968-150719

 Procedure No.: PS/00421/2019

RESOLUTION R/00130/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00421/2019, instructed by the Agency

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

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

BACKGROUND

FIRST: On December 3, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against VODAFONE

ESPAÑA, S.A.U.. Having notified the initiation agreement and after analyzing the allegations

presented, on February 4, 2020, the resolution proposal was issued that

is transcribed below:

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Procedure no.: PS/00426/2019

926-240120

Of the procedure instructed by the Spanish Agency for Data Protection and

based on the following:

BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claimant) dated June 2, 2019

filed a claim with the Spanish Data Protection Agency.

The claim is directed against Vodafone España, S.A.U. with NIF A80907397

(hereinafter, the claimed). The grounds on which the claim is based are

following: that the claimed party has sent a text message to his mobile number

indicating that a contract has been made with your telephone number and data

from your home.

Add, that the user data, name and e-mail do not match yours,

but the registration data coincides with your mobile phone and your address not being a customer

of the claimed.

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

• SMS screenshot received “Resumen de tu compra”, in which you are informed of

the installation data: order number, date of sale June 2, 2019,

name, surnames, address and e-mail.

SECOND: In view of the facts denounced and the documents provided by

the claimant, the General Subdirectorate for Data Inspection requests information from the

claimed, through two separate writings dated July 16 and October 3, 2019 and,

with date of acceptance by electronic means on July 22 and October 7 of the

same year, without the aforementioned entity having provided the requested information.

However, after the one month period granted in the first of the

notifications and ten days in the second, the respondent did not answer within said

deadlines.

Well, on November 19, 2019, the respondent states the

following: “My client proceeded to make the necessary corrections in his

systems in order to update the data that existed in relation to D. A.A.A.

Once this error in the data matching described by the claimant in

your complaint, a letter has been sent D. A.A.A. informing you of the solution

adopted, which is attached as Document number 1.

After analyzing the claim and carrying out the appropriate internal investigations

We have verified that the data related to D. A.A.A., a former client of

Vodafone, had come across the data of a current client when migrating the systems

of ONO “Smart”.

With all this, we confirm that it is a computer error due to the crossing of

data, because the claimant and the current client shared the same ID (Id:

***ID.1).

After learning of the facts, corrections were made.

necessary in the system as well as to solve the errors derived from the crossing of data

so that the error does not persist any longer in the system and does not occur

no further communication that is not appropriate.

Therefore, the data related to D.

A.A.A., not currently appearing any data related to his person in the

vodafone systems

THIRD: On December 3, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimant, 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.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written

allegations in which, in summary, it states that the situation arose because the

claimant while he was a Vodafone customer had a specific ID associated with it, which, after

cease to be a Vodafone customer associated with another customer. That is, they shared

same id Given this, after confirming the error in the system due to migration, he acted

with extreme speed, solving the error. Hence, in the conduct described

no intentionality concurs, neither by way of fraud, nor by way of fault.

For all these reasons, it is appropriate for the AEPD to agree to the dismissal of this

file and the file of the actions or subsidiarily, impose a sanction

for minor infraction in its minimum degree.

SIXTH: On January 10, 2020, the test practice period began,

remembering: 1. Consider reproduced for evidentiary purposes the complaint filed

by the claimant and her documentation, the documents obtained and generated that

are part of the file and 2. Consider reproduced for evidentiary purposes, the

allegations to the initiation agreement of PS/00421/2019, presented by the entity

reported.

SEVENTH: Of the information and documentation provided by the parties in this

procedure, the following facts are accredited:

PROVEN FACTS

THIRD: From the documentation provided by the claimant, it appears that

Next:

1.- It is stated that the claimant has received an SMS from the claimed party on his mobile

reporting a contract made on behalf of a third party. Although the name

surnames and e-mail belong to said third party, the mobile phone number and the

postal address that appear in the contract made, coincide with that of the

claimant.

2.- The defendant acknowledges said error and states that it is an error

computerized by data crossing, because the claimant and the current client

They shared the same identifier.

SIXTH: Attached as an Annex is a list of documents in the

process.

FOUNDATIONS OF LAW

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The Director of the Agency is competent to resolve this procedure.

Spanish Data Protection, in accordance with the provisions of art. 58.2 of the

RGPD and in the art. 47 and 48.1 of LOPDGDD.

II

The defendant is imputed the commission of an infraction for violation of the

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 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, since it carried out the treatment of the personal data of the claimant without their consent. The personal data of claimant were incorporated into the company's information systems, without has accredited that he had his consent for the collection and treatment

later of your personal data.

The Contentious-Administrative Chamber of the National High Court, in

assumptions such as the one presented here, has considered that when the owner of the

data denies the hiring, the burden of proof corresponds to those who affirm their

existence, and the third-party data controller must collect and

keep the necessary documentation to prove the consent of the holder.

We cite, for all, the SAN of 05/31/2006 (Rec. 539/2004), Basis of Law

Fourth.

The personal data of the claimant were registered in the files of the

claimed and were treated for the issuance of emails. In

consequently, has carried out a treatment of personal data without having

accredited that it has the consent of the latter for its treatment, nor that

have the legal authorization to do so.

However, and this is essential, the defendant does not prove legal standing to

the processing of the claimant's data.

In short, the respondent has not provided a document or evidence

one that shows that the entity, in such a situation, would have deployed the

minimum diligence required to verify that your interlocutor was indeed the one who

claimed to hold

Respect for the principle of legality that is in the essence of the fundamental right

of protection of personal data requires that it be accredited that the

responsible for the treatment displayed the essential diligence to prove that

extreme. Failure to act in this way -and this Agency, who is responsible for ensuring

for compliance with the regulations governing the right to data protection of

personal character - the result would be to empty the content of the principle of legality.

IV

In accordance with the provisions of the RGPD in its art. 83.1 and 83.2, when deciding the

imposition of an administrative fine and its amount in each individual case will be

taking into account the aggravating and mitigating factors listed in the article

indicated, as well as any other that may be applicable to the circumstances of the

case.

"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

may also be taken into account:

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of data processing

personal.

c) The profits obtained as a result of committing the offence.

d) The possibility that the conduct of the affected party could have led to the commission of

the infringement.

e) The existence of a merger by absorption process subsequent to the commission of the

infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when not mandatory, a data protection delegate.

h) Submission by the person in charge or person in charge, on a voluntary basis, to

alternative conflict resolution mechanisms, in those cases in which

there are controversies between them and any interested party."

In accordance with the precepts transcribed, in order to set the amount of the sanction of

fine to be imposed in the present case for the infraction typified in article 83.5.a) of the

RGPD for which the claimant is responsible, the following are considered concurrent

factors:

As aggravating criteria:

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

significant identified (article 83.2b).

- Basic personal identifiers are affected (name, a number of

identification, the line identifier) (paragraph g).

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, it allows setting a

sanction of 50,000 euros (fifty thousand euros), typified as "very serious", for the purposes of

prescription thereof, in article 72.1.b) of the LOPDGDD.

In view of the foregoing, the following is issued

MOTION FOR A RESOLUTION

That the Director of the Spanish Data Protection Agency sanction

VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for an infringement of Article 6 of the

RGPD, typified in Article 83.5 of the RGPD, a fine of €50,000.00 (FIFTY THOUSAND

euros).

Likewise, in accordance with the provisions of article 85.2 of the LPACAP,

informs that you may, at any time prior to the resolution of this

procedure, carry out the voluntary payment of the proposed sanction, which will entail

a reduction of 20% of the amount of the same. With the application of this reduction, the

sanction would be established at 40,000.00 euros and its payment will imply the termination of the

process. The effectiveness of this reduction will be conditioned to the withdrawal or

Waiver of any administrative action or recourse against the sanction.

In case you chose to proceed with the voluntary payment of the amount specified

above, in accordance with the provisions of article 85.2 cited, must make it effective

by depositing it in the restricted account number ES00 0000 0000 0000 0000 0000 open to

name of the Spanish Data Protection Agency 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 cause, by voluntary payment, of reduction of the

amount of the penalty. Likewise, you must send proof of payment to the Subdirectorate

General Inspection to proceed to close the file.

By virtue thereof, the foregoing is notified, and the

procedure so that within TEN DAYS you can allege whatever you consider in your

defense and present the documents and information that it considers pertinent, in accordance

with article 89.2 in relation to art. 73.1 of the LPACAP).

RRR

INSPECTOR/INSTRUCTOR

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: On February 21, 2020, VODAFONE ESPAÑA, S.A.U. he has

SECOND

proceeded to pay the penalty in the amount of 40,000 euros using the

reduction provided for in the motion for a resolution transcribed above.

THIRD: The payment made entails the waiver of any action or resource in via

against the sanction, in relation to the facts referred to in the

resolution proposal.

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 the Procedure

Common Administrative of Public Administrations (hereinafter LPACAP), under

the heading "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/00421/2019, of

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

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

In accordance with the provisions of article 50 of the LOPDGDD, the

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 process as

prescribed by art. 114.1.c) of Law 39/2015, of October 1, on Procedure

Common Administrative of Public Administrations, interested parties may

file a contentious-administrative appeal before the Contentious Chamber

of the National High Court, in accordance with the provisions of article 25 and

in section 5 of the fourth additional provision of Law 29/1998, of July 13,

regulation of the Contentious-Administrative Jurisdiction, within a period of two months to

count from the day following the notification of this act, as provided in the

Article 46.1 of the aforementioned Law.

Sea Spain Marti

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