

☐ Procedure No.: PS/00010/2020

938-300320

RESOLUTION OF PUNISHMENT PROCEDURE

Of the procedure instructed by the Spanish Agency for Data Protection and
based on the following

BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the claimant) dated May 22, 2019

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 grounds on which your claim is based are that there have been
recurring charges on your checking account for phone lines

***PHONE.1 and ***PHONE.2 which he did not hire or authorize. Add that
the owner of the line ***TELÉFONO.2 is a third party due to a subscription made to his
bank account for it.

On the other hand, it states that the events took place between January 2 and 2
November 2018.

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

☐ Bank debit documents corresponding to January, May, July,
August, September, October and November 2018.

☐ Bank payment document from Telefónica, stating as
beneficiary holder the third party and with the bank account number that of the
claimant.

SECOND: In view of the facts denounced in the claim and the
documents provided by the claimant, the Subdirector General for Inspection of

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

As a result of the research actions carried out, it is confirmed that the data controller is the claimed party.

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In addition, the following extremes are noted:

☐ There is evidence, in the documentation provided by the claimant, of debts of Telefónica in your bank account corresponding to the telephone lines mobile ***PHONE.1 and ***PHONE.2.

☐

It appears in the documentation provided by the claimant, that there was a credit to your current account from Telefónica and as beneficiary a third.

On May 22, 2019, this Agency received a letter from allegations sent by Telefónica stating that these lines were active from November 22, 2017 until they were discharged at the request of the claimant on August 30, 2018, and that on this date they proceeded to annul the only

invoice generated on January 1, 2018 for an amount of 0.33 euros in relation to the line ***PHONE.1. They also proceeded to cancel all invoices issued corresponding to the telephone line ***TELEPHONE.2.

They indicate that the data of the claimant were never reported to files of capital solvency and credit.

And provide the following documentation:

- Copy of the cancellation invoice of the invoice of January 1, 2018 corresponding to the telephone line ***TELEPHONE.1.
- Screenshots of your invoice cancellation systems corresponding to the telephone line ***TELEPHONE.2.
- Copy of the Fusion + contract that includes both lines, as well as a copy of the contracts for the ***TELEPHONE.1 and ***TELEPHONE.3 lines.

THIRD: On January 24, 2020, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimed party, 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 83.5 of the GDPR.

FOURTH: Once the aforementioned initial agreement was notified, the respondent requested an extension of the period initially granted to formulate allegations and subsequently presented brief of allegations in which, in summary, it states: "that there was an error of transcript because, as the Agency itself indicates, it is accredited by the screen provided and invoices that the correct address is C/ ***DIRIMIENTO.1, ***LOCATION.1. However, all invoices and associated debt in the name of the claimant was annulled as soon as the facts became known, not being possible at the moment the location of the contract of the line ***TELÉFONO.2,

proceeding as soon as it becomes aware of the facts to annul all of the generated invoices, not being included at any time the data in the asset and credit solvency files. Agree to reduce the penalty initially imposed in this sanctioning procedure”.

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FIFTH: On February 19, 2020, the practice period for evidence, agreeing: 1. To consider reproduced for evidentiary purposes the claim filed by the claimant and her documentation, the documents obtained and generated that are part of the file and 2. Consider reproduced for purposes evidence, the allegations to the initiation agreement of PS/00010/2020 and the documentation that accompanies them, presented by the claimed.

SIXTH: The Proposed Resolution was notified on June 8, 2020, for alleged infringement of article 6.1 of the RGPD, typified in article 83.5 of the RGPD, proposing a fine of 70,000 euros.

The respondent presented arguments to the Proposed Resolution on June 22 2020, affirming and ratifying in its pleadings brief dated March 14, February 2020, submitted to the Agreement to initiate File PS/00010/2020, requesting to reduce the sanction proposed in this sanctioning procedure, by consider it disproportionate.

PROVEN FACTS

1.- It is known that there have been recurring charges in the current account of the claimant corresponding to the telephone lines ***TELÉFONO.1 and

***TELEPHONE.2 which he did not hire or authorize.

2.- The owner of the line ***TELÉFONO.2 is a third party due to a subscription made in the bank account of the claimant by the claimed.

3.- The events took place between January 2 and November 2, 2018.

4.- There are bank documents of the debt claimant corresponding to January, May, July, August, September, October and November of 2018.

5.- There is a bank document of payment from Telefónica, stating the third party as beneficiary owner and with the bank account number of the claimant.

6.- The entity claimed acknowledges said error and states that it is a transcription error and that you have not been able to locate the contract on the line ***PHONE.2.

FOUNDATIONS OF LAW

Yo

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

Spanish Data Protection, in accordance with the provisions of art. 58.2 of the RGPD and in the art. 47 and 48.1 of LOPDGDD.

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The defendant is accused of committing 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:

"1. Based on the provisions of article 83.5 of the Regulation (U.E.) 2016/679 are considered very serious and the infractions that suppose a substantial violation of the articles mentioned in it and, in particularly the following:

(...)

b) The processing of personal data without the concurrence of any of the

conditions of legality of the treatment established in article 6 of the

Regulation (EU) 2016/679.”

III

The documentation in the file offers evidence that the

claimed violated article 6.1 of the RGD every time that it carried out the treatment of the

personal data of the claimant without having any legitimacy to do so. The

personal data of the claimant were incorporated into the information systems

of the company, without proving that he had legitimately contracted,

had your consent for the collection and subsequent processing of your data.

personal data, or there is any other cause, which makes the treatment lawful

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effected.

Well, it follows that the contracts provided (Movistar Fusión) where

the claimant appears as the owner, they refer to the numbers ***TELÉFONO.3 as

first line and ***PHONE.1 as the second line. Not stating the type of contract or

place of contracting of the line ***TELEPHONE.2.

That the mobile telephone lines were contracted in the physical store of

Movistar of ***LOCALIDAD.2 located in the street ***ADDRESS.2. These hirings

correspond to the lines ***TELEPHONE.1 and ***TELEPHONE.3, not to the line

***TELEPHONE.2 indicated by the claimant.

The respondent states that the invoices were sent to the address of the

claimant that appears in their systems in the town of Lugo, while it has been

been able to verify that the address that appears in the contracts, and in the impressions screen of their systems, is the one indicated by the claimant at the time of present the claim in this Agency, in the town of *** LOCATION.1.

On line debt write-off screen printout

***PHONE.2, it is verified that it has a different NIF identifier from that of the claimant.

It is noteworthy that the respondent acknowledges said error and states that it is a transcription error and that it has not been able to locate the contract of the line ***PHONE.2.

The personal data of the claimant were recorded in the files of the claimed and were treated for the issuance of invoices for services associated with the claimed person. Consequently, it has processed the data without having accredited that you have the legal authorization to do so. However, and this is essential, the defendant does not prove the legitimacy to the processing of the claimant's data.

In short, the respondent has not provided a document or evidence one that shows that the entity, in such a situation, would have deployed the minimum diligence required to verify that your interlocutor was indeed the one who claimed to hold

Respect for the principle of legality that is in the essence of the fundamental right of protection of personal data requires that it be accredited that the responsible for the treatment displayed the essential diligence to prove that extreme. Failure to act in this way -and this Agency, who is responsible for ensuring for compliance with the regulations governing the right to data protection of personal character - the result would be to empty the content of the principle of legality.

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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;
- 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

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

Consequently, the following have been taken into account as aggravating factors:

- In the present case we are dealing with an unintentional negligent action, but significant identified (article 83.2b).
- Basic personal identifiers are affected (name, a number identification number, the line identifier) (paragraph g).

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 70,000 euros (seventy thousand euros), typified as "very serious", for of prescription thereof, in article 72.1.b) of the LOPDGDD.

Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of 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 6.1 of the RGPD, typified in Article 83.5

of the RGPD, a fine of €70,000 (seventy thousand euros).

SECOND: NOTIFY this resolution to TELEFONICA MOVILES ESPAÑA,

S.A.U.

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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 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

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

Sea Spain Marti

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