

□ Procedure No.: PS/00456/2019

938-0419

RESOLUTION OF PUNISHMENT PROCEDURE

In sanctioning procedure PS/00456/2019, instructed by the Spanish Agency for Data Protection, to the entity VODAFONE ESPAÑA SAU, with C.I.F.: A80907397, (hereinafter, "the entity claimed"), having seen the complaint by D. A.A.A. (hereinafter, "the claimant"), and based on the following,

BACKGROUND

FIRST: On 06/27/19, you had a written entry to this Agency, submitted by D.A.A.A. (hereinafter, "the claimant"), in which he stated, among others, the following:

"Vodafone has accepted from me a consent with the following description:

"I accept that Vodafone processes my billing, traffic and navigation data to send me personalized commercial communications based on this information", as can be seen in the image.

I have no record of having given my consent at any time for this, so they must have marked it without him or by manipulating the information granted.

Secondly, the list of consents that you request in your section of privacy is patently confusing. There are affirmative and negative consents at the same time, as can be seen in the image "Section – Privacy of your data.png".

The following documentation is provided, among others:

1.- Screenshot of the web page "URL.1", where it can be seen, in the area of "Privacy of your Data", the boxes, according to the complaint, pre-marked with (x):

Box

X

(pre-marked)

X

(pre-marked)

X

(pre-marked)

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Consent:

I accept that Vodafone processes my location data so that it can offer me Vodafone services or products in accordance with my needs

I accept that Vodafone processes my billing, traffic and navigation to send me personalized commercial communications based on on this information.

I accept that Vodafone send me commercial communications with offers that could be of interest to me from third parties companies with which Vodafone has reached an agreement.

I do not accept Vodafone sending me commercial communications information about products, services, offers, discounts and Vodafone promotions.

I do not accept that Vodafone transfers anonymized and aggregated data based on my browsing, traffic, billing and location to other entities.

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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 art. 57.1 GDPR. So with Date 08/28/19 and 11/12/19, an information request is addressed to the entity claimed.

THIRD: On 12/02/19, the entity claimed, sends to this Agency, between others, the following information:

“A copy of the letter sent to the claimant informing him of the steps made to resolve your claim. Also, we apologize for the inconvenience caused.

The "My Vodafone" App has a specific section called "Permissions and Preferences", in which only customers, through access with a personal password, they can access and check or uncheck the relevant options they consider adequate for the treatment of your personal data and proceed or not to the acceptance of the consents for the use of the same.

Only customers have the power to grant their permissions through this app. My client does not have access to them, nor to their modification, if not It expressly has the consent of the clients.

The claimant is the one who motu proprio can activate and deactivate this option in his mobile application, and that my client cannot access their customer profile to modify such permissions if you do not expressly have your consent, as it is of a case in which the claimant expresses his clear opposition to the treatment of your billing, traffic and navigation data to send you communications

business, my client has proactively decided to deal with this case

internally, and uncheck said consent in the systems, in order to comply with

Your request.

We provide screen printing of the systems of my represented in which

observe the consents granted by the claimant, before being

unchecked the indicated option, and the final state of the systems, in which

We find this option currently already unchecked.

We have answered the claimant's request, who, after considering confusing

the My Vodafone application, and not acknowledge having given consent to one of the

specific points, my client has proceeded proactively to deactivate the option

of said consent object of the controversy.

The letter sent by Vodafone to the claimant, dated 12/02/19, indicates the

Next:

“By means of this letter, we want to inform you that the

The "My Vodafone" application has a specific section called "Permissions and

Preferences”, in which only customers, through access with a personal password,

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they can access and check or uncheck the relevant options they consider

adequate for the treatment of your personal data and proceed or not to the

acceptance of the consents for its use.

Although the Vodafone company cannot access customer profiles to

modify such permissions if you do not expressly have your consent, as it is

of a case in which you express your clear opposition to the treatment of your billing, traffic and navigation data to send you commercial communications, we have decided to treat this case internally, and uncheck said consent in systems, thus fulfilling your request. We apologize for the inconvenience that we could have caused him”.

FOURTH: In view of the reported facts, the documentation provided by the parties and in accordance with the evidence available, the Inspection of Data from this Spanish Data Protection Agency considered that the action of the claimed entity did not meet the conditions imposed by the regulations in force, Therefore, the opening of a sanctioning procedure proceeds. Thus, with date 03/12/20, the Director of the Spanish Data Protection Agency agreed to initiate sanctioning procedure to the claimed entity, by virtue of the powers established, for breaching the principle of free consent, contemplated in the article 7 RGPD, which could lead to the commission of an infringement typified in the article 6 of the RGPD, on the legality of the processing of personal data, punishable in accordance with the provisions of art. 58.2 of the aforementioned RGPD, with a sanction initial payment of 40,000 euros, arguing that:

“The claimant denounces that, in his personal account "My Vodafone", section "allows sos and preferences" (Privacy of your data), of the 5 boxes related to the consents for various purposes, is checked by default and without your consent the box: "I accept that Vodafone processes my billing, traffic and navigation data to send me personalized commercial communications based on this information. tion". Consider that this box has been tampered with."

It also denounces that the list of the 5 consents is confusing, since there are affirmative and negative consents at the same time and provide screenshots in which five boxes are seen, three of them marked.

In the allegations presented by the respondent entity, at no time was it denied

Please ensure that the consent boxes are previously checked and only indicate that

"The entity cannot access them to manipulate them if it does not expressly have

the consent of the client, and that since it is a case in which it is clearly manifested

Rarely, the client's preferences proceed to unmark them".

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

dated 04/16/20, made, in summary, the following allegations:

"The claimant indicates that, as a Vodafone customer, he accessed the personal area of My

Vodafone via the web and detected that in the "Privacy of your Data" area,

consent was accepted on your part with the following description

"I accept that Vodafone processes my billing, traffic and navigation data to

send me personalized commercial communications based on this information",

without proof of having given such consent at any time.

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After receiving the claim, Vodafone acted as quickly as possible, and because the

The claimant expressed his clear opposition to the processing of his personal data.

billing, traffic and navigation to send you commercial communications, my

represented proceeded to unmark said consent in their systems, in order to

meet customer request. This action was carried out with the utmost diligence and

quickly, as long as the changes were fully implemented on the date

11/27/19, that is, just fifteen days after receiving the claim and, having

Keep in mind that system modifications are not carried out immediately, but

that entail a certain delay until they are properly synchronized.

Vodafone responded to both the Agency and the claimant on 12/02/19, reporting

on the steps taken, specifically, (i) modification of the consent of the

claimant not to receive commercial communications expressed through the

claim and, (ii) explanation about the operation of the personal area of My

Vodafone (via web and via app). Regarding the latter, it became clear that Mi

Vodafone only and exclusively accesses the main customer with its corresponding

user and password. Within that environment where all the information of the

services and customer data, is also found in a specific section

called "Permissions and Preferences" which is reached by accessing "Data

Personal" (via the web) or "My Account" (via the app), the personal management of the

consents by the client where you can check or uncheck the different

options that you consider appropriate for the treatment of your personal data and,

this way provide your consent or not to Vodafone.

In short, the boxes for granting express consent for the

processing of personal data of the interested parties in relation to purposes that so

require, in no case and under no circumstances are they pre-marked and it is the customer

or interested party who decides what, when and how he wants to voluntarily mark or not the

express consent boxes.

Only customers have the power to manage their permissions and preferences

through this application, so Vodafone cannot access them, nor

modify them, if you do not have the express consent of the client. This, of

implicitly, highlights the fact that (i) Vodafone does not manipulate the

consent granted by the interested party and, (ii) Vodafone does not modify the boxes,

unless the client expressly requests it (as my client understood

that the claimant did so through the claim). That is, there is no

tacit consent, if the customer does not check the boxes, Vodafone cannot process their data for treatment purposes that require the express consent of the interested.

The Agency establishes in the Basis of Law II of the Agreement of Initiation of sanctioning procedure that, "in the allegations presented by the entity claimed, at no time is it denied that the consent boxes are previously marked and only indicates that: a).- the entity cannot access them to manipulate them if it does not expressly have the consent of the client, and b).- that when be a case in which the client's preferences are clearly manifested proceeds to uncheck consent on their systems."

In this sense, my client wants to show in a clear and emphatically, that the boxes granting express consent of the Interested parties for certain data processing do not come under any pre-marked. The management of consents for the processing of data by www.aepd.es

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part of Vodafone is a clear and transparent system for all its customers because they can access it both via the web and via the app and modify it at any moment and as many times as they want. This way of requesting and presenting the consents is born from the project for the correct implementation of permits for the treatment of personal data derived from the legal modifications introduced by the RGPD and LSSI.

Prior to the RGPD, tacit consent was allowed, hence the transformation to

when obtaining the consent of the clients by Vodafone. These consents, which my client groups and calls "Permissions and Preferences" are included without pre-marking in all model contracts, way that a client at the time of reading and signing the contractual conditions of the service has the option of marking the consents as it deems appropriate express rights that you grant to Vodafone for the processing of your data that support your basis of legitimacy in the express consent of article 6.1.a) of the RGPD.

These Permits appear in all contractual models: face-to-face contracting, online or teleshopping. This information is then stored in the Vodafone systems, in the customer profile. Therefore, if a client for any of These contracting channels check any box, it will be understood that you have given your consent and will appear in your customer file. My representative does not mark the permissions and preferences of the client if the client has not given his express consent to it previously.

We have just explained the situation that new clients of Vodafone when obtaining your consent for the processing of your data according to the purposes described, which is extrapolated to all those people who were already Vodafone customers when launching the functionality of Permissions and Preferences. Under no circumstances, neither in the systems nor in the environment of My Vodafone the boxes appear pre-marked until the customer does so personally, therefore, until that moment, my client cannot deal with the personal data of the client for the purposes required by said consents. Therefore, with respect to portfolio clients, well until they do not contact Vodafone to expressly authorize and give their consent, or directly and personally access My Vodafone to give their consent, Vodafone cannot process your personal data.

A client can change his mind at any time, therefore, for
can manage those changes in a simpler, faster and more comfortable way, and not
only request it through the Customer Service of my client, you can
undertake this management through the private environment of My Vodafone in the section of
Permissions and Preferences. My Vodafone makes it easy for them to access at any time and
place and manage their consents as they deem appropriate. This being a
sample of the transparency and commitment of Vodafone with the management of the treatment
of the data.

In any case, clarify that Vodafone when managing the consents of its
clients will always take into account their last will, that is, the last change that
recorded in systems carried out by the client regardless of whether it was carried out through the
Customer Service or My Vodafone. From everything said so far
clearly deduces that Vodafone:

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- You do not have pre-marked the express consent boxes of your clients.
but they are the ones who mark or not their permissions and preferences to
the treatment of your data.
- It is impossible for Vodafone to manipulate or alter the consent of its customers.
you.
- Vodafone can only manage the Permissions and Preferences of a client when
When there is an express request, for example, through the Customer Service
Client or a claim from the Agency.

Therefore, with respect to the specific case of the complainant, the only reason why the box of “I accept that Vodafone processes my billing, traffic and navigation data to send me personalized commercial communications based on this information”, appears marked is good because he himself marked it when contracting the service, either at some point you accessed the My Vodafone app and dialed it, or you put at some point in contact with Vodafone and gave his consent for it. has not there has been any manipulation by Vodafone.

If those boxes appear checked, it is because the claimant at some point using some of the avenues already mentioned, he checked those two boxes by putting express their willingness for the processing of data by Vodafone. Because, remember, those two boxes by default are not pre-ticked. As well as the fact that the other two consents are not checked. So that shows that at some point the claimant managed his consents and established his Permissions and Preferences for data processing by Vodafone, even if he can't remember the exact moment he did it.

Specifically, of the screen copy of the systems of my represented that is Note below, the claimant gave his consent for the treatment of traffic and billing data on 2705/17 through a call to the call center or Vodafone Customer Service. Therefore, it cannot be attributed to Vodafone breach of article 7 of the RGPD, given that the evidence of acceptance of the data processing reflected in My Vodafone is the log itself recorded by the system when the appropriate boxes are checked and these are saved. changes.

When managing a change in Permissions and Preferences in My Vodafone (via web and app), it is not as simple as checking a box, but requires a double confirmation. Below is an example of a particular case

where, having the last two boxes checked, a change is going to be made unchecking those that appear selected in the first instance and checking two different boxes. When a change is made a pop-up window appears end of the page where the number of changes that the interested party has done and you are asked to save these changes. Otherwise, everything will remain the same. In the following screenshots you can see this double confirmation of security:

My client interpreted that the claimant did not want to receive commercial communications personalized promotions based on your traffic, navigation and billing data, for which, since that option is marked in his profile and the claimant is not satisfied with Therefore, Vodafone proceeded to modify this consent in the client profile of the claimant. granting the exercise of their right to oppose said treatment of data.

cough. A measure that my client considered appropriate, having proof of the ma-
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claimant's consent in writing and understand that he had his consent to undertake said change, in accordance with the definition of "consent of the interested party", re-taken in Recital 32 of the RGPD: "Consent must be given through a clear affirmative act that reflects a manifestation of free, specific, informed will. demanded, and unequivocal of the interested party to accept the processing of personal data. that concern you, as a written statement, including by electronic means. tronics, or a verbal statement."

Regarding the assessment made by the Agency of article 4.11 of the RGPD in its

Basis of Law III on "the consent of the interested party in the treatment of your personal data as: "any manifestation of free will, specific, informative, stated and unequivocal by which the interested party accepts, either by means of a declaration or a clear affirmative action, the treatment of personal data that concerns you",

This part refers to what has already been said in the previous Legal Basis, by which the management of customer consents has been explained.

Vodafone does not process customer data if it does not have the corresponding consent voluntarily collected through the Permissions and Preferences section.

references articulated both in the contract and in the private digital environment of Mi Vodafone. The way in which consent management is articulated by

My client complies with the requirements established by the RDPD. They find each other in My Vodafone, within the "Personal Data" section (via the web) or "My Account" (via app) under the Permissions and Preferences heading. It is accessible by the client where of and when you want and in it you are informed of the purpose of the treatment in each of the assumptions in a clear and unequivocal manner. We can observe this from the screenshots that we extract from the Permissions and Preferences section of the environment

My Vodafone website (the same content is displayed in the app, only adapted to the mobile screen format) which can be seen below:

It can be seen that, at the end of the section, the client can "click" on the "See more details" link where you are provided with more information about the treatment of the data in each of the assumptions, as detailed below.

continuation:

This demonstrates that Vodafone has implemented a very complete and solid for the management of the consents of the clients through the which they can freely and voluntarily express their preferences by facilitating all the information in a complete, unequivocal and transparent manner, based on a model of

layered information as collected by the Agency itself in its Compliance Guide of the duty to inform, the RDPD and the Organic Law 3/2018, of September 5, Protection of Personal Data and guarantee of digital rights ("LOPD"), in concrete art. 11 of the LOPD states: "When personal data is obtained from the affected party through electronic communications networks or in the framework of the provision of an information society service, (...) the responsible for the treatment may comply with the duty of information (...) providing the affected party with the basic information referred to in the following section and indicating an electronic address or other means that allows access in a simple and immediate to the rest of the information."

Following the reasoning of the Agency in the Basis of Law III in which, After analyzing the importance and characteristics of consent, he concludes that: "In the case that concerns us, the claimed entity uses, for the compilation of the www.aepd.es

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consent of the clients, a questionnaire where there are pre-marked boxes.

It is also found that the consents are confusing, since there are affirmative and negative consents at the same time and could even become contradictory such as: "I accept that Vodafone processes my billing data, traffic and navigation to send me personalized commercial communications based on this information" and "I do not accept that Vodafone send me communications Relevant commercials about products, services, offers, discounts and promotions of Vodafone".

First of all, Vodafone wants to show again that the consents are not presented through pre-ticked boxes, but it is each client voluntarily who marks the boxes that he considers pertinent according to your preferences so that my client treats your personal data according to it. As they do not come pre-marked, it means that by default Vodafone will not treat personal data for the treatment purposes that require the consent of your clients, that is, your personal data will not be treated in the following form:

- The location data will not be used to offer products and services of Vodafone according to customer needs.
- Billing, traffic and navigation data will not be used to send co-personalized commercial communications based on said information.
- No commercial communications will be sent with offers that could be of the customer interest from third-party companies with which Vodafone have agreements.

Only if the client gives his express consent by checking these boxes, in the time of contracting, at a later time or through the Service of Customer Service, Vodafone may process your personal data for these purposes.

Second, regarding the confusion alluded to by both the complainant and now by the Agency on the wording of the Permissions and Preferences, Vodafone denies that there is confusion. The list of permissions and preferences includes the express consent that the interested parties may grant to Vodafone, as well as

The exercise of the right to object to certain data processing is facilitated for that Vodafone has a legal basis for processing other than consent.

Moreover, it should be noted that Vodafone is the only operator in the Spanish market that provides so many options to the user for managing the processing of their data

personal in a clear and simple way. This has been demonstrated in actions as recent as the communication of anonymized and aggregated data of the operators to the INE to prepare a mobility study of Spaniards in the past month of November. Only my represented through My Vodafone in the section of Permissions and Preferences allowed your customers to check the appropriate box to object to your location data being communicated. In the case of Orange had to request it by email and Telefónica did not give any option. Going into more detail on this issue, there are five Permissions and Preferences which are grouped into two large blocks. The first three start with

"I agree":

These are the permissions called "opt-in" by which the client expresses, in agreement to RGPD, LOPD and LSSI, expressly consenting to Vodafone can process your personal data to send commercial communications.

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Purposes clearly explained in the section "See more details" as already stated.

explained in the previous Rationale and require said consent as a basis legal in compliance with article 6 of the RGPD.

Furthermore, and with the aim of providing even more information and facilities to Vodafone customers, understanding their concern for the correct use and treatment of your personal data by my client, it is established a second block of preferences:

These are the so-called "opt-out" permissions that facilitate the exercise of the right to

opposition to data processing automatically.

The "opt-out" that refers to the sending of communications about products,

Vodafone services and offers, it is a right to object to a treatment

of data that does not require the express consent of the interested party as a legal basis,

but the legal basis of the same is framed in the execution of the contract in which the

interested is part. This is established by the special applicable legislation on the

data protection regulations in this case, such as the LSSI, in its article 21.2.

in which it is established as an exception to the prohibition of sending communications

commercials made through email or communication media

electronic equivalents without prior consent, that there is a contractual relationship

between the service provider and the client and the communications are

referring to products or services of the company itself and similar to those

initially they were contracted with the client.

Likewise, it is framed within the cases of legitimate interest as stated in the

Considering 47 of the RGPD that "remembers that the legitimate interest of a person in charge,

of an assignee or a third party, "may constitute a legal basis for the

treatment, provided that the interests or the rights and freedoms of the user do not prevail.

data subject, taking into account the reasonable expectations of data subjects

based on their relationship with the controller.

As requested by the norm and is also included in the reports of the Cabinet

Legal of the Agency 2018-0173 and 2017-0195, internally a

"thorough evaluation" taking into account whether "the interests and rights

interests of the interested party could prevail over the interests of the person in charge

of treatment when proceeding to the treatment of personal data in

circumstances in which the data subject does not reasonably expect that a

further treatment". Following the guidelines set by the Agency, it is understood

that a legitimate interest exists “when there is a relevant and appropriate relationship between the data subject and the controller, such as in situations where the data subject is client”, which is exactly the relationship between Vodafone and its client portfolio to which that provides telecommunications services. Furthermore, both continue reports indicating as an example that it is not necessary to obtain consent for those assumptions referred to "communications related to" products or services of your own company that are similar to those that were initially subject to contracting with the client.

This is precisely what the first of the permissions of this second refers to block. Specifically, the possibility of receiving offers of products and services from Vodafone. Therefore, this section would be protected by the doctrine of interest legitimate so that my client would not even have to contemplate the possibility and give the option to its customers. However, and as we have been repeating over Throughout the entire writing, Vodafone wants to be a transparent entity for its www.aepd.es

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customers and is deeply committed to the management and processing of data personal. For this reason, each one of its actions is aimed at it, this being one of them by allowing their customers to even block the possibility of receiving offers owned by Vodafone. The fact that the formula used is that of "opt-out" is to differentiate of the rest of the permits, whose consent must be express, while in this option is not necessary as there is a legitimate interest.

The last of the sections, also under the “opt-out” formula, is the one related to the

communication of anonymized and aggregated data based on navigation, traffic, billing and location to other entities. The reason it doesn't show up as "opt-in" is due to the nature of the data that is processed, since it is not requires the express consent of the interested party in the treatment of this data for this purpose for the reasons explained below. The data at that it refers to are anonymous and aggregated data and, therefore, from that same moment they are no longer considered personal data, the privacy of the customers is completely protected because it is not possible to identify them so that, with respect to said data, it is not possible to apply any rule on Data Protection. This categorical statement is included in the Recital 26 of the RGPD: "Therefore the principles of data protection should not apply to anonymous information, that is information that is not related to a person identified or identifiable physical data, or to data rendered anonymous in such a way that the interested party is not identifiable, or ceases to be. Consequently, the present Regulation does not affect the processing of said anonymous information, including for statistics or research. Once again it is clear that Vodafone complies with the regulations on protection and goes a step further by offering more possibilities to its clients in the management of the processing of their personal data because, in this case, my client would not have to provide this option anymore that the information to be processed in this last permit, being anonymized, does not have the consideration of personal data.

Taking into account all of the above, my client wants to highlight the lack of infringing intent in this factual assumption, while Vodafone has acted in accordance with the existing regulations on the matter, in order to safeguard the interest and correct understanding of users when granting consent for the treatment of your personal data. In this sense, it has also been seen how the

private environment of My Vodafone (via app or web) is a simple, electronic, and free, by which customers can access the Permissions and Preferences for manage the processing of your personal data. Therefore, this part considers and defends that the performance of my client has been diligent, and according to the legality.

It is relevant to highlight the repeal of article 130 of Law 30/1992, of 26 November, on the Legal Regime of Public Administrations and the Procedure Common Administrative Law that established that "they may only, sanctioned for acts constituting administrative infringement the natural and legal persons that result responsible for them even by way of simple non-compliance". Its replacement by Article 28.1 of Law 40/2015 of October 1, on the Legal Regime of the Sector Public eliminates the mention of "simple non-compliance" making the rule prevail "nullum poena sine culpa", a basic principle that implies the exclusion of the imposition of sanctions for the mere result, without regard to the negligent conduct of the company. It does no more than exclude the applicability of any sanction based on this cause.

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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

Furthermore, the Sentence of the Constitutional Court number 219/1988,

indicated that the defining element of guilt is subjective, in its double meaning of voluntariness in the action or omission and personal responsibility or for own acts.

Therefore, the High Court rejects the possibility that there is our legal system a regime of liability without fault, if one of the two fails elements, as is the case at hand, given that it is not possible to find either the least hint of willfulness when committing an infraction.

It is therefore clear that, in the objective performance of the action as an infringement administrative, without referring to the voluntariness of the offending subject, as is the case that concerns us, cannot be the subject of an infringement, and this because it is inadmissible a system of strict liability or without fault as also comes to point out the Judgment 246/1991. My client may not be sanctioned for infraction of the article 6 of the LOPDGDD and the RGPD and article 7 of the RGPD, without doing reference to the subjective element of the type, not proving fraud, guilt, or negligence. Additionally, taking into account the special nature of the Law sanctioning body 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, this part maintains the inadmissibility of the imposition of any penalty.

Thus, the Supreme Court in Judgment of December 21, 1998 (RJ1998/10226) provides that "the right to the presumption of innocence stands as fundamental, within the constitutionalized procedural guarantees of paragraph 2 of article 24 of the Constitution, and is specified in a constitutional content that both the jurisprudence of the Constitutional Court and that of the Supreme Court have meaning, noting that no one can be convicted, if any, or punished administratively without a minimum of legal and legitimate evidentiary activity obtained, which proves the guilt of the accused, as this Chamber has declared,

among others, in Judgments of January 20, 1996 (RJ 1996\695) (Appeal 9074/1991), January 27, 1996 (RJ 1996\926) (Appeal 640/1992) and 20 January 1997 (RJ 1997\257) (Appeal 2689/1992)".

The Supreme Court also points out in Judgment of July 20, 1990, Ar. 6163, establishes that, "participating the sanctioning administrative regime of the character of the punitive law, the principle of "nulla pena sine culpa" is correctly applied in the judgment of the Territorial Chamber, and therefore the absence of intentionality in the infraction and consequently the inadmissibility of the sanction when it has been justified that the non-inclusion of goods in the manifest has been due to a timely corrected error".

As can be seen, there is no intention in the behavior described, neither by way of intent, nor by way of guilt. Therefore, there is no guilt any, it is totally inadmissible to impose any sanction on my represented, insofar as one of the essential requirements of the Law is lacking Sanctioning administrative. All this taking into account that it has been evidenced that:

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- Vodafone does not have pre-ticked the boxes of its Permissions and Preferences, only when the client gives his express consent, my client can treat your data for the detailed purposes.

- Only the customer can give their consent to Vodafone to process their data.

cough, either when signing the contract for the provision of services, or when it is already

customer, either by Customer Service or by the private environment

of My Vodafone.

- Vodafone managed the request not to receive commercial communications from Mr.

González when he became aware of it through the claim.

- Vodafone complies with data protection regulations when

to establish the different consent options in the Permissions and Pre-

ferences:

- Opt-in for cases in which express, free consent is needed,

informed and unequivocal.

- Opt-out for the assumption covered in the execution of the contract and the legal interest.

gypsy

- Opt-out for the treatment of anonymized and aggregated data that, therefore,

They are not considered personal data, so they are not applicable.

tion the regulations.

What is appropriate is that the Spanish Agency for Data Protection agrees on the

dismissal of this file and the file of the proceedings since the

events have occurred without any intention on the part of my client.

Subsidiarily and in the event that despite the explanations above

facilitated, the Agency understood that my client is deserving of a sanction

for the commission of an infringement of articles 6 and 7 of the RGPD, the amount of said

The sanction must be moderate, imposing its minimum amount, taking into account

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

- The processing of the data has been carried out locally.

-

The speed with which Vodafone resolved the problem, two weeks later

upon receipt of the claim, taking into consideration that the changes in

computer systems cannot be realized immediately.

- There was no financial loss
- There is no intentionality on the part of Vodafone in the facts claimed.

mados.

- Sensitive data categories are not processed in any case by Vodafone.
- My client is adopting all the diligence that may be required

to ensure that the processes of granting consent for the reception of advertising campaigns are carried out correctly through the electronic means made available to customers, through the application My Vodafone, as well as the Vodafone website.

It is requested: The dismissal of the file, with the consequent filing of the actions and Subsidiarily, impose on my client the sanctions for minor infractions in their minimum degree.

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EIGHTH: On 04/21/20, the test practice period began,

remembering: a).- to consider reproduced for evidentiary purposes the complaint filed by the complainant and her documentation, the documents obtained and generated that are part of file E/10699/2019 and b).- consider reproduced for purposes evidence, the allegations to the initiation agreement of PS/00456/2019, presented by the reported entity.

NINTH: On 07/29/20, the respondent entity is notified of the proposed resolution in which it is proposed that, by the Director of the Spanish Agency for Protection

tion of Data proceed to the FILE of this sanctioning procedure by not there is a violation of the provisions of the RGPD, and that the entity is required to that proceeds to clearly separate or differentiate the acts of affirmative consent of the acts of “opposing the processing of anonymized data” and “receiving communications promotional communications of the company”.

After the notification of the resolution proposal, it has NOT been received in this Agency allegations to the same, in the period granted to effect.

In view of everything that has been done, by the Spanish Data Protection Agency

In this proceeding, the following are considered proven facts:

PROVEN FACTS

1º.- On 06/27/19, the claimant reports that, on the company's website Vodafone, where consent is given for the processing of personal data, has found that one of the questions customers are asked to request their consent, is pre-marked in "I accept", specifically, the box belonging to to the question: "I accept that Vodafone processes my billing, traffic and navigation to send me personalized commercial communications based on this information". It is also denounced that, the list of questions where it is requested consent is confusing because there are affirmative and negative consents to Same time.

2º.- On 12/02/19, Vodafone argues that they cannot access the page of the consents to manipulate them if you do not expressly have the authorization of the client, and that being a case in which it is manifested clearly the preferences of the client proceeds to uncheck the consent in their systems. At no time does the entity deny that the consent boxes were previously marked.

3º.- On 03/12/20, the Director of the Spanish Data Protection Agency

agreed to initiate sanctioning proceedings against the claimed entity, for alleged violation of article 6 of the RGPD, regarding the legality of consent.

4º.- On 04/16/20, the entity claimed, sends to this agency allegations to the initiation of the file indicating, in essence, that:

a.

About the pre-marked boxes.- the boxes for the granting of consent to express feelings for the treatment of personal data of the interested parties in relation to purposes that so require, in no case and under no circumstances.

Some concept are pre-marked and it is the client or interested party who decides

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what, when and how you want to voluntarily check or not check the consent boxes.

express fear. Only customers have the power to manage their

permissions and preferences through this application, so Vodafone cannot

to access them, nor modify them, if you do not expressly have the

customer consent. The only reason the box appears checked-

da is good because the claimant at the time of contracting the service marked it, well

at some point you accessed the My Vodafone app and dialed it, or you put

at some point in contact with Vodafone and gave his consent for it.

There has been no manipulation on the part of Vodafone so that this box

appears checked. The entity provides a screenshot of the web page, where

requests the consent of the clients, with the boxes left blank, without premar-

car.

b. On the existence of contradictory questions (affirmative and negative), in the questionnaire.- The negative questions: "I do not accept", refer to permissions so-called "opt-out", which facilitate the exercise of the right to oppose the treatment

Data storage automatically:

o The "opt-out": "I do not accept that Vodafone send me commercial communications relevant information about products, services, offers, discounts and promotions of Vodafone", it is a right to oppose a treatment

Data processing that does not require consent as a legal basis

of the interested party, but the legal basis of the same is framed in

the execution of the contract in which the interested party is a party. So set it-

ce the applicable special legislation on the regulations for the protection of data in this case such as the LSSI, in its article 21.2.

o The "opt-out": "I do not accept that Vodafone transfers anonymized data and adds

paid based on my navigation, traffic, billing and location to

other entities". It is a right of opposition that does not require

express consent of the interested party in the treatment of these data

data for said purpose, since they are anonymous and aggregated data and, therefore,

Therefore, they are not considered personal data. the privacy of

customers is completely protected because it is not possible to

identification in such a way that, with respect to said data, it is not possible

apply any rules on data protection. This statement comes

collected in Recital 26 of the RGPD.

FOUNDATIONS OF LAW

Yo

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

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

the art. 47 of LOPDGDD.

The joint assessment of the documentary evidence in the procedure brings to knowledge of the AEPD a vision of the denounced action that has been reflected in the facts declared proven above reported.

II

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In the present case, the complaint was about two possible violations of the RGPD:

a). On the one hand, it is reported that, on the page where the entity collects the consent of the clients to process their personal data, there are boxes that already they are pre-marked before the client gives his consent or not. In this case, at the request of this Agency for the company to give explanations to this part of the complaint, it at no time denied such an assertion, limiting itself to inform that, "the entity cannot access the consent page to manipulate them if you do not expressly have the authorization of the client, and that when be a case in which the client's preferences are clearly manifested proceeds to uncheck the consent in their systems" and it is not until, this The Agency initiates the sanctioning file, when the company provides evidence, sending a screenshot of the consent collection page, where you can see that the boxes are blank, (without pre-checking), declaring at this time that: "The boxes for the granting of express consent for the treatment of personal data of the interested parties in relation to purposes that require it, in In no case and under no circumstances are they pre-marked and it is the client or interested party

who decides what, when and how he wants to voluntarily check or not the boxes of express consent”.

b).- Regarding the second part of the complaint, where it is indicated that the list of consents requested by the company, it is confusing since there are affirmative and negative consents at the same time, the company alleges that the Negative consents refer to so-called “opt-out” permissions, which facilitate the exercise of the right to oppose the processing of data in a automatic. The two negative options are:

-
-

“I do not accept that Vodafone sends me relevant commercial communications about Vodafone products, services, offers, discounts and promotions”

“I do not accept that Vodafone transfers anonymized and aggregated data based on my navigation, traffic, billing and location to other entities”

Well, at first we see how consent is requested through an act of inaction, in which if the client wishes to be sent communications commercial Vodafone or that the company transfers its anonymized data based on navigation to other entities should leave the box unchecked. But this act of, “no check the box” raises the question of whether the customer really wants to be sent commercial communications and transfer their anonymized data or otherwise not checked the box due to an oversight or any other reason and really what he wanted is that they did NOT send you commercial communications or you did NOT want your data anonymized were transferred, giving rise to a dubious situation.

In this sense, recital 32) of the GDPR indicates that: “Consent must given through a clear affirmative act that reflects a manifestation of will free, specific, informed, and unequivocal of the interested party to accept the treatment of

personal data that concerns you... Therefore, the silence, the boxes already markings or inaction should not constitute consent. The consent must be given for all treatment activities carried out with the same or the same purposes. When the treatment has several purposes, consent must be given to all of them..."

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Articles 6 and 7 of the same RGPD refer, respectively, to the "Legality of the treatment" and the "Conditions for consent", it is also necessary to take into account account, also what is established in article 6 of the LOPDGDD on the treatment based on the consent of the affected party: "1. In accordance with the provisions of the Article 4.11 of Regulation (EU) 2016/679, means consent of the affected any manifestation of free will, specific, informed and unequivocal by the one that he accepts, either by means of a declaration or a clear affirmative action, the processing of personal data concerning you.

According to what has been said, with this mechanism there is no option for the client to consent to the treatments in question, but that the consent is intended to be collected through the inaction of the interested party, ("do not check the boxes in those that indicate "I DO NOT accept..."), contrary to the provisions of the RGPD.

In this case, it is not an affirmative action, but a pure inaction that does not ensures that the interested party unequivocally grants consent (it is considered that when you mark something it is because you want it, not because you don't want it); As it can not having understood the double negative; or may not have paid attention

due to reading the indications in question. It is, ultimately, a consent that is intended to be deduced from inaction and, therefore, contrary to the RGPD, The requirement that "consent must be given by means of a clear affirmative act that reflects a manifestation of free will, specific, informed, and unequivocal consent of the interested party to accept the treatment of personal data that concern him", it being understood that "inaction should not constitute consent" (Considering 32 of the RGPD).

However, the respondent entity alleges that: the "opt-out": "I do not accept that Vodafone send me relevant commercial communications about products, services, offers, Vodafone discounts and promotions", it is a right to oppose a data processing that does not require the express consent of the user as a legal basis. interested, but the legal basis of the same is part of the execution of the contract in which the interested party is a party. This is established by the special applicable legislation on the data protection regulations in this case, such as the LSSI, in its article 21.2.

Article 21 of the LSSI, on the "prohibition of commercial communications made through via email or equivalent means of electronic communication.

indicates:

1. The sending of advertising or promotional communications by email or other equivalent means of electronic communication previously they had not been requested or expressly authorized by the their recipients.
2. The provisions of the preceding section shall not apply when there is a prior contractual relationship, provided that the provider had legally obtained the contact details of the recipient and will use them to send communications commercial references to products or services of your own company that are similar to those initially contracted with the client.

In any case, the provider must offer the recipient the possibility of opposing the processing of your data for promotional purposes through a simple procedure

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and free, both at the time of data collection and in each of the commercial communications addressed to you.

When the communications have been sent by email, said means must necessarily consist of the inclusion of an email address electronic or other valid electronic address where this right can be exercised, sending communications that do not include said address is prohibited.

Based on the provisions of the aforementioned article 21 of the LSSI, the claimed entity may send advertising or promotional communications about your products, services, offers, or discounts, whenever it is by email or other means of communication. equivalent electronic communication, as there is a prior contractual relationship between both, also offering the possibility of opposing the shipment, as marked in the second paragraph of the aforementioned article.

However, all this collides with what was indicated above about the fact that the Consent must be given by a clear affirmative act that reflects a manifestation of free, specific, informed and affirmative will of the interested party accept the processing of personal data concerning you. so this act of “opposing the processing of your data for promotional purposes of the company itself” company”, should be separate or clearly differentiated from the other acts of affirmative consent.

Regarding the other “opt-out”: “I do not accept that Vodafone transfers anonymized data and aggregated based on my browsing, traffic, billing and location to other entities”. The entity alleges that it is a right of opposition that does not require express consent of the interested party in the treatment of this data for said purpose, since they are anonymous and aggregated data and, therefore, do not have the consideration of personal data.

The company alleges that “customer privacy is fully protected because it is not possible to identify them so that, with respect to said data, it is not No rules on data protection can be applied.

This statement is included in Recital 26 of the RGPD: "The principles of the data protection should apply to all information relating to a natural person identified or identifiable. The pseudonymised personal data, which could be attributed to a natural person by using additional information, they must considered information about an identifiable natural person. To determine if a natural person is identifiable, all means must be taken into account, such as the singularization, which can reasonably be used by the data controller or any other person to directly or indirectly identify the natural person.

To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, as the costs and time required for identification, taking into account both technology available at the time of treatment such as advances technological. Therefore, the data protection principles should not apply to anonymous information, that is information that is not related to a person identified or identifiable physical data, or to data rendered anonymous in such a way that the interested party is not identifiable, or ceases to be. Consequently, the present

Regulation does not affect the processing of said anonymous information, including for statistics or research.

Therefore, and according to recital 26, alluded to above, the treatment of anonymized data based on navigation, traffic, billing or localization, which is carried out by the entity, should not be subject to the GDPR. Nope. However, allowing the client to refuse that the information obtained is processed by the entity in the same questionnaire where consent is requested may give rise to a contradictory and doubtful situation. So this act of "opposing to the processing of anonymised data", should be separated or clearly differentiated from the other acts of affirmative consent.

Therefore, in accordance with the foregoing, By the Director of the Agency Spanish Data Protection,

:

RESOLVE

FILE: procedure PS/00456/2019, initiated to the entity VODAFONE ESPAÑA SAU, with C.I.F.: A80907397,

REQUEST: to the entity VODAFONE ESPAÑA SAU., so that, within a period of one month from this act of notification of the resolution, proceed to separate or clearly differentiate mind acts of affirmative consent from acts of opposition, such as that of "oppose the processing of anonymized data" and "receive communications company promotions.

NOTIFY: this Agreement to the entity VODAFONE ESPAÑA SAU.

In accordance with the provisions of article 82 of Law 62/2003, of December 30,
bre, of fiscal, administrative and social order measures, this Resolution is
will make public, once it has been notified to the interested parties. The publication is made
will be in accordance with the provisions of Instruction 1/2004, of December 22, of the Agency
Spanish Data Protection on the publication of its Resolutions.

Against this resolution, which puts an end to the administrative procedure, and in accordance with the
established in articles 112 and 123 of the LPACAP, the interested parties may interpose
have, optionally, an appeal for reconsideration before the Director of the Spanish Agency
of Data Protection within a period of one month from the day following the notification
fication of this resolution, or, directly contentious-administrative appeal before the
Contentious-administrative Chamber of the National High Court, in accordance with the provisions
placed in article 25 and in section 5 of the fourth additional provision of the Law
29/1998, of 07/13, regulating the Contentious-administrative Jurisdiction, in the
two months from the day following the notification of this act, according to
the provisions of article 46.1 of the aforementioned legal text.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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