

□ Procedure No.: PS/00484/2020

RESOLUTION R/00198/2021 TERMINATION OF THE PROCEDURE FOR PAYMENT VOLUNTEER

In sanctioning procedure PS/00484/2020, 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 February 18, 2021, 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/00484/2020

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 November 10,
2020 filed a claim with the Spanish Data Protection Agency. The
claim is directed against VODAFONE ESPAÑA, S.A.U. with NIF A80907397 (in what
successively, the claimed one).

The grounds on which the claim is based are as follows:

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“After several complaints to you (last resolution with reference number E/01699/2019) in which they urged VODAFONE to permanently erase and, after the which, VODAFONE sent me a written certificate and a new confirmation by email of having proceeded, after an incident, to solve it, I continue to receive the SMS initially accused more than a year ago and I don't know what to do anymore...Not only for continuing without the guarantee that my data will be definitively deleted, if not, because they are SMS in which it is indicated that an invoice is generated in my name and, although I am reassure me that I have nothing pending, I have no guarantee that this will is...I beg you to take action on your part so that these SMS.”

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

- Letter from the respondent, dated March 24, 2020 and sent within the framework of the file E/01520/2020, in which you are informed that your phone was assigned incorrectly to another customer, hence the SMS alerts I was receiving.

They proceed to correct the incident, and guarantee that you will no longer receive any SMS plus.

- Attach two screenshots of your mobile phone, where two notices are displayed, sent on May 11 and November 9, 2020.

- Emails addressed to the address ***EMAIL.1 from temalegales@vodafone.es, about the facts that are the subject of this claim.

SECOND: As background to this sanctioning procedure, it is necessary to manifest:

- 1.- The claimant was a client of the respondent years ago. He stated that he received SMS of the entity advising about invoices for non-contracted services, for which he put the made known to the entity requesting clarification and requesting the deletion

of your data and, despite receiving a positive response, you continued to receive the same SMS. Provided documentation.

2.- The claims filed with this Agency by the claimant were forwarded dated January 9 and May 23, 2019 to the one claimed, giving rise to the

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files E/01699/2019 and E/06311/2019. This Agency proceeded to file of the claims for having been attended to, and therefore the resolved incidents.

3.- In a new claim dated November 9, 2019, it stated the claimant who continued to receive SMS dated October 9, 2020, provided the SMS, gave rise to E/11566/2019. It was inadmissible for having sent the claimed letter dated October 30, 2019 to the claimant indicating that the incident was resolved, not consisting of SMS subsequent to said communication.

4.- Thus, in another claim dated December 23, 2019, it provides SMS of December 13, 2019, so it is transferred to the DPD, giving rise to the E/01520/2020. The file was proceeded, since the entity stated that the number telephone number was associated with another client and that the incident had been resolved.

5.- Well, the claimant provides new SMS sent to the mobile, she has received on the mobile phone two notices, sent on May 11 and November 9 of the year 2020, showing that the event continues to occur.

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

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The claimed facts are specified in the treatment of the data of the claimant by the claimed party without legitimacy to do so, by sending SMS to your mobile phone informing you of the generation of invoices in your name and subsequent emails to your personal Gmail account clarifying the circumstances in which these SMS messages have occurred.

Said treatment could constitute a violation of article 6, Lawfulness of the treatment, of the RGPD that establishes that:

"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;

(...)

In article 4 of the RGPD, Definitions, in section 11, it states that:

“11) «consent of the interested party»: any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a statement or a clear affirmative action, the processing of personal data that concern him”.

Also article 6, Treatment based on the consent of the affected party, of the new Organic Law 3/2018, of December 5, on Data Protection Personal and guarantee of digital rights (hereinafter LOPDGDD), indicates that:

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"1. In accordance with the provisions of article 4.11 of the Regulation (EU) 2016/679, consent of the affected party is understood to be any manifestation of will free, specific, informed and unequivocal by which he accepts, either through a declaration or a clear affirmative action, the treatment of personal data that concern.

2. When the data processing is intended to be based on consent of the affected party for a plurality of purposes, it will be necessary to state specific and unequivocal that said consent is granted for all of them.

3. The execution of the contract may not be subject to the affected party consenting to the processing of personal data for purposes unrelated to the maintenance, development or control of the contractual relationship”.

Article 83.5 a) of the RGPD, considers that the infringement of “the principles basic for the treatment, including the conditions for the consent in accordance with

of articles 5, 6, 7 and 9” is punishable, in accordance with section 5 of the mentioned article 83 of the aforementioned Regulation, “with administrative fines of €20,000,000 maximum or, in the case of a company, an equivalent amount at a maximum of 4% of the total global annual turnover of the financial year above, opting for the highest amount.

On the other hand, the LOPDGDD for prescription purposes states in its article 72:

“Infringements considered very serious:

1. Based on the provisions of article 83.5 of the Regulation (EU)

2016/679 are considered very serious and the infractions that

suppose a substantial violation of the articles mentioned in that and, in

particularly the following:

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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.

(...)”

III

The documentation in the file offers clear indications that the claimed violated article 6 of the RGPD, since it carried out the treatment of the personal data of the claimant without having any legitimacy to do so, materialized in that it continues to receive SMS sent to the mobile related to the

billing, despite the fact that you requested in the past the deletion of your data and the claimed guaranteed that they would no longer receive similar notices, within the framework of various claims filed with this Agency.

It is important to highlight that this Agency transferred the claims made by the claimant to the claimed giving rise to the files E/01699/2019, E/06311/2019, E/11566/2019 and E/01520/2020. In all they stated that the incident had already been resolved.

Thus, it is clear that, within the framework of file E/01520/2020, which has given rise to the present sanctioning procedure, the claimant provided a response from the respondent dated March 24, 2020, in which it stated:

“Through this letter, we want to inform you that we have returned to review his case, since the incident was already resolved, as he was informed by the last April 5, 2019.

On this occasion, we have noticed that your mobile number was associated to another Vodafone customer as a contact number, hence the receipt by you of the SMS.

We inform you that this incident has already been resolved, so that

You will no longer receive invoice availability notices.”

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Despite all of the above, the claimant continued to receive SMS sent to her mobile by the claimed. As evidenced by the two screenshots provided by that of his mobile phone, where two notices are displayed, sent on May 11 and

November 2020 by Vodafone.

Consequently, it has carried out a processing of personal data without
has accredited that it has the legal authorization to do so.

IV

In order to establish the administrative fine to be imposed,
observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which
point out:

"1. Each control authority will guarantee that the imposition of fines
administrative actions under this article for violations of this

Regulation indicated in sections 4, 5 and 6 are in each individual case
effective, proportionate and dissuasive.

2. 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 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
such as the number of interested parties affected and the level of damages that
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;

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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 whether the person in charge or the person in charge notified the infringement and, if so, in what measure;

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 related 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 obtained or losses avoided, directly or indirectly, through infringement.

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its Article 76, "Sanctions and corrective measures", establishes that:

"two. In accordance with the provisions of article 83.2.k) of the 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 treatments

of personal data.

- c) The profits obtained as a result of committing the offence.
- d) The possibility that the conduct of the affected party could have induced the commission of the offence.
- e) The existence of a merger by absorption process after the commission of the infringement, which cannot be attributed to the absorbing entity.
- f) Affectation of the rights of minors.

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- g) Have, when it is not mandatory, a delegate for the protection of data.

- h) The submission by the person in charge or person in charge, with voluntary, to alternative conflict resolution mechanisms, in those assumptions in which there are controversies between those 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 impose in the present case on the entity claimed for the infraction typified in the article 83.5.a) of the RGPD for which the claimed party is responsible, in a initial assessment, the following factors are considered concurrent:

- In the present case we are facing a serious negligent action (article 83.2 b).
- Basic personal identifiers are affected (name, surname, mobile phone number) (article 83.2 g).
- The evident link between the business activity of the defendant and the

treatment of personal data of clients or third parties (art. 83.2 k in

relation to art. 76. 2 b) of the LOPDGDD.

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Any offense previously committed (article 83.2 e).

- The serious lack of diligence demonstrated then, after having communicated to the claimant who attended his right to oppose the processing of his data, proceeded again to send you commercial communications.

In accordance with the precepts indicated, and without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction to be imposed in the present case, it is considered appropriate to graduate the sanction to be imposed in accordance with the following criteria established in article 76.2 of the LOPDGDD:

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The link between the activity of the offender and the performance of treatment of personal data, (section b).

The balance of the circumstances contemplated in article 83.2 of the RGPD, with

Regarding the infraction committed by violating the provisions of article 6.1 of the

RGPD allows to set a penalty of 100,000 euros (one hundred thousand euros), considered as

“very serious”, for prescription purposes, in 72.1.a of the LOPDGDD.

Therefore, in accordance with the foregoing, by the Director of the Agency

Spanish Data Protection,

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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 Ms. C.C.C. as secretary, indi-
whereby any of them may be challenged, as the case may be, in accordance with
established in articles 23 and 24 of Law 40/2015, of October 1, of Ré-
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
documentation of E/01699/2019, E/06311/2019, E/11566/2019 and
E/01520/2020.

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 100,000 euros (one hundred 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

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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.

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.

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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 March 9, 2021, the claimant has proceeded to pay the

SECOND

sanction in the amount of 60,000 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:

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"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/00484/2020, 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

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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