

Procedure No.: PS/00056/2019

RESOLUTION R/00250/2019 TERMINATION OF THE PROCEDURE BY
VOLUNTARY PAYMENT

In sanctioning procedure PS/00056/2019, instructed by the Agency

Spanish Data Protection Officer to VODAFONE ESPAÑA, S.A.U., given the complaint
presented by A.A.A., and based on the following,

BACKGROUND

FIRST: On April 9, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against VODAFONE

SPAIN, S.A.U. (hereinafter, the claimed party), through the Agreement that is transcribed:

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Procedure No.: PS/00056/2019

AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Agency for the Protection of

Data before VODAFONE ESPAÑA, S.A.U., by virtue of a claim filed by

A.A.A. and based on the following:

FACTS

FIRST: On 09/05/2018 there is an entry in the AEPD written by Ms. B.B.B., in

representation of D.A.A.A. (hereinafter the claimant). The claim is directed

against VODAFONE ESPAÑA, S.A.U. with NIF A80907397 (hereinafter VODAFONE).

The reasons on which the claim is based are, in summary, the following: the claimant

has been directing writings against VODAFONE, informing that for some of its

departments, your DNI has been assigned to a third party, with whom it has no relationship

any and who also resides outside their CCAA; the third party maintains a debt for

unpaid invoices in which the claimant's DNI appears, so the situation

it is causing a permanent restlessness; VODAFONE prevents you from accessing fully to your application but at the same time it allows you to access invoices of the lady who has been assigned her DNI, which is a flagrant violation of the LOPD by the company; that in this situation has been forced to File a complaint with the Civil Guard.

Provides:

- Copy of ID.
- Complaint before the G.C.
- Bills.
- Emails addressed to VODAFONE.

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SECOND: Upon receipt of the claim, the Subdirector General for

Data Inspection proceeded to carry out the following actions:

On 10/15/2018, reiterated on 11/27/2018, the claim was transferred to VODAFONE submitted for analysis and communication to the complainant of the decision adopted regard.

On the same date, the claimant was informed of the receipt of the claim and its transfer to the claimed entity.

THIRD: VODAFONE has not responded to any of the requests formulated by the Spanish Agency for Data Protection.

FOUNDATIONS OF LAW

By virtue of the powers that article 58.2 of the RGPD recognizes to each

control authority, and according to the provisions of articles 47 and 48 of the LOPDGDD,

The Director of the Spanish Agency for Data Protection is competent to initiate

and to solve this procedure.

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The facts denounced are specified in the treatment of the data of the

claimant by VODAFONE without their consent, specifically their DNI,

linking it to the name and surname of a third person client of the entity and

debtor of the same, with which he has no relationship whatsoever, being completely

self-employed and whose domicile is outside their Autonomous Community of residence.

Said treatment could constitute a violation of article 6, Legality of the

treatment, of the RGPD that establishes that:

"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;

(...)"

Article 4 of the GDPR, Definitions, in section 11, states that:

"11) «consent of the interested party»: any manifestation of free will,

specific, informed and unequivocal by which the interested party accepts, either

by means of a declaration or a clear affirmative action, the processing of data

personal matters that concern him".

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Also article 6, Treatment based on the consent of the affected party, of the new Organic Law 3/2018, of December 5, on the Protection of Personal Data and guarantee of digital rights (hereinafter LOPDGDD), states that:

"1. In accordance with the provisions of article 4.11 of the Regulation (EU) 2016/679, consent of the affected party is understood to be any manifestation of will free, specific, informed and unequivocal by which he accepts, either through a declaration or a clear affirmative action, the treatment of personal data that concern.

2. When it is intended to base the processing of the data on the consent of the affected for a plurality of purposes, it will be necessary to state specific and unequivocal that said consent is granted for all of them.

3. The execution of the contract may not be subject to the affected party consenting to the processing of personal data for purposes unrelated to the maintenance, development or control of the contractual relationship".

On the other hand, article 83.5 a) of the RGPD, considers that the infringement of "the basic principles for processing, including conditions for consent in accordance with articles 5, 6, 7 and 9" is punishable, in accordance with section 5 of the mentioned article 83 of the aforementioned GDPR, "with administrative fines of €20,000,000 maximum or, in the case of a company, an amount equivalent to 4% as maximum of the overall annual total turnover of the previous financial year, opting for the highest amount.

The regulation of infractions in the LOPDGDD is more precise in terms of the

situations that give rise to an infraction and its consideration, so that it is much easier to know the limitation period of that infraction (that is, if it is considered mild, serious or very serious) and in view of the administrative sanction to be imposed for its non-compliance.

The LOPDGDD in its article 72 indicates: "Infringements considered very serious:

1. Based on the provisions of article 83.5 of Regulation (EU) 2016/679

are considered very serious and will prescribe after three years the infractions that suppose

a substantial violation of the articles mentioned therein and, in particular, the

following:

(...)

c) 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.

(...)"

The exposed facts reveal the treatment by VODAFONE of

the claimant's data without their consent, which would imply the violation of the

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Article 6 of the RGPD, Legality of the treatment, as your consent is not recorded and without

is part of the service contract in which the data of the same are recorded. Also,

VODAFONE has not provided any documentation proving that the person

claimed I provide personal data.

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 consent for the processing of your data corresponds to the load of the proof to the person who affirms its existence, owing the person in charge of the treatment of data collect and keep the necessary documentation to prove the consent of the owner, SAN of 05/31/2006 (Rec. 539/2004).

The claimant has provided copies of service and consumption bills contracted with VODAFONE corresponding to a third party, client of the entity, in the that the DNI of the claimant appears linked to the billing data of the third party; person who is also domiciled in a CCAA other than the residence of the claimant.

There are also emails addressed to the company demanding response for the events that occurred; situation that also prevents him from accessing the VODAFONE application (apps) when showing unpaid invoices assigned to your DNI that do not correspond to him and that in view of the situation of insecurity that it caused him, he had to go to the corresponding post of the Civil Guard to report the facts.

In order to establish the administrative fine to be imposed, observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which point out:

IV

"1. Each control authority will guarantee that the imposition of fines administrative actions under this article for violations of this Regulation indicated in sections 4, 5 and 6 are in each individual case effective, proportionate and dissuasive.

2. 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 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;

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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, 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.

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its

Article 76, "Sanctions and corrective measures", establishes that:

"two. In accordance with the provisions of article 83.2.k) of the 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 after the commission of the infringement, which cannot be attributed to the absorbing entity.
- f) Affectation of the rights of minors.
- g) Have, when it is not mandatory, a delegate for the protection of data.
- 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."

In accordance with the transcribed precepts, and without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction of fine to impose in the present case for the infringement typified in article 83.5.a) of the RGPD for which VODAFONE is held responsible, in an initial assessment, it is estimated concurrent the following factors:

The merely local scope of the treatment carried out by the entity claimed.

Only one person has been affected by the offending conduct.

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The damage caused to the claimant since she had to file a complaint before the GC and there were several occasions on which he addressed the entity to inform him of the facts without making any decision.

The entity claimed has not responded to the requirements of the AEPD nor has it measures have been taken to prevent similar incidents from occurring.

There is no evidence that the entity had acted maliciously, although the performance reveals a lack of diligence.

The link between the activity of the offender and the performance of treatment of personal data number of people affected.

The entity claimed is considered a large company.

Therefore, as stated,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

1. INITIATE PUNISHMENT PROCEDURE against VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for the alleged infringement of article 6.1.a) of the RGPD, sanctioned in accordance with the provisions of article 83.5.a) of the aforementioned RGPD and typified as very serious infraction in article 72.1.c) of the aforementioned Law.
2. APPOINT R.R.R. Instructor and Secretary to S.S.S., indicating that any of them may be challenged, where appropriate, in accordance with the provisions of articles 23 and 24 of Law 40/2015, of October 1, on the Legal Regime of the Public Sector (LRJSP).
3. INCORPORATE to the disciplinary file, for evidentiary purposes, the complaint filed by the complainant and her documentation, the documents obtained and generated by the Inspection Services during the preliminary investigation phase as well such as the report of previous inspection actions; documents all of them make up file E/07458/2018.
4. THAT for the purposes provided in art. 64.2 b) of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations (LPACAP), and art. 127 letter b) of the RLOPD, the sanction that could correspond for the infraction described would be 60,000 euros (sixty thousand euros), without prejudice to what results from the instruction.
5. NOTIFY this Agreement to VODAFONE ESPAÑA, S.A.U., with NIF A80907397, expressly indicating their right to a hearing in the procedure and granting him a period of TEN WORKING DAYS to formulate the allegations and
Propose the tests you consider appropriate. In his pleadings
You must provide your NIF and the procedure number that appears in the heading
of this document.

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Likewise, in accordance with articles 64.2.f) and 85 of the LPACAP, informs that, if it does not make allegations within the term of this initial agreement, the same may be considered a resolution proposal.

You are also informed that, in accordance with the provisions of article 85.1 LPACAP, may acknowledge its responsibility within the term granted for the formulation of allegations to this initial agreement which will entail a reduction of 20% of the sanction to be imposed in the present procedure, equivalent in this case to 12,000 euros. With the application of this reduction, the sanction would be established at 48,000 euros, resolving the procedure with the imposition of this sanction.

Similarly, you may, at any time prior to the resolution of the present procedure, carry out the voluntary payment of the proposed sanction, in accordance with the provisions of article 85.2 LPACAP, which will mean a reduction of 20% of the amount of the same, equivalent in this case to 12,000 euros. With the application of this reduction, the penalty would be established at 48,000 euros and its payment will imply the termination of the procedure.

The reduction for the voluntary payment of the sanction is cumulative to the one It is appropriate to apply for the acknowledgment of responsibility, provided that this acknowledgment of responsibility is revealed within the period granted to formulate arguments at the opening of the procedure. The payment of the amount referred to in the preceding paragraph may be made at any time prior to resolution. In this case, if it were appropriate to apply both

reductions, the amount of the penalty would be established at 36,000 euros.

In any case, the effectiveness of any of the two reductions mentioned

will be conditioned to the withdrawal or renunciation of any action or resource in via

administrative against the sanction.

In the event that you choose to proceed with the voluntary payment of any of the

amounts indicated above (48,000 euros or 36,000 euros), in accordance with the

provided for in article 85.2 referred to, we indicate that you must make it effective by

your deposit in the restricted account number ES00 0000 0000 0000 0000 0000 open to

name of the Spanish Data Protection Agency at CAIXABANK Bank,

S.A., indicating in the concept the reference number of the procedure that appears in

the heading of this document and the reason for the reduction of the amount to which

welcomes

Likewise, you must send proof of payment to the General Subdirectorate of

Inspection to proceed with the procedure in accordance with the quantity

entered.

The procedure will have a maximum duration of nine months from the

the date of the start-up agreement or, where applicable, of the draft start-up agreement.

Once this period has elapsed, it will expire and, consequently, the file of

performances; in accordance with the provisions of article 64 of the LOPDGDD.

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Finally, it is pointed out that in accordance with the provisions of article 112.1 of the

LPACAP, there is no administrative appeal against this act.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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SECOND: On May 23, 2019, the respondent has proceeded to pay the sanction in the amount of 36,000 euros making use of the two planned reductions in the Startup Agreement transcribed above, which implies the recognition of the responsibility.

THIRD: The payment made, within the period granted to formulate allegations to the opening of the procedure, entails the waiver of any action or resource in via administrative action against the sanction and acknowledgment of responsibility in relation to the facts referred to in the Initiation Agreement.

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

Next:

"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.

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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."

According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: DECLARE

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

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

the termination of procedure PS/00056/2019, of

In accordance with the provisions of article 50 of the LOPDGDD, 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 as prescribed by

the art. 114.1.c) of Law 39/2015, of October 1, on Administrative Procedure

Common of the Public Administrations, the interested parties may file an appeal

contentious-administrative 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.

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