☐ Procedure no.: PS/00182/2020

926-300320

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

based on the following:

BACKGROUND

FIRST: D.A.A.A. (hereinafter, the claimant) dated January 13, 2020

filed a claim with the Spanish Data Protection Agency. The

The claim is directed against Telefónica Móviles España, S.A.U. with NIF A78923125

(hereinafter, the claimed).

The claimant states in his claim that since the month of May

2019, the respondent has charged five invoices from a third party that have been

paid through his bank account, which he has subsequently returned.

On the other hand, he states that he is not a client of said operator, and that he has

filed various claims with said company and they have ignored him.

The claimant, provides with his claim letter the following

documents:

1.- Proof of the five charges made by the claimed person in your account

linked to a mobile phone number of an unknown third party.

2.- SMS from the claimed party informing that they are analyzing the claim

1341890, dated October 21, 2019.

SECOND: In accordance with article 65.4 of the LOPGDD, which has provided for a

mechanism prior to the admission to processing of the claims that are formulated before

the AEPD, consisting of transferring them to the Data Protection Delegates

designated by those responsible or in charge of the treatment, for the purposes foreseen

in article 37 of the aforementioned rule, or to these when they were not designated, it was given

transfer of the claim to the claimed entity so that it proceeded to its analysis and respond to the complaining party and to this Agency within a month.

As a result of this procedure, on April 8, 2020, the claimed

states:

That they have sent an email in response to the claim of the

claimant. A copy of the aforementioned email is attached.

THIRD: The result of the transfer process initiated in the previous Fact does not made it possible to understand the claims of the claimant satisfied. Consequently, with dated June 3, 2020, for the purposes provided in article 64.2 of the LOPDGDD,

The Director of the Spanish Agency for Data Protection agreed to admit for processing the claim filed.

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FOURTH: On July 20, 2020, the Director of the Spanish Agency for

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

in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the

Common Administrative Procedure of Public Administrations (hereinafter,

LPACAP), for the alleged infringement of Article 6.1 of the RGPD, typified in Article

19/2018, of November 23, on payment services and other urgent measures in

83.5 of the GDPR.

FIFTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations in which, in summary, it stated that the respondent informed the claimant about the procedures to follow, in accordance with art. 43.1 of the Royal Decree Law

financial matter

They also emphasize that the receipts referred to in the claim are not finally paid by the claimant at the time of making the timely steps before the bank.

On the other hand, it states that the information contained in the bank receipts mentioned has been carried out by a banking entity, resulting in the absence violation of the principle of legality of treatment contained in article 6.

In conclusion, the facts that are the object of the procedure, as well as the absence of responsibility exclude the commission of the infraction contained in article 72.1b) of the LOPDGDD, for which it requests that the file of the procedure be proposed.

SIXTH: On August 28, 2020, the instructor of the procedure agreed to the opening of a period of practice tests, considering incorporated the previous actions, E/01519/2020, as well as the documents provided by the claimed.

SEVENTH: The Proposed Resolution was notified on September 28, 2020, by alleged infringement of article 6.1 of the RGPD, typified in article 83.5 of the RGPD, proposing a fine of 75,000 euros.

The respondent requested an extension of the term, on October 5, 2020, to formulate allegations and subsequently presented the same in which, in summary, stated that it is affirmed and ratified in its pleadings brief, submitted to the Agreement to initiate this file, requesting the file of the procedure.

Of the actions carried out in this proceeding and of the documentation in the file, the following have been accredited:

PROVEN FACTS

1.- It is stated that the respondent has charged five invoices from a third party that have been paid through his bank account, which he has subsequently

Returned.

2.- The claimant is not a client of the claimed party.

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- 3.- The events took place since May 2019.
- 4.- The receipts contain the charges made by the person claimed in the claimant's account.
- 5.- There is an SMS from the respondent informing that they are analyzing the claim 1341890, dated October 21, 2019.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each control authority, and as established in arts. 47 and 48.1 of the LOPDGDD, the Director of the Spanish Data Protection Agency is competent to resolve this procedure.

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The defendant is imputed the commission of an infraction for violation of the Article 6 of the RGPD, "Legality of the treatment", which indicates in its section 1 the assumptions in which the processing of third party data is considered lawful:

- "1. The treatment will only be lawful if at least one of the following is met conditions:
- a) the interested party gave their consent for the processing of their data
 personal for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of the latter of measures pre-contractual;

(...)"

The infringement is typified in Article 83.5 of the RGPD, which considers as such:

- "5. Violations of the following provisions will be sanctioned, in accordance with section 2, with administrative fines of a maximum of EUR 20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the global total annual turnover of the previous financial year, opting for the largest amount:
- a) The basic principles for the treatment, including the conditions for the consent under articles 5,6,7 and 9."

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the Digital Rights (LOPDGDD) in its article 72, under the heading "Infringements considered very serious" provides:

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"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."

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The documentation in the file offers evidence that the claimed, violated article 6.1 of the RGPD, since it processed the personal data of the claimant without standing.

Well, with respect to the facts that are the subject of this claim,

we must emphasize that the claimed one, has answered but of the content of the same one does not it follows that they would have responded to the claimant with a reliable explanation of the reasons why invoices that you do not recognize were charged to your account. Of here that it does not provide any evidence that would allow estimating that the treatment of the claimant data had been legitimate.

The lack of diligence displayed by the entity in complying with the obligations imposed by the personal data protection regulations it is therefore evident. Diligent compliance with the principle of legality in the treatment of third-party data requires that the data controller be in a position to prove it (principle of proactive responsibility).

IV

In accordance with the provisions of the RGPD in its art. 83.1 and 83.2, when deciding the imposition of an administrative fine and its amount in each individual case will be taking into account the aggravating and mitigating factors listed in the article indicated, as well as any other that may be applicable to the circumstances of the case.

"Each control authority will guarantee that the imposition of fines administrative actions under this article for violations of this Regulation indicated in sections 4, 9 and 6 are in each individual case

effective, proportionate and dissuasive."

"Administrative fines will be imposed, depending on the circumstances of each individual case, in addition to or as a substitute for the measures contemplated in the Article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine administration and its amount in each individual case will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the nature, scope or purpose of the processing operation in question as well as the number of stakeholders affected and the level of damage and damages they have suffered;

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- b) intentionality or negligence in the infringement;
- c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

- d) the degree of responsibility of the person in charge or of the person in charge of the treatment, taking into account the technical or organizational measures that have applied under articles 25 and 32;
- e) any previous infraction committed by the person in charge or the person in charge of the treatment;
- f) the degree of cooperation with the supervisory authority in order to put remedying the breach and mitigating the possible adverse effects of the breach;
- g) the categories of personal data affected by the infringement;
- h) the way in which the supervisory authority became aware of the infringement,

in particular if the person in charge or the person in charge notified the infringement and, in such case, to what extent;

- i) when the measures indicated in article 58, paragraph 2, have been previously ordered against the person in charge or the person in charge in question in relation to the same matter, compliance with said measures;
- j) adherence to codes of conduct under article 40 or mechanisms
 certificates approved in accordance with article 42, and
- k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits realized or losses avoided, direct or indirectly, through infringement."

Regarding section k) of article 83.2 of the RGPD, the LOPDGDD, article 76,

"Sanctions and corrective measures", provides:

"two. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679 may also be taken into account:

- a) The continuing nature of the offence.
- b) The link between the activity of the offender and the performance of treatments of personal data.
- c) The profits obtained as a result of committing the offence.
- d) The possibility that the conduct of the affected party could have induced the commission of the offence.
- e) The existence of a merger by absorption process 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) The submission by the person in charge or person in charge, with voluntary, to alternative conflict resolution mechanisms, in those

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assumptions in which there are controversies between those and any interested."

In accordance with the precepts transcribed, in order to set the amount of the sanction of a fine to be imposed in the present case for the infraction typified in the article 83.5.a) of the RGPD for which the claimed party is responsible, it is estimated concurrent the following factors:

As aggravating criteria:

- The duration of the illegitimate treatment of the data of the affected party carried out by the claimed (article 83.2. a) of the RGPD).
- The intentionality or negligence of the infringement (art.83.2. b) of the RGPD).
- Basic personal identifiers are affected (personal data and banking (art.83.2. g) of the RGPD).
- The evident link between the business activity of the defendant and the processing of personal data of clients or third parties (article 83.2.k, of the RGPD in relation to article 76.2.b, of the LOPDGDD).

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 75,000 euros (seventy-five thousand euros), typified as "very serious", to prescription effects thereof, in article 72.1.b) of the LOPDGDD.

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of the sanctions whose existence has been proven, the Director of the

Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE TELEFONICA MOVILES ESPAÑA, S.A.U., with NIF

A78923125, for an infringement of Article 6 of the RGPD, typified in Article 83.5

of the RGPD, a fine of €75,000 (seventy-five thousand euros).

SECOND: NOTIFY this resolution to TELEFONICA MOVILES ESPAÑA,

S.A.U.

THIRD: Warn the sanctioned party that he must make the imposed sanction effective once

Once this resolution is enforceable, in accordance with the provisions of the

art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common Public Administrations (hereinafter LPACAP), within the payment term

voluntary established in art. 68 of the General Collection Regulations, approved

by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003,

of December 17, through its entry, indicating the NIF of the sanctioned and the number

of procedure that appears in the heading of this document, in the account

restricted number ES00 0000 0000 0000 0000, opened on behalf of the Agency

Spanish Department of Data Protection in the banking entity CAIXABANK, S.A.. In case

Otherwise, it will be collected in the executive period.

Received the notification and once executed, if the date of execution is

is between the 1st and 15th of each month, both inclusive, the term to carry out the

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voluntary payment will be until the 20th day of the following month or immediately after, and if

is between the 16th and last day of each month, both inclusive, the term of the

payment will be until the 5th of the second following month or immediately after.

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 procedure in accordance with art.

48.6 of the LOPDGDD, 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 period of

month 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.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the

LPACAP, the firm resolution may be provisionally suspended in administrative proceedings

if the interested party expresses his intention to file a contentious appeal-

administrative. If this is the case, the interested party must formally communicate this

made by writing to the Spanish Agency for Data Protection,

introducing him to

the agency

[https://sedeagpd.gob.es/sede-electronica-web/], or through any of the other

records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also

must transfer to the Agency the documentation that proves the effective filing

of the contentious-administrative appeal. If the Agency were not aware of the

filing of the contentious-administrative appeal within two months from the

day following the notification of this resolution, it would end the
precautionary suspension.
Electronic Registration of
through the
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