936-150719

Procedure No.: PS/00301/2019

RESOLUTION R/00551/2019 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00301/2019, 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 September 23, 2019, the Director of the Spanish Agency

of 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/00301/2019

935-240719

AGREEMENT TO START A SANCTION PROCEDURE

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

Data and based on the following

FACTS

FIRST: D.A.A.A. (hereinafter, the claimant) dated February 12, 2019

filed a claim with the Spanish Data Protection Agency. The

claim is directed against Vodafone Spain, S.A.U. with NIF A80907397 (in

later, the claimed one). The reasons on which the claim is based are that in April or

May 2018, his daughter, authorized by him, provided a Vodafone worker with data

of the claimant in order for them to make an offer.

Days later, he received a call from the respondent at his home, offering his services. The claimant states that he did NOT accept the offer, however, the claimed proceeded to make the change of his line.

On May 16, 2018, he received a payment request from I.S.G.F. Reports Comerciales S.L., for a debt with the claimed company, a company from which the claimant declares not to be a client.

After receiving two other payment requests, on August 21, 2018, he requested opposition to the processing of your data to that claimed.

The claimant provides a copy of the payment requirements received in May and July 2018, of the defendant and of ISGF Informes Comerciales S.L. and notifications of inclusion of your data in the Asnef and Badexcug files dated August 24 and 28 respectively.

SECOND: In view of the facts denounced in the claim and the documents provided by the claimant, the Subdirectorate 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 November 16, 2018, the claim was transferred to the respondent

within the framework of the actions with reference E/8971/2018.

On February 10, 2019, these actions began when no

response to transfer.

On February 15, 2019, a request for information was sent to the

reported company.

On February 25, 2019, the respondent has sent this Agency the following

information in relation to the facts denounced:

1. They have not received the transfer of the complaint, so they do not have the

complete documentation to respond to the request.

On March 8, 2019, a new request for information was sent to the

claimed and a copy of the complaint is attached.

On March 12 and March 22, 2019, the respondent sends the Agency the

Next information:

1. They provide a copy of the document sent to the claimant in response to their

claim, dated March 11, 2019, informing you that they have

proceeded to qualify the registration of his line as "unrecognized registration", giving

lower services and existing debt.

2. According to the information contained in their systems, the registration of the line in the name

of the denounced was made through telemarketing dated January 22, 2018

and was withdrawn on January 29, 2018. They provide a printed copy of the application

registration made in the online store of the claimed party as well as the request for

cancellation.

3. According to the information in your files, during the time of

contracting (7 days), two invoices are generated, with quota and without consumption.

4. The debt associated with the claimant presented an amount of €123.90

corresponding to the invoice issued on February 1, 2018 and after being

After analyzing the case, it is specified that it is a case of fraud.

5. The claimant's data was included in solvency files dated

August 26, 2018 and they were discharged on December 14, 2018.

The date of registration coincides with the notifications of inclusion in said files

provided by the claimant.

THIRD: According to the documentation in the file, it is accredited

that the claimed party processed the personal data of the claimant without his/her consent.

consent. The personal data of the claimant were registered in the

files of the claimed and were treated for the issuance of invoices for services

associated with the complainant and to be included in the solvency file

equity and credit.

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

Article 58 of the RGPD, “Powers of Attorney”, says:

“2 Each supervisory authority shall have all of the following powers

corrections listed below:

(…)

b) sanction any person responsible or in charge of the treatment with a warning

when the treatment operations have violated the provisions of this

Regulation;

(...)

d) order the person in charge or in charge of the treatment that the operations of

treatment comply with the provisions of this Regulation, where appropriate,

in a certain way and within a specified period.

(…)

i) impose an administrative fine in accordance with article 83, in addition to or instead of the

measures mentioned in this section, depending on the circumstances of the case

particular

(…)”

III

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 in relation to the

interested party (<<legality, loyalty and transparency>>);”

Article 6 of the RGPD, "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 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 infraction for which the claimed entity is held responsible is

typified in article 83 of the RGPD that, under the heading “General conditions for

the imposition of administrative fines”, states:

"5. Violations of the following provisions will be sanctioned, in accordance

with section 2, with administrative fines of a maximum of EUR 20,000,000 or,

in the case of a company, an amount equivalent to a maximum of 4% of the

global total annual turnover of the previous financial year, opting for

the largest amount:

a) The basic principles for the treatment, including the conditions for the

consent under articles 5,6,7 and 9.”

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the Digital Rights (LOPDGDD) in its article 72, under the heading "Infringements considered very serious” provides:

"1. Based on the provisions of article 83.5 of the Regulation (U.E.) 2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in it and, in particularly the following:

(…)

b) 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.”

IV

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 their consent. The personal data of complainant were incorporated into the company's information systems, without who has accredited that he had his consent for the collection and further processing of your personal data.

The Administrative Litigation Chamber of the National High Court, in cases like the one presented here, has considered that when the owner of the data denies

contracting corresponds the burden of proof to who affirms its existence

the person responsible for the processing of third-party data must collect and keep the

documentation necessary to prove the consent of the holder. We quote, for

all, the SAN of 05/31/2006 (Rec. 539/2004), Fourth Law Basis.

The personal data of the claimant were registered in the files of the

claimed and were processed for the issuance of invoices for services associated with the

denouncing person and to be included in the asset and credit solvency file.

Consequently, it has carried out a processing of personal data without

accredited that it has the consent of the same for its treatment, nor that

have the legal authorization to do so.

However, and this is essential, the defendant does not prove the legitimacy to

the processing of the claimant's data, and as she herself acknowledges, it is

a case of fraud.

In short, the respondent has not provided a document or evidence

one that shows that the entity, in such a situation, would have deployed the

minimum diligence required to verify that your interlocutor was indeed the one

claimed to hold

Respect for the principle of legality that is in the essence of the fundamental right

of protection of personal data requires that it be accredited that the

responsible for the treatment displayed the essential diligence to prove that

extreme. Failure to act in this way -and this Agency, who is responsible for ensuring

for compliance with the regulations governing the right to data protection of

personal character - the result would be to empty the content of the principle of legality.

v

In order to determine the administrative fine to be imposed, the

provisions of articles 83.1 and 83.2 of the RGPD, precepts that indicate:

"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,

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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."

Regarding section k) of article 83.2 of the RGPD, the LOPDGDD, article 76,

"Sanctions and corrective measures", provides:

"two. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679

may also be taken into account:

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of data processing

personal.

c) The profits obtained as a result of committing the offence.

d) The possibility that the conduct of the affected party could have led to the commission of the infringement.

e) The existence of a merger by absorption process subsequent to the commission of the infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when not mandatory, a data protection delegate.

h) Submission by the person in charge or person in charge, on a voluntary basis, to alternative conflict resolution mechanisms, in those cases in which there are controversies between them and any interested party."

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 Avon as responsible for an infringement typified in article 83.5.a) of the RGPD, in an initial assessment, the following factors are considered concurrent:

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The merely local scope of the data processing carried out by the claimed party.

The purpose of the treatment was reasonable in the hypothesis that the claimed

was legitimized for the treatment carried out.

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Only one person has been affected by the offending conduct.

There is no evidence that the defendant had acted maliciously or with a

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relevant negligence.

There is an obvious link between the processing of personal data and

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the activity carried out by the claimant.

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 €60,000 for the infringement of article 6.1 of the RGPD.

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 violation of article 6.1. GDPR

typified in article 83.5.a) of the aforementioned RGPD.

1. APPOINT D.R.R.R. as instructor. and as secretary to Ms. S.S.S.,

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).

two.

INCORPORATE to the disciplinary file, for evidentiary purposes, the

claim filed by the claimant and its attached documentation, the

information requirements that the General Subdirectorate of Inspection of

Data sent to the entity claimed in the preliminary investigation phase and its

respective acknowledgments of receipt.

3. 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 60,000 euros (sixty thousand euros), without prejudice to what results from the instruction.

4. 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 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 the present procedure. With the application of this reduction, the sanction would be established at 48,000 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 48,000 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 In this case, if it were appropriate to apply both reductions, the amount of the penalty would be set at 36,000 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, 48,000 euros or 36,000 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

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 October 22, 2019, the respondent has proceeded to pay the

SECOND

sanction in the amount of 36,000 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

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 Administrative Procedure Common to Public Administrations (hereinafter, LPACAP), under the rubric "Termination in sanctioning procedures" provides the following:

"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:

FIRST: TO DECLARE the termination of procedure PS/00301/2019, 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

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

C/ Jorge Juan, 6

28001 – Madrid

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