

□ Procedure No.: PS/00235/2020

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and based on
to the following:

BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the claimant) dated March 6, 2020

filed a claim with the Spanish Data Protection Agency. The

The claim is directed against Telefónica Móviles España, S.A.U. with NIF A78923125
(hereinafter, the claimed).

The claimant states that she was the owner of five lines contracted with the
claimed (provides numbers), using one of them his son (***TELEPHONE.1).

Thus, on January 14, 2020, your son receives a message on his phone
indicating that said line had stopped sharing mobile data with the rest of the
lines. He contacts the claimed party and they tell him that it was deactivated and
that was no longer owned by him.

Well, he goes to a store of the claimed one and they inform him that
third parties, posing as the claimant, had made a change
ownership of the line in favor of a third party, without any type of
identity check in this regard. That same day (01/14/2020), the new
holder requests a duplicate SIM card in a store due to theft or loss, opening
an incident number the one claimed

The claimant provides with her written claim the following
documents:

1. Name and surname of the third party, address. store, date and time, and number of
incidence.

2. Proof of previous ownership invoices.

3.

Mobile capture showing your child's departure from various date groups

January 14, 2020.

4. Capture WhatsApp message from a contact recounting the request for money.

5. Complaint filed with the Police on January 14, 2020 filed by the

claimant and his son.

SECOND: In accordance with article 65.4 of the LOPGDD, which has provided for a

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mechanism prior to the admission to processing of the claims that are formulated before

the AEPD, consisting of transferring them to the Data Protection Delegates

designated by those responsible or in charge of the treatment, for the purposes foreseen

in article 37 of the aforementioned rule, or to these when they were not designated, it was given

transfer of the claim to the claimed entity so that it proceeded to its analysis and

respond to the complaining party and to this Agency within a month.

As a result of this procedure, on July 8, 2020, the claimed

states:

That they have sent a response letter to the claimant's claim.

Attach a copy of the letter.

THIRD: The result of the transfer process initiated in the previous event does not

made it possible to understand the claims of the claimant satisfied. Consequently,

given that the respondent answered only that "additional measures of

security". That is why on July 24, 2020, for the purposes provided in its article 64.2 of the LOPDGDD, the Director of the Spanish Agency for the Protection of Data agreed to admit the submitted claim for processing.

FOURTH: On September 25, 2020, the Director of the Spanish Agency of Data Protection agreed to initiate a sanctioning procedure against the claimed party, with in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations (hereinafter, LPACAP), for the alleged infringement of Article 6.1 of the RGPD, typified in Article 83.5 of the GDPR.

FIFTH: Once the mentioned initiation agreement was notified, the respondent requested an extension deadline to make claims.

On October 5, 2020, the concession of extension of the mentioned period for 5 days.

Subsequently, the respondent presented arguments in which, in summary, stated that: "TME has a consolidated and adequate procedure for Verification of the identity of our clients. In this verification procedure of identity are requested, in addition to the identification data of the old and new holder, the last 4 digits of the bank account of the former holder.

Therefore, it is important to emphasize that the reason for the situation exposed by the claimant is due to the illicit obtaining and use of the personal data of the claimant by the impersonator and the subsequent deception of the commercial agent of ***TELEPHONE.2 that processed the request to change the owner, and not to a treatment illegitimate use of the claimant's data by my client.

Once the claim has been filed with TME, two days after the produced the change of holder and subsequent duplication of card, it is offered to the claimant the possibility of reinstating ownership of the line. However, the

claimant expresses the wish that no further steps be taken, in the extent to which you prefer to be advised by your lawyers.

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Consequently, my client considers that there has been no violation of article 6.1 of the RGPD to carry out the processing of the data of the claimant on his part, but by an impersonator, since the processing of these data by TME is necessary to manage the contractual relationship with the claimant, and to the effects of carrying out said treatment, TME has established an operation that is sufficient guarantees to ensure compliance with current regulations in matter of data protection”.

Requests that the circumstances that have occurred in the facts be taken into account object of the procedure and, in the case that the infraction is appreciated, the amount of the sanction proposed in the Initiation Agreement and that a Resolution be issued ordering the filing of this sanctioning file or subsidiarily, reduce the sanction initially proposed under art. 83 of the GDPR.

SIXTH: On October 26, 2020, the instructor of the procedure agreed to the opening of a period of practice tests, considering incorporated all the previous actions, as well as the documents provided by the claimed party.

SEVENTH: On December 3, 2020, the resolution proposal was formulated, proposing that the Director of the Spanish Data Protection Agency sanction the claimed party, for an infringement of Article 6.1 of the RGPD, typified in the Article 83.5 of the RGPD, with a fine of 75,000 euros.

EIGHTH: Once the proposed resolution was notified, on December 9, 2020, it requested extension of the term to formulate allegations, being granted.

The party complained against filed a brief with allegations confirming those made to the Start Agreement, requesting a declaration of non-existence of responsibility on the part of the claimed for alleged infraction that is imputed to him in this procedure, and a Resolution is issued ordering the file of the this sanctioning file to the margin referenced, and subsidiarily, minore the sanction initially proposed in art. 83 of the GDPR.

In view of everything that has been done, by the Spanish Agency for the Protection of Data in this procedure are considered proven facts the following:

PROVEN FACTS

FIRST: The claimant was the holder of five lines contracted with the claimed (provides numbers), using one of them his son (**PHONE.1).

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SECOND: It is recorded that on January 14, 2020, the claimant's son received a message telling him that said line had stopped sharing mobile data with the rest of the lines. He contacts the claimed party and they inform him that the line was deactivated and that it was no longer owned by him.

THIRD: It is verified that the claimant appeared in a store of the claimed and they inform him that third parties, pretending to be the claimant, had made a change of ownership of the line in favor of a third party, without there having been no type of identity verification has been carried out in this regard.

It is recorded that on January 14, 2020, the new owner requests in a store of the claimed a duplicate of the SIM card due to theft or loss, opening a number of incident claimed (provide name and surname of the third party, address, store, date and time, and incident number).

FOURTH: The respondent acknowledges the facts, in her allegations, and states that is due to the illicit collection and use of the personal data of the claimant by of the impersonator and the subsequent deception of the impersonator to the commercial agent of ***TELEPHONE.2 that processed the request to change the owner.

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 as established in arts. 47 and 48.1 of LOPDGDD, the Director of the Spanish Data Protection Agency is competent to resolve this procedure.

II

The defendant is charged with the commission of an infringement due to infringement of 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
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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."

III

The documentation in the file offers evidence that the

claimed violated article 6.1 of the RGPD.

In this regard, it is proven that the respondent processed the personal data of the claimant without standing to do so. It is clear that the defendant has carried out the change of ownership of the line of the claimant, without legitimacy for it, such as recognized by the respondent in her allegations, stating: "that it is due to the Obtaining and illicit use of the personal data of the claimant by the impersonator and the subsequent deception of the impersonator to the commercial agent of 1004 who processed the request for a change of owner.

Based on the foregoing, in the case analyzed, it remains in questioned the diligence used by the respondent.

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.

The lack of diligence displayed by the entity in complying with the obligations imposed by the personal data protection regulations it is therefore evident. Diligent compliance with the principle of legality in the treatment of third-party data requires that the data controller be in a position to prove it (principle of proactive responsibility).

Thus, having been proven that the respondent processed the data

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of the claimant, who denies her consent to treatment, and as long as the first has not provided any evidence to disprove such evidence, it is estimated that the facts that are submitted to the assessment of this Agency could be constituting an infringement of article 6.1 of the RGPD, an infringement typified in the Article 83.5 of the aforementioned Regulation 2016/679.

IV

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

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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 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) 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."

In accordance with the precepts transcribed, in order to set the amount of the sanction of a fine to be imposed on the entity claimed as responsible for a infringement typified in article 83.5.a) of the RGPD, they are considered concurrent in the present case, as aggravating factors, the following factors:

- The duration of the illegitimate treatment of the data of the affected party carried out by the claimed (article 83.2. a) of the RGPD).
- The intentionality or negligence of the infringement (art.83.2. b) of the RGPD).
- Basic personal identifiers are affected (personal data and banking (art.83.2. g) of the RGPD).
- The evident link between the business activity of the defendant and the processing of personal data of clients or third parties (article 83.2.k, of the RGPD in relation to article 76.2.b, of the LOPDGDD)

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of the sanctions whose existence has been proven, the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE TELEFÓNICA MÓVILES ESPAÑA, S.A.U., with NIF A78923125, for an infringement of Article 6.1 of the RGPD, typified in Article 83.5 of the RGPD, a fine of 75,000 euros (seventy-five thousand euros).

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

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THIRD: Warn the sanctioned party that he must make the imposed sanction effective once Once this resolution is enforceable, in accordance with the provisions of the art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure Common Public Administrations (hereinafter LPACAP), within the payment term voluntary established in art. 68 of the General Collection Regulations, approved by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003, of December 17, through its entry, indicating the NIF of the sanctioned and the number of procedure that appears in the heading of this document, in the account restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency Spanish Department of Data Protection in the banking entity CAIXABANK, S.A.. In case Otherwise, it will be collected in the executive period.

Received the notification and once executed, if the date of execution is between the 1st and 15th of each month, both inclusive, the term to make the payment

voluntary will be until the 20th day of the following month or immediately after, and if

between the 16th and last day of each month, both inclusive, the payment term

It will be until the 5th of the second following month or immediately after.

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 in accordance with art. 48.6 of the

LOPDGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the

Director of the Spanish Agency for Data Protection within a month from

counting from the day following the notification of this resolution or directly

contentious-administrative appeal 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.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP,

may provisionally suspend the firm resolution in administrative proceedings if the

The interested party expresses his intention to file a contentious-administrative appeal.

If this is the case, the interested party must formally communicate this fact by

writing addressed to the Spanish Agency for Data Protection, presenting it through

Electronic Register of the Agency [<https://sedeagpd.gob.es/sede-electronica->

web/], or through any of the other registers provided for in art. 16.4 of the

aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the

documentation proving the effective filing of the contentious appeal-

administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative within a period of two months from the day following the notification of this resolution would end the precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

938-131120

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