2 of the LOPD), and in accordance with the provisions of articles 112 and 123 of the Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations, the interested parties may optionally file appeal for reconsideration before the Director of the Spanish Data Protection Agency within one month from the day following the notification of this resolution, or, directly contentious-administrative appeal before the Chamber of the Contentious-administrative of the National Court, in accordance with the provisions of the Article 25 and in section 5 of the fourth additional provision of Law 29/1998, of

July 13, regulating the Contentious-Administrative Jurisdiction, within the period of two months from the day following the notification of this act, as provided for in article 46.1 of the aforementioned legal text.

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