

936-031219

Procedure No.: PS/00405/2019

RESOLUTION R/00011/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00405/2019, 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 November 28, 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/00405/2019

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: Ms. A.A.A. (hereinafter, the claimant) dated May 16, 2019

filed a claim with the Spanish Data Protection Agency. The

claim is directed against VODAFONE ESPAÑA, S.A.U. with NIF A80907397 (in

later, the claimed one). The grounds on which the claim is based are that on 20

February 2019 received an e-mail from the respondent informing of the billing of a

line that states not having contracted. Despite the efforts made, it has not

received adequate response to the situation of the alleged contracting.

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2/12

The claimant provides the messages sent to the claimed and received from
is.

Provide receipts for bank charges.

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:

This Agency transferred this claim to the claimed one, with
dates July 15 and October 4, 2019, it appears delivered on July 18 and October 7
of the same year, not having responded to the requirements of this Agency.

In the messages sent by the claimed party to the claimant,
notes:

That the respondent sent an e-mail to the claimant in which she stated that

You would receive a bill for your line.

Charges in your bank account in relation to the aforementioned line.

Answer from the respondent stating that at the time

a registered line appeared active at the same address where he lived

previously the claimant, but under the ownership of another person.

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

that the claimed person processed the personal data of the claimant without her

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 claimed person.

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3/12

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

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4/12

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:

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"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 the

claimant were incorporated into the company's information systems, without

has accredited that he had his consent for the collection and treatment

later 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 recorded in the files of the

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

complaining person. Consequently, it has processed the data

without having proven that you have the consent of the same

for its treatment, nor that it has the legal authorization for it.

However, and this is essential, the defendant does not prove the legitimacy to the processing of the claimant's data.

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
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6/12

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;

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7/12

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.”

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 officer.

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, the party claimed is considered responsible for an infringement

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8/12

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

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identified significant (article 83.2 b).

Basic personal identifiers (name, a number of

-

identification, the line identifier) (article 83.2 g).

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 €100,000 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.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).

1.

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.

2. 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
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9/12

Public, the sanction that could correspond would be 100,000 euros (one hundred thousand
euros), without prejudice to what results from the instruction.

3. 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 80,000 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 80,000 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 60,000 euros.

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10/12

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, 80,000 euros or 60,000 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 December 24, 2019, the respondent has proceeded to pay the

SECOND

the sanction in the amount of 60,000 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.

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11/12

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/00405/2019, 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.

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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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