

Procedure No.: PS/00411/2018

RESOLUTION R/00132/2019 TERMINATION OF THE PROCEDURE BY
VOLUNTARY PAYMENT

In sanctioning procedure PS/00411/2018, instructed by the Agency

Spanish Data Protection Officer to VODAFONE ESPAÑA, S.A.U., given the complaint
presented by A.A.A., and based on the following,

BACKGROUND

FIRST: On February 13, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against VODAFONE

SPAIN, S.A.U. (hereinafter, the claimed party), through the Agreement that is transcribed:

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Procedure No.: PS/00411/2018

AGREEMENT TO START A SANCTION PROCEDURE

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

Data before VODAFONE ESPAÑA, S.A.U. and in consideration of the following:

FACTS

FIRST: Dated 04/23/2018 has entry in the Spanish Protection Agency

of Data (AEPD) a letter from D. A.A.A. (hereinafter referred to as the claimant) in which

states that he has been continuously receiving SMS messages on his mobile phone

VODAFONE ESPAÑA, S.A.U., NIF

(number ***TELEPHONE.1) sent by

A80907397 (hereinafter, VODAFONE or the claimed party) despite the fact that in 2015

exercised before this entity the right to cancel your personal data. It states

which since January 2018 has received more than two hundred SMS from VODAFONE.

Provides a copy of the letter, dated 06/04/2015, which, in response to the

requested cancellation of data, sent to him by the operator and in which he was informed that “proceeds immediately to the cancellation of all the data related to your person that have in your files.”

On 09/25/2017, a new document from the complainant in which he explains that he has received a letter from VODAFONE dated 07/17/2018 informing you that it has adopted various measures to put an end to the reported facts. The complainant warns that despite the time that has elapsed from the date of the letter informing him of the adoption of measures - more than two months - continues to receive SMS from the operator. Submit proof of the statement the capture of two screens of a mobile terminal that incorporate a total of twelve SMS, all dated September 24, and all of them with the following text: “VF Info: Le We inform you that your request to unsubscribe from the service has been processed. N1894...”.

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Also attached is the letter you received from VODAFONE, dated 07/17/2018. In She, in addition to explaining that the AEPD had notified her of her claim, processed within the framework of file E/03011/2018, informs you that after has been perform searches on their systems have verified that your mobile number “ used for testing the sending of messages, as well as for different quality control processes of the Vodafone online store, probably because of the characteristics of that number.” (The underlining is from the AEPD) The operator adds that “This practice is contrary to our processes, which

prohibit the use of actual data for testing. That is why it has sent a reminder to all those responsible for these processes to prevent This situation will happen again."

SECOND: In view of the facts set forth in the claim and the documents provided by the claimant, the General Subdirectorate for Data Inspection proceeded to carry out preliminary investigative actions to clarify the facts, in accordance with the provisions of Regulation (EU) 2016/679 (Regulation General Data Protection, hereinafter RGPD).

Thus, in the framework of file E/03011/2018, information is requested from the claimed, VODAFONE ESPAÑA, S.A.U., having knowledge of these extremes:

- The complainant was a VODAFONE client in the past. The defendant has explained that, having carried out the pertinent inquiries, it has been verified that your personal data is blocked in their systems by virtue of the request of cancellation made by the complainant in May 2015.
- VODAFONE states that "we must rule out that the reason why Mr. A.A.A. would have received the SMS messages had it been because their data were visible in our systems or there had been some kind of error of my client when managing the cancellation". (The underlining is from the AEPD)
- He affirms that he has been able to find out that the mobile number of which the complainant is the owner "appears (...) in different files of different clients as one of the contact telephone numbers that can be associated with each client". Also, what has verified that "within the processes of registering services from the Store Online this number has been included for carrying out tests of different nature (both to verify the quality of the process and its correct operation) given the characteristics of said telephone number, such as

its simplicity and little probability that it belongs to someone...Finally,

this number has also been used erroneously in the testing process

to send certain communications to customers in order to

verify that they are correct. (The underlining is from the AEPD)

The defendant says that she has adopted the following measures: (i) She has sent

“reminders to all your agents to remember that it is not possible

include information that is not true, invented or that

not owned by the customer

”. (ii) “Likewise, the elimination of

said telephone number in the files of the clients in which they appear

as contact data” .(iii) “..the pertinent guidelines to the

technical staff (internal and external) who carry out tests in the online store and

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level of sending communications to clients to stop these practices, to

all lights, incorrect and that in no case are a consequence of the guideline

some given by Vodafone”. (The underlining is from the AEPD)

- He explains that his processes in the Online Store "always involve using some

specific and already defined test users, not being able to use other data

other than these”. Add as an example that "from Online Store and to

test purposes, the process indicates that a series of NIF of

tests already defined (**NIF.1/**NIF.2) which are automatically canceled

instantly by the system itself, thus preventing any

Communication with the customer. The facts expressed in this request imply that the process is not being carried out in accordance with the guidelines implemented by Vodafone”.

The defendant has sent the following documents to the AEPD:

☐ Screenshots of their systems with the -negative- result of the data search carried out on the complainant by the criterion of his number of NIF.

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☐ Copy of the letter that, dated 07/17/2018, sent to the claimant informing him that the AEPD had notified him of his complaint and measures taken to put an end to the situation caused.

☐ Copy of two internal emails that VODAFONE sent among its departments on 07/16/2018 at 6:36 p.m. and 6:41 p.m. in relation with the number ***PHONE.1. In them remind all users, “especially the external ones that depend on each one”, who must “launch the tests in NTOL including yours as a contact mobile number own, not using other numbers that could cause harm to its owner.

THIRD:

The facts object of the claim are subject to the provisions of Regulation (EU) 2016/679, of the European Parliament and of the Council, of 04/27/2016, regarding the Protection of Natural Persons with regard to the Treatment of Personal Data and the Free Circulation of these Data, which entered into effective 05/25/2018.

The claimant filed a complaint with the AEPD on 04/23/2018 -before therefore after Regulation (EU) 2016/679 entered into force and when it was still

Organic Law 15/1999 on the Protection of Personal Data, LOPD-

in which he recounted the reception of SMS sent by VODAFONE to his mobile line.

However, this behavior was maintained over time at least until 09/24/2018,

as evidenced by the copy of the SMS messages that the complainant sent to

this Agency on 09/25/2018, Regulation (EU) 2016/679 already in force.

The infringement for which VODAFONE is held responsible participates in the nature of the so-called permanent infractions, in which the consummation is projected in time beyond the initial fact and extends during the entire period of time in which the data is processed in violation of the personal data protection regulations. In the present case, despite the fact that time the infringing conduct began, the applicable norm was the LOPD, the that is applicable is the one in force when the infraction is consummated, because it is at that moment when it is understood committed.

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The Supreme Court has ruled on the applicable rule when the offenses are prolonged over time and there has been a regulatory change while committed the offence. The STS of 04/17/2002 (Rec. 466/2000) applied a rule that does not was in force at the initial moment of commission of the infraction, but it was in the subsequent years in which the offending conduct continued. The Judgment examined a course that dealt with the sanction imposed on a Judge for breach of their duty to abstain in preliminary proceedings. The sanctioned alleged the validity of article 417.8 of the LOPJ when the events occurred. the STS

considered that the offense had been committed since the date of initiation of the Preliminary Proceedings until the moment in which the Judge was suspended in the exercise of their functions, so that rule was indeed applicable.

The SAN of 09/16/2008 (Rec.488/2006) pronounces in the same sense

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 04/27/2016, 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, hereinafter RGPD) recognizes each Control Authority and, as established in articles 47, 64.2 and 68.1 of Organic Law 3/2018, of December 5, on Data Protection Personal and Guarantee of Digital Rights (hereinafter LOPDGDD), the Director of the Spanish Data Protection Agency is competent to initiate this procedure.

II

The RGPD deals in its article 5 with the principles that must govern the treatment of personal data and mentions among them that of "Accuracy". The precept provides:

"1. The personal data will be:

(...)

d) "accurate and, if necessary, updated; all measures will be taken reasonable to eliminate or rectify without delay the personal data that are inaccurate with respect to the purposes for which they are processed (<<accuracy>>)"

Article 4 of the RGPD, "Definitions", offers a legal concept of <<data personal>> and considers as such "all information about a natural person,

identified or identifiable (<<the interested party>>);

will be considered a natural person

identifiable person any person whose identity can be determined, directly or

indirectly, in particular by means of an identifier, such as a name,

an identification number, location data, an online identifier, or one or

various elements of the physical, physiological, genetic, psychic,

economic, cultural or social of that person. (The underlining is from the AEPD)

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Article 83 of the RGPD, under the heading “General conditions for the

imposition of administrative fines” establishes:

"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)

Basic principles for treatment, including

conditions for consent under articles 5,6,7 and 9.” (The

underlined is from the AEPD)

III

The documentation in the file shows that VODAFONE

violated the principle of data accuracy since it acknowledges having processed

the claimant's telephone number (**TELEFONO.1) associated with different clients as well as to carry out quality tests related to the online store and shipments of communications to customers.

In particular, the defendant has indicated as one of the causes that motivated the sending of SMS to the claimant "that the number appears in different records of different clients as one of the contact telephone numbers that can be associated with each client"

In accordance with the evidence available at the current stage of the procedure, and without prejudice to what results from the investigation, it is considered that the behavior described, attributable to VODAFONE, could violate article 5.1.d) of the RGPD and be constitutive of the infringement typified in article 83. 5.a) of the aforementioned rule.

At the same time, Organic Law 3/2018 on Data Protection and Guarantees of Digital Rights (LOPGDD) 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 violating the principles and guarantees established in article 5 of Regulation (EU) 2016/679"

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:

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“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.” (The underlining is from the AEPD)

“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;

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.

The documentation in the file allows us to conclude that they are present mitigating the responsibility required of VODAFONE, as they reflect a minor culpability or unlawfulness of their conduct, the following circumstances:

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- Section a): “the nature, seriousness and duration of the offence, taking into account the nature, scope or purpose of the data processing operation concerned as well as the number of stakeholders affected and the level of

damages they have suffered”.

It is estimated that it operates as a highly qualified mitigating or especially significant. It is taken into consideration for this that the data processed has been, exclusively, the telephone number of the affected party; that the operation of treatment has had no more scope than sending the complainant messages of SMS text to your line ***TELEFONO.1 and that, regarding the effects of the treatment, although they have been a serious inconvenience for those affected by the high number of messages received, have not resulted in damage or serious damage.

- Section b): “intentionality or negligence in the infringement”.

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In the conduct of the defendant - which is contrary to the principle of accuracy in the data processing of the claimant's mobile number - there has been no intent or intentionality of VODAFONE but exclusively lack of diligence.

d): “the degree of responsibility of the controller or processor taking into account the technical or organizational measures that they have applied in under articles 25 and 32”.

Although it is obvious and evident that the measures that VODAFONE had implemented to avoid the violation of the right to data protection of the claimant were insufficient, it cannot be ignored, in order to assess the degree of responsibility of the claimant, which, as regards the evidence of the online store the claimed had planned the use of specific users and that if company employees had followed its guidelines, at least as far as the online store is concerned, could have been infringement of the principle of data quality has been avoided. In this matter in particular, the defendant's lack of diligence is specified in the omission of the

necessary controls over its employees to guarantee respect for their
action protocol.

Let us remember that VODAFONE has explained that its processes in the Online Store

“always involve using specific and already defined test users, not

being able to use other data different from these”. Add as an example that

“From the Online Store and for testing purposes, the process indicates that they must

use a series of test NIFs already defined (***NIF.1/**NIF.2) which

they are self-canceled instantly by the system itself,

thus preventing any communication with the client. The facts

expressed in this requirement imply that the process is not being

complying with the guidelines implemented by Vodafone”.

- Section f): “the degree of cooperation with the supervisory authority in order to

to remedy the violation and mitigate the possible adverse effects of the

infringement”.

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In this regard, we must indicate that on 06/06/2018 the Inspection of

Data required VODAFONE to report within a month on

the sending of SMS messages to the claimant and on the measures adopted to

put an end to that situation. VODAFONE responded on 07/23/2018 and

stated that it had taken the following measures:

(i) It has sent “reminders to all its agents so that they remember not to

it is possible to include non-true information in the files of our clients,

invented or not owned by the customer

". (ii) "Likewise, it has been requested the

elimination of said telephone number in the files of the clients in the

that appear as contact data" .(iii) "...the guidelines have been remembered

relevant to the technical personnel (internal and external) who carry out tests in the

online store and at the level of sending communications to customers to stop

these practices, clearly, incorrect and that in no case are

consequence of any directive given by Vodafone". (The underlined

is from the AEPD)

It is also estimated that the following factors, described in the

article 83.2 of the RGPD, which operate aggravating the responsibility of the claimed party:

- Section e) –"any prior infraction"-.

Provision that must be connected to article 29.3.d) of Law 40/2015 of

Legal Regime of the Public Sector. The Law, article 29, mentions among the

principles that must govern the imposition of sanctions

proportionality, which is defined as "due suitability and necessity of the

sanction to be imposed and its adequacy to the seriousness of the act constituting the

infraction", and to make it effective it attends, among other variables, to "The

recidivism, by commission within a year of more than one infraction of

the same nature when it has been so declared by firm resolution in

administrative channel" (section 3.d) (The underlining is from the AEPD)

In this sense, it is worth mentioning some sanctioning Resolutions issued by the

AEPD in the year immediately prior to the claim that have become

firm in administrative proceedings and in which VODAFONE was sanctioned by

infractions of an identical nature to the one examined here: PS/521/2017,

signed on 01/15/2018; PS/194/2018, signed on 06/14/2018, among others.

However, it is important to note that, as well as the behavior that constitutes the factual budget for the opening of this file sanctioning party, the offending conduct for which VODAFONE was sanctioned by the AEPD in the aforementioned procedures do not have a great relevance, hence, in the present case, it is not appropriate to attribute to the aggravating circumstance of section e) of article 83.2 of the RGPD a special significance.

- Section k), in relation to article 76.2 of Organic Law 3/2018, in which is framed as an aggravating circumstance the continued nature of the offense attributed to VODAFONE.

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There is evidence that, regarding the information on the line number of the complainant, the principle of data quality was already violated on 04/24/2018 and the violation was maintained, at least, until 09/24/2018, that is, for at least least five months.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

1.

START SANCTION PROCEDURE against VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for the alleged infringement of article 5.1.d) of the RGPD, typified in article 83.5 of the RGPD and qualified as a very serious infringement in

Article 72.1.a) of the LOPDGDD.

2. APPOINT R.R.R. as instructor. and secretary to S.S.S., indicating that anyone of them may be challenged, where appropriate, in accordance with the provisions of the Articles 23 and 24 of Law 40/2015, of October 1, on the Legal Regime of the Public Sector (LRJSP).

3.

INCORPORATE to the disciplinary file, for evidentiary purposes, the claim filed by the claimant and the attached documentation, as well as the documents obtained and generated by the General Subdirectorate of Data inspection during the investigation phase.

4. THAT for the purposes provided in art. 64.2 b) of Law 39/2015, of 1 October, of the Common Administrative Procedure of the Administrations Public, the sanction that could correspond would be a fine of 45,000 euros, without prejudice to what results from the instruction.

5. NOTIFY this agreement VODAFONE ESPAÑA, S.A.U., with NIF A80907397, granting a hearing period of ten business days for formulate the allegations and present the evidence that it deems appropriate.

In your brief of allegations you must provide your NIF and the number of procedure at the top 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 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 9,000 euros. With the application of this reduction, the sanction would be established at 36,000 euros, resolving the procedure with the imposition of this sanction.

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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 the amount of the same, equivalent in this case at 9,000 euros. With the application of this reduction, the sanction would be established in 36,000 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 27,000 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.

If you choose to proceed to the voluntary payment of any of the amounts indicated above, you must make it effective by depositing it in account number ES00 0000

0000 0000 0000 0000 opened in the name of the Spanish Agency for the Protection of Data in Banco CAIXABANK, S.A., indicating in the concept the number of reference of the procedure that appears in the heading of this document and the cause of reduction of the amount to which it is accepted.

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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SECOND: On March 12, 2019, the respondent has proceeded to pay the sanction in the amount of 27,000 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

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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 RGPD 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 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 the Procedure Common Administrative of Public Administrations (hereinafter, LPACAP), under the heading "Termination in sanctioning procedures" provides the

Next:

"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:

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FIRST: DECLARE

in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to VODAFONE ESPAÑA, S.A.U.

the termination of procedure PS/00411/2018, of

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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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