

- Procedure No.: PS/00144/2019

938-0419

RESOLUTION OF SANCTION PROCEDURE VOLUNTARY PAYMENT

In sanctioning procedure PS/00144/2019, instructed by the Spanish Agency for Data Protection, to the entity VODAFONE ESPAÑA SAU, (hereinafter, "the entity claimed"), given the complaint filed by Ms. A.A.A., (hereinafter, "the claimant"), and based on the following,

BACKGROUND

FIRST: On 12/05/18, you had entry into this Agency in writing submitted by the claimant, through the Ministry of Health of the Autonomous Community of Castilla la Mancha (CCM), in which he states, among others, that: "It has been put into contacted the company VODAFONE and they have confirmed that they have contracted their Name several services with the entity, which you had NOT contracted. just match name and ID. The following documentation is provided, among others:

☐ On 08/22/18, a complaint was filed with the Civil Guard of Torrijos (Toledo), for receive constant phone calls from a legal advisor claiming the payment of a debt for non-payment of the services of some telephone lines.

☐ On 09/14/18, a complaint was filed with the Community Health Department Autonomous Community of Castilla la Mancha (CCM), for usurpation of identity in the hiring some telephone lines in the company VODAFONE.

On 11/05/18, official letter of referral of the complaint filed with

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the Ministry of Health of the CCM, to the company VODAFONE.

On 11/09/18, the entity's response to the Ministry of

☐

Health of the CCM where, among others, it indicates that: "on 11/08/18 there has been proceeded to the deactivation of the services contracted with the company; No However, the billing process is a process that detects consumption made and offers guarantees that the consumptions that appear have been made from the SIM card", therefore, it is confirmed that the billing made by the claimant is correct and still has a debt of €583.99 pending payment".

Provide a copy of the Mobile Service contract and General Conditions,

□

made at the point of sale OWUNISM1 (UNISOMO IBOUND) CIF A82365412, where the data indicated in the customer section coincide with claimant information. The contracted services are: Fibra 50Mb; Fixed line and mobile portability (***TELEFONO.1; ***TELEFONO.2; ***PHONE.3 and ***PHONE.4); checking account number direct debit "Bankia ***9330"; All of them, without any signature on www.aepd.es

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the reserved part of "client signature", but if signed by D. B.B.B. and D^a C.C.C. in the reserved part of "Vodafone signature".

Dated 07/13/18 Contract for the installment sale of a mobile brand

□

"Samsung Galaxy A8", associated with the telephone number ***TELEFONO.4, to name of the claimant, without signing in the area reserved for "signature of the

client", but if in the reserved area of "Vodafone signature", being signed by

D.D.D.D. and Mrs. C.C.C.

Provide a copy of 7 invoices, for the period between 05/08/18 and

□

on 10/21/18, with a total amount of 657.36 euros.

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 RGPD. A) Yes,

On 01/08/19, an information request was addressed to the entity VODAFONE.

Regarding this requirement, the Electronic Notifications Support Service and

Electronic Address Enabled, certifies that it was notified on 01/08/19. However, to

date 04/08/19, the claimed entity had NOT yet sent to this Agency, any

type of information about the matter.

THIRD: On 04/09/19, the Director of the Spanish Agency for the Protection of

Data agreed to initiate sanctioning proceedings 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 of the RGPD typified in article 83.5. of the RGPD and considered very serious

in 72.1.b) of the LOPDGDD, arguing essentially that: "the claimant

complaint before the Ministry of Health of the Autonomous Community of Castilla the

He stains a fraudulent hiring, carried out with his name and DNI, of several

fixed and mobile telephony services, in the company VODAFONE ESPAÑA SAU. Is

company, when it becomes aware of this complaint, on 11/08/18, proceeds to

deactivate all services provided on behalf of the claimant, but still

keeping alive the debt generated by the consumption of said services. For other part, in the copies of the contracts provided by the company VODAFONE, in its written response to the Ministry of Health of the CACM, it is observed that, the name and ID of the claimant appears in the customer data, but all lack signature in the "client signature" area.

FOURTH: Once the initiation agreement has been notified, the entity claimed, by means of a letter of dated 04/30/19, made, in summary, the following allegations:

“Vodafone wishes to state that, upon receipt of this Startup Agreement found that the allegations that were prepared in response to the information request E/0001/2019 were submitted to the Agency on the same April 8, 2019, in the Registry. A copy of the same is attached as Doc. 1.

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Vodafone is aware that these allegations and the explanation of what happened are submitted after the deadline. This happened like this, as a consequence of the great number of requests that it has been receiving since the entry into force of the RGPD.

After receiving said request, Vodafone re-analyzed the claim and,

Firstly, it confirmed that the services had been terminated since the

November 2018 (as had already been reported to the Ministry of

Health of the Autonomous Community of Castilla La Mancha), and also requested the

cancellation of the debt that had been left pending. This resolution was

communicated to Mrs. A.A.A. by letter attached as Doc. 2, dated 4

April 2019.

Once the Agency has been informed that the claim was resolved completely (canceled the debt and duly informed the claimant thereof), in accordance with the documentation provided in the request for information, the hiring made in the name of the claimant had the appearance of a dear and also correct hiring and that my client displayed the due diligence, that is, that which may be required in contracting processes carried out through remote means, as in the case at hand, where the hiring was made through a call received in our call center, Unison.

Specifically, the registration of the lines occurred through a request received by call and were activated on 04/26/18, resulting deactivated subsequently after the claim in the month of November 2018. Attached are as Doc. 3, copy of the contract that is not signed because it is generated automatically by the tool when a distance contract is made to through teleshopping, in compliance with current regulations. Also attached is as Doc. 4, the recordings that we have where the recapitulation of the contracts made, the first of them, audible from of minute 18:30 on the acquisition of the terminal and the second, where the financing of the terminal, audible from minute 9. In it you can check that the person provides the details of the contract. Also, there is of the delivery notes of the terminals, Docs. 5-6.

Finally, there were bills with consumption, as can be seen from the invoices that are attached as Doc. 7. Attached as Doc. 8, a report in which It can be verified that there are even interactions where supposedly Mrs. A.A.A. demanded the billing of the services, not denying in any case said hiring but quite the opposite, reaffirming it, which turns out to be a

one more clue that made him think that the hiring made in his name was completely correct.

It is evident that my client was also the victim of a deception by a impersonator, not being able to be attributed any intentionality in the facts or nor lack of diligence because my client requested the celebration of a contract, made a recording to confirm the hiring and financing of the terminal, has the signed delivery notes as proof of delivery of the terminals and also has invoices with consumption and interactions in the systems about from service. For this reason, it understands that it has adopted the measures that may be in its hand to avoid situations of fraud and that the hiring has the appearance of correct.

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In relation to these facts, my client wants to reiterate the lack of infringing intent that governs the acts carried out by Vodafone in the file that concerns us.

In this sense, it is relevant to highlight the repeal of article 130 of Law 30/1992, of November 26, on the Legal Regime of Public Administrations and the Common Administrative Procedure. Its substitution by article 28.1 of the Law 40/2015 of October 1, on the Legal Regime of the Public Sector eliminates the mention of the "simple non-observance" making the rule "nullum poena sine culpa" prevail.

The foregoing comes only to highlight the lack of room for the responsibility without fault, principle that governs or must govern in the administrative field

sanctioning, because to the extent that it is a manifestation of "ius puniendi" of the State,

It is inadmissible in our legal system a liability regime

no fault

In this sense, it indicates Judgment of the Constitutional Court number 219/1988, and this

for being inadmissible a system of strict liability or without fault as

it also comes to point out Judgment 246/1991. I cannot be penalized

represented for infraction of article 6.1. of the LOPD, without reference to the

subjective element of the type, not proving fraud, guilt, or negligence.

Additionally, taking into account the special nature of penalizing law

that determines the impossibility of imposing sanctions without taking into account the will

of the acting subject or the factors that may have determined the breach of a

legal obligation, maintains the inadmissibility of the imposition of any sanction.

Thus, the Supreme Court indicates in the Judgment of December 21, 1998

(RJ1998/10226) (Appeal 9074/1991), January 27, 1996 (RJ 1996\926)

(Appeal 640/1992) and January 20, 1997 (RJ 1997\257) (Appeal of

Appeal 2689/1992)." It also indicates the TS of July 20, 1990, Ar. 6163,

Well, as can be seen, in the behavior described there is no

intentionality, neither by way of intent, nor by way of guilt. Therefore, do not

If there is any guilt, it is totally inadmissible to impose a sanction

any to my client, as long as one of the essential requirements of the

Sanctioning Administrative Law.

For all these reasons, he understands that what is appropriate is for the AEPD to agree on the dismissal

of this file and the filing of the proceedings since the facts have been

produced without any intention on the part of my client and it seems that

due to some kind of error. Subsidiarily and in the event that despite the

explanations previously provided, the Agency understands that my client is

deserving of a sanction for the commission of an infringement of art. 6.1. of the GDPR,

the amount of said sanction must be moderate, imposing its minimum amount,

taking into account the following circumstances set forth in art. 83.2 of the GDPR:

It is requested, therefore, to agree: The dismissal of the file, with the consequent

record of proceedings. Subsidiarily with respect to what is intended in number

1, impose on my represented the sanctions for minor infractions in their degree

minimum. Subsidiarily regarding what is intended in number 2, impose on my

represented the sanctions for serious infractions in their minimum degree”.

FIFTH: On 05/13/19, the test practice period began,

remembering: a).- to consider reproduced for evidentiary purposes the complaint filed

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

are part of file E/0001/2019 and b).- consider reproduced for purposes

evidence, the allegations to the initiation agreement of PS/00144/2019, presented by

the entity.

: On 06/05/19, the sanctioning resolution proposal is notified

SIXTH

consisting in that by the Director of the Spanish Agency for the Protection of

Data is sanctioned to the entity claimed for infringement of art 6.1 of the RGPD,

classified as very serious for prescription purposes, in article 72.1.b) of

LOPDGDD, with a fine of 120,000 euros, in accordance with the provisions of the

article 83.5 of the aforementioned RGPD, arguing that:

“In the first place, this Agency required the entity claimed to report on the facts denounced, on 01/08/19, granting a period of one month for it, but it is not until 04/08/19 (3 months later), when the entity sends the information required, therefore, it has not been possible to take into consideration said information when have submitted it after the deadline.

However, it has been found that the claimant was not a client of the company and that, according to complaints filed with the Civil Guard and the Ministry of Health of the CCM, in April 2018 he was the object of a fraud in the usurpation of his data personal when using them to register 4 telephone lines and the purchase of 2 mobile terminals in the company VODAFONE.

VODAFONE was officially aware of the fraud complaint on 11/05/18 through of the Ministry of Health of the CCM, although the claimant indicates that months He had previously contacted the company to report the events.

Well, VODAFONE in its response dated 09/11/18, to the Ministry of Health of the CCM, recognizes the fraud, by indicating that it cancels the lines discharged in the name of the claimant, but continues to carry out an irregular treatment of the data personal by keeping alive the debt of 583.99 euros in his name, since he is followed claiming.

VODAFONE continues to carry out irregular processing of the personal data of the claimant, at least until 04/04/19 (5 months later), when, as

As a result of receiving the request from this Agency, proceeds to send a letter of acknowledgment of fraud and cancellation of debt to the claimant. However, it has not It has been proven that the company has canceled and deleted the personal data of their databases yet.

As regards the recordings presented by the company in the allegations, indicate that said recordings are NOT hiring recordings and/or

portability of services or verification of data, which should have been carried out in

the month of April/May 2018, but they are the recordings of the purchase of the

mobile terminals, made, as can be seen in them, in July 2018. Indicate

In addition, in said recordings there are errors in the indicated digits of the DNI and

of the telephone number, which are not taken into account by the representative of the

company.

In short, while the entity complained against has not demonstrated due diligence

when regularizing the existing fraudulent situation, as required by article 6 of the

RGPD, the existence of an infringement of the RGPD can be declared, in said article,

which sufficiently motivates the present sanctioning procedure”.

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SEVENTH: Once the proposed resolution has been notified, the entity claimed submits

written, dated 06/20/19, indicating therein: “That in light of the Proposal for

Resolution notified, Vodafone has proceeded to order the payment of €96,000

corresponding to the infraction initially foreseen but once the

reduction associated with prompt payment. By virtue of the foregoing, I REQUEST the AEPD to

considers this document presented with the statements contained therein, is served

admit it proceeding to dictate the corresponding resolution of termination of the

procedure for voluntary payment, according to the terms provided in the

Resolution Proposal”.

EIGHTH: On 07/05/19, the entity claimed has proceeded to pay the

penalty in the amount of 96,000 euros, making use of the reduction provided for in the

initiation agreement, which entails the waiver of any action or recourse in administrative against the sanction.

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 LOPDGDD, the Director of the Agency Spanish Data Protection is competent to initiate and resolve this process.

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"

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In accordance with the above, the Director of the Spanish Agency for the Protection of

Data RESOLVES

PS/00144/2019, of

FIRST: DECLARE the termination of the procedure:

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

SECOND: NOTIFY this resolution to VODAFONE ESPAÑA SAU.

In accordance with the provisions of article 50 of the LOPDPGDD, 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 in accordance with art. 48.6 of the

LOPDPGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the

Director of the Spanish Agency for Data Protection within a month from

counting from the day following the notification of this resolution or directly

contentious-administrative appeal 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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