

968-150719

□ Procedure No.: PS/00009/2020

RESOLUTION R/00348/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00009/2020, 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 February 18, 2020, 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 June 29, 2020, the resolution proposal was issued that

is transcribed below:

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Procedure no.: PS/00009/2020

821-200320

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

based on the following:

BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the claimant) dated February 25, 2019

filed a claim with the Spanish Data Protection Agency. The

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

later, the claimed one).

The grounds on which your claim is based are that you received a message from

Vodafone Spain, S.A.U. (hereinafter Vodafone) thanking you for a purchase

that you do not recognize, made in a physical store of which you were a customer.

Thus, check through the application for mobile devices of

Vodafone that a contracted portability was carried out in your name and with your data banking.

Well, at the store he asks for the contract that he supposedly signed, but

They deny it and recognize that it is a habitual practice that they carry out: they buy prepaid Lycamobile cards and carry out portability to customers of their store. In

As soon as they are aware of these facts, they cancel the cover line.

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On the other hand, it indicates that the events took place on February 22, 2019.

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

☐ Vodafone service contract for portability of the number ***TELÉFONO.1

from Lycamobile.

☐ Copy of the claim form filled out by the claimant in which

claims that (i) your identity has been supplanted, (ii) your data has been processed

personal and bank accounts at your convenience and (iii) have made a contract at your

name without your consent.

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 Subdirector 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 confirmed

that the data controller is the claimed party.

In addition, the following extremes are noted:

The background information is the following:

☐ Made a request for information to Vodafone on the hiring of

unsigned portability and on the ported telephone number, dated

November 11, 2019 is received in this Agency, with registration number

054686/2019, letter sent by the operator stating that the

portability are formalized by means of a contract signed by the client in a

that the contract model includes the signature fields necessary for the

previous client authorizes the change of owner and the new client authorizes the

portability. The contract can be signed digitally or manually:

- When the digital signature option is chosen, the contract signed by the client

dumps directly into "Docuweb". The system should not advance if it is missing

one of the 2 signatures in the portability and change boxes.

- When the manual signature option is chosen, the order advances in any case and

The store is obliged to keep an original copy of the contract signed by

the client and to send this copy to "Docout" for safekeeping. "Docout" reviews

if the contract arrives at your office and informs us otherwise.

As for the ported number, they report that it was discharged from the 26

from February 2019 until February 28, 2019, the date on which the application was processed.

final drop.

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THIRD: On February 18, 2020, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against the claimed entity,

by virtue of the powers established in article 58.2 of the RGPD and in articles

47, 64.2 and 68.1 of Organic Law 3/2018, of December 5, on Data Protection

Personal and Guarantee of Digital Rights (LOPDGDD), for the infringement of the

article 6.1 of the RGPD typified in article 83.5.a) of the RGPD.

FOURTH: Once the initiation agreement has been notified, the entity claimed, by means of a letter of

dated March 19, 2020, made, in summary, the following allegations:

“It should be noted, in the first place, that the factual assumption before which we

we found and that affects Vodafone is the portability of the unrecognized line of the

claimant that was managed by the Vodafone agency modality. In this

In this sense, the signed contract is provided as document number 3, in which

They observe the personal data of the claimant. In this sense, and with a view to overturning

of data in the Vodafone system, the contracting had the appearance of consent,

dear and real by having all the updated and truthful information for what was

impossible to know the reality of the facts -a non-consensual one of the data together with

the illicit action of the commercial - that, if he had known them, he would not have managed the

portability.

Vodafone rejects this type of behavior for which it has tolerance

zero. Proof of this is the contract signed between Vodafone and Oliveros Reus on

which we provide as Document 4.

Likewise, breaches of all these behaviors carry a series of sanctions to the agent that are included in Clause 4 Penalties of Annex I of the contract attached as Document 5.

It is evident that, in the case at hand, he has also been a victim of the actions illicit by this agency, not being able to be blamed for any intentionality, nor lack of diligence, because there is a contract between the agency and Vodafone that regulates the relationship between the parties and establishes the obligations and guidelines to follow to carry out the commercial activity that has not been fulfilled.

In relation to these facts, he wishes to reiterate, therefore, the lack of intentionality infringing entity that governs the acts that are the object of this procedure.

For all these reasons, the appropriate thing is to agree on the dismissal of this file and the archive of the proceedings, since the events have occurred without intention some. Subsidiarily, the amount of the sanction must be moderated, imposing its minimum amount, taking into account the following circumstances set forth in the art. 83.2 of the RGPD”.

FIFTH: On June 1, 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/00009/2020, presented by the entity reported.

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SIXTH: Of the information and documentation provided by the parties in this proceeding

lien, the following facts are accredited:

PROVEN FACTS

1º The claimant states that, on February 25, 2019, she received a SMS notification of the claim, in relation to the registration of a line that does not recognized and proceeded to check through the My Vodafone mobile application, where he saw that indeed, a portability had been carried out in his name also using your bank details.

2º Due to the above, and by having the information in the My application Vodafone, went to the store where he requested the contract that he supposedly signed, but they deny it and recognize that it is a habitual practice that they carry out: buy prepaid Lycamobile cards and carry out portability to clients of their store. As soon as they become aware of these facts, they cancel the ported line.

3º Work in the file copy of the Vodafone service contract for portability of the ***TELÉFONO.1 number from Lycamobile.

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 GDPR and in arts. 47 and 48.1 of the 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:

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"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 having any legitimacy to do so. The personal data of the claimant were incorporated into the information systems of the company, without proving that he had legitimately contracted, had your consent for the collection and subsequent processing of your data. personal data, or there is any other cause that makes the treatment lawful effected.

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.

On the other hand, there is evidence, in the contract provided by the claimant, that the portability contract was made in the physical store of the claimed party and that the contract is without signatures.

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Although the company states that portability does not occur if there is no any of the signatures, the contract obtained by the claimant through the application for Vodafone mobiles contains all the spaces intended for the signatures of the blank headlines.

However, and this is essential, the defendant does not prove the legitimacy to the processing of the claimant's data.

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 RGD 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;

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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 treatment of personal information.
- 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 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 fine to be imposed in the present case for the infraction typified in article 83.5.a) of the RGPD for which the claimed party is responsible, the following factors:

As aggravating criteria:

The intentionality or negligence in the infringement (article 83.2 b).

Basic personal identifiers are affected (name, surname, domicile) (article 83.2 g).

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The balance of the circumstances contemplated in article 83.2 of the RGPD, with

Regarding the infraction committed by violating what is established in article 6, it allows establishing a penalty of 60,000 euros (sixty thousand euros), typified as "very serious", for 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 to VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for an infraction of Article 6 of the RGPD, typified in Article 83.5 of the RGPD, a fine of €60,000.00 (SIXTY THOUSAND euros).

Likewise, in accordance with the provisions of article 85.2 of the LPACAP, informs you 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 48,000.00 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 do so effective by depositing it in restricted account number ES00 0000 0000 0000 0000 0000 opened in the name of the Spanish Agency for Data Protection in the Bank 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 in the amount of the penalty. Likewise, you must send proof of admission to the Subdirector General for Inspection to proceed to close the file.

By virtue thereof, the foregoing is notified, and the procedure so that within a period of TEN DAYS you can allege whatever you consider in its defense and present the documents and information that it considers pertinent, according to article 89.2 in relation to art. 73.1 of the LPACAP).

BBB

INSPECTOR/INSTRUCTOR

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06-01-2020 Notification of testing period to VODAFONE ESPAÑA, S.A.U.

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: On July 16, 2020, VODAFONE ESPAÑA, S.A.U. has proceeded

SECOND

to the payment of the sanction in the amount of 48,000 euros making use of the reduction envisaged 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

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 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

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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/00009/2020, 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, 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

Director of the Spanish Data Protection Agency

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