 Procedure No.: PS/00085/2021

RESOLUTION R/00248/2021 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00085/2021, instructed by the Spanish Agency for

Data Protection to VODAFONE ESPAÑA, S.A.U., given the complaint filed

by A.A.A., B.B.B., C.C.C., and based on the following,

BACKGROUND

FIRST: On March 9, 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/00085/2021

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: D.A.A.A. (hereinafter claimant 1), Ms. B.B.B. (hereinafter

claimant 2) and D.C.C.C. (hereinafter claimant 3) dated October 24,

2019, November 13, 2019, and July 22, 2020, respectively, filed

claims before the Spanish Data Protection Agency. the claims

are directed against Vodafone Spain, S.A.U. with CIF A80907397 (hereinafter, the

claimed).

The claimants state that the claimed entity did not remove their data

information from their files, once the subscribed telephone contract has concluded.

Thus, they point out that they continue to receive SMS with bills of zero amount.

According to the claimants, the events took place in the following periods:

during the last year (claimant 1), during the last two years (claimant 2), and

during the last 7 months (claimant 3) prior to filing the

these claims.

And, among other things, they provide the following documentation:

Claimant 1

- Notification by SMS of a new invoice available with a payment date of 20

September 2019.

Claimant 2

- Complaint before the Municipal Consumer Information Office of the

City Council of ***LOCALIDAD.1 (Ref. 1252/19) where an invoice appears

issued by the respondent dated September 15, 2019.

Claimant 3

Invoice sent by the claimed party dated July 15, 2020.

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- Request made by email dated July 21, 2020 for the cessation of

issuance of invoices and communications.

- Answer from the respondent indicating various procedures to follow

to solve the incident.

SECOND: In view of the facts denounced in the claim and the

documents provided by the claimant and the facts and documents of which he has

had knowledge of this Agency, the Subdirectorate General for Data Inspection proceeded to carry out preliminary investigation actions for the clarification of the facts in question, by virtue of the investigative powers granted to the control authorities in article 57.1 of the Regulation (EU) 2016/679 (General Data Protection Regulation, hereinafter RGPD), and in accordance with the provisions of Title VII, Chapter I, Second Section, of the Law Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD).

As a result of the research actions carried out, it is found that the responsible for the treatment is the claimed one.

In addition, the following extremes are noted:

1. The records that are recorded are the following:

Files of transfer of claims E/11384/2019, E/00232/2020 and E/06666/2020.

In these files, the claims presented in this Agency to the claimed.

With dates of January 9 and 23, 2020, and September 21, 2020 are received briefs of allegations to the transfers of the claims sent by the claimed stating that the personal data of the interested parties were not disposed of properly due to a breakdown in the internal systems of the claimed. In all three cases, the claimants were sent a document in which they were

informs of the causes that have generated the incident and that their data has been

definitely removed.

And attach, among others, the following documents:

- Letter dated January 9, 2020 sent to claimant 1 informing him

that as soon as the breakdown of the systems of the claimed company is resolved,

data would be deleted.

- Letter dated January 23, 2020 sent to claimant 2

informing her that it had been a computer error and that they had

proceeded to delete your data from their systems.

- Letter dated September 17, 2020 sent to claimant 3

informing him that it had been a computer error and that they had

proceeded to delete your data from their systems.

On February 7 and 11 and September 27, 2020, it is agreed to admit

processes the claims submitted by the claimants. It is notified to

claimed with dates of February 10, 14 and October 6, 2020.

On March 3, 2020, it is received in this Agency, with the number of

registration, 010434/2020, brief of allegations to the resolution of admission for processing

stating that the data of claimant 1 had already been deleted from their

systems.

And, among other documents, they attach:

- Letter sent to claimant 1 informing him of this fact.

On June 2, 2020, the status of solution is requested from the claimed

of the errors detected after the claims of claimants 1 and 2. With

date of June 10, 2020 is received in this Agency, with registration number

019403/2020, reply brief stating that they had verified that

the data of claimants 1 and 2 had been canceled so they gave the

issues as resolved.

On July 22, 2020, a new claim was received for the same

facts about which the respondent stated, in the answer to the transfer of the

claim, that the issuance of invoices was due to another error in their systems.

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

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

claimants by the claimed party without legitimacy to do so, by sending

SMS to the mobile phones of the claimants informing them of the generation of

invoices in your name, when your contractual relationship had already ended and the

claimed had stated: “that your data has been definitively eliminated”.

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 claimants without having any legitimacy to do so,

materialized in that they continue 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.

It is important to highlight that this Agency transferred the

claims made by the claimants to the claimed party giving rise to the

files E/11384/2019, E/00232/2020 and E/06666/2020.

Well, on June 2, 2020, the respondent is requested the status of

solution of the errors detected after the claims of claimants 1 and 2.

Thus it is stated that on June 10, 2020, the respondent states that the data of the

claimants 1 and 2 had been canceled so the incidents gave as

resolved.

Taking the above into account, on July 22, 2020, a new

claim for the same facts about which the respondent stated, in the

response to the transfer of the claim, that the issuance of invoices was due to another

error in their systems.

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 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 respondent 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).

The serious lack of diligence shown then, after having communicated to

the claimants that addressed the right to oppose the treatment of their

data, proceeded again to send them 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 penalty to

impose in the present case, it is considered appropriate to graduate the sanction to

impose 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 150,000 euros (one hundred and fifty thousand euros),

considered as "very serious", for the purposes of prescription of the same, in the 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 as instructor D.D.D.D. and as secretary to Ms. E.E.E., 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/11384/2019, E/00232/2020 and E/06666/2020.

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 150,000 euros (one hundred

fifty thousand euros), without prejudice to what results from the instruction.

4. NOTIFY this agreement to VODAFONE ESPAÑA, S.A.U., with CIF

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 120,000 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 120,000 euros and its payment will imply the termination of the procedure.

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 120,000 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, 120,000 euros or 90,000 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

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

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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

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: On March 30, 2021, the claimant has proceeded to pay the

SECOND

sanction in the amount of 90,000 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:

"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/00085/2021, 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.

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