936-031219

 Procedure No.: PS/00186/2020

RESOLUTION R/00398/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00186/2020, 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 July 10, 2020, 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:

<<

Procedure No.: PS/00186/2020

935-200320

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 March 11, 2020

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 claimant states that he has received again at his email address

electronically a notice of availability of electronic invoicing from the company

claimed, which constitutes a recurrence of the acts sanctioned in the

sanctioning procedure PS/00278/2019, processed by this Agency against the party

claimed.

Attach the following documentation to the claim:

- E-mail received by the claimant from the respondent dated 28

February 2020.

SECOND: After receiving the complaint, the Subdirectorate General for Inspection

of Data proceeded to carry out preliminary investigation actions for the

clarification of the reported facts, having knowledge of the following

ends:

As background to this sanctioning procedure, it should be noted

that on April 3, 2019, the claimant filed another claim against the

claimed given that he had requested the deletion of his data from the operator and

Despite this, he continued to receive emails from it, which replied:

“that once the facts described by the claimant have been analyzed, he does not maintain service

any assets in Vodafone, nor amounts pending payment”. However, I continue

receiving communications from said entity.

Based on the foregoing, the sanctioning procedure was opened by this Agency

PS/00278/2019, and the Director of the Spanish Agency for Data Protection, issued the

January 13, 2020, resolution of said procedure, being notified on January 16

January 2020, for violation of article 6.1. of the RGPD typified in the article

83.5.a) of the aforementioned RGPD.

On August 28, 2019, within the framework of the aforementioned procedure, the

claimed submitted to this Agency the following information in relation to the facts

reported:

It states that: “due to a computer error in their systems, the email

The claimant's e-mail remained "hooked" and continued to appear in the file of

sending informative communications regarding electronic invoices issued by

Vodafone, this being the reason why it has received said communications”.

They point out that: "said error was solved, so the claimant will not return

to receive any communication related to electronic invoicing from Vodafone or

any other that has not previously consented”.

On the other hand, they provided a copy of the email they sent to the

claimant to inform him of the aspects indicated above.

Thus, the claimant has received a new email from

the one claimed on February 28, 2020.

FOUNDATIONS OF LAW

Yo

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

The claimed facts are specified in the treatment of the data of the

claimant by the claimed without his consent, or any other cause

legitimating said treatment, by sending emails to your

personal account.

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:

"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:

(…)

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 the referral to your email address communications with

origin in “vodafone@corp.vodafone.es” and whose subject is “you already have your

Electronic bill".

Likewise, after the evidence obtained, it is clear that initially the

claimant denounced the processing of their data after a request for

suppression. The claimant provided a response from the respondent, within the framework of a

claim before SESIAD, in which they stated that the claimant ceased to be a client

of the company (does not maintain any active service in Vodafone, nor amounts

pending payment) and the last invoice issued in your name was dated May 15

2017. However, the claimant continued to receive invoice notices in the

last months of 2018 and 2019, exactly the same as the one claimed this time from date February 28, 2020.

In sanctioning procedure PS/00278/2019, the defendant acknowledged said error, claiming that it was due to a computer error in their systems, the email The claimant's e-mail remained "hooked" and continued to appear in the file of sending informative communications regarding electronic invoices issued by Vodafone, but stated that the error had already been solved and due to these facts sanctioned the defendant. It is stated that the date of signing the Resolution by the director of the Spanish Data Protection Agency was on January 13, 2020 and the date of notification to the party of the claimed, took place on January 16, 2020.

Well, the claimant has stated again that he continues to receive emails electronic, despite resolution PS/00186/2020.

It is clear that the claimant has received again on February 28, 2020 in his e-mail address an electronic invoice availability notice from the claimed company, which constitutes a recurrence of the facts sanctioned in the sanctioning procedure PS/00278/2019, processed in this Agency against said company.

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;

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.

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 claimant is responsible, in an assessment

initial, the following factors are estimated concurrent:

- In the present case we are dealing with an unintentional negligent action, but

significant (article 83.2 b)

- Basic personal identifiers are affected (name, surname,

domicile) (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.

-

Any offense previously committed (article 83.2 e).

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 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,

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

information requirements that the General Subdirectorate of Inspection of

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

respective acknowledgments of receipt and their response.

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
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
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.

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

>>

: On August 3, 2020, 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

Yo

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/00186/2020, 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.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

Sea Spain Marti

Director of the Spanish Data Protection Agency

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es