

□ Procedure No.: PS/00356/2020

RESOLUTION R/00564/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT
VOLUNTEER

In sanctioning procedure PS/00356/2020, instructed by the Spanish Agency for
Data Protection to VODAFONE ESPAÑA, S.A.U., given the complaint filed
by A.A.A., and based on the following,

BACKGROUND

FIRST: On October 26, 2020, 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/00356/2020

AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Data Protection Agency and in
based on the following:

FACTS

FIRST: Ms. A.A.A. (hereinafter, the claimant) dated July 9, 2019
filed a claim with the Spanish Data Protection Agency. The
claim is directed against Vodafone Spain, S.A.U. with NIF A80907397 (in
hereinafter, the claimed or Vodafone).

The reasons on which the claim is based are that it continues to receive in the
your email address emails from Vodafone related to billing. Yes
well on April 02, 2018, the Galician Consumer Institute issued an Arbitration Award
by which it ordered, among others, that Vodafone stop issuing invoices and that the
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claimant causes permanent cancellation of any type of activated service and Vodafone

remove the claimant's data from any type of database.

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

1. Arbitration award in favor of the claimant dated April 2, 2018 in

which is required to Vodafone:

a) Proceed to permanently withdraw from any type of service/s that, in its

case, would have activated with effect from the date of issuance of this

award

a) Exclude the claimant from any third-party collection management company and/or

registry of patrimonial solvency in which it could have been included

Vodafone instance.

b) Delete the consumer's personal data of any kind

recruitment database. disclosure, advertising or others.

1. Demand for enforcement of the Arbitration Award filed on June 22, 2018

before the Court of First Instance No. 3 of Pontevedra.

2. Order of execution of the Award dated March 25, 2019 of the

Court of First Instance nº3 of Pontevedra.

3. Copy of the invoice notice email communications available

On September 25, 2019, this Agency received a new

written by the claimant stating that the claimed continues to violate its

rights by failing to comply with the Arbitration Award of April 2, 2018 as well as the order of

execution of the same dated March 25, 2019.

And attach the following documentation:

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New emails dated June 26, July 25, December 26,

August and September 13, 2019 invoice notice available.

On August 29, 2019, the claim was transferred to the

claimed requesting information on the facts claimed, and the causes that may have motivated the claim.

Subsequently, on December 16, 2019, without having received a written allegations sent by the respondent to the transfer of the claim, it is agreed admit this claim for processing, and the claimant is notified on January 23, this year.

SECOND: In view of the facts denounced in the claim and the documents provided by the claimant, the Subdirector General for Inspection of Data 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).

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

In addition, the following extremes are noted:

On February 24, 2020, the respondent states that the measures issued in the Award were executed in its entirety, annulling all the contracted services and removing the personal data of the claimant from their systems.

They add that due to a computer error they continued to send invoice notices available at zero cost between June 2017 and September 2019.

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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 according to the provisions of articles 47 and 48 of the LOPDGDD, 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 RGPD, "Legality of the treatment", which indicates 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 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."

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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 particularly 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 respondent has recognized said error and has indicated as the cause that motivated the sending the emails that of a computer error and therefore they continued sending notices of available invoices at zero cost between June 2017 and September 2019.

Well, it is especially important that the defendant continued to send invoices to the claimant after the Upheld Arbitration Award of April 2, 2018 and the Order of execution of the Award of March 25, 2019, that is, the personal data of the claimant and the communications ceased once the claimed received the transfer of the claim sent by this Agency on 29 August 2019, in which the notification emails of new invoice received by the claimant.

In any case, and this is essential, the defendant does not prove legal standing for the processing of the claimant's data.

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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;

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;

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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 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 be imposed

in the present case, the party claimed is considered responsible for an infringement

typified in article 83.5.a) of the RGPD, in an initial assessment, concurrent

the following factors.

As aggravating the following:

-In the present case we are dealing with an unintentional negligent action, but

identified significant (article 83.2 b).

-Basic personal identifiers are affected (name, a number of identification, the line identifier) (article 83.2 g).

-Any offense previously committed (article 83.2 e).

-Section k), in relation to article 76.2 of Organic Law 3/2018, in which the continuous nature of the infraction attributed to the claimed.

This is why it is considered appropriate to adjust the sanction to be imposed on the person claimed and set it at the amount of €70,000 for the infringement of article 6 of the RGD.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

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1.

START SANCTION PROCEDURE against VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for the alleged violation of article 6 of the RGD typified in article 83.5.a) of the aforementioned RGD.

2. APPOINT D.B.B.B. as instructor. and as secretary to Ms. C.C.C.,

indicating that any of them may be challenged, where appropriate, in accordance with what is established in articles 23 and 24 of Law 40/2015, of October 1, of Legal Regime of the Public Sector (LRJSP).

3.

INCORPORATE to the disciplinary file, for evidentiary purposes, the

claim filed by the claimant and its attached documentation, the information requirements that the General Subdirectorato of Inspection of Data sent to the entity claimed in the preliminary investigation phase and its respective acknowledgments of receipt.

4. 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 70,000 euros (seventy thousand euros), without prejudice to what results from the instruction.

5. NOTIFY this agreement to 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 must provide your NIF and the procedure number listed 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).

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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

the present procedure. With the application of this reduction, the sanction would be established at 56,000 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. With the application of this reduction, the sanction would be established at 56,000 euros and its payment will imply the termination of the process.

The reduction for the voluntary payment of the penalty is cumulative with the corresponding apply 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 42,000 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, 56,000 euros or 42,000 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 November 12, 2020, the claimant has proceeded to pay the

SECOND

the sanction in the amount of 42,000 euros making use of the two reductions provided for in the Start Agreement transcribed above, which implies the acknowledgment of 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 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

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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 Administrative Procedure

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

"Termination in sanctioning procedures" provides the following:

"1. Started a sanctioning procedure, if the offender acknowledges his responsibility,

the procedure may be resolved with the imposition of the appropriate sanction.

2. When the sanction is solely pecuniary in nature or it is possible to impose a

pecuniary sanction and another of a non-pecuniary nature, but 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 with each other.

The aforementioned reductions must be determined in the notification of initiation of the procedure and its effectiveness will be conditioned to the withdrawal or resignation of any administrative action or recourse against the sanction.

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

In accordance with the above, the Director of the Spanish Agency for the Protection of Data RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00356/2020, of in accordance with the provisions of article 85 of the LPACAP.

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

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

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day following the notification of this act, as provided in article 46.1 of the
aforementioned Law.

Sea Spain Marti

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