

Procedure No.: PS/00055/2019

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and in consideration to the following

BACKGROUND

FIRST: On 08/31/2018 it has entry in the Spanish Protection Agency of Data (AEPD) a letter from D. A.A.A. (hereinafter, the claimant) in which states that VODAFONE ESPAÑA, S.A.U., with NIF A80907397 (hereinafter, VODAFONE or the claimed party), an entity of which it is not a client and has not been for a long time more than fifteen years, has treated your bank data without legitimacy whenever you a service receipt has been passed to the collection in a bank account of which he is the holder in the Banco Sabadell entity.

The claimant provides a copy of the direct debit document issued by Banco Sabadell in your name on which the date of 08/27/2018 appears. In the box of document destined to "Name of the creditor" appears "Vodafone"; In the box "Creditor identification", "(...)" and as "Debt reference", the indication "02-940400245677".

SECOND: In view of the facts exposed, the AEPD, on 10/10/2018, in the scope of file number E/07263/2018 and under article 9 of the Real Decree-Law 5/2018, on urgent measures for the adaptation of Spanish Law to the European regulations on data protection -rule in force at the time and which would be repealed by Organic Law 3/2018, of December 5, on Data Protection and Guarantees of digital rights (LOPDGDD) - notified VODAFONE of the claim and requested that, within a month of receipt, inform the

this Agency about the decision it would have taken to put an end to the situation provoked irregular; on the communication of its decision to the claimant, having to prove receipt by the claimant of that communication, and on the measures taken to prevent similar events from occurring in the future. The writing, signed by the AEPD on 10/10/2018, VODAFONE was notified electronically, being the date of availability and the date of acceptance of the communication 10/10/2018.

In turn, the AEPD sent the claimant on the same date a letter in which he acknowledged receipt of his claim and informed him of his transfer to the claimed party. The electronic notification of that writing is dated 10/10/2018.

After the period of one month granted to VODAFONE to respond to the information request without a response having been received, the AEPD reiterated its request

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through a new letter dated 11/16/2018 in which it granted a term of five business days to respond. This writing was notified electronically to VODAFONE being the date of availability 11/16/2018 and the date of operator access to the document on 11/26/2018. The respondent did not respond either. this time to the request for information.

In accordance with the provisions of article 65.2 of Organic Law 3/2018, Protection of Data and Guarantee of Digital Rights (LOPDGDD), the 03/21/2019 the agreement for admission to processing of this claim is signed.

On 02/28/2018 - one day after the Director of the AEPD signed the

agreement to initiate the sanctioning procedure - was entered in the Registry of this agency VODAFONE's response to the request for information made in the framework of E/07263/2018.

Thus, the entity responded to the aforementioned request when they had

More than three months have elapsed since he received -on 11/26/2018- the letter reiterating the informative request made by the Agency on 10/10/2018.

THIRD: On February 27, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimed party, with

in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the

Common Administrative Procedure of Public Administrations (hereinafter,

LPACAP), for the alleged violation of article 6.1 of the RGPD sanctioned in the

article 83.5 of the RGPD.

FOURTH: Once the initiation agreement was notified, the respondent presented arguments in the

who requested that the Agency agree to the dismissal of the sanctioning file

that concerns us and proceed, consequently, to file the proceedings.

In support of this claim, he argued the following:

- Recognizes "the facts that are the object of this sanctioning procedure, because

used the account number of Mr. A.A.A. without your consent to bill

some services". However, it states that "the events took place because

of an error, probably in the registration of the services in the name of Mr. B.B.B."

(the underlining is from the AEPD).

- Alleges that the hiring made by Mr. B.B.B. (hereinafter the third)

was pampered and loved and that, although in the file of the third party that acts in their

records had associated with it the claimant's bank account number,

There was no fraudulent registration or identity theft.

- That he had knowledge of the facts that gave rise to the opening of the

sanctioning procedure when it received the informative request. in the frame

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of file E/7263/2018, and that, immediately, carried out all the

actions that were in their power to correct the error that occurred. A) Yes,

contacted the third party to obtain your bank details and remove those from the

claimant. He attaches a screenshot in which, he states, "you can

Verify that said account number has already been modified.

- Explains that if you did not respond to the Agency's information request within the

granted for this was due to the very high number of requests for

information that on those dates it had received from the AEPD and that did not exist for

his part, in no case, intention not to answer for what he answered to that

application dated 02/28/2019.

- Attach to the brief of allegations to the initiation agreement a copy of its response to the

information requirement - document that had already been sent to the Agency on

02/28/2019-. In it he narrates the facts, the reasons why they

occurred and the actions taken to guarantee the resolution of the

issue. He also attached a copy of the letter he sent to the claimant

informing you of what happened and the measures taken.

- Concludes that although the facts have been caused by their conduct, they are

result of an error in registration; human error that must be related to the

guilt principle.

On a subsidiary basis -in the event that the AEPD concludes that there was a

infringement of the data protection regulations - requests that you value as mitigating circumstance for the purposes of setting the amount of the sanction to be imposed actions he carried out to put an end to that situation as soon as he learned of the claim.

FIFTH: On 08/26/2019, in accordance with the provisions of article 77 of the Law 39/2015, of Common Administrative Procedure of Public Administrations (LPACAP), a trial practice period opens.

It is agreed to reproduce the claim filed by the claimant and the documentation attached to it; the documents obtained and generated by the Services of Inspection before VODAFONE, documents that make up the file E/07263/2018, as well as the allegations to the initiation agreement of PS/00055/2019 presented by the claimed party and the attached documentation.

The instructor of the file also agrees to carry out certain tests before VODAFONE (I) and before the financial entity Banco Bilbao Vizcaya Argentaria, S.A. (BBVA) (II)

I. The respondent responds to the evidence requested in two separate documents dated 09/20/2018, filed electronically, and dated 09/23/2019, filed in physical support before the Registry of the organism – as it is not possible to attach recordings to www.aepd.es

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through the electronic headquarters - with which it attaches a CD with a recording.

The respondent states that, after carrying out a search in the VODAFONE, there is no information regarding the claimant (Mr. A.A.A.) as

client of the entity and adds that the third party (Mr. B.B.B.) continues to be active as a client yours.

Regarding how the account data reached the third party's client file

claimant's bank account VODAFONE offers this explanation: "The account number indicated, which ends in XXX was provided when the contract was made in the name from B.B.B." and provides the following documents: "...SEPA document containing said account number, recording where said number is provided (minute 4:10 of recording onwards) and contract, all dated July 27, 2018".

Among the documents mentioned, no probative value can be attributed to the copy of the contract concluded between the claimed party and the third party and to the order of direct debit SEPA, dated 07/27/2018, in which the data appears bank accounts of the claimant associated with the person of the third party, since none of these documents is signed by the third party and VODAFONE client.

VODAFONE also provides a CD with the recording of the conversation maintained between the third party, your client, and the employee of the company belonging to the Verification Department. The recording begins when a commercial for the operator contacts the VODAFONE employee (operator of the Department of verification) to give way to customers who have been offered the one product, ADSL + mobile line, without television. Then the communication goes from the commercial Mr. B.B.B. with whom the VODAFONE verification operator will maintain a conversation. This VODAFONE employee informs you that he is going to confirm the data of the offer and the personal data that you have provided and, subsequently, will proceed to the recording of the contract. It is obvious from the start that Mr. B.B.B. (of Dutch nationality) speaks Spanish with difficulty. The VODAFONE operator requests the holder, Mr. B.B.B., to provide him with the number of ID; birth date; nationality; a contact mobile phone and

then (minute 4.07 of the recording) the name of the entity. The client says:

"(...)". Next, it asks you to confirm the last four digits of the account and provide the numbers "XXXX"

VODAFONE also provides, in response to the tests requested, various screenshots of their systems showing:

- That the third contracted with her on 07/27/2018
- That the invoices issued by VODAFONE in the name of the third party were domiciled in an account that, according to the operator, the client "request in contract recording...".

- VODAFONE explains, in relation to the invoices issued that were domiciled in the account of which the claimant is the holder, that the "customer I always ended up paying them with a Credit Card and there are interactions where the client claims that they were not direct debiting him at his bank".

- That on 02/22/2019 the bank details are changed and the new account is www.aepd.es

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***ACCOUNT.1

- VODAFONE has provided a list of all the invoices issued in the name of the third party from the contract registration date (August 2018) to the date in which the bank details are updated by deleting the account from the claimant, February 2019. The screenshot regarding the "Status of accounts" in the name of the client, is a list of all the invoices that are issued between 09/18/2018 and 09/01/2019 in which they appear, among others

data, its amount, the compensation document, the compensation date, the transaction number and under the name heading, the indication "Collection by card".

- Provides screenshots of each of the invoices issued in August, September, October, November and December 2018 and January and February of 2019. In all of them it is observed that the payment of the invoice is domiciled in the Bank and that, after one or two mentions of the existence of a "failed operation", there is, for all of them, the indication that the payment is made through bank card, there being a delay of one month, approximately, between the date of issuance of the invoice and the date of payment with card.

- Screenshots of the invoices for March, April, June, July and August 2019 issued to the third. In all of them the payment is stated domiciled in the bank account of the BBVA entity ending in the digits YY.

II. A test is carried out before BBVA requesting that it inform if the bank details that VODAFONE has provided us with as a new account of its client (the third party) in substitution of the claimant's bank account - the latter data that accredits have removed from their records - correspond, effectively, to an account of the which is owned by the third party.

BBVA responds on 09/24/2019. Confirm that the identifying digits of the bank account provided by the respondent correspond to an account of that entity owned by the third party (the VODAFONE customer) which is open to its name since 2013.

SIXTH: Of the actions carried out, the following have been accredited

FACTS

1.- Mr. A.A.A. denounces that VODAFONE, an entity of which it is not a client but with the who claims to have maintained a contractual relationship for more than fifteen years, has processed your bank details without your consent by having passed the collection in your Banco Sabadell account a receipt for a service provided by the operator to which he is oblivious.

2.-Include in the file a copy of the direct debit document issued in the name of the claimant on 08/27/2018, against his bank account at Banco Sabadell whose identifying digits are ***ACCOUNT.2. In the document box destined to "Name of the creditor" appears "Vodafone"; in the box "Identification of the creditor", "(...)" and as "Debit reference", the indication "02-940400245677".

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3. VODAFONE has acknowledged, and provides a screenshot that proves it, that the claimant's bank account ***ACCOUNT.2 has appeared in their systems linked to your client (Mr. B.B.B.) (document 2 annexed to the brief responding to the request information of the Agency in the framework of E/7263/2018)

4. Regarding the origin of the events, VODAFONE has stated that the number of account ***ACCOUNT.2 "was provided when the contract was made in the name of ...B.B.B...." and has sent the AEPD a recording of the contracting "where said number is contributed (minute 4:10 of the recording onwards)"

5. The CD that VODAFONE provides in the test phase includes, on the one hand, the conversation between the commercial and the VODAFONE agent verifying the hiring. The first informs you of the characteristics of the product that has been

offered to the future client and then puts the future client and the verification operator. This second part begins with the information that the verification operator facilitates Mr. B.B.B. (of Dutch nationality and who as can be seen, he speaks Spanish with difficulty) in which he is informed that he is going to confirm your personal data and the services offered and then record the Conversation in which you consent to the hiring. the operator of verification requests Mr. B.B.B. to provide you with the ID number; the date of birth; nationality; a contact mobile phone and then (minute 4.07 of the recording) the name of the entity. The client says: "...". Next asks you to confirm the last four digits of the account and gives you the numbers "XXXX"

6. VODAFONE provides documentary evidence that all invoices issued in the name of your client (client account 103253538) from the conclusion of the contract (August 2018) until the invoice of 02/15/2019 were issued with the bank details of the claimant although, in all cases, they were paid by the customer (not the claimant) by credit card. Provide the following documents:

- Screenshot of your client's "Statement of Accounts" detailing all invoices issued. Those issued until March 2019 bear the comment "card charges". Those issued from March 2019 to August (last invoice mentioned) bear the indication "Receipt domiciled".
- Screenshots relating to each of the invoices. In those issued between August 2018 and February 2019 (included) mention is made of direct debit of the receipt, to the situation of "Failed" and finally to the payment by card.
- Screenshots of invoices issued from March 2019 to August of 2019. In all of them it is stated that the receipt is domiciled in the account

***ACCOUNT.1

7. VODAFONE stated that after learning of what had happened through the request for information received, he contacted his client who proceeded to modify the bank details for the direct debit of invoices and provided the account

***ACCOUNT.1.

8. BBVA has confirmed to this Agency, in response to the tests carried out, that the

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Mr. B.B.B., a VODAFONE customer, is the holder of the account ending in the digits

YY which was opened in his name in 2013.

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.

II

It is necessary to indicate, in the first place, what is the regulatory framework in which The facts set forth in the claim must be assessed.

The RGPD deals in its article 5 with the principles that must govern the treatment of personal data and mentions among them that of "lawfulness, loyalty and transparency". The provision provides:

"1. The personal data will be:

a) Treated in a lawful, loyal and transparent manner with the interested party;"

Article 6 of the RGD, "Legality of the treatment", details in its section 1 the assumptions in which the processing of third party data is considered lawful:

"1. The treatment will only be lawful if it meets at least one of the following 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;
- (...)"

Article 83 of the GDPR states:

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

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III

The complaint we are examining deals with the processing of bank details

of the claimant made by VODAFONE without their consent and materialized in the issuance of invoices against your bank account in the name of a third party, client of the operator.

The processing that VODAFONE has carried out of the bank details of the claimant evidence of the copy of the direct debit receipt in your bank account - which the claimant contributed with his claim - and the various screenshots of VODAFONE systems relating to invoices issued between August 2018 and February 2019 (included) in which it is stated that the Payment was to be made by direct debit to the claimant's account.

However, it must be stressed that, in the present case, all the invoices issued by VODAFONE against the claimant's bank account -invoices that corresponded to the services provided to his client - were paid by the client by bank card payment (approximately one month after the date of issuance of the invoice). In such a way that the claimant did not make the payment effective of any of the invoices that were debited to your account. At the same time it is worthy of mention that, although the claimant affirms that fifteen years ago he was a client of VODAFONE and implies that the processing of your bank details comes from your customer file, so they would not be duly blocked, the truth is that VODAFONE stated, in response to the Agency's request regarding this question, that a search of their systems had been carried out and there was no no information on the claimant as your customer.

Confirmed that VODAFONE processed the claimant's bank details without his consent, it must be determined what is the origin of the data that were subject to treatment by the operator linked to the person of a third party (its client) and, in particular, if VODAFONE's fault or negligence intervened in that action or if the entity omitted the diligence that was appropriate to observe on the occasion of the hiring

of the services by its current client.

It should be noted that, as the respondent stated in her pleadings brief to the initial agreement, could not respond to the information request of the AEPD in term and when it responded to the request for information, the agreement to start the procedure was already signed.

Thus, VODAFONE's explanations entered this Agency when the agreement to initiate the file had been issued. Well, in his arguments VODAFONE acknowledges the facts - that it processed the claimant's bank details without his consent to bill a client's services - and explains that these are occurred due to an error in registering the services of Mr. B.B.B.. He explains that in the file of this client, in the VODAFONE systems, was associated with him the claimant's bank account number. And he adds that we are not even before a discharge fraudulent or identity theft.

The entity has provided proof of the statement a CD containing the Recording made by a contract verification agent of your company. The The call is made by a commercial who informs the agent of what the product has been offered and puts Mr. B.B.B. (future client) with the verifying agent. It is

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in that conversation when the verifying agent requests from Mr. B.B.B. what confirm various personal data including the bank in which it is direct debit the payment and the last four digits of your bank account. It is perfectly audible as the customer identifies his bank as "b.b.s." and the

last four digits as "XXXX", data that coincides with the bank account of the claimant at Banco Sabadell.

From the content of the recording provided, it is inferred that the data of the future client were provided to the verifying agent by the commercial (who in turn had collected from the future client) and that, therefore, in the course of the recording the agent The verifier limited itself to verifying that the data in its possession were the same that the future client (in this case Mr. B.B.B.) had provided to the commercial. This explains why the verification agent limited himself to asking the client to will confirm, not the twenty digits of the account, but exclusively, the name of the entity and the last four digits.

In view of the circumstances that concur in the case examined

We estimate that the documentation provided by VODAFONE shows that this entity, on the occasion of contracting its services in the name of Mr. B.B.B., moment in which he provided his bank details for the purpose of direct debiting the payment for his services, he took the minimum diligence that seemed required. Is circumstance -the diligence displayed by the operator- deprives her conduct of the culpability, essential to be able to demand administrative responsibility for behaviors that in principle are unlawful.

In short, no matter how much the behavior analyzed may coincide, a priori, with the sanctioning type of article 83.5.a) of the RGPD, such conduct is not worthy of reproach or administrative sanction for not appreciating in it lack of diligence of the claimed.

The requirement of sanctioning responsibility presupposes the concurrence of the subjective element of the infringement, an essential requirement insofar as it governs our Law sanctioning the principle of culpability that prevents imposing sanctions based on the strict liability of the alleged offender.

The presence of the subjective element as a condition for it to be born
sanctioning responsibility has been recognized by the Constitutional Court, among
others, in STC 76/1999, in which it states that administrative sanctions participate
of the same nature as the criminal ones, being one of the manifestations of the ius
puniendi of the State, and that, as a requirement derived from the security principles
legal and criminal legality enshrined in articles 9.3 and 25.1 of the CE, is
their existence is essential to impose them.

In turn, Law 40/2015 on the Legal Regime of the Public Sector provides in the
article 28, under the heading "Responsibility", "1. They can only be penalized for
Acts constituting an administrative offense natural and legal persons, as well as
such as, when a Law recognizes their capacity to act, the affected groups, the
unions and entities without legal personality and independent estates or
self-employed, who are responsible for them by way of fraud or negligence."

In light of this precept, the sanctioning responsibility can be demanded by way of
of fraud or fault, being sufficient in the latter case the mere non-observance of the
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duty of care In Judgment of 10/17/2007 (Rec. 63/2006) the National Court

It stated that "....the administrative offense provided for in article 44.3.d) of the LOPD is
consumed, as is usually the general rule in administrative offenses, by the
concurrence of slight fault. Indeed, the principle of culpability established in the
Article 130.1 of Law 30/1992 provides that they can only be sanctioned for acts
constituting administrative infractions those responsible for them, even

title of simple non-compliance. This simple non-observance cannot be understood as the admission in sanctioning administrative law of the responsibility objective

In this regard, the following SSANs are very enlightening:

The one dated 04/26/2002 (Rec. 895/2009) that states: "In effect, there is no affirm the existence of culpability from the result and this is what the Agency by maintaining that by not having prevented the security measures the result there is guilt. Far from it what must be done and is missing in the Resolution is to analyze the sufficiency of the measures from the parameters of average diligence required in the data traffic market. Well, if you act with full diligence, scrupulously fulfilling the duties derived from diligent action, there is no affirm or presume the existence of any guilt. (The underlining is from the AEPD)

Also the SAN of 04/29/2010 that in its sixth Legal Basis, and to purpose of a fraudulent hiring, indicated that "The question is not to elucidate if the Appellant processed the personal data of the complainant without her consent. consent, such as whether or not you used reasonable diligence in trying to identify the person with whom the contract was signed. (The underlining is from the AEPD)

In light of the foregoing reflections, given that in the present case, it has been verified that VODAFONE acted with reasonable diligence and adopted the measures that the circumstances of the case required to guarantee that the data incorporated into their files had been provided by the client, the subjective element of the offence. Therefore, no sanctioning liability derives from the facts that are submitted to the assessment of this body and must, in Consequently, agree on the file of the investigative actions carried out.

Therefore, in accordance with what was indicated, by the Director of the Agency Spanish Data Protection,

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HE REMEMBERS:

PROCEED TO FILE these actions.

NOTIFY this Resolution to VODAFONE ESPAÑA, S.A.U., with NIF
A80907397.

In accordance with the provisions of section 2 of article 37 of the LOPD,
in the wording given by article 82 of Law 62/2003, of December 30, of
fiscal, administrative and social order measures, this Resolution will be made
public, once it has been notified to the interested parties. The publication will be
in accordance with the provisions of Instruction 1/2004, of December 22, of the Agency
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Spanish Data Protection Agency on the publication of its Resolutions and in accordance
to the provisions of article 116 of the Regulations for the development of the LOPD approved
by Royal Decree 1720/2007, of December 21.

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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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