

936-150719

Procedure No.: PS/00173/2019

RESOLUTION R/00397/2019 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00173/2019, instructed by the Agency

Spanish Data Protection Agency to TELEFONICA MOVILES ESPAÑA, S.A.U., in view of the

complaint filed by A.A.A., and based on the following,

BACKGROUND

FIRST: On May 6, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against TELEFONICA

MOVILES ESPAÑA, S.A.U. (hereinafter, the claimed party), by means of the Agreement

transcribe:

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Procedure No.: PS/00173/2019

935-160419

AGREEMENT TO START A SANCTION PROCEDURE

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

Data before the entity, TELEFÓNICA MÓVILES ESPAÑA SAU, (TME) with NIF

A78923125 (hereinafter, "claimed entity), by virtue of a complaint filed

by D.A.A.A. (hereinafter, "the claimant") and based on the

following:

FACTS

FIRST: On 06/19/18, you had a written entry to this Agency, submitted by

the claimant, in which he states, among others, the following: "On 03/01/18, Movistar

my bank account was charged 2 invoices, each with a phone number

mobile, although my NIF appeared on both invoices, they were in the name of another person and

other address: 28-c820-753850 and 28-c820-798362 and corresponded to mobile lines

of a new contracted fusion rate (I enclose a copy of both). Before hiring

this rate, movistar had all my personal data, since both the fixed line and

the mobiles had been in my name for years. Another invoice issued that month,

corresponding to my fixed line and internet of the same fusion product, if I had my

correct data. It seems that Movistar crossed my data with the data of another

subscriber, who mistakenly included in my invoice, therefore, not only the invoices

were incorrect, but personal data of another subscriber was transferred to me. In view of

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this irregularity I made the corresponding claim to Movistar, requesting the

reimbursement of the amount paid and the issuance of invoices with correct data.

Movistar's response was an email telling me that they had verified that the

incidence in the issued invoice was in the name of the holder, being the correct NIF.

They never came to correct the invoices already issued with my correct data. I have

formulated the corresponding claim in consumption to request again the

reimbursement of the amount paid and the issuance of invoices with correct data".

The following documentation is provided, among others:

a).- Copy of the DNI of: A.A.A.. NIF- ***NIF.1. and address at ***ADDRESS.1.

b).- Two invoices with the following information:

INVOICE DATE

TELEPHONE

tax

DATA OF THE HOLDER OF THE
INVOICE

DATA
NOTIFICATION

OF

28-C820-
753850

28-C820-
798362

03/01/18 ***PHONE.
1

03/01/18 ***PHONE.
two

3.39
euros

2.26
euros

A.A.A.. NIF- ***NIF.1.
B.B.B.

***ADDRESS.2
***ADDRESS.2

A.A.A.. NIF- ***NIF.1.
B.B.B.

***ADDRESS.2
***ADDRESS.2

SECOND: In view of the facts set forth in the claim and the documents provided by the claimant, the General Subdirectorate for Data Inspection proceeded to carry out actions for its clarification, under the powers of investigation granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter RGPD). A) Yes, On 08/02/18, an information request is addressed to the entity claimed. This claim for information was reiterated on 11/16/18.

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THIRD: On 11/26/18, the entity claimed, sends to this Agency, between others, the following information:

“a).- Regarding the mobile lines ***TELEFONO.1 and ***TELEFONO.2, issued invoices 28C820753850 and 28C820798362 respectively, dated broadcast 03/01/19. The aforementioned invoices are edited with data that is not correspond to those of the claimant, specifically the name and address, fact which was motivated by a technical incident in the TME systems.

By virtue of the claim filed with the OMIC of the City Council of Torrelodones, which was notified to TME on 06/22/18, we proceed to the analysis of the same and after its study the existence of an incidence is estimated, which was corrected by canceling the invoices object of the claim, as credited.

Conclude that, as has been proven at the time of having knowledge of the claim made, TME carries out the actions necessary in order to meet your request, proceeding to cancel the invoices regarding

of which the incident occurred regularizing the situation.

b).- indicate that the personal data of the A.A.A. linked to the aforementioned lines that appear in the files of this Company are correct, not having issued previous or subsequent bills with an error in the name and address. Being the data

Address: ***ADDRESS.1

c).- Response letter from the TME company to the claimant, dated 11/01/18

where they indicate that: "By means of this writing we answer the claim submitted by you to the Spanish Data Protection Agency. I inform you that, as a result of his claim presented at the OMIC of the City Council of Torrelodones, which was notified to us on June 22, 2018, was considered attend to the exposed allegations proceeding to correct the incident detected canceling the invoices object of claim. Also indicate that your data that appear in this Company are correct and are those that have been linked at all times to the services contracted by you. In relation to the facts object of the claim, we inform you that a response has been given to the AEPD

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clearly specifying the causes that have motivated the fact that gave rise to its complaint and details of the measures adopted to respond to it.

FOURTH: On 11/26/18, a resolution is issued by this AEPD where it is

indicates that: "considering that TME corrects the incident detected, annulling the invoices in question; that no other subsequent invoices have been issued with the error revealed in the claim; and that the data relating to the claimant

contained in their information systems are correct, considering that the person in charge has attended the claim presented, and agreeing the NO admission to processing of the claim presented.

FIFTH: On 12/18/18, an appeal for reconsideration is received in this AEPD (RR/00847/2018), filed by the claimant where he states, among others, what following: "Telefónica communicated the personal data of another person to me without my being authorized for such access. Once I detected it I made the corresponding claim before Telefónica and this was NOT duly attended to. I made the corresponding claim before Telefónica that was NOT duly attended to.

Contrary to its claims, Telefónica has reoffended months after it was detected and reported the incident. In his telephone answer he refers to the claim for my filed before the OMIC of the Town Hall of Torrelodones, and that in its answer to the 06/22/18 to the same already claimed the correction of my data. However, in my response to the OMIC I already reflected that this was not true, for example, on 10/12/18 (7 months after the error occurred and my first complaint to Telefónica) the data that appeared on the web continued to be incorrect.

Nor do I consider Telefónica's answer to be true, since, although I have received through the organizations before which I have filed my claim, a copy of the payment invoices that would mean the beginning of the aforementioned cancellation. are you from new had an incorrect name and mailing address as of issue date 08/16/18, so YES that the error was repeated. 5 months after detection and claimed the incidence, have been sent to the wrong person and address that appears in them, communicating again my personal and billing data to an unauthorized person. Present two invoices, with the following information:

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INVOICE DATE

TELEPHONE

AMOUNT

DATA

OF

HOLDER OF THE

INVOICE

DATA OF THE

NOTIFICATION OF THE

INVOICE

28-H8A1-

020917

28-H8A1-

022132

08/16/18 ***PHONE.1-3.39 euros.

A.A.A.

BBB

NIF- ***NIF.1.

***ADDRESS.2

***ADDRESS.2

(is

invoice

rectify the number

28-C820-753850

of

date

03/01/18

08/16/18 ***PHONE.2-2.26 euros.

A.A.A.

B.B.B.

(is

invoice

rectify the number

28-C820-798362

of

date

03/010/18.

NIF- ***NIF.1.

***ADDRESS.2

***ADDRESS.2

SIXTH: On 04/01/19, this AEPD issues a Resolution on the appeal for reconsideration

RR/00847/2018, where it states, among others, that: "In the present case, this Agency

considers that the appellant has provided new facts and new documentation

relevant for the purposes of the question posed. As revealed in the

new analysis carried out on the occasion of the appeal filed, TME has not corrected the

incidence detected by the appellant, revealed to the entity claimed to

through various channels (OMIC of the City Council of Torrelodones and the AEPD), and which has

disclosed in the issuance of the invoices corresponding to the services

contracted by the appellant, the processing of personal data corresponding

to another user. TME justified in the arguments presented, that in the data registered in his computer application, the address of the appellant appeared on the website in the ***ADDRESS.1, from which it is inferred that the error that has been mentioned in the filed appeal has not been resolved, since the address that appears in the four invoices issued does not correspond to the personal data of the recurrent".

SEVENTH: In view of the reported facts, in accordance with the evidence that is available, the Data Inspection of this Spanish Agency for the Protection of Data considers that the treatment of personal data that is carried out by the www.aepd.es

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denounced, does not meet the conditions imposed by the regulations on the protection of data, for which the opening of this sanctioning procedure proceeds.

FOUNDATIONS OF LAW

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By virtue of the powers that art. 58.2 of Regulation (EU) 2016/679, of European Parliament and of the Council, of 04/27/2016, regarding the Protection of Natural Persons with regard to the Processing of Personal Data and the Free Circulation of these Data (General Data Protection Regulation, RGPD) recognizes each Control Authority and, as established in articles 47, 64.2 and 68.1 of LO 3/2018, of December 5, on the Protection of Personal Data and Guarantee of Digital Rights (LOPDGDD), the Director of the Spanish Agency of Data Protection is competent to initiate this procedure.

Paragraphs 1) and 2) of art. 58 the RGPD, list, respectively, the investigative and corrective powers that the supervisory authority may provide to the effect, mentioning in point 1.d), that of: "notifying the person in charge or in charge of the treatment of alleged infringements of these Regulations" and in 2.i), that of: "impose an administrative fine in accordance with art 83, in addition to or instead of the measures mentioned in this section, depending on the circumstances.

In the present case, it has been verified that TME loads the c/c of the claimant, two invoices showing the personal data and address of another client, with the services provided by TME belonging to the claimant.

The affected party files a claim with the AEPD that is not admitted to procedure, given that the DPO of the entity claimed (TME), reported, among others, that: "it was due to a technical incident, which has already been corrected": also stating, that: "the invoices in question have already been canceled and that no other invoices were issued. subsequent invoices with the error revealed in the claim"; Also, TME indicated that: "the data related to the claimant that appears in its systems is correct".

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On the occasion of the appeal for reconsideration of the resolution of the AEPD, filed by the claimant, it has been found that TME has not corrected the incident detected by the appellant, and that was revealed to the entity claimed to through various channels (OMIC of the City Council of Torrelodones and the AEPD),

revealing in the issuance of the invoices corresponding to the services contracted by the appellant, the processing of personal data corresponding to another user/client.

Thus, the known facts could constitute an infraction, attributable to the claimed, for violation of article 5.1.a), of the RGPD, which establishes that: "Personal data will be processed in a lawful, loyal and transparent manner in relationship with the interested party.

For its part, section a) of article 72.1 of the LOPDGDD typifies, for the purposes of prescription, such as "very serious", the: "processing of personal data violating the principles and guarantees established in article 5 of the RGPD".

III

This infraction can be sanctioned with a fine of €20,000,000 maximum. 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 of greater amount, in accordance with article 83.5 of the RGPD.

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 83.2 of the RGPD:

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The nature and seriousness of the infraction, since when the infraction is detected in the March 2018 invoices, the company justifies that it corrected the error in June 2018 but it has been detected again, in the August 2018 invoices, (section a).

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The negligence in the infringement, when indicating company, which on 06/22/18 was corrected the error, but in the invoices issued on 08/16/18 it is detected the existence of the same error in the treatment of the data, (section b).

The data processed, in this case, are of a highly personal nature and therefore person identifiers, (section g).

The way in which the supervisory authority became aware of the infringement. In this case due to a claim by an interested party in June 2018, reiterated in the appeal for reconsideration filed in December 2018, (section h).

- Other aggravating factors such as the total business volume of the company, the size of the company, the number of clients it has, etc. (section k).

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:

- The continuing nature of the offence. Spotted on March bills 2018, and detected again in the invoices of August 2018, (section a).

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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 5.1, it allows set a penalty of 60,000 euros (sixty thousand euros), considered "very serious", for prescription purposes, in 72.1.a) of the LOPDGDD.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

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HE REMEMBERS:

1 APPOINT: instructor to D.R.R.R. and, as secretary, to D^a S.S.S., indicating that 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 Legal Regime of the Public Sector (LRJSP).

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INCORPORATE to the disciplinary file, for evidentiary purposes, the claim filed by the claimant and his documentation, the documents obtained and generated by the Subdirector General for Data Inspection during the investigation phase.

1 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 a fine of 60,000 euros (sixty thousand euros), without prejudice to what results from the instruction.

1 NOTIFY this agreement to the entity TELEFÓNICA MÓVILES ESPAÑA SAU (TME), granting a hearing period of ten business days for

formulate the allegations and present the evidence that it deems appropriate.

If within the stipulated period it does not make allegations to this initial agreement, the

The same may be considered a resolution proposal, as established in the

Article 64.2.f) of Law 39/2015, of October 1, on Administrative Procedure

Common to Public Administrations (hereinafter, LPACAP).

In accordance with the provisions of article 85 of the LPACAP, in the event of

that the sanction to be imposed was a fine, it may recognize its responsibility within

of 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

this procedure, equivalent in this case to 12,000 euros. with the app

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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 the

present procedure, carry out the voluntary payment of the proposed sanction, which

which will mean a reduction of 20% of the amount of the same, equivalent in this

case to 12,000 euros. With the application of this reduction, the sanction would be

established at 48,000 euros and its payment will imply the termination of the procedure.

The reduction for the voluntary payment of the sanction is cumulative to the one

It is appropriate to apply for the acknowledgment of responsibility, provided that this

acknowledgment of responsibility is revealed within the period

granted to formulate arguments at the opening of the procedure. The pay

volunteer of the amount referred to in the preceding paragraph may be made at any time prior to resolution. In this case, if it were appropriate to apply both reductions, the amount of the penalty would be established at 36,000 euros (thirty six thousand euros).

In any case, the effectiveness of any of the two reductions mentioned will be conditioned to the withdrawal or renunciation of any action or resource in via administrative against the sanction.

If you choose to proceed with the voluntary payment of any of the amounts indicated above, you must make it effective by depositing it in account no. ES00 0000 0000 0000 0000 0000 opened on behalf of the Spanish Agency for Data Protection at Banco CAIXABANK, 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 it is accepted.

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 the date of the start-up agreement or, where applicable, 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 Agency for Data Protection.

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: On June 17, 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.

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. 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/00173/2019, of

in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to TELEFONICA MOVILES 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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