

968-150719

□ Procedure No.: PS/00453/2019

RESOLUTION R/00172/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT

VOLUNTEER

In sanctioning procedure PS/00453/2019, instructed by the Agency

Spanish Data Protection Agency to TELEFONICA MOVILES ESPAÑA, S.A.U., in view of the

claim filed by A.A.A., and based on the following,

BACKGROUND

FIRST: On December 17, 2019, the Director of the Spanish Agency

of Data Protection agreed to initiate a sanctioning procedure against TELEFONICA

MOVILES ESPAÑA, S.A.U.. Having notified the start-up agreement and after analyzing the

arguments presented, on February 19, 2020, the proposal for

resolution transcribed below:

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Procedure no.: PS/00453/2019

926-240120

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 October 5, 2018

filed a claim with the Spanish Data Protection Agency. The

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

(hereinafter, the claimed)

The claimant states that their data has been used for contracting

fraudulent use of telephone lines without your consent with reference to the following

lines: ***PHONE.1, ***PHONE.2, ***PHONE.3 and ***PHONE.4.

The claimant provides the following documentation, among others:

- Movistar recognition of fraudulent registrations

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

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in accordance with the provisions of Title VII, Chapter I, Second Section, of the Law

Organic 3/2018, of December 5, on the Protection of Personal Data and guarantee of

digital rights (hereinafter LOPDGDD).

As a result of the research actions carried out, it is confirmed

that the data controller is the claimed party.

In addition, the following extremes are noted:

In accordance with article 65.4 of Organic Law 3/2018, of 5

December, of Protection of Personal Data and guarantee of digital rights, is

transferred the claim to the respondent so that it could proceed with its analysis and

respond to this Agency within a month.

On August 24, 2018, the respondent party stated before the

request for information from this Agency, which proceed to its analysis and after its study

resolved by estimating the existence of identity theft for the object lines

Of claim.

Consequently, they cancel the existing debt with respect to the aforementioned lines, not the claimant appearing as the owner thereof.

In this sense, they paralyzed any recovery action, requesting the exclusion of the claimant's data from the asset solvency files in the that could be included as a result of the incident that is the subject of this claim. They add that, to date, the claimant's personal data is not are communicated to the aforementioned files for debts contracted with this Company.

On December 3, 2019, within the framework of file E/08079/2018,

After analyzing the documentation that was in it, a resolution was issued by the director of the AEPD, agreeing to admit the claim for processing.

THIRD: On December 17, 2019, the Director of the Spanish Agency of Data Protection agreed to initiate sanctioning procedure to the claimed, 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: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations in which, in summary, it states that it has been proven throughout of this proceeding, that there is conclusive evidence to have the conviction that the data obtained at the time of hiring were truthful and provided by the claimant and therefore it was the claimant who lent his consent.

Requests the application of the principle of presumption of innocence and non-existence of

responsibility on the part of the claimed party and that a Resolution be issued ordering the filing of this sanctioning file.

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FIFTH: On January 22, 2020, the test practice period began,

remembering: 1. Consider reproduced for evidentiary purposes the complaint filed by the claimant and their documentation, the documents obtained and generated that are part of the file and 2. Consider reproduced for evidentiary purposes, the allegations to the initiation agreement of PS/00453/2019, presented by the entity reported.

SIXTH: Of the information and documentation provided by the parties in this procedure, the following facts are accredited:

PROVEN FACTS

FIRST. - It is stated that the data of the claimant have been used for the Fraudulent contracting of the following telephone lines without your consent:

***PHONE.1, ***PHONE.2, ***PHONE.3 and ***PHONE.4.

SECOND. - It is stated in the allegations dated August 24, 2018, that by part of the claim, its distributors are required to request the following documentation:

Photocopy of National Identity Document, expression of the Number of Tax identification of the signatory, photocopy of the Passport, Residence Card and Personal Identification Number for Foreigners, if the signer is a foreigner.
Photocopy of National Identity Document; or of the Passport, Card of

Residence and Personal Identification Number of Foreigners, if you are a foreigner, of the

holder of the bank account charged, as well as his signature on the Payment Order

Banking, in the case of being a different person from the one who appears as a client.

Photocopy of National Identity Document; or of the Passport, Card of

Residence and Personal Identification Number of Foreigners and Power of Attorney

enough in favor of the signatory, in case of being a different person from the one that appears as client.

Documents accrediting the collection data (receipt, bank statement,

etc...) in which the owner or owners of the account and the 20 digits

of the Customer Account Code (C.C.C.).

Likewise, it is pointed out that the distributors are responsible for the veracity

of the information that it incorporates and with which the Subscription contract is completed. In

the moment of contracting, the Distributor must inexcusably verify the

personal identification data of the client and, where appropriate, those of the signatory, with the original documents.

On the other hand, they state that in no case will they proceed to request discharge

for a client whose data and documents present any doubt about their veracity

or authenticity.

In the recording provided by the respondent, the contracting party is told that

approach your distributor, to whom you must provide a photocopy of the DNI of the contracting party and the payment account holder.

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THIRD. - Based on the documentation in the file, it is accredited that the claimed person processed the personal data of the claimant without his consent. The personal data of the claimant were registered in the files of the claimed party, as well as the inclusion of the data of the claimant in the solvency file, and were treated for the issuance of invoices by services associated with the claimed person.

SEVENTH: Attached as an Annex is a list of documents in the process.

FOUNDATIONS OF LAW

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

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

II

The defendant is imputed the commission of an infraction for violation of the Article 6 of the RGD, "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 RGD, 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 particular the following:

(...)

b) The processing of personal data without the concurrence of any of the conditions of legality of the treatment established in article 6 of the Regulation (EU) 2016/679."

III

The documentation in the file offers evidence that the claimed, violated article 6.1 of the RGPD, since it carried out the treatment of the

personal data of the claimant without their consent. The personal data of the claimant were incorporated into the company's information systems, without has accredited that he had his consent for the collection and treatment later of your personal data.

Based on the foregoing, in the case analyzed, it remains in questioned the diligence used by the respondent to identify the persons who contracted on behalf of the claimant.

It should be noted that the defendant acknowledges the existence of impersonation of identity for the lines object of the claim.

Well, on the part of the defendant, its distributors are required to request the following documents:

Photocopy of National Identity Document, expression of the Number of Tax identification of the signatory, photocopy of the Passport, Residence Card and Personal Identification Number for Foreigners, if the signer is a foreigner. Photocopy of National Identity Document; or of the Passport, Card of Residence and Personal Identification Number of Foreigners, if you are a foreigner, of the holder of the bank account charged, as well as his signature on the Payment Order Banking, in the case of being a different person from the one who appears as a client. Photocopy of National Identity Document; or of the Passport, Card of Residence and Personal Identification Number of Foreigners and Power of Attorney enough in favor of the signatory, in case of being a different person from the one that appears as client.

Documents accrediting the collection data (receipt, bank statement, etc...) in which the owner or owners of the account and the 20 digits of the Customer Account Code (C.C.C.).

Likewise, it is pointed out that the distributors are responsible for the veracity

of the information that it incorporates and with which the Subscription contract is completed. In the moment of contracting, the Distributor must inexcusably verify the personal identification data of the client and, where appropriate, those of the signatory, with the original documents.

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On the other hand, they state that in no case will they proceed to request discharge for a client whose data and documents present any doubt about their veracity or authenticity.

For all the above, it is confirmed that the contribution of the recording is not enough, not having been sufficiently accredited that the treatment of personal data has been made in accordance with the precepts indicated previously; having verified that the respondent has associated the data personal information of the claimant to the registration of four telephone lines that he denies having hired.

The Contentious-Administrative Chamber of the National High Court, in assumptions such as the one presented here, has considered that when the owner of the data denies the hiring, the burden of proof corresponds to those who affirm their existence, and the third-party data controller must collect and keep the necessary documentation to prove the consent of the holder.

We cite, for all, the SAN of 05/31/2006 (Rec. 539/2004), Basis of Law Fourth.

The personal data of the claimant were registered in the files of the

claimed and were treated for the issuance of invoices for services associated with the claimant. Consequently, it has processed personal data without that has proven that it has the consent of the latter for its treatment, nor that has 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.

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.

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“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 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 data processing personal.

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- c) The profits obtained as a result of committing the offence.
- d) The possibility that the conduct of the affected party could have led to the commission of the infringement.
- e) The existence of a merger by absorption process subsequent to the commission of the infringement, which cannot be attributed to the absorbing entity.
- f) Affectation of the rights of minors.
- g) Have, when not mandatory, a data protection delegate.
- h) Submission by the person in charge or person in charge, on a voluntary basis, to alternative conflict resolution mechanisms, in those cases in which there are controversies between them and any interested party.”

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

As aggravating criteria:

In the present case we are dealing with an unintentional negligent action, but

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identified significant (article 83.2 b).

Basic personal identifiers (name, a number of

-

identification, the line identifier) (article 83.2 g).

It must be considered that the respondent estimated the existence of impersonation of identity, canceled the existing debt, stopped any collection action, requested the exclusion of the data of the claimant of the patrimonial solvency files.

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

Regarding the infraction committed by violating the provisions of article 6, it allows setting a

sanction of 50,000 euros (fifty thousand euros), typified as "very serious", for the purposes of prescription thereof, in article 72.1.b) of the LOPDGDD.

In view of the foregoing, the following is issued

MOTION FOR A RESOLUTION

That the Director of the Spanish Data Protection Agency sanction

Telefónica Móviles España, S.A.U., with NIF A78923125, for a violation of Article 6.1

of the RGPD, typified in Article 83.5 a) of the RGPD, a fine of €50,000.00 (fifty a thousand euros).

Likewise, in accordance with the provisions of article 85.2 of the LPACAP,

informs that you may, at any time prior to the resolution of this

procedure, carry out the voluntary payment of the proposed sanction, which will entail

a reduction of 20% of the amount of the same. With the application of this reduction, the

sanction would be established at 40,000.00 euros and its payment will imply the termination of the

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process. The effectiveness of this reduction will be conditioned to the withdrawal or

Waiver of any administrative action or recourse against the sanction.

In case you chose to proceed with the voluntary payment of the amount specified

above, in accordance with the provisions of article 85.2 cited, must make it effective

by depositing it in the restricted account number ES00 0000 0000 0000 0000 0000 open to

name of the Spanish Data Protection Agency at Banco CAIXABANK, S.A.,

indicating in the concept the reference number of the procedure that appears in the

heading of this document and the cause, by voluntary payment, of reduction of the

amount of the penalty. Likewise, you must send proof of payment to the Subdirectorate

General Inspection to proceed to close the file.

By virtue thereof, the foregoing is notified, and the

procedure so that within TEN DAYS you can allege whatever you consider in your

defense and present the documents and information that it considers pertinent, in accordance

with article 89.2 in relation to art. 73.1 of the LPACAP).

RRR

INSPECTOR/INSTRUCTOR

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: On March 16, 2020, TELEFONICA MOVILES ESPAÑA,

SECOND

S.A.U. has proceeded to pay the penalty in the amount of 40,000 euros using
of the reduction envisaged in the motion for a resolution transcribed above.

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THIRD: The payment made entails the waiver of any action or resource in via
against the sanction, in relation to the facts referred to in the
resolution proposal.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, and as established in art. 47 of the Organic Law 3/2018, of 5 December, of Protection of Personal Data and guarantee of digital rights (in hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection is competent to sanction the infractions that are committed against said Regulation; infractions of article 48 of Law 9/2014, of May 9, General Telecommunications (hereinafter LGT), in accordance with the provisions of the article 84.3 of the LGT, and the infractions typified in articles 38.3 c), d) and i) and 38.4 d), g) and h) of Law 34/2002, of July 11, on services of the society of the information and electronic commerce (hereinafter LSSI), as provided in article 43.1 of said Law.

II

Article 85 of Law 39/2015, of October 1, on the Procedure Common Administrative of Public Administrations (hereinafter LPACAP), under the heading "Termination in sanctioning procedures" provides the following:

"1. A sanctioning procedure has been initiated, if the offender acknowledges his responsibility, the procedure may be resolved with the imposition of the sanction to proceed.

2. When the sanction is solely pecuniary in nature or fits impose a pecuniary sanction and another of a non-pecuniary nature but it has been justified the inadmissibility of the second, the voluntary payment by the alleged perpetrator, in any time prior to the resolution, will imply the termination of the procedure, except in relation to the replacement of the altered situation or the determination of the compensation for damages caused by the commission of the infringement.

3. In both cases, when the sanction is solely pecuniary in nature, the competent body to resolve the procedure will apply reductions of, at least 20% of the amount of the proposed sanction, these being cumulative each. The aforementioned reductions must be determined in the notification of initiation of the procedure and its effectiveness will be conditioned to the withdrawal or Waiver of any administrative action or recourse against the sanction. The reduction percentage provided for in this section may be increased regulations."

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According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00453/2019, of in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to TELEFONICA MOVILES ESPAÑA, S.A.U.

In accordance with the provisions of article 50 of the LOPDGDD, the

This Resolution will be made public once it has been notified to the interested parties.

Against this resolution, which puts an end to the administrative process as

prescribed by art. 114.1.c) of Law 39/2015, of October 1, on Procedure

Common Administrative of Public Administrations, interested parties may

file a contentious-administrative appeal before the Contentious Chamber

of the National High Court, in accordance with the provisions of article 25 and

in section 5 of the fourth additional provision of Law 29/1998, of July 13,
regulation of the Contentious-Administrative Jurisdiction, within a period of two months to
count from the day following the notification of this act, as provided in the
Article 46.1 of the aforementioned Law.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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