 Procedure No.: PS/00059/2020

RESOLUTION OF PUNISHMENT PROCEDURE

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

based on the following

BACKGROUND

FIRST. Since the second quarter of 2018, this Agency has received

191 claims as of the initiation agreement date 02/26/2020 (23 of which between

on October 1, 2019 and February 2020) against the entity VODAFONE ESPAÑA,

S.A.U. (hereinafter VODAFONE or VDF), with NIF A80907397, in which

denounces the performance of marketing actions and commercial prospecting in

name and on behalf of VDF through telephone calls and by sending

electronic commercial communications (SMS messages and emails).

Such actions could violate both the regulations Law 9/2014, of May 9, General

of Telecommunications (hereinafter LGT), Law 34/2002, of July 11, on services

of the information society and electronic commerce (hereinafter LSSICE),

such as Organic Law 3/2018, of December 5, on the Protection of Personal Data and

Guarantees of Digital Rights (hereinafter LOPDGD).

The foregoing, because these reported electronic communications are produced, by

one side and with regard to the LSSICE, without having been requested or

expressly authorized and/or without addressing the exercise of the right to oppose the shipment

of new notifications; on the other, regarding the LGT, without facilitating the possibility of

exercise the right of opposition or, once the affected party has exercised

previously your right of opposition through its inclusion in the file of

internal advertising exclusion of the indicated entities (hereinafter Robinson List

Internal -LRI-), or through the common general advertising exclusion system

called the Robinson Adigital List -LRAD-; and, finally, as regards the

LOPDGDD without adapting the procedures and guarantees established for the execution

of marketing actions in the content of the contracts with those in charge of

the treatments that act in the name and on behalf of the person in charge (VDF) and without

offer the interested party the necessary, sufficient and appropriate means that guarantee

the protection of their rights and freedoms.

Likewise, it should be made clear that from the analysis of the responses to the

Information requirements of this Agency evacuated by the claimed entity are

summarizes the following:

They do not explain the reason why the events happen and continue to happen

object of claim.

The origin of the data relating to the telephone line number or

email addresses of the recipients.

The reason why there are claimants who have exercised the

right of opposition to receive marketing actions and / or appear in your LRI or

LRAD and, however, commercial actions have been carried out again.

They do not explain the reasons why the rights exercised by the

the complainants nor do they propose effective actions tending to avoid this in the future.

type of conduct.

Marketing actions continue after resolutions of the AEPD in

□

protection of the rights exercised and previous resolutions of procedures

sanctioning urging the cancellation of commercial actions and sanctioning the

same facts now analyzed.

Of the claim admission procedure provided for in article 65 of the

□

LOPDGDD shows that although a satisfactory response has been obtained for

the claimant in certain claims as the entity has stated

claimed that the data of the claimant were incorporated into the files of exclusion of

advertising actions of the entities (LRI) (despite already being incorporated

in the LRAD), it becomes clear that the procedure carried out is not

decisive. The marketing actions continue, and may involve a behavior

regular and permanent violation of the rights and freedoms of

interested in the field of direct marketing actions, customer service

rights recognized in the aforementioned regulations (LGT, LSSICE and LOPDGDD) and absence

of appropriate technical and organizational measures for the effective application

of the principles and guarantees of the interested parties as indicated by the current regulations

above indicated.

To which must be added, for the purposes of lack of collaboration, that the last

□

Claims before this Agency during the process of admission to processing have not been

attended by the entity, or have been after the expiration of the term of 3

months, which has given rise to its admission for processing by imperative of art 65.5 of the

LOPDGDD.

It consists of the documentation received from VDF on 04/26/2019 (on a pendrive given the large volume of information, with entry registration number 021640/2019) that the volume of commercial actions carried out in the name and on behalf of VDF from May 2018 to March 2019 it is 200,000,000 (two hundred million).

It also consists of the balance of annual accounts (March 2018-March 2019) presented by VDF that the net turnover exceeds 1,600 million euros and has 4,000 employees.

Consequently, it was deemed necessary to initiate investigative actions by the Subdirectorate General for Data Inspection aimed at clarifying the responsibilities that in terms of data protection (RGPD and LOPDGDD) may have been incurred by the person responsible for the treatment object of the claims in its marketing actions and attention to the exercise of rights established in Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 regarding the protection of natural persons in what regarding the processing of personal data and the free circulation of these data and which repeals Directive 95/46/EC (hereinafter RGPD).

It was also considered necessary to investigate the facts denounced in order to settle the responsibilities that may have been incurred by the person responsible for the actions of marketing in relation to the provisions of article 48 of Law 9/2014, of 9

May, General Telecommunications (LGT) and article 21 of Law 34/2002, of 11

July, of services of the information society and electronic commerce (LSSICE).

SECOND: In view of the foregoing, the Director of the Spanish Protection Agency of Data urged the Subdirectorate General for Data Inspection to proceed to carry out investigative actions necessary to clarify the facts in denounced, by virtue of the powers of investigation granted to the authorities of control in article 57.1 of the RGPD, and in accordance with the provisions of the Title VII, Chapter I, Second Section, of the LOPDGDD, having knowledge of the following ends:

On 02/26/2019, it was agreed to start investigation actions in order to prove the possible existence of a regular and continued conduct of violation of the data protection regulations (RGPD and LOPDGDD), LGT and LSSICE in the field of direct marketing actions by the entity now under investigation (VFD).

The purpose of the research actions to be carried out is part of the analysis of the procedures designed internally for the data processing carried out in the field of direct marketing in the name and on behalf of VDF, since the data is incorporated into the information systems for which it is responsible until which ceases to be used for these purposes.

This implies that the origin of the processed data is clarified, the subsequent treatment of these and the relationship with those in charge of the treatments, the prior verification of inclusion in the system of internal or general advertising exclusion of those affected (Robinson internal and General listings of Adigital), the management of the rights of opposition and suppression, as well as the technical and organizational measures implemented and its degree of compliance for the protection of the rights and freedoms of interested.

INVESTIGATED ENTITIES

During these proceedings, investigations have been carried out on the following

entities:

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-
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VODAFONE ONO, S.A.U.

VODAFONE ESPAÑA, S.A.U.

VODAFONE ENABLER ESPAÑA, S.L.

TELEFONICA DE ESPAÑA, S.A.U.

TELEFONICA MOVILES ESPAÑA, S.A.U.

LYCA MOBILE, S.L.

XTRA TELECOM

DIALOG INTERACTIVE SERVICES

FLASH MEDIA EUROPE,

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ORANGE ESPAÑA, S.A.U.

GLOBALIA CALL CENTER, S.A.

MARKTEL GLOBAL SERVICES, S.A.

COMPUTER ENGINEERING OLOT, S.L.

CASMAR TELECOM, S.L. (hereinafter Casmar)

THREE-QUARTERS FULL, S.L. (hereinafter TQF)

RESULT OF THE INVESTIGATION ACTIONS

1.

From the beginning of the investigative actions that are in the file

of reference E/01615/2019, 191 claims have been incorporated through the

reference file E/09541/2018, of which 23 received since October

2019 to February 2020.

On dates of 02/27/2019, 03/08/2019, 03/18/2019, 06/07/2019

information requirements to VODAFONE ESPAÑA, S.A.U. and on dates of

On 09/18/2019 and 09/30/2019, an on-site inspection is carried out (whose Minutes and documentation

incorporated into the file) at the VDF headquarters in order to be able to contrast it with the

current regulations the general procedure for managing data processing relative to

direct marketing actions through telephone calls, SMS and

emails, being aware of the following:

1.1. In general, marketing actions can be classified

according to several criteria.

1.1.1.Campaigns managed directly by VDF and Campaigns managed by others

entities by account and name of VDF.

The difference between campaigns managed directly by VDF from those that are

managed by other entities on behalf of and on behalf of VDF is as follows:

That in the first (VDF), the databases of the recipients of the actions

commercial services are provided by VDF and the commercial actions are carried out, or

the internal Marketing Department or the internal Telesales Department

(TVTA hereinafter), the latter through entities contracted by VDF that

make up what they call the TVTA Platform.

And the second ones (entities that act on behalf and name of VDF) are carried out in

entirely by the so-called Distributors/Collaborators/Agents (which sometimes,

in turn subcontract the management and data processing of affected parties for the

effective performance of marketing actions in the name and on behalf of

VDF) being able, in this case, to use the databases provided by the company itself.

VDF or its own databases, taking charge, according to VDF, of said

distributors/collaborators/agents of data leaks with both Lists

Robinson (internal, LRI and Adigital, LRAD).

Regarding the "campaigns managed by other entities on behalf of and in the name of VDF", no

It is clear that VDF has technical and organizational control over the processing and

databases used by these entities, because neither when the

“distributor/collaborator/agent” does not use its own databases nor when it uses

those provided by VDF itself, VDF has not implemented methods or technical means

and organizations that verify the legality, the origin of these or their effective prior filtering

with LRIs or LRADs, nor for how long they are used.

There is also no evidence that VDF has actual control over the commercial actions themselves.

themselves (calls, SMS and emails), but only has a formal control based on the

contractual obligations that distributors/collaborators/agents acquire with

VDF and referred only to internal informative communications, which are not

prior authorizations to carry out marketing actions, in the case

that they use their own databases of distributors/collaborators/agents and

therefore foreign to VDF. In this sense, it should be noted that the documentation required to

VDF and these entities it is inferred that the control over the marketing actions

it is a posteriori, that is, once the deficiency has been detected or a claim has been filed

before the AEPD, the acting entities are informed and indicate, where appropriate,

corrective actions.

department

VDF intern who contracts with

The

the entities

distributors/collaborators/agents that make up this second set of is the

called "Distribution/agents" which is divided into several sales channels, among

others: <<Door to Door Channel>> (D2D hereinafter), <<online channel>>, <<corners

physical in shopping centers and establishments>>.

1.1.2.Classification according to who materially carries out the commercial actions:

These may be those carried out by:

(A) Internal VDF Marketing Department through VDF's own means.

(B) VDF's internal Telesales Department through the entities that make up

the TVTA Platform.

(C) Department of Distributors/Collaborators/Agents through its network of distributors/agents/collaborators.

A.- VDF's internal Marketing Department carries out its own marketing actions advertising from their own databases, without prejudice to having powers and functions that are projected on the TVTA department.

B.- The VDF TVTA Department is made up of the following platforms subcontracted:

For LOWI, the teleshopping platforms are:

Global Sales Solutions Line, S.L. (GSS)

Emergia Contact Center, S.L. (Emergy)

Konecta Bto, S.L. (Konecta)

For VDF and ONO, the teleshopping platforms are:

Global Sales Solutions Line, S.L. (GSS)

Emergia Contact Center, S.L. (Emergy)

Konecta Bto, S.L. (Konecta)

Telecyl, S.A. (Madison)

Atento Teleservices Spain Branch in Morocco/Atento Teleservices Spain, S.L. (Attentive)

Marktel Telephone Marketing Services, S.A. (Marktel)

Unisono Business Solutions, S.A. (Unison)

VDF states that for each of the platforms that make up the Department

internal to TVTA, there is <<a data protection framework agreement>> adapted to the

RGPD and, at least, a contract for the provision of services where the

rights and obligations, although only from the commercial field.

All these contracts are negotiated by the Vodafone Group purchasing center

located in Luxembourg (Vodafone Procurement, S.a.r.l.).

For their part, all the aforementioned entities that make up the platform of the

TVTA Department, prior to being hired, they must pass a process of

<<approval of providers>> which is managed by Vodafone Grupo located

in Budapest, Hungary. For this, they are sent a checklist where they are asked for a certain

information in order to validate if it is possible to contract with said provider. The quoted

checklist is limited to answering certain questions with a "YES" or "NO", without

accreditation or content of the answers and management of procedures is specified

to follow. The content of the form/checklist is as follows:

<<GOVERNMENT POLICIES

A.1 Where is your headquarters located?

A.2 Do you have a person responsible for the privacy of personal data? BUT

A.3 If yes, what is your address?

A.4 Do you have a person responsible for GDPR? BUT

A.5 If yes, what is your address?

A.6 Do you have defined and documented policies and procedures for the management of personal data? YES

NO

A.7 Do the policies and procedures include a statement about the commitment towards the protection of

data and privacy? BUT

A.8 Do the policies and procedures have transversal rules, established profiles and responsibilities

defined on data protection and privacy? BUT

A.9 Do the policies and procedures contemplate disciplinary processes in the event of breaches of

security including appropriate escalation to report to management? BUT

A.10 Are possible changes to the data protection policy reported to management? BUT

A.11 Is management informed of the privacy policy and data protection procedures

on a regular basis, eg annually? BUT

A.12 If you are asked to have a record of the processing of personal data, would it be valid and would it be

updated? BUT

EVALUATION AND MODIFICATIONS OF THE PROCESSING OF PERSONAL DATA

B.1 Is there a procedure to assess whether a requirement or instruction from Vodafone regarding the

processing of personal data by Vodafone is legitimate? BUT

B.2 Are you prepared to notify Vodafone if your assessment of the instruction or requirement on

the processing of personal data received from Vodafone is illegitimate or could lead to a

regulatory breach of the law on data protection and privacy? BUT

B.3 Have you defined a process to ensure that if there are significant changes in the way the

process the personal data of Vodafone, contact Vodafone to obtain preliminary approval

when proceed? BUT

B.4 Would you be willing to obtain Vodafone's prior written consent before processing the

Vodafone personal data with an outsourced third party? BUT

B.5 Would you be willing to help Vodafone to carry out the assessment of the impacts on the

privacy of personal data for those processes that Vodafone has classified as High

Risk as stated in the GDPR regulations? BUT

B.6.1 Will you allow Vodafone to carry out audits of its Data Protection Policies and Procedures?

data, security and privacy? BUT

B.6.2 Will you allow Vodafone to carry out audits of the systems used to process the data

Vodafone personals? BUT

B.6.3 Will you allow Vodafone to carry out audits of the physical locations in which data is processed?

said Vodafone personal data? BUT

B.7 Do you have defined processes to document the processing of personal data carried out by the

on behalf of Vodafone? BUT

B.8 Do you have defined procedures for deleting Vodafone's personal data in

accordance with the information retention policy or instructions provided by Vodafone?

BUT

B.9 In the absence of data retention guidelines established by Vodafone, is there a policy

data retention and erasure standard? BUT

B.10 Are there processes in place to ensure that once the contract with Vodafone has expired,

all Vodafone personal data is retrieved from all systems and returned to Vodafone and

removed from all systems? BUT

B.11 Has a procedure been established to identify and notify Vodafone of any

regulation or regulatory obligation to which you are subject and that requires you to retain personal data

after the end of the contract with Vodafone? BUT

KNOWLEDGE ABOUT DATA PROTECTION OR PRIVACY AND PREPARATION OF THE

MANAGERS INVOLVED IN THE PROCESSING OF PERSONAL DATA

C.1 Do the contracts signed by your management oblige you to protect and properly manage the

personal information? BUT

C.2 Do the contracts signed by your management oblige you to extend the responsibilities for the data

beyond the working day and after ending the employment relationship with your company? BUT

C.3 Do the contracts signed by your employees contemplate disciplinary measures as a result of a

failed in its responsibilities regarding personal data? BUT

C.4 Have you informed your management and information systems personnel that they are handling data

(through the appropriate channel) the data protection policy and procedures and

privacy? BUT

C.5 Is the privacy and data protection policy communicated to all those new workers and

to management when there is a change in the professional profile that in turn produces new

responsibilities regarding the processing of personal data? BUT

C.6 Is there training and education defined and implemented on data protection and

privacy for all personnel involved in the processing of personal data of Vodafone with

To ensure that all staff and management have adequate knowledge of the

requirements for the processing of personal data? BUT

C.7 Can you demonstrate that training has been given to all new hires and management

existing when there are changes in the responsibilities regarding the handling of personal data? YES

NO

C.8 Is the training and awareness program developed on a regular basis, eg annually? BUT

RIGHTS OF INDIVIDUALS

D.1 In the event of an access requirement of an individual, or any other requirement regarding

personal data (including any Supervisory Entity), does it have a procedure to give

coverage to Vodafone or, if required by Vodafone, attend to the request directly? BUT

D.2 Is there a procedure in place to assist Vodafone in correcting the personal data

processed in the systems for which you are responsible? BUT

D.3 Does the procedure have escalation processes in the communication of information to those responsible

with time limits and local rectification mechanisms? BUT

D.4 Do you have defined procedures that allow Vodafone to extract personal data from Vodafone

of the systems for which you are responsible so that Vodafone can comply with the

obligations on the portability of the information of a client or an employee? BUT

D.5 Do you have a procedure that would allow Vodafone to block an individual's access to your

personal information? BUT

D.6 Could Vodafone permanently block a subject's access to personal data

individual? BUT

D.7 Could Vodafone be able to block access to an individual's personal data in an

temporary? BUT

D.8 Would you be in a position to attend to the requirements that Vodafone might have regarding

pseudonymization and anonymization of personal data? BUT

DATA SECURITY BREACH - INCIDENT AND NOTIFICATION MANAGEMENT

E.1 Do you have defined processes for monitoring logs (activity) and reporting to Vodafone of

security incidents in relation to Vodafone's personal data? BUT

E.2 Are the processes for reporting security incidents and tracking logs on personal data

of Vodafone communicate in your organization? BUT

E.3 Are reports of security incidents and data breaches investigated internally on a regular basis?

security of personal data, including the review of lessons learned and identifying how many

Incidents have occurred in the last 12 months? BUT

E.4 If there has been any security incident in the last 12 months that has had an impact on the

Vodafone personal data Has Vodafone been notified? BUT

E.5 Is someone in your organization responsible for managing incidents and reporting incidents?

the same to Vodafone? BUT

E.6 Does the process include the obligation to notify affected customers within 24 hours, as could be

Vodafone to allow customers to investigate and make the corresponding notifications to the

regulators before the 72 hours established by GDPR? BUT

THREADS

F.1 Is there evidence of due diligence processes for the selection of subcontractors that include

a review of technical, administrative and physical controls concerning data protection

personal? BUT

F.2 Do you ensure that you have the agreements and contracts with your subcontractors with the same or equivalent

obligations, as required in the contract with Vodafone, in relation to the processing of

personal information? BUT

F.3 Would you provide Vodafone with a list of the sub-processes involved or who would be involved?

in the processing of personal data by Vodafone? BUT

F.4 Is there a procedure to inform clients when there is a change to a thread used

by the main process in the processing of personal data? BUT

F.5 Is there a return strategy with all subcontractors to return personal data

used by the thread? BUT

LOCATION OF PERSONAL DATA PROCESSED

G.1 Are the employees who process the personal data of Vodafone in the Economic Union

European? BUT

G.2 Are the employees who process the personal data of Vodafone outside the Economic Union?

European? BUT

G.3 Are the employees who process Vodafone's personal data located both in the Economic Union

European and outside the European Economic Union? BUT

G.4 Does Vodafone process personal data in its own data centers located in Europe? BUT

G.5 Does Vodafone process personal data in its own data centers located outside Europe?

BUT

G.6 Does Vodafone process personal data in third party data centers located in Europe? YES

NO

G.7 Does Vodafone process personal data in third-party data centers located outside of

Europe? BUT

G.8 Does Vodafone process personal data in public cloud data centers such as Amazon AWS?

BUT

G.9 Do you know the location of all Vodafone personal data and how/when it is used in all

the jurisdictions where it operates? BUT

G.10 Do you ensure that all standards and procedures in the locations/jurisdictions where you

or its subcontractors operate are appropriate and in any case are at least comparable to the

standards and procedures that you agreed with Vodafone? BUT

G.11 Do you transfer personal data from Vodafone to any country outside the European Union? BUT

G.12 If Vodafone personal data is transferred to a location such as: Non-member countries

to the European Union or countries that are not included in the list of "Safe Countries" by the European Union,

Are you prepared to sign a data transfer agreement with Vodafone based on the clauses

of the European Union Model for export and import? BUT

DISCLOSURE TO THIRD PARTIES

H.1 Is there a procedure defined to evaluate the legitimacy or legality of the requirements of

disclosure of personal data received from third parties including agencies in charge of

ensure compliance with the law? BUT

H.2 Are the employees who receive and process such requests aware of that process? YES

NO

H.3 Does the process have all the guarantees to be securely registered? BUT

H.4 Does the process require an assessment to be performed to enable customer notification of the

request of third parties on the request for access or on the disclosure of the personal data of the

client? BUT

H.5 Does the process establish who could notify the client of the request of the third party to access or

disclose customer personal data? BUT

CONTRACTS AND RESOURCES

I.1 Would your company be willing to sign a data processing agreement with Vodafone in the

terms established by Vodafone to regulate the process? BUT

I.2 Would your company formalize an agreement with unlimited liability for the breach of the obligations

contractual in the processing of personal data? YES NO>>

Therefore, any entity requesting to join the TVTA platform must

carry out this homologation before contracting with VDF and joining the platform

from TVTA. This homologation process consists of completing a form

where you get an “OK” (valid) or “KO” (invalid) response. In the event that the

result of the form is "OK", VDF generates a code called "SAP" which is the

that is attributed as an identifier to the new entity and allows it to enter into contracts in

VFD name.

VDF has the services of a third company that performs quality audits

(not specifically in terms of data protection) to verify the correct

proceed from the contracted entities and compliance with the processes defined in

the contracts.

C.- The Department of Distributors/Collaborators/Agents is divided into several sales channels: Channel “Door to Door” (D2D hereinafter), “online channel”, “corners physical in shopping centers and establishments”, among others.

There are exclusive agents who sign <<Agency contracts>> with VDF, in where a general content annex is always included regarding compliance with the data protection regulations, delegating the responsibilities on the Compliance with legal obligations to agents. There are also entities that do not sign an Agency contract.

Regarding the D2D channel, two scenarios must be distinguished when analyzing its action, one referred to before the acquisition by VDF of ONO (on the date 01/10/2018), and another later.

In the first scenario, the VDF agents carry out collection actions “at the door cold" to potential customers in whose homes there is the possibility of installing VDF fiber optic technology. After acceptance of the offer by the potential client, the agent shows on his Tablet the contractual conditions of the service to contract that are accepted by the user, and subsequently occurs a verification call by the verification entity Marktel.

In the second scenario, Distributors/Collaborators/Agents sell through of stands in shops and on the street, which in turn also reach <<agreements with other telemarketing and commercial agencies>> (subprocessors of treatment by

VDF account) for the effective realization of telephone calls and that manage

<<your own listings>> of telephone numbers of potential clients.

These subcontracted <<other telesales and commercial agencies>> are not subject to

a prior homologation process -as do those assigned to the platform of

TVTA- but currently work continues with those that already provided the

service in ONO before the merger with VDF (on 01/10/2018) and there is no evidence that

have verified the technical and organizational means at their disposal.

In these cases, VDF does not know the identity of the entities (other

telesales and commercials) subcontracted by the Distributor/Collaborator/Agent and

unaware of the guarantees of a technical or organizational nature that they have. The

information regarding the identity of these subcontracted entities must be included in the

the annex to the contract (subcontract) established for this purpose, but it only appears once

subcontracting, that is, VDF is previously unaware of the qualification

technical and organizational information and the identity of these subcontracted entities as well as their

ability to comply with current regulations.

Of the clauses of the standard contract called "On-site Channel 2019-2020" (by

example, with CASMAR of May 1, 2019) signed between VDF and the entities

attached to the TVTA platform, there is an obligation to previously communicate to

VDF the list of sub-processors on behalf of VDF that are going to use the

distributors/collaborators/agents. This communication is collected, among others, in the

clauses 5 (resources) and 6 (characteristics of the activity) of the aforementioned contract (it is

included in the file). Only in clauses 13.4 and 13.5 of the aforementioned contract is

reference to the obligation to comply with data protection regulations

in the following terms: "... without prejudice to the obligations assumed by the

COLLABORATOR in compliance with the Data Protection legislation in force in

every moment…" (sic). Clause 13.6 expressly states that the

“collaborator will be considered the person in charge of the treatment and must

formalize the standard data processing agreement that is attached as an annex

IV…”.

However, this communication to VDF of the subcontracted entities has a

a posteriori declarative character and is not subject to prior approval by VDF nor does it have

reflected the possibility of exercising the rights of the interested parties. The purpose of

this declaration, according to VDF, is fundamentally to have

information when malpractice is detected.

The contracts, allegations and communications between two of the

distributor entities/collaborators/agents (CASMAR and THE THREE QUARTERS

FULL S.L.,) as well as the process by virtue of which VDF is aware of the

entities in turn subcontracted by those, and it is concluded that it does not meet the

requirement of prior authorization by VDF, but that VDF is aware in the

time of contracting after completing the informative ANNEX established at

effect as it is necessary to <<register>> the interveners (sub-managers

treatment on behalf of VDF).

Once the aforementioned ANNEX has been completed, registration with VDF of the entity to be subcontracted is requested.

and are collected: name and surnames (or business name), CIF/NIF and email, and it is in

that moment when VDF has knowledge of the identity of the entity

outsourced. No evidence has been found that clauses 5 and

6 of the contract called “On-site Channel 2019-2020” signed between VDF and the

entities attached to the TVTA platform. It is recalled that these clauses,
(they appear in the documentation of the file) are found in the "contract of
provision of face-to-face channel services" between VDF and Casmar dated 05/1/2019, and
which, according to VDF, is a standard contract signed with the entities in charge.
In turn, there is also the contract between Casmar and A-Nexo Contact Center SAC, of
date 02/1/2017, in which the services of sale of products of
VDF through telephone telemarketing offers, according to the script provided by
Casmar.
VDF does not provide detailed documentation regarding guarantees of protection of
data of the contract that supports the relationship between the initial distributor and the
subcontracted nor the guarantees for the fulfillment of the assignment. As reported
VDF, the contract is similar to the one between VDF and the initial affiliated distributors
to the TVTA platform. VDF includes as a generic contractual obligation that
transfer the instructions to the <<third parties>> (sub-processors of the treatment by
VDF account), so that the marketing actions are carried out in the terms
indicated by VDF, but without guarantees to prove compliance.
The contracts between the VDF distributors (CASMAR and THE
THREE QUARTER FULL, S.L.) with <<third parties>> (sub-processors of the treatment by
VDF account) and it is verified that they are not similar to the one that VDF has with the
distributors attached to the TVTA platform. Two modes can be distinguished
in relation to the determination of the origin of the data and the obligation to consult and
filtering of exclusion files and exercise of rights (opposition):
The first, in which VDF contracts with CASMAR and the latter subcontracts with A-NEXO,
which in turn subcontracts with other natural and legal persons who are the ones that
they actually make the calls. In this case, the data used for the
making calls, according to CASMAR, is provided by A-NEXO; However, in

the contract states that it is CASMAR who provides the data. In this sense, the

Marketing actions object of this contract are carried out by A-NEXO with

a data file provided by CASMAR and nothing is indicated on consultation

prior and filtering with the files of exclusion or exercise of rights. in said

contract (seventh clause) contains the express prohibition of subcontracting with

individuals or legal entities without the prior express written consent of

CASMAR.

It appears as a response by CASMAR to the request for information made

by the Inspection of this AEPD on 09/11/2019, that the calls from the

numbering ***TELEFONO.2 and 954781254 were made by A-NEXO. As for the

destination numbers, CASMAR states that they are random. They are added to the file

sample title, four emails between CASMAR management and A-NEXO

on complaints to the AEPD of improper calls as the

numbers in exclusion lists. Among others, from CASMAR numbers

920211348, 951117277, 958146834, 679905774 and 954781254, to the numbers

***PHONE.1, ***PHONE.2.

The second, in which VDF contracts with THE THREE QUARTERS FULL, S.L. and this

subcontracts in turn with other natural and legal persons who are the ones who carry out

materially the calls. In the contributed contracts signed between THE THREE

QUARTERS FULL and the sub-processors on behalf of VDF do not appear

any indication regarding the obligation of prior consultation and filtering with the

exclusion files or with those of exercise of rights. Nor is the origin of

data for making commercial calls.

Origin of the data used by VDF for the actions of

1.2.

marketing and filtering obligation with Lista Robinson Internal and with Lista

Robinson of Adigital

The origin of the data used by VDF for marketing actions may

be grouped into five large groups: (i) generation of random numbers (ii)

databases rented to third parties (iii) records generated through the online channel

(web`s) (iv) non-VDF databases of distributors/collaborators and (v)

VDF databases used by distributors/collaborators

1.2.1.

(i) Generation of random numbers:

Numbers are generated from different numerical ranges at the discretion of VDF,

either for fixed or mobile numbers. In these cases it may happen that a

user has exercised the right of deletion/opposition and after the random generation

the data relating to the landline or mobile phone is once again included in another campaign.

Many of these called numbers do not exist or are not assigned to any

person. In any case, these numbering databases generated

randomly, before being used for commercial actions they are crossed by VDF

with both internal Robinson lists and LRAD, as long as the exercise of the right

before a certain collaborator has been informed to VDF, circumstance this last

that does not appear in the signed contracts nor is it accredited, so in this case

calls are repeated.

1.2.2.

(ii) Databases “rented” to third parties.

Databases <<rented to third parties>> are used. In this section you can

basically two origins can be differentiated: those from DATACENTRIC PDM,

S.A. and those from MEYDIS S.L.

In the first case, the DATACENTRIC entity is an intermediary between VDF and the

owner of the database (there are several owners that provide this service to

DATACENTRIC, such as: WEBPILOT, BELEADER, ADSLASA, EGENTIC, LNVISTO,

PRESENT SERVICE, NETSALES, etc.,). As reported to VDF, the holders of the

data provided in these databases of potential customers have given their

consent to receive commercial information. However, the circumstance of

have express consent to receive commercial offers through

electronic communications (email or SMS) has not been accredited, nor

even by statistical procedures such as through samples

representative.

Regarding the mechanics of working with DATACENTRIC, it is the following:

A global order is made by VDF that is executed monthly. The request

made via email by the VDF internal Marketing Department indicating

segmentation (for example, by zip codes, type of access technology

installed in the building...). Received response from DATACENTRIC with the budget,

which has previously transferred the request to its collaborators, it is reported, among

other issues, how long the database can be used.

These databases are already filtered by the general Robinson Listings

(Adigital).

In the second case, the MEYDIS entity provides VDF with databases

published in directories of subscribers to telecommunications services.

Generally the period during which the data can be used is one year. In

There is no contract for this service because it is less than the amount determined by

the purchasing department so an order is placed according to the conditions

terms of contracting for this type of amounts. VDF requires MEYDIS to

requirement that the data is adequate to carry out marketing actions.

Once the databases have been received by VDF, the crossover with LRI and LRAD is carried out.

1.2.3.

(iii) Data obtained through web pages, On/Line Channel, generation of

“leads”.

From web pages of VDF or third parties (for example, through banners)

obtain data from potential clients who are interested in VDF services and

They provide their contact information accepting a certain privacy policy, which

may be for specific products or services on issues raised regarding

to the availability of fiber coverage at your home, or for commercial actions

future.

Also included here is data obtained from callers

directly to VDF requesting information. These personal data thus collected

-called “leads”- are incorporated into the <<lead management tool>> called

DELIO, to then be contacted in accordance with the accepted privacy policy

at the time of providing the data on the VDF website and that may involve two

possibilities, one referring to receiving concrete information and the other to being a recipient of

future commercial communications.

With the DELIO tool it is possible to answer the user automatically since

visualizes directly to the operator the web or the channel in which the user has made

the consultation and has accepted the privacy policy.

If finally the user does not contract the service after receiving the call from DELIO,

create a record in the “lead management”, in accordance with the privacy policy

accepted by the user when providing their contact information. It may happen that the data

have been incorporated to receive information on a specific product or service and, in

change, the check related to the use of data in future actions has not been marked

commercial.

These leads are subsequently contacted through different means: calls

from the TVTA platform, SMS or Email.

However, for a "lead" to be incorporated into DELIO, it must have been produced at

minus the contact call. These leads are contacted within a maximum period of 48

hours, and are made by prior request of the interested party and, after this period, is sent

an SMS informing that an attempt has been made to contact without success by providing a number

where you can contact VDF again.

Regarding the data incorporated after having carried out a coverage query

of fiber, it is observed that the coverage consultation process has been modified

with respect to the existing one in the month of July 2019.

In the tests carried out in the month of July 2019, it is verified that it was requested,

In addition to the address with respect to the domicile where the query was intended to be made, the

name, surnames and telephone number and a privacy policy was offered with two

possibilities: (i) accept the processing of data to respond

exclusively to what was requested, in this case, whether or not there was fiber optic coverage –

the contact data could be provided through the website itself in that

moment, without needing to know name, surnames and telephone; (ii) in addition to the

above, accept the treatment for other commercial purposes.

In the month of September 2019, it is verified that initially only

data relating to the address of the domicile where the query is to be made, and if the

process cannot be completed (for example, the address is not in the database).

coverage information, written in another language or incorrectly, is a number of

route that does not exist, etc.,..), the website offers the option of a contact system

“click to call”, and it is at this moment that the name and telephone number are requested, putting

disposition, some acceptance check of the privacy policy.

With the different data sources indicated (random, databases rented from

third parties and lead generation) VDF's internal Marketing Department filters the

data with LRAD and lists of exercises of rights, and sends it to the Department

TVTA intern. The TVTA Department leaks the data a second time

after segmenting them for distribution among the different <<calls center>> services

subprocessors of the treatment on behalf of VDF that materially carry out the

calls. Some entities that make up the TVTA platform have their own

LRI that are also subject to prior confrontation and filtering. In order to prevent the

over time variations occur in the database (referred to

people who have subsequently exercised the right of opposition), the platform of

TVTA will use the databases for one month only.

In short, in the three cases indicated, the owners of the data are

contacted by the Marketing Department or by the TVTA Department at

through the different entities that make up the platform, always using the

LRAD filtered databases and lists of users who have exercised their rights.

1.2.4

(iii)

Non-VDF databases used by

the

Distributors/Collaborators.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

This possibility occurs only in campaigns managed by "third parties" using

personal databases not provided by VDF.

VDF does not know the adequacy to the legality of these external databases and has not

accredited its legality, not even indirectly, such as by carrying out

sampling in order to contrast the consent of the interested parties, since VDF

understands that "it is up to third parties to control its legality as long as they are

responsible for them" (origin of the data, actions to prove the

consent, filtering with both LRs, attention to the rights exercised, etc.,).

In connection with calls made by these agents/distributors (and where applicable,

other sub-processors on behalf of VDF) when a right is exercised

of opposition during a call, this exercise is not transferred to VDF, but

included in the LRI of the agents/distributors.

The obligation to consult the LRAD by distributors is not provided for in

the contract signed between VDF and the distributors. Whether or not to check the LRI lists,

LRAD or rights exercises, it is a circumstance that VDF is not in

disposition to verify and, moreover, VDF understands -since it affirms it in several occasions- which is exclusively the responsibility of distributors in compliance with the current regulations on data protection.

In the contracts analyzed between the distributors and the sub-managers of the treatment on behalf of VDF, no clauses have been found that determine this obligation to consult prior to exclusion lists and their filtering.

It is clear that the distributors do not previously check the database used for commercial actions with the LRI of VDF. It may happen that an interested has exercised the right to object before VDF and, despite this, a distributor repeat the call.

It has also happened that a claim against VDF has been processed before the AEPD and that it has been resolved by urging VDF to inform the affected party that their Data has been included in LRI and, having communicated this circumstance to the affected party, with subsequently the call is repeated by one of these distributors. This is due to that there is no adequate communication on the part of VDF with the distributors and subprocessors of treatment on behalf of VDF.

VDF has established communication protocols through emails for distributors and sub-processors of treatment on behalf of VDF -in case that they exist- related to the reminder that they cross the databases to be used with the LRAD, which is known to have been ineffective.

Regarding the guarantees of legality in the use made by the distributors/collaborators of the databases, in the letter dated 04/26/2019 VDF stated that these communications are made with the following content:

<<(...) if the database used by the collaborator belongs to his -of the collaborator- property, Vodafone requires that, in the first place, they have the authorization of Vodafone to use that database in a campaign carried out in the name and by

Vodafone account. Second, they are required to have obtained the

informed consent of the holder. And, thirdly, that they filter their base of

data with the official Robinson lists.

Likewise, they must provide a simple means so that the recipients of the

campaigns can exercise their right to object to continue receiving calls

or commercial communications. (…)>>

In the inspection carried out at the VDF headquarters on September 18 and 30, the

VDF representatives clarify the following: << (...) (i) there is no authorization

regarding the use of external databases, that is, those of the distributors and by

therefore there is no authorization process, but information is requested in the case of

use these databases. (ii) VDF is not in a position to verify that

the holders of the receiving lines have given their consent or have not

opposite, since it is an obligation that corresponds to collaborating agents, (iii)

VDF does not ensure that each call offers an effective means of exercising

right of opposition.

1.2.5.

(v) VDF databases used by the Distributors/Collaborators/.

Sometimes distributors/collaborators make use of databases provided

by VFD. In these cases, there are communications (which are indicated later) by

part of VDF referring to the obligation to use only these databases (for

be already filtered with LRAD and exercise of rights). However, there is no

no procedure enabled or controlled by VDF aimed at verifying that

only its distributors, and not others, use the database that VDF has provided

provided and during the periods indicated.

Measures taken by VDF in relation to the complaints received

two.

and after learning of the existence of inspection actions initiated by

the AEPD.

Most of the complaints received are for campaigns that it does not manage

directly VDF (those managed directly by VDF are those carried out through

your TVTA Department or the Marketing Department), but are about

campaigns managed by third parties, that is, distributors / collaborators and in their

case sub-processors on behalf of VDF by them.

Regarding the adoption of measures, general measures can be distinguished, and others

more specific in relation to certain claims, consisting of requesting

distributors the inclusion of specific numbers in the LRI when it has already been

produced the call(s) or after a request from the AEPD, and are summarized in the

following:

In the month of November 2018 and in the month of July 2019,

-

NOTICES to the affiliated entities of the TVTA platform, and to the

Distributors/Collaborators, respectively, in order to remind them of the obligations

in terms of data protection, differentiating between two cases:

a)

In case of using VDF databases: these must be used during the

stipulated time and exclusively for the indicated campaign, since they are filtered

by LRAD and list of exercise of rights. If they are subsequently used in

future campaigns are warned that they may be out of date.

a)

the

distributors/collaborators (outside VDF): they must ensure that they have

In case of using own databases of

with the prior and express approval of VDF to make such calls; that

They have the data in a lawful manner and obtaining the express consent of the

holders, being prohibited the use of databases that do not meet these requirements;

filter your databases with LRAD and do not use means of communication that do not

have been consented by the recipients of the campaign.

In the inspection carried out at the VDF headquarters on September 18 and 30,

2019, the VDF representatives stated that no

checks on compliance with the measures indicated in the

previous communications.

In November 2018, VDF created a numbering database

callers (distributors and their sub-processors on behalf of VDF) in order to

to be able to identify who is making the calls.

In the month of July 2019 this database has increased notably, in the

to the extent that in the contracts signed with the "On-site Channel 2019-2020" it has been

included a clause that imposes as a mandatory condition the prior identification of

the numbers from which the commercial calls will be made.

The communications between VDF and its distributors have been added to the file

requesting the identification of the sub-processors of the treatment on behalf of VDF and

the numbers that are going to be used, all of them being from the month of September

2019. This numbering database has also been added to the file

callers updated as of July 2019.

Another of the measures that are being studied is to carry out to prevent the

make calls from unidentified numbers, call routing

only through VDF's internal network, also integrating the "crossing" with the

numbers included in LRAD and list of exercise of rights, so that

have an effective control of the calls made on your behalf, which goes through the

identification of the caller and for the exclusion of commercial actions to users

who have expressed their opposition or through their inclusion in files of

exclusion of advertising actions of an internal or external nature.

Therefore, in the future it will be an essential condition to provide the service to VDF

use VDF trunks in order to be able to carry out certain restrictions (lines

callers, schedule, LRAD, opposition rights, etc.,). The web interface will connect

with the VDF dialing system to previously validate the call.

VDF begins to raise this idea at the end of May 2019 and in the months of June

and July is communicated to collaborating agents. Meetings are held in the month of

September 2019 and in October the tests will begin with an entity to

later implement it in the rest.

In this sense, communications between VDF and collaborators are provided in the following

sense: <<Subject: Meeting this morning the commitments that have been

acquired CASMAR, THREE-QUARTER, SOLIVESA in connection with the shipment of

communicated to collaborators, ensuring that databases are filtered

data with LRAD, and the adoption of measures to audit that said collaborators

they comply with the processes>>. And it is also mentioned that <<we will work together to

implement the call routing platform that we have discussed>>. To

current date there is no evidence that this routing protocol has been implemented

from the VDF trunk and at the date of the initial agreement, of the 191 claims

filed, 26 claims date from the month of September 2019 to January

2020.

There are other measures related to the sending of communications by VDF to

distributors about specific complaints in relation to the calls, to

that the numbers of subsequent commercial actions are excluded.

By way of example, they are provided to the Inspection Record E/01615/2019/I-01 as

document number 21, various communications consisting of requesting the

distributors the inclusion of certain numbers in Robinson lists (internal and

AD), when the call(s) have already been made and after a request from the AEPD.

VDF reports that it has not filed a complaint with the Police regarding calls

undue to the extent that VDF is not certain of the identity of the holder of the

calling number acting on your behalf.

In the relationship between VDF and distributors/collaborators, it is not a requirement for the

payment of your commission verifying the number from which the deposit was made

of the client (calling numbering), but the verifications are limited to the

compliance with the requirements of contracting the product or service.

3. Procedure for obtaining data from recipients and exercising actions of

marketing in relation to the sending of commercial communications by

electronic means (SMS):

The numbers intended for sending SMS are generated randomly without

any discrimination for which commercial communications have been sent

electronic communications to potential customers without the concurrence of the requirements set forth in the

Article 21 of the LSSI (expressly authorized). SMS shipments are made by

directly VDF.

4. Sampling of evidence of non-compliance with current regulations regarding

protection of data obtained in relation to the operation of the process

described in the previous sections.

4.1- Commercial actions after a claim procedure resolved in the AEPD

where VDF states that it has included the data of the affected party in the LRI.

On the date of 05/03/2019, by (...) a letter is presented to this agency in which

□

indicates that "I filed a claim with the Spanish Agency for Data Protection

on September 11, 2018 (Registration No.: 193763/2018), which I attach, because

we received unsolicited commercial calls from Vodafone to the landline. Nope

We were and are not Vodafone customers, and we were and are on the Robinson List.

The AEPD replied to me (files E/07212/2018 and E/05851/2019) that Vodafone

Spain, S.A.U. had informed them "that they have been included in their list

Robinson, in order to ensure that the claimant is not included in future

commercial campaigns of Vodafone", (...)

Well, the situation, with the inconvenience it entails, continues to occur,

calling us to the landline telephone operators of this company to offer us their

unsolicited commercial services, (…)

 On the date of 05/29/2019, by (...) a letter is presented to this agency in which it indicates

that (files E/10150/2018 and E/07447/2019) VODAFONE, by letter of

date 02/28/2019 communicated the inclusion of your data in the internal Robinson list to

in order to prevent your phone number from being included in future campaigns

commercial. It states that from 05/15/2019 to 05/24/2019 they have followed

producing commercial calls for VODAFONE.

Provides recording of two calls received on 05/24/2019, in which

check the following:

On the first call, the telemarketer asks for the claimant, and after repeated

questions of the claimant, is identified as (...) of the company ONO VODAFONE

to offer discounts on services, the claimant, after explaining that he is

on the Robinson list and that VODAFONE sent him a letter informing him of such

circumstance, the telemarketer communicates that they will continue to call him.

On the second call, the telemarketer asks for the owner of the line, and after

repeated questions from the claimant, identifies himself as (...) from the company ONO

VODAFONE. the claimant states that he is on the Robinson list. The

teleoperator states that they do not consult the Robinson list file.

E/03445/2019, whose affected party is (...), denounces the reception of calls from

line 912001212 in the month of February 2019 (files E/09407/2018

E/03445/2019 E/07055/2019) where you have already identified, among others, as the calling line the

same numbering that continues to make calls, and in whose file

VODAFONE declared the inclusion of its data in the internal Robinson list and the sending of

communicated to their distributors.

In file E/03367/2018 (and subsequent E/03964/2019) the

reception of calls from lines 911251946 and 955316972, in which

VODAFONE declared the inclusion of its data in the internal Robinson list, and the sending

of communications to its distributors, reiterating again the calls on the date

later.

E/03978/2019, denounces the reception of calls from the telephone number

935085190 on 03/11/2019, having as background the procedure of

claim E/07329/2018 and in whose file VODAFONE stated the inclusion

of your data in the Robinson list, in addition to knowing your inclusion in the Robinson List

Adigital, and sending communications to its distributors.

E/03980/2019 and E/07960/2019, whose affected party is (…), denounces the receipt of

calls from the telephone number 954781254 on dates of 03/12/2019 and

04/01/2019, having as background the claim procedure

E/10149/2018 and in whose file the claim was transferred to VODAFONE

where, in addition to revealing the facts, the inclusion in the list was reported

Robinson of Adigital.

E/07106/2019, the claimant receives calls from the numbers

764255362, 953230927, ***TELEFONO.2 and 953241849, the last one on the date of

06/10/2019, being in LRAD since 03/19/2019 and in LRI since 04/8/2019. VDF not

has been able to identify the ownership of the calling lines, as it does not appear in the database

data created for this purpose.

4.2- Commercial actions carried out from the numbers ***TELEFONO.2 and

954781254 by the distributors CASMAR and THREE QUARTERS FULL S.L.

Given the volume of claims (191 claims included in the file)

that have the indicated numbers as calling lines, have been carried out

proceedings expressly directed at analyzing VDF's relationship with CASMAR and

THREE QUARTERS FULL S.L. (TQTF hereinafter), the procedure for obtaining

of the data, and compliance with the obligation of prior consultation with the lists of

exclusion.

17 claimants have been found that show commercial actions carried out

from the number 954781254, and 19 claimants regarding those carried out from

the numbering ***TELEFONO.2, even though the numbers of the recipients

were included in LRAD, or have exercised their right to object against VDF and

listed on your LRI.

VDF states and insists again that the consultation with the LRAD is the responsibility of the

third-party distributors because they are responsible for the databases and that, if

Although this obligation is not stated in the contract, through communications they have made

awareness raising in this regard. CASMAR states that it is the entity

supplier "A-NEXO" the one that provides the Robinson list and has not transferred them

no right of opposition received after making calls. However, in

the contract signed between both entities states that the Robinson listings are

contributed by Casmar.

CASMAR uses different providers, including A-NEXO, both for

provide the database used to make the calls, which in turn

time contracts with commercial sub-processors on behalf of VDF to

making calls effectively.

This scheme of participants outlines various levels of action:

Level I.- VDF is the one who contracts with the entity CASMAR (and this, if applicable, with other

collaborators) carrying out commercial actions to attract customers. The

database to be used can be provided by VDF or by CASMAR that the

obtains on its own (from other collaborators).

Level II.- CASMAR subcontracts to the A-NEXO entity (and this, if applicable, to other

collaborators) making commercial calls. CASMAR informed the AEPD

that the data used is provided by A-NEXO and, however, in the contract that

provided figure that the data is provided by CASMAR.

Level III.- A-NEXO in turn subcontracts commercials to make calls,

both legal and natural persons.

Level IV- Commercials contracted by CASMAR, in turn, make the calls for their

bill.

VDF only has a legal relationship with CASMAR and with respect to the other

levels, is informed in different temporary spaces and not as part of the contract

of the identity of the other collaborators. On the knowledge by VDF of

the sub-processors of the treatment on behalf of VDF, CASMAR provided the

contractual documentation where the list of sub-managers of the contract appeared “blank”.

treatment on behalf of VDF that VDF had to approve, stating that it is in

<<white>> due to the dynamism with which they are replacing and updating the

call center

CASMAR provides a list of sub-processors on behalf of VDF

as Annex I to the contract "On-site Channel 2019 2020" dated 05/1/2019 that has

signed with VDF, among which is the entity A-Nexo.

It should be added that in Annex I of the aforementioned contract between Casmar and VDF, there is a

list of 15 subcontracted entities and natural persons called "list of

approved sub-managers” (sic), among which is the entity A-Nexo, in the

stating that the "current location of treatment" (sic) is in Peru. According to

It is stated in the contract signed between Casmar and the subcontractor A-Nexo, the

Exclusion listing numbers are provided by Casmar. Said Annex I

it is signed by Casmar and VDF dated 05/01/2019. It is not accredited

that have a contract that contains the mandatory contractual clauses

type of the Decision of the Commission, of February 5, 2010, relative to the clauses

contractual types for the transfer of personal data to those in charge of the

treatment established in third countries.

For its part, TQTF stated that VDF is aware of the sub-managers of the

treatment on behalf of VDF only at the moment in which your access to

the VDF contracting platform. That is, TQTF requests the registration to VDF of the

subprocessors of the treatment on behalf of VDF to be able to carry out the

contracting (VDF provides them with a user to access the contracting platform).

Therefore, so that the commercial sub-processors of the treatment on behalf of VDF

can register new lines, VDF must have granted access to a

certain application of “highs”. VDF does not require any type of verification to

commercial sub-processors on behalf of VDF on the data to

use in commercial calls, but is limited to creating a user with

password, at the request of CASMAR or TQTF, which is communicated to commercial or

to the final distributor to be enabled to register contracted lines.

VDF is aware of the filing of claims with the AEPD, since since the month of

November 2018 they have been transferred from the AEPD and it is not until

month of July 2019 when he communicates it to the distributors (since he already did it in the

November 2018 for the entities that make up the Internal Department

of TVTA).

They are examples of these actions in which they have not used numbers

previously filtered with the advertising exclusion lists nor have they taken into account

the rights of opposition previously exercised by those affected made before

CASMAR or VDF, the following:

E/07147/2019: The claimant receives commercial calls, the last one on date

□

of 06/12/2019 after having exercised the right of suppression against VDF on the date of

05/08/2019, and in VDF LRI since 05/09/2019.

E/07144/2019: The claimant receives commercial calls, the last one on date

□

of 06/05/2019, after having exercised the right of opposition, appearing in the LRI of VDF

from 04/02/2019, the mobile line, and 08/20/2018 the fixed line. Also in LRAD from

March 2019.

E/7765/2019: The claimant receives commercial calls, the last one on the date of

□

06/07/2019, after having requested the deletion against VDF on 06/02/2019 and

be registered in LRAD since 11/14/2017.

E/7758/2019: The claimant receives commercial calls, the last one on the date of

□

06/26/2019 listed in LRAD since 10/22/2018. In this case, the dealer

caller is TTQF in the name and on behalf of VDF.

These claims show that the distributors and sub-managers of the

treatment by VDF have not used previously filtered numbers

with the advertising exclusion lists nor have they taken into account the rights of

opposition previously exercised by those affected.

VDF insists again that it does not contemplate in its contracts with distributors

the obligation to consult the LRAD as it is understood that this corresponds to the holders of

the databases to be used, and as VDF has stated, the databases used are not

filter against internal exclusion listings.

4.3- Sampling of evidence of non-compliance in relation to campaigns

managed directly by VDF.

These actions are considered "directly managed by VDF" since the entity

making the call is one of those that make up its own TVTA platform.

VDF has a process so that both the TVTA platform and the

Marketing Department, use only databases that contain data

of lines that are not registered in LRAD and lists of exercise of rights. Nope

However, the treatment of the data followed by VDF is deficient as

credit below:

From number 607100219, which belongs to KONECTA (belongs to the

TVTA platform) calls have been made that have given rise to different

claims for being included the data of the claimants in LRAD, to

Examples are listed below:

E/03455/2019: the number ***TELEFONO.3 has been registered in the LRAD since

□

March 2017, and the calls occur in March 2019.

E/1845/2018: which gave rise to the sanctioning procedure of reference

□

PS/290/2018 for calls made in 2018 to a number that

been listed in LRAD since 2013 and to the new current claim of

reference E/03821/2019. In the aforementioned sanctioning procedure, the entity recognized

responsibility for the reported facts and was sanctioned for an infraction with

fine of €12,000, taking advantage of a 40% reduction in the amount.

4.4- Sampling of evidence of non-compliance in relation to the sending of

commercial communications by electronic means (LSSICE) by account and name

of VDF.

As indicated in section 4, VDF stated that SMS have been sent to

randomly generated numbers, which prevents verification of compliance with the

provided in art. 21 of the LSSI, specifically the requirement to request “expressly

authorized”, considering all the recipients <<potential clients>>.

Below, of the 25 LSSICE files, some refer to the

Fraudulent sending of SMS:

E/03977/2019

RECEIVER NUMBER: ***PHONE.4 ***PHONE.5

OPPOSITION: 07/05/2018

DATE OF THE SMS:

07/05/2018, 10/20/2018, 10/21/2018, 02/11/2019 and 02/15/2019

E/02050/2019 and E/08132/2018

RECEIVER NUMBER: ***TELEPHONE.6

OPPOSITION: 8/10/2018 ATTENDED BY VDF

DATE OF THE SMS:

02/04/2019, E/2050/2019 (Precedent E/08123/2018, December 27, 2018, letter to

claimant)

NO. RECEIVER: ***PHONE.7

OPPOSITION: THROUGH CLAIM AEPD

DATE OF THE SMS:

12/22/2018, 02/01/2019, 01/30/2019

E/00126/2019

NO. RECEIVER: ***PHONE.8

OPPOSITION: OCTOBER 2018

DATE OF THE SMS:

11/05/2018, 11/30/2018, 12/28/2018

NO. RECEIVER: ***PHONE.9 ***PHONE.10 ***PHONE.11

OPPOSITION/CANCELLATION: 08/25/2018; 07/10/2018 AND ROBINSON.

DATE OF THE SMS:

08/25/2018, 09/06/2018, 09/23/2018, 10/30/2018

5. The on-site inspection actions carried out in relation to the

claims received at the AEPD in order to determine the adequacy of the

procedure for managing marketing actions carried out by

account and name of VDF appear annexed to the Inspection Act and in the documentation

of this file that was duly notified to the representation of the

investigated (VDF).

THIRD: On February 26, 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 28 of the RGPD in relation to the

article 24 of the RGPD punishable in accordance with article 83.4 of the RGPD, for the alleged

Serious violation of article 21 of the LSSICE, typified as serious in article

38.3.d) and c) of said rule, for the presumed infringement of article 48.1.b) of the LGT,

considered serious in article 77.37 of the aforementioned regulation.

FOURTH: Having been notified of the aforementioned initiation agreement, the respondent filed on

03/04/2020 letter requesting a copy of the file and extension of the deadline to

purpose of submitting claims. Granted the extension of the term, the

file to the investigated presenting allegations on 06/09/2020 (when

affected by the suspension of deadlines as a result of the establishment of the

state of alarm) which are set out, in summary, in the following terms:

The notified files include those affected who are people

1.

legal.

The statement of facts in the Initiation Agreement makes it extremely difficult to analyze and

two.

carry out a detailed examination, which may undermine the right to self-defense.

3.

Due diligence in the terms of article 28 of the RGPD refers only to

the contracting phase with the person in charge and should not be understood with respect to the

subsequent follow-up of the contract.

Four.

Suppliers contracted by VDF from the internal telesales department

have passed a prior validation process and are subjected to processes of

audits justifying the technical and organizational measures with which

account for the development of the contracted service.

5.

Regarding external providers using their own databases: these

Providers do not act as data processors but as

responsible for their own databases since these personal data are

collected on behalf of the supplier and not on that of VDF.

6.

Regarding external providers using databases provided by

VDF: VDF complies in the contracting with those in charge of all the requirements

established in article 28 of the RGPD and these providers meet the conditions to

to comply with its obligations, not existing lack of the duty of diligence for what

that it is not appropriate to question the effective execution of the obligations

contractually assumed.

7.

Regarding the regulation of the contract between the person in charge and the person in charge of the

subcontracting carried out by the person in charge, in the Guide of the AEPD it is

recommends the application of certain clauses such as the one used by VDF. in said

clauses indicates that it is up to the initial manager to regulate the new relationship and

with the same formal requirements as with the controller.

8.

The need for prior express authorization of the subprocessors is not a

mandatory requirement, but article 28.2 indicates that the person in charge must inform the

responsible and, where appropriate, authorize it, thus giving the responsible the option of

stand against. This aspect is not considered in the AEPD Guide (option B).

9.

According to the DT5ª of the LOPDGDD, contracts prior to 05/25/2018

will remain valid until 05/25/2022, so their content cannot be

required as it is not applicable.

The exhaustive control of the person in charge over those in charge would prevent “the

10.

may dial an unauthorized telephone number”, VDF having had the

reasonable diligence.

eleven.

The technical efforts made by VDF have not been taken into account

to implement improvements in the development phase, which were accredited in the

moment of the on-site inspection by the AEPD, undervaluing the

technical development effort.

12.

The contact data for telemarketing actions made available to

suppliers by VDF have been previously contrasted with the data

contained in the internal Robinson and ADigital listings and the time of

use to avoid outdated data.

13.

The data object of treatment can only be treated by the entities

commissioned in accordance with the VDF instructions that govern the contract, in which

clearly establish the conditions in which the treatments of the

personal information.

VDF asks suppliers to notify it of all objections that they

14.

may occur during telemarketing actions.

fifteen.

Personal data from the provider's databases are not transferred

at no time to VDF. Only after contracting the service are they included in the

VDF information system.

After contracting, it is validated after a call to control the

16.

quality.

17.

VDF has implemented complementary measures to guarantee a control

detailed information about the activity of the service providers when they use their

own databases. Said control is estimated to be operational in January 2020

(new routing system through the VDF trunk).

18.

The imputed infraction of art 21 of the LSSICE, does not proceed every time that the

legality of the treatments is based on the legitimate interest, as indicated in the

Considering 47 of the RGPD and this is recognized by the AEPD in its report 0173/2018.

VDF at all times allows the interested party to oppose receiving

19.

communications, so it is not appropriate to impute infringement of article 38.3.d).

Complaints relating to the LSSICE are a minority and far from the

twenty.

Total number of claims filed.

twenty-one.

Regarding infractions related to the LGT, VDF always facilitates the

possibility of exercising the right of opposition to the interested party, as stated in art.

48.1.b) of said rule. It is also known that VDF previously filters with the lists of

advertising exclusion before providing potential customer data to suppliers.

And when the databases are external "it is not possible to materially prevent the

making a call" (sic) although control measures are being implemented

based on VozIP technology that prevent calling numbers included in listings

advertising exclusion.

22.

The AEPD seems to sanction for receiving claims without verifying the facts

described in them and automatically conclude that they correspond

with illegitimate actions and contrary to the legal system and, therefore, adopting

these decisions go against the onus probandi principle that governs the right

sanctioning

23.

The quantification of the sanctions is disproportionate, and it cannot be sustained

that VDF's conduct is a repeated and permanent breach, since only

191 stakeholders out of 200 million trading shares could be affected

carried out by VDF.

There are prescribed infractions such as the one referred to in E/07180/2019 and others in the

24.

that no evidence of infringement has been provided (E/01119/2019 and E/02809/2019).

25.

In general, the Initiation Agreement lacks sufficient motivation to support the

imputation to VDF of the infractions that it relates that it is a guarantee against the

Arbitrary conduct proscribed in the C.E.

These allegations have already been answered in the Proposed Resolution and it is reiterated

in FD III of this Resolution.

FIFTH: After the period for pleadings granted in the Start-up Agreement and

presented arguments, it was agreed to open a period of practice of evidence, as

provided in article 77 of Law 39/2015, of October 1, on the Procedure

Common Administrative of the Public Administrations, agreeing the Instruction

perform the following tests:

1. The claims filed are deemed reproduced for evidentiary purposes and that

work in the file and its documentation, the documents obtained and generated

by the Inspection Services before VODAFONE ESPAÑA, S.A.U., and the Report on

previous inspection actions that are part of files E/01615/2019

and E/09541/2018.

2. Likewise, it is considered reproduced for evidentiary purposes, the allegations to the agreement of

VODAFONE ESPAÑA, S.A.U., and the

start PS/00059/2020 presented by

accompanying documentation.

3. Request the Spanish Association of Digital Economy, C/ Entença, 218 Entlo 7ª

08029 Barcelona, with CIF: G61668505, certifying the inclusion and date thereof

of the following phone numbers:

PHONE NUMBERS TO CERTIFY YOUR INCLUSION AND DATE

ON ADIGITAL ROBINSON LIST

(LISTED WITH 264 PHONE NUMBERS)

Warning that the result of this test may lead to the performance of others.

SIXTH: Having warned the Instructor body of rectifiable deficiencies in the documentation of the file sent to the investigated in March 2020, dated 11/13/2020, the deficiencies are corrected by sending the documentation information regarding the fifteen files with documentation initially incomplete, granting a term of 10 days to present the allegations that they consider convenient. It is recorded that on 11/14/2020 this second shipment of documentation correction.

SEVENTH: Once the proposed tests have been carried out and the term to formulate allegations to the same and to the aforementioned second shipment of the corrected documentation Regarding fifteen files, the respondent presented the following allegations:

1.- Two of the submitted files correspond to the same claim

2.- Seven of the submitted files were not mentioned in the first Shipping.

3.- Of the 264 telephone numbers requested from Adigital for verification in the Robinson list, 33 do not include registration, 4 are of a later date, 1 corresponds to a filed procedure, 1 corresponds to a supplier and not to a claimant, 1 does not there are commercial calls received and 1 does not correspond to VDF as an entity claimed.

These Allegations are answered in FD III of this Resolution. Nevertheless, it is anticipated that they were analyzed by the examining body admitting the annulment for the purposes of valuation in this procedure of 29 files, resulting in the remaining files collected in the Annex, in the amount of 162.

EIGHTH: On December 22, 2020, the Instruction formulated a proposal for resolution that proposed and raised to the competent body to resolve, the following sanctions:

<That the Director of the Spanish Data Protection Agency sanction

VODAFONE ESPAÑA, S.A.U., with NIF A80907397,

for infringement of article 28 of the RGPD in relation to article 24 of the RGPD

typified in accordance with article 83.4 of the RGPD with an administrative sanction of amount

four million euros (€4,000,000) considered serious for prescription purposes in

Article 73, sections j), k) and p) of the LOPDGDD,

for infringement of article 44 of the RGPD typified in accordance with article 83.5.c) of the

RGPD, with an administrative penalty of two million euros (€2,000,000)

considered very serious for prescription purposes in article 72.l) of the LOPDGDD,

for violation of article 21 of the LSSICE, typified as serious in article 38.3.d)

and c) of said rule with a penalty of one hundred and fifty thousand euros (€150,000) and,

for violation of article 48.1.b) of the LGT, in relation to article 21 of the RGPD,

classified as serious in article 77.37 of the LGT and for violation of article 48.1.b)

of the LGT, in relation to article 23 of the LOPDGDD, typified as serious in the

article 77.37 of the LGT, with a penalty of two million euros (€2,000,000)>.

An Annex was attached to the Resolution Proposal that listed 162 files after

void valuation 29 files as a result of deficiencies detected in

the data provided by the claimants or investigated by this AEPD, or by

estimation of the allegations presented by the respondent.

The aforementioned Annex, which is also attached to this Resolution, consists of the

Next information.

ANNEX (Ordered by date of entry of the claim in the AEPD)

Column legend:

:

R/D/C:

PF/PC:

Sequential order number

Róbinson/Rights/Express Consent

Physical Person/Juridical Person

LGT/PD/LSSI:

broken law

F.Robin.credited:

Accredited date inclusion in advertising exclusion lists

LINE:

Transmitter/Receiver

F. CALL LINE: Date of the advertising action

REFER. AEPD:

Reference code of the claim in the AEPD

CLAIMANT:

Name of the claimant (the number indicates the times claimed)

CLAIM TEXT: Text of the claim filed by the claimant

NINTH: Once the deadline for the presentation of allegations had elapsed,

on 01/18/2021, the following allegations to the Proposed Resolution:

1)

two)

Previous: Reiteration of the allegations presented.

First: Arguments against the Proven Facts.

Second: Relating to information request files

3)

referenced in the sanctioning procedure.

Third: Rejection by the AEPD of the allegations presented by

4)

Vodafone.

Fourth: Alleged breach of article 24 RGPD. Consideration of

5)

Vodafone as data controller and responsibility of Vodafone.

6)

Fifth: Alleged breach of article 28 RGPD. alleged lack of

real, continuous, permanent and audited control of the treatments carried out by the

managers.

Sixth: Alleged breach of article 44 RGPD. Transfers

7)

International data.

8)

Seventh: Alleged breach of article 21 LSSICE. Send of

commercial communications without consent and to recipients who have

opposed to such treatment.

9)

Eighth: Alleged breach of the General Telecommunications Law

(LGT). Alleged non-attention to the right of opposition not to receive communications

commercial.

Ninth: On the Sanction Proposal. Legal basis and

10)

proportionality of it.

These Allegations are answered in the Legal Basis of this

Resolution.

Of the actions carried out in this procedure and the documentation

in the file, the following have been accredited

PROVEN FACTS

FIRST: VDF is responsible for the processing of personal data

carried out on your behalf and name in the marketing actions through

telephone calls, SMS and emails, both those managed internally

from its own files as well as from the treatments that it entrusts to other entities to

through rented files or from their own files.

SECOND: VDF has not implemented for marketing actions methods or

organizational and technical means that verify, not even by procedures

statistics, the legality of the data subject to treatment, its origin, its prior filtering

with the internal listings of advertising exclusion and general exclusion of Róbinson, nor

with those of the entities to which you have entrusted the treatments (in charge of the

treatment) nor opposition rights exercised by those affected before one and the other.

THIRD: There is no evidence that VDF has real, continuous, permanent and audited control

on the development of the processing of personal data of the actions of

marketing carried out on your behalf and on your behalf, limited to a control
initial merely formal and only in some specific cases referred only to
partial internal informative communications.

There are no prior written authorizations for the treatment of databases
of the successive managers of the treatments entrusted to VDF for its
account and name.

FOURTH: VDF has a prior authorization procedure for entities
attached to the TVTA Department. For this, they are sent a checklist where they are
requests certain information in order to validate if it is possible to contract with said
Service provider. The aforementioned checklist is limited to answering certain
questions with a "YES" or "NO", without specifying accreditation, guarantees,
content and management of procedures and audits as stated in article 28 of the
GDPR.

FIFTH: In these cases, VDF is unaware of the subcontracted entities ("other
telesales and commercial agencies") guarantees of a technical or organizational nature
which they have. Information relating to the identity of these entities
subcontracted must be stated in the annex to the contract (subcontract) established at
effect, but it only appears once the subcontracting has been carried out and for the sole purpose of
facilitate access in the case of consummating the contracting on behalf of VDF, it is
In other words, VDF is previously unaware of the technical and organizational qualifications and identity
of these subcontracted entities as well as their capacity to comply with the
current regulations on data protection.

SIXTH: VDF does not provide detailed documentation regarding guarantees of

data protection of the contract that supports the relationship between the person in charge of the initial and subcontracted treatment, nor the guarantees for the fulfillment of the subcommission. As reported by VDF, the contract is similar to the one maintained by the entities initially commissioned by VDF and the initial commissioners attached to the TVTA platform. VDF includes as a generic contractual obligation that transfer the instructions to the sub-processors on behalf of VDF so that the marketing actions are carried out in the terms indicated by VDF, but without guarantees to prove its compliance.

SEVENTH: The contracts between the initial managers of VDF attached to the TVTA platform (CASMAR and THE THREE QUARTER FULL, S.L. -TQF-) and the subprocessors are not similar, so the same guarantees are not included in against what is stated by VDF and the provisions of article 28 of the RGPD, without prejudice of the content deficiencies detected in the contracts with those in charge initial, such as the lack of follow-up measures in the execution of the contract.

EIGHTH: Regarding the Casmar entity as the entity in charge of the treatment in name and on behalf of VDF, declares that it is the subcontracted entity "A-NEXO" provided by the Robinson listing and it has not transferred any right of opposition received after making calls. However, in the contract signed between both entities (Casmar and A-Nexo of June 2019) it appears that the lists of Advertising exclusion and opposition rights are provided by Casmar. I do not know indicates the management to be carried out on the prior consultation of the exclusion files advertising or exercise of rights, contrary to the provisions of article 28 of the RGPD.

NINTH: It is stated that VDF contracts with TQF and the latter in turn subcontracts with other natural and legal persons who are the ones who materially make the calls. In the contributed contracts signed between TQF -as data processor for the account and on behalf of VDF- and the subcontracted entities are not listed indications regarding the obligation of prior consultation and filtering with the files of advertising exclusion or with those of exercise of rights by the various entities intervening in the marketing actions in the name and on behalf of VDF.

TENTH: There is no proof that VDF is aware of the rights exercised by those affected before the entities in charge and sub-in charge, which originates that before calls of sequential or random type from a certain numbering reiterate calls to those affected who have previously exercised their right of opposition, despite, both in the case of in the case of files from of VDF as external, that VDF has previously filtered them to avoid calls improper.

ELEVEN: In the case of the DATACENTRIC entity, which is an intermediary between VDF and the owner of the rented database, there is no evidence that VDF is involved in the effective control of verification of the mandatory express authorization of the affected for email communications and sending SMS.

TWELFTH: In the case of the entity MEYDIS, which provides VDF with databases data published in directories of subscribers to telecommunications services, not There is a contract signed in accordance with article 28 of the RGPD, for not requiring it, according to manifests VDF, the internal contracting system of both entities, against the provisions of article 28 of the RGPD.

THIRTEENTH: The obligation to consult advertising exclusion lists by managers and sub-managers is not provided for in the contracts

signed for the purpose. Whether or not the aforementioned lists are contrasted is a circumstance that VDF not in a position to check.

FOURTEENTH: It is stated that before a claim on actions of marketing of VDF before the AEPD and that it has been resolved urging VDF to inform the affected party that their data has been included in LRI and, having communicated this circumstance to the affected party, subsequently the call is repeated. (PS/00290/2015).

FIFTEENTH: In the inspection carried out at the VDF headquarters on the 18th and 30th of September, VDF representatives state that: << (...) (i) there is no authorization regarding the use of external databases, that is, those belonging to the distributors and therefore there is no authorization process, but a request is made information in the event that they use these databases. (ii) VDF is not in conditions of verifying that the holders of the receiving lines have lent their consent or have not objected, since it is an obligation that corresponds to collaborating agents, (iii) VDF does not ensure that each call offers a effective means of exercising the right of opposition.

SIXTEENTH: Regarding the Databases provided by VDF and used by data processors in the name and on behalf of VDF, it consists that there are communications by VDF referring to the obligation to use only these databases. However, there is no procedure enabled or controlled by VDF aimed at verifying those in charge use

only the database that VDF has provided them and during the periods

which is indicated to them. In the inspection carried out at the VDF headquarters on the dates of 18 and 30 September 2019, VDF representatives stated that they have not been carried out checks on compliance with the measures indicated in the previous communications.

SEVENTEENTH: Regarding commercial communications via SMS, are performed by random generation without any discrimination, so that electronic commercial communications have been sent to potential clients without the concurrence of the requirements set forth in article 21 of the LSSI (expressly authorized). SMS shipments are made directly by VDF.

EIGHTEENTH: Without prejudice to the provisions of the annex to this Resolution, way of a representative sample, in the commercial actions carried out since the numbers ***TELEFONO.2 and 954781254 by CASMAR distributors and TQF, respectively; 17 claimants have been found that manifest actions commercial made from the number 954781254, and 19 claimants regarding of those made from the numbering ***TELEFONO.2, despite the fact that the numbers of the recipients were included in LRAD, or have exercised their right to opposition against VDF and appear in its LRI.

NINETEENTH:

In the scheme of participants in the actions of marketing carried out by VDF, consist of the following levels of action

Regarding Casmar:

Level I.- VDF is the one who contracts with the entity CASMAR (and this, if applicable, subcontracts with others) the performance of commercial actions to attract customers. The database to be used can be provided by VDF or by CASMAR, which obtains on its own (from other collaborators).

Level II.- CASMAR subcontracts to the A-NEXO entity (and this, if applicable, to other

collaborators) making commercial calls. CASMAR informed

requirement of the AEPD that the data used is provided by A-NEXO and, without

However, the contract that it provided states that the data is provided by CASMAR.

Level III.- A-NEXO in turn subcontracts commercials to make calls,

both legal and natural persons,

Level IV- Commercials contracted by CASMAR, in turn, make the calls for their

account from own numbers without reporting them to VDF.

About the knowledge by VDF of the subprocessors of the treatment by

account of VDF, CASMAR provided the contractual documentation where it appeared “in

white” (Annex II to the face-to-face channel contract of 05/01/2019), the list of sub-managers

treatment on behalf of VDF that VDF had to approve, stating that it is in

<<white>> due to the dynamism with which they are replacing and updating the

"call centers", that is, after contracting and not beforehand and that

allows verifying the technical and organizational competence of these

entities.

TWENTIETH: The contract signed between Casmar and VDF on 05/01/2019 includes, in

separate annex and of later date (1) referenced to said contract of which it brings cause

dated 05/01/2019 between VDF and Casmar, a list of 15 legal entities and

natural persons subcontracted by Casmar called "list of sub-processors

approved” (sic), among which is the entity A-Nexo, in which it is stated that

the “current location of treatment” (sic) is in Peru. It is not accredited

that have a contract that contains the mandatory contractual clauses

type of the Decision of the Commission, of February 5, 2010, relative to the clauses

contractual types for the transfer of personal data to those in charge of the

treatment established in third countries.

(1)

There is a contract dated 06/27/2019 (after the one dated 05/1/209 between VDF and

Camar) between Casmar and A-nexo (in the name and on behalf of the entity A-NEXO

CONTACT CENTER SAC, with RUC 20601266530 and address for notification purposes at

Av. De los Precursores 1192, office 303, San Miguel, Lima, Peru.)

TWENTY-FIRST: TQTF affirms at the request of the Inspection of this AEPD

that VDF is aware of the sub-processors on behalf of VDF

only at the moment in which you are requested to access the contracting platform

of VDF and only for these purposes. That is, TQTF requests the registration to VDF of the

subprocessors of the treatment in the name and on behalf of VDF to be able to carry out the

contracting (VDF provides them with a user to access the contracting platform),

without requiring any type of verification to the commercial sub-managers of the

processing in the name and on behalf of VDF of the data to be used in calls

commercial or technical and organizational conditions that they have, limiting themselves

VDF to generate a user with a password, upon request from CASMAR or TQTF, which

It is communicated to the commercials or the final distributor (sub-processors) to be

enabled to register contracted lines in the VDF systems.

TWENTY-SECOND: VDF is aware of the filing of claims with the AEPD,

since since November 2018 they have been transferred from

the AEPD and it is not until July 2019 when it is communicated to the

distributors (managers) without stating to date the measures adopted to

avoid improper treatment.

TWENTY-THIRD: These are examples of these actions carried out by CASMAR to

numbers registered in LRAD or LRI of VDF, the following:

E/07147/2019: The claimant receives commercial calls, the last one on date

□

of 06/12/2019 after having exercised the right of suppression against VDF on the date of

05/08/2019, and in VDF LRI since 05/09/2019.

E/07144/2019: The claimant receives commercial calls, the last one on date

□

of 06/05/2019, after having exercised the right of opposition, appearing in the LRI of VDF

from 04/02/2019, the mobile line, and 08/20/2018 the fixed line. Also in LRAD from

March 2019.

E/7765/2019: The claimant receives commercial calls, the last one on the date of

□

06/07/2019, after having requested the deletion against VDF on 06/02/2019 and

be registered in LRAD since 11/14/2017.

E/7758/2019: The claimant receives commercial calls, the last one on the date of

□

06/26/2019 listed in LRAD since 10/22/2018. In this case, the dealer

caller is TTQF in the name and on behalf of VDF.

This sample of claims (all the evidence is included in the annex to this

Resolution Proposal) notes that the managers and sub-managers have not

used to carry out marketing actions on behalf of and on behalf of VDF

previously filtered numberings with the advertising exclusion lists nor have they

taking into account the rights of opposition previously exercised by those affected,

either before the VDF itself or before the entities in charge or sub-in charge

when they act in the name and on behalf of VDF. Nor is there evidence that in the actions

of marketing through telephone calls VDF has control

that allows you to validate the possibility of exercising the right to oppose the

interested party, since VDF limits itself to providing those in charge with a certain legend

without requiring guarantees of its effective reading to those affected.

TWENTY FOURTH. In the annex to this Resolution is the list

complete and detailed list of all the claims taken into account in the valuation of

the facts charged in this proceeding.

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of Regulation (EU) 2016/679, of the

European Parliament and of the Council, of 04/27/2016, regarding the Protection of

Natural Persons with regard to the Processing of Personal Data and the Free

Circulation of these Data (General Data Protection Regulation, hereinafter

RGPD) recognizes each Control Authority, and according to what is established in the articles

47, 48, 64.2 and 68.1 of Organic Law 3/2018, of December 5, on the Protection of

Personal Data and Guarantee of Digital Rights (hereinafter LOPDGDD), the

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

resolve this procedure.

Article 63.2 of the LOPDGDD determines that: "The procedures processed by the

Spanish Agency for Data Protection will be governed by the provisions of the

Regulation (EU) 2016/679, in this organic law, by the provisions

regulations issued in its development and, as long as they do not contradict them, with a

subsidiary, by the general rules on administrative procedures."

In accordance with the provisions of art. 43.1, second paragraph, of the Law

34/2002, of July 11, on Services of the Information Society and Commerce

(LSSI), the Director of the Spanish Data Protection Agency is

competent to initiate and resolve this sanctioning procedure.

In accordance with the provisions of article 84.3) of Law 9/2014, of May 9,

General Telecommunications (hereinafter LGT), the Director of the Agency

Spanish Data Protection is competent to initiate and resolve this

penalty procedure.

II

As for the allegations presented to the initial agreement, they have already been answered and

the Motion for a Resolution, in summary, in the following terms:

The notified files include those affected who are people

1.

legal.

As already indicated, 29 claims have been excluded from valuation due to the

reasons that were proposed without being found in the annex those related to

legal persons and those referenced in the VDF allegations dated 12/1/2020.

It must now be added that the scope of application of the LGT and LSSICE includes the

legal persons and, if 29 files have been excluded from assessment, it has not been due to

this reason.

The statement of facts in the Initiation Agreement makes it extremely difficult to analyze and

two.

carry out a detailed examination, which may undermine the right to self-defense.

The terms of the start-up agreement are in accordance with the provisions of article 64 of the Law

39/2015, of October 1, of common administrative procedure of the

Public administrations. In this regard, it should be noted that VDF has not requested practice

of any proof after the initial agreement, being able to have requested it if it really

considers that it undermines his right to self-defense.

Furthermore, VDF does not explain or prove how its

right to self-defense and what is the real and effective damage that has been

produced. Especially when the facts show us that he was able to argue after the

initial agreement and throughout the administrative procedure everything that in its

right, it was convenient, made, all kinds of allegations with a significant volume

both in their reasoning and in their quantity (also including, in such

consideration the high number of pages of the documents presented by

VFD). It has also been able to provide all the documentation that it has considered relevant

and necessary. The real and effective defense of the defendant has not even diminished

in any moment.

We must bring up, for all, the Judgment of the National High Court, of 22

February 2019 (RJCA 2019/63), in which also collecting various jurisprudence

of the Constitutional Court, it is stated exhaustively that "consequently, out of

the assumptions of nullity of full right only have annulment scope those

infractions of the procedure, which have left the interested party in a situation of

actual or material defenselessness due to a resolution contrary to their interests without

having been able to allege or not have been able to prove (SS.TC. 155/1988, of July 22 (RTC

1988, 155), FJ 4; 212/1994, of July 13 (RTC 1994, 212), FJ 4; 137/1996, dated 16 September (RTC 1996, 137), FJ 2; 89/1997, of May 5 (RTC 1997, 89), FJ 3; 78/1999, of April 26 (RTC 1999, 78), FJ 2, among others). […] Now, I don't know produces defenselessness for these purposes, as stated in the Judgment of the Court Supreme Court of October 11, 2012 (RJ 2012, 11351) - appeal no. 408/2010 -, "if the interested party has been able to allege and prove in the file what he has considered opportune in defense of their rights and position assumed, as well as resorting in replacement, doctrine that is based on article 24.1 CE (RCL 1978, 2836), if it did within the file the allegations that it deemed appropriate" (S.TS. February 27, 1991), "if he exercised, finally, all the pertinent resources, both administrative and jurisdictional" (S.TS. of July 20, 1992). […] Ultimately, the plaintiff did not specifies what material defenselessness the alleged vices have produced procedural complaints, and in any case, the ANC has been able to allege and prove, both in prior administrative channels and in this judicial channel, how much has been estimated

convenient in defense of their rights and legitimate interests, so that no violation of their right to defense (article 24.2 CE)".

Likewise, the Judgment of the Contentious-Administrative Chamber, Section 1, of the National Court of National Court of April 8, 2019 (RJCA\2019\466), ratifies that defenselessness must be material, resulting in real damage and effective, since "For this purpose and in general, it must be brought up the doctrine of the Constitutional Court according to which, to assess the existence of injury

constitutional, the existence of a procedural defect is not enough, but it is

equally necessary that this has translated into material defenselessness, that is, into

a real and effective damage, never potential and abstract, of the possibilities of

defense in a procedure with the necessary guarantees (SSTC 15/1995, of 24

January and 1/2000, of January 17, among many others). Helplessness concept with

constitutional relevance that, in any case, does not necessarily coincide with

any defenselessness of a merely procedural nature, nor less with any

violation of procedural rules, but requires, as an essential condition,

that the impossibility of alleging and proving one's own rights and interests and refuting the

allegations to the contrary have produced a real and effective impairment of the right

defense of the party, material damage. Without there being helplessness

material if, despite having produced some procedural violation, the parties

have been able to defend their legitimate rights and interests (STC 27/2001 of January 29)".

3.

Due diligence in the terms of article 28 of the RGPD refers only to

the contracting phase with the person in charge and should not be understood with respect to the

subsequent follow-up of the contract.

It is answered on the following grounds of law

Suppliers contracted by VDF from the internal telesales department

Four.

have passed a prior validation process and are subject to audit processes

in which the technical and organizational measures are justified with which they count for the

development of the contracted service.

The selective process of entities in charge is limited to an initial checklist, without

record subsequent evaluation of the contracted assignment, as indicated in

subsequent legal foundations.

In the on-site inspection, it was found that (page 11 of this Resolution),

Regarding the second scenario, the Distributors/Collaborators/Agents sell to

through stands in shops and on the street, which in turn also reach <<agreements

with other telemarketing and commercial agencies>> (subprocessors of treatment by

account and on behalf of VDF) for the effective realization of telephone calls and that

they manage <<their own lists>> of telephone numbers of potential clients.

These subcontracted <<other telesales and commercial agencies>> are not subject to

a prior homologation process -as do those assigned to the platform of

TVTA- but currently work continues with those that already provided the

service in ONO before the merger with VDF (on 01/10/2018) and there is no evidence that

have verified the technical and organizational means at their disposal.

It should be noted that the decision by VDF to continue working with the

entities in charge of the treatment that already provided the service in ONO before the

merger with VDF (on 01/10/2018), certifies that the person responsible for said

treatments is VDF.

In these cases, VDF does not know the identity of the entities (other

telesales and commercials) subcontracted by the Distributor/Collaborator/Agent and

unaware of the guarantees of a technical or organizational nature that they have. The

information regarding the identity of these subcontracted entities must be included in the

the annex to the contract (subcontract) established for this purpose, but it only appears once

subcontracting, that is, VDF is previously unaware of the qualification

technical and organizational information and the identity of these subcontracted entities as well as their ability to comply with current regulations.

Of the clauses of the standard contract called "On-site Channel 2019-2020" (by example, with CASMAR of May 1, 2019) signed between VDF and the entities attached to the TVTA platform, there is an obligation to previously communicate to VDF the list of sub-processors on behalf of VDF that are going to use the distributors/collaborators/agents. This communication is collected, among others, in the clauses 5 (resources) and 6 (characteristics of the activity) of the aforementioned contract (it is included in the file). Only in clauses 13.4 and 13.5 of the aforementioned contract is reference to the obligation to comply with data protection regulations in the following terms: "... without prejudice to the obligations assumed by the COLLABORATOR in compliance with the Data Protection legislation in force in every moment…" (sic). Clause 13.6 expressly states that the "collaborator will be considered the person in charge of the treatment and must formalize the standard data processing agreement that is attached as an annex IV…".

However, this communication to VDF of the subcontracted entities has a a posteriori declarative character and is not subject to prior approval by VDF nor does it have reflected the possibility of exercising the rights of the interested parties. The purpose of this declaration, according to VDF, is fundamentally to have information when malpractice is detected.

5.

Regarding external providers using their own databases: these Providers do not act as data processors but as responsible for their own databases since these personal data are collected on behalf of the supplier and not on that of VDF.

It is answered on the following grounds of law

Regarding external providers using databases provided by

6.

VDF: VDF complies in the contracting with those in charge of all the requirements

established in article 28 of the RGPD and these providers meet the conditions to

to comply with its obligations, not existing lack of the duty of diligence for what

that it is not appropriate to question the effective execution of the obligations

contractually assumed.

It is answered on the following grounds of law

7.

Regarding the regulation of the contract between the person in charge and the person in charge of the

subcontracting carried out by the person in charge, in the Guide of the AEPD it is

recommends the application of certain clauses such as the one used by VDF. in said

clauses indicates that it is up to the initial manager to regulate the new relationship and

with the same formal requirements as with the controller.

The aforementioned Guide tries to summarize the initial conditions that the

contracting between the person in charge and the person in charge, without prejudice to the follow-up that the

responsible must perform to evaluate the effective compliance with the clauses

subscribed.

It should be considered that the Guide contains guidelines that must be adapted to each

specific assumption, since the cited guide expressly warns that “This document

aims to identify the key points to keep in mind at the time of

establish the relationship between the person responsible for the treatment and the person in charge of the

treatment, as well as to identify the issues that directly affect the

management of the relationship between the two. Likewise, it intends to offer orientations, as

of recommendation, to prepare the document that regulates said relationship".

In the same sense, it is expressly noted that its Annex I, when collecting an example

of what could be the treatment manager contract, that "These clauses

They are for guidance only and must be adapted to the specific circumstances of the

treatment that is carried out"; in such a way that, throughout the Guide and by multiple

pathways, it is unquestionably clear that these are guidelines, that they are not

exempt the data controller from entering into the treatment contract in accordance with the

GDPR in relation to the concurrent circumstances in each individual case

concrete.

8.

The need for prior express authorization of the subprocessors is not a

mandatory requirement, but article 28.2 indicates that the person in charge must inform the

responsible and, where appropriate, authorize it, thus giving the responsible the option of

stand against. This aspect is not considered in the AEPD Guide (option B).

Article 28.2 of the RGPD indicates that "The person in charge of the treatment will not resort to another

without the prior written authorization, specific or general, of the person in charge.

In the latter case, the person in charge will inform the person in charge of any change

foreseen in the incorporation or substitution of other managers, thus giving the

responsible the opportunity to oppose said changes".

This implies that prior written authorization will be required for the person in charge

of the treatment can resort to another person in charge. And that said authorization can be

specific (indicating the subcontracted entity) or general. Only in the latter

course, already existing general authorization by the person in charge of the treatment,

This is when changes in the incorporation or substitution of others must be reported.

managers, with respect to which, in addition, the person in charge of the

treatment (for example, if it does not meet the technical or organizational measures that are

set in the general authorization).

From the foregoing, it is concluded that prior authorization is always mandatory.

The authorization prior to the subcontracting of managers must evaluate, in any case,

and among other issues, the technical and organizational conditions that the

in charge of the treatment to carry out the contract. as configured

in article 28.2 of the RGPD is not a simple communication of a formal nature, but

which constitutes a true material requirement of GDPR compliance.

9.

According to the DT5ª of the LOPDGDD, contracts prior to 05/25/2018

will remain valid until 05/25/2022, so their content cannot be

required as it is not applicable.

The 5th transitory provision of the LOPDGDD determines that "The contracts of

in charge of the treatment signed before May 25, 2018 under the

of the provisions of article 12 of Organic Law 15/1999, of December 13, of

Protection of Personal Data will remain in force until the date of

expiration indicated in them and in case of having been agreed in a

indefinite, until May 25, 2022.

During these periods, either party may require the other to modify

of the contract so that it is in accordance with the provisions of article 28 of the

Regulation (EU) 2016/679 and in Chapter II of Title V of this organic law”.

The 5th transitory provision of the LOPDGDD allows "to maintain the validity" of the

treatment manager contracts signed prior to the application of the

GDPR. It refers only to the term of the contract.

This is so because in compliance with the proactive responsibility for the

responsible for the treatment, they require their material adaptation to the RGPD. The

obligations arising from the legal text must be fulfilled from the full application

of it in May 2018.

Well, this Provision also refers to the modification of the contract

so that it is in accordance with the provisions of article 28 of the RGPD. As we have

indicated, we can understand that such modification is restricted to the formal content of the

article 28 of the RGPD, allowing each of the parties to demand from the other the

modification of the contract in order to comply with the aforementioned precept. But it doesn't affect the

application of the principles and material obligations of the RGPD since it is a

norm with direct effect of an imperative nature and no provision could go against

of this character.

Therefore, the validity of the treatment manager contracts until the

05/25/2022 will be maintained as long as its content conforms to the principles

arranged in the RGPD and the LOPDGDD.

The exhaustive control of the person in charge over those in charge would prevent “the

10.

may dial an unauthorized telephone number”, VDF having had the

reasonable diligence.

The controller's control over the processor must be reasonable.

and adequate throughout the development of the contract and in the present case they consist

repeatedly affected the rights and freedoms of the interested parties without VDF

has taken appropriate corrective action to prevent violations such as

now analyzed.

eleven.

The technical efforts made by VDF have not been taken into account

to implement improvements in the development phase, which were accredited in the

moment of the on-site inspection by the AEPD, undervaluing the

technical development effort.

The technical efforts made by VDF to avoid claims before the AEPD do not

They show that it has been implemented to date.

12.

The contact data for telemarketing actions made available to

suppliers by VDF have been previously contrasted with the data

contained in the internal Robinson and ADigital listings and the time of

use to avoid outdated data.

The data of the interested parties object of advertising actions have not been contrasted

with advertising exclusion lists and opposition rights, especially when

have been exercised before managers or sub-managers and have not been communicated to the

responsible nor has he forced its communication, especially in terms of

advertising actions that start from random numbers.

13.

The data object of treatment can only be treated by the entities

commissioned in accordance with the VDF instructions that govern the contract, in which

clearly establish the conditions in which the treatments of the

personal information.

There is no record on the part of VDF of monitoring the execution of the contracts signed

with those in charge in the name and on behalf of the person in charge.

VDF asks suppliers to notify it of all objections that they

14.

may occur during telemarketing actions.

There is no evidence that VDF requires those in charge to communicate the rights of

opposition exercised by the interested parties and has deployed technical means and

organization that allow them to be taken into account in subsequent advertising campaigns.

fifteen.

Personal data from the provider's databases are not transferred

at no time to VDF. Only after contracting the service are they included in the

VDF information system.

The personal data subject to treatment by those in charge are carried out on behalf

and on behalf of VDF as the responsible entity regardless of whether

are included in your information system.

After contracting, it is validated after a call to control the

16.

quality.

The quality control call is made once the hiring of the

service offered on behalf of VDF, a circumstance that is outside of this

process.

17.

VDF has implemented complementary measures to guarantee a control

detailed information about the activity of the service providers when they use their

own databases. Said control was estimated to be operational in January

2020 (new routing system through the VDF trunk).

There is no evidence that VDF has implemented technical and organizational measures to guarantee

a detailed control of the activity of those in charge who act on behalf of and

on behalf of VDF from January 2020. Example of subsequent claims

(January and February 2020) are, among others, the following:

01/22/2020

E/02252/2020

01/23/2020

E/02255/2020

01/24/2020

E/02262/2020

01/25/2020

E/02263/2020

01/27/2020

E/02266/2020

01/28/2020

E/02269/2020

03/02/2020

E/02271/2020

03/02/2020

E/02274/2020

A.A.A.

BBB

C.C.C.

DDD

E.E.E.

F.F.F.

GGG

H.H.H.

18.

The imputed infraction of art 21 of the LSSICE, does not proceed every time that the

legality of the treatments is based on the legitimate interest, as indicated in the

Considering 47 of the RGPD and this is recognized by the AEPD in its report 0173/2018.

The LSSICE requires in article 21 expressly authorized authorization to

electronic advertising communications, and in the present case it does not appear.

VDF at all times allows the interested party to oppose receiving

19.

communications, so it is not appropriate to impute infringement of article 38.3.d).

There is no evidence that both VDF and the managers and sub-managers who act in

name and on behalf of VDF have the technical and organizational measures that

allow to carry out the right of opposition exercised by the interested party since

There is evidence of the repetition of advertising actions after the exercise of such right.

Complaints relating to the LSSICE are a minority and far from the

twenty.

Total number of claims filed.

It is stated in the annex to this Proposal that the number of claims for infringement of

the LSSICE amount to twenty-four (24) of the 162 taken into account in this

Resolution.

twenty-one.

Regarding infractions related to the LGT, VDF always facilitates the

possibility of exercising the right of opposition to the interested party, as stated in art.

48.1.b) of said rule. It is also known that VDF previously filters with the lists of

advertising exclusion before providing potential customer data to suppliers.

And when the databases are external "it is not possible to materially prevent the

making a call" (sic) although control measures are being implemented

based on VozIP technology that prevent calling numbers included in listings

advertising exclusion.

The allegation cannot be accepted since, as evidenced by the facts

tested and in the attached annex advertising actions have been carried out on behalf of and in

name of VDF repeatedly even though the interested party is in the relationship of

advertising exclusions or having previously exercised their right to oppose

such actions, contrary to the provisions of article 48.1.b) of the LGT.

22.

The AEPD seems to sanction for receiving claims without verifying the facts

described in them and automatically conclude that they correspond

with illegitimate actions and contrary to the legal system and, therefore, adopting

these decisions go against the onus probandi principle that governs the right

sanctioning

It appears in the documentation of the file notified to VDF in March 2020

sufficient reasons to undermine the presumption of innocence since the very

VDF in its responses to the information requirements of this AEPD

manifests its error and proceeds to correct promptly informing the claimant. Nope

However, this infringing conduct and subsequent adoption of measures allegedly

corrections are permanently reiterated, and sometimes there are up to three

subsequent claims of the same affected party after being "supposedly" attended to on

right of opposition before VDF

23.

The quantification of the sanctions is disproportionate, and it cannot be sustained

that VDF's conduct is a repeated and permanent breach, since only

191 stakeholders out of 200 million trading shares could be affected

carried out by VDF.

Regarding the graduation and final quantification of the proposed sanctions, it must be

point out that, without prejudice to the new amounts indicated in the RGPD and criteria of

graduation applied, and only for comparative purposes with the repealed LOPD, the amount

would be much higher than the current proposal. Specifically, and only for comparative purposes

with the LOPD, now one hundred and forty-one (141) infractions are attributed to the RGPD that

separately and applying the LOPD, an amount close to six

million euros, considering the minimum amount (€40,001). In the same sense the

one hundred twenty-four (124) violations of the LGT and twenty-four (24) of the LSSICE, in

which the amounts have also been weighted jointly.

Furthermore, regarding the allegation that "they could only be affected

191 interested parties of the 200 million commercial actions carried out by

VDF", it should be noted that, as may be the case in this proceeding,

the confluence of various claims of individual affected persons is put

manifest an action of the person in charge that in general (that is, not

only in the specific cases presented by the complainants) from which it turns out that

These specific cases are the reflection of a common guideline or policy applied to all

those affected persons who are in the same case as the interested parties and who do not

are claiming neither before VDF nor before the AEPD.

From the claims presented, a pattern of behavior in the treatment of

personal data in connection with VDF's marketing operations (which

includes gross negligence in action and inaction) that directly impacts, and

in a general and indiscriminate manner, in the rights and freedoms of citizens.

There are prescribed infractions such as the one referred to in E/07180/2019 and others in the

24.

that no evidence of infringement has been provided (E/01119/2019 and E/02809/2019).

The files alluded to in the allegation are not among the one hundred and sixty-two

(162) valued in this Resolution.

25.

In general, the Initiation Agreement lacks sufficient motivation to support the

imputation to VDF of the infractions that it relates that it is a guarantee against the

Arbitrary conduct proscribed in the C.E.

Motivation is required by virtue of art. 35 of the LPACAP, establishing the Court
Supreme a series of elements must concur for this to be adequate.
Thus, the motivation has a finalist character, that is, that the requirement is met.
to explain or externalize the core of the administrative decision, from which
the interested party can deploy their means of defense. As determined by the
Judgment of the Contentious-Administrative Chamber, Section 1, of the High Court
National of September 13, 2019, "The requirement of the motivation of the acts
administrative authorities responds, according to reiterated jurisprudential doctrine, of which it is
Exponent the Judgment of the Supreme Court of July 16, 2001, for the purpose of
that the interested party can know exactly and precisely when, how and why
established by the Administration, with the necessary amplitude for the defense of
their rights and interests, also allowing, in turn, the bodies
jurisdictional knowledge of the factual and normative data that allow them to
resolve the judicial challenge of the act, in the judgment of its power of revision and
control of administrative activity; in such a way that the lack of that motivation or its
notorious insufficiency, to the extent that they prevent challenging that act with serious
possibility of criticizing the bases and criteria on which it is based, integrate a vice of
nullity, as soon as they leave the interested party defenseless.
All this without prejudice to the logical discrepancy of the person who obtains a resolution
unfavorable to their interests, which does not constitute lack of motivation, because their
right does not reach the granting of what is requested, since no one has the right to be
give the reason, but that the decision that is offered offers the necessary explanation
so that the administrator can know with accuracy and precision the content of the
act>>".
The motivation can be brief and succinct, but always sufficient in such a way that

allows the interested party to know the administrative decision-making reasons (STS of 15 December 1999).

For the motivation to be sufficient, it must be specific, that is, it must refer to to the particular case discussed in the specific administrative procedure (STS of 23 September 2008) and consistent with the content of the decision. If the decision administration entails the exercise of discretionary powers, it is necessary that the logical process that determines such a decision is made explicit (STS of December 15, 1998).

Regarding the lack of reasoning of the initiation agreement, reason for which it is alleged arbitrariness in the performance of this AEPD, it should be noted that there are sufficiently reasoned in the initial agreement the infractions imputed based on in the documentation that works in the file and that has its origin both in the on-site inspection carried out (the documentation of which is known to VDF) at the headquarters of VDF as in the attached in the claims of those affected and that appears in the proceedings. In the same sense, the infraction now imputed of Transfer International without the adequate measures required in the RGPD, it is also found documented and accredited of VDF's own manifestations in the documentation provided to this AEPD.

From the examination of the administrative file and the various resolutions issued in its bosom, it is clearly revealed, in a broad and reasoned, concrete and congruent way, the

reason for the administrative decision, fulfilling more than enough with the

prescriptions established by law.

III

Regarding the allegations presented to the practice of evidence and the second shipment

of files in order to correct deficiencies in the documentation initially

notified, are summarized as follows:

1.- Two of the submitted files correspond to the same claim.

2.- Seven of the submitted files were not mentioned in the first

Shipping.

3.- Of the 264 telephone numbers requested from Adigital for verification

in the Robinson list, 33 do not include registration, 4 are of a later date, 1 corresponds to

a filed procedure, 1 corresponds to a supplier and not to a claimant, 1 does not

there are commercial calls received and 1 does not correspond to VDF as an entity

claimed.

In the first place, in the allegations made by VDF on 12/1/2020, it is not

detail the procedures to which it refers. However, it means that

there are several claims that make up different files of the same

claimant, since for the same facts they have made several claims

successive years as VDF continues to carry out the events now charged.

Second, it should be noted that of the initial 191 claims that gave

origin of this procedure have been removed from the assessment, accepting

partially the VDF allegations dated 12/1/2020, twenty-nine claims

(29) for various reasons, such as not stating the inclusion of the numbers within the deadline

in the lists of advertising exclusion or prior exercise of rights, as well as the lack

numbering of the issuing, incoming call or date of the advertising activity, or that

the claims were addressed to entities other than VDF (in two cases). Without

However, if those others are valued in which the VDF itself confirms in its

own written responses to the requirements of the AEPD that the claimant

was included in the advertising exclusion lists or had exercised

previously the right of opposition before VDF, and that work in the file.

It must be added that in the Annex of notified files it is true that they appear in

occasions various files in which some of them do not belong to the present

process. In this sense, it should be clarified that this circumstance is due to the fact that

have also indicated, together with the specific file being assessed in this

procedure, those other previous -by way of indication and without being added to the

now valued- and with the same claimant for the same facts and already resolved by

Resolution of this Agency in accordance with article 65 of the LOPDGDD, which allows

prove the lack of technical and organizational measures continued over time in

regarding the attention of the rights exercised by those affected. It can be summed up in

that have also been indicated (without being added to those now valued) the

recidivism of offenders after resolutions of this Agency in protection of the rights

opposition/cancellation previously exercised by the same claimant before VDF. In

the allegations made by VDF on 12/1/2020 do not detail the procedures

to which it refers. All this shows the pattern of behavior, to which

previously we mention, in relation to the obligations of protection of

data corresponding to VDF.

Regarding the 14 numbers sent to Adigital in the practice of tests that VDF

alleges are repeated, it should be noted that, although they are not indicated, they are

correspond to claims that start from the same receiving telephone number of

the improper call, so it does not affect the facts now valued.

VDF alleges that another 49 numbers are not in the file, without indicating

which, so analysis is not possible.

VDF adds that 33 numbers on the list of practice tests are not registered in

Robinson, without indicating which ones. In this regard, it has already been indicated and this is stated in the

file, that VDF in its own responses to the requirements of this

AEPD affirmed that they were included in Robinson.

The rest of the allegations refer to another 4 telephone numbers receiving

calls, which does not indicate which.

Lastly, although these allegations refer to merely formal aspects and without

indicate your reference, it is insisted that from now on they will only be taken into account for your

assessment in this procedure of the claims before the AEPD that appear

in the aforementioned annex (162 claims), having eliminated from the annex those

claims/files that presented defects, even formal ones.

IV

Regarding the allegations presented to the Resolution Proposal, it is summarized

as indicated above in the fifth antecedent, in the following:

1. Prior: Reiteration of the allegations presented.

2. First: Arguments against the Proven Facts.

3. Second: Relating to information request files

referenced in the sanctioning procedure.

4. Third: Rejection by the AEPD of the allegations presented by

Vodafone.

5. Fourth: Alleged breach of article 24 RGPD. Consideration of

Vodafone as data controller and responsibility of Vodafone.

6. Fifth: Alleged breach of article 28 RGPD. alleged lack of control

real, continuous, permanent and audited of the treatments carried out by the

managers.

7. Sixth: Alleged breach of article 44 RGPD. Transfers

International data.

8. Seventh: Alleged breach of article 21 LSSICE. Send of

commercial communications without consent and to recipients who have

opposed to such treatment.

9. Eighth: Alleged breach of the General Telecommunications Law (LGT).

Alleged non-attention to the right of opposition not to receive communications

commercial.

As a matter prior to answering the allegations, and regarding the documentary block

provided by VDF, to point out that it is made up of a series of documents, among which

found a “proposal for VODAFONE the DEVELOPMENT AND

HOSTING to control robinsons in the Door to Door area, following their

instructions based on the Robinsones 2020 List Management Service”, dated 17

August 2020. Such document is unsigned between the parties (page 20

of the aforementioned documentation), in such a way that we are not accredited that such

proposal is implemented.

Likewise, they also provide a service provision contract for the face-to-face channel

between VDF and CASMAR that seem to present as a new model to subscribe with

your suppliers. This contract, although completed with the data of the parties,
It is neither dated nor signed. Nor does it prove that this contract was
is executing at this time nor, if applicable, what are the specific guarantees
implemented on the rights of those affected with which it is being carried out.
Such documents do not prove the establishment and current operation of the system
that they claim to have implemented (which they call "routing"), not even
corroborated by the screenshots presented in the documentation. In addition, at
date, sanctioning procedures continue to be initiated for the same facts
as a result of the claims filed with this AEPD.
The data controller, derived from his proactive responsibility, must
prove that it has complied, that it complies and that it will comply with the provisions of the
RGPD and LOPDGDD. And to prove that it currently complies, mere
party documents, drafts; it is not conclusively known whether it has led to
effect its content. Accreditation of compliance must be produced through a
certificate of the company itself or with the contribution of the aforementioned documents with
full legal validity (arts. 1254, 1258 and 1261 of the Civil Code).
In relation to this, Report 0064/2020 of the Legal Office of the AEPD attributes
to the person in charge of the treatment, within the obligations of the responsibility
proactively, the burden of "…guaranteeing the protection of said right through the
compliance with all the principles contained in article 5.1 of the RGPD,
adequately documenting all the decisions that it adopts in order to be able to
prove it."
Notwithstanding the foregoing, we cannot ignore that the fact that they are
implementing this new system tells us that previously they were not
holding, that the VDF collaborators did not contrast with the Robinson List,
VDF's internal Robinson list nor with the internal Robinson list of collaborators;

and that VDF did not control the contrast process either, bone, did not know if their

collaborators were complying with their instructions and with the regulations of

Data Protection.

Let us remember that VDF has the obligation to control the treatment of its

collaborators as if he did it himself, implementing all kinds of systems and

security and monitoring measures that verify compliance with your instructions

and compliance with data protection regulations.

In the new documents provided, they continue with the same approach as they have

maintained throughout the procedure in terms of those in charge of the treatment.

That is, they indicate in such documentation that the collaborators with whom they contract

call in the name and on behalf of VDF to offer VDF products: “Which, therefore,

above, the scope of this contract for the provision of services is the promotion door-to-

door of the Services in the name and on behalf of VODAFONE-ES and VODAFONE-

ONO” (page 24 of the documentation provided).

However, they are forced to present themselves in their own name and as responsible for the

treatment: “Furthermore, the COLLABORATOR will have its own databases

of potential clients who must meet the requirements established by the

applicable regulations on data protection and to whom it will offer the

VODAFONE services in the event that they show their interest. Thus,

the COLLABORATOR must appear before said potential clients in their own

name, as responsible for the treatment of the same, complying with the

applicable regulations regarding the protection of personal data” (page 30 and 31 of

documentation provided).

If collaborators use their own databases, then VDF considers them

data controllers until the sale has to be validated. However, it

above, VDF has access to said databases through the information that the

telephone numbers that their collaborators use: “The COLLABORATOR must

inform VODAFONE at all times of all those telephone numbers that

both the COLLABORATOR and its third-party collaborators use to contact

Clients or possible Clients of VODAFONE in the development of the activity object of the

this contract. In this sense, the use of telephone numbers does not

previously informed to VODAFONE will be understood as a breach of the

contract” (page 33 of the documentation provided).

We can observe a clear inconsistency between these manifestations, which

will result in a lack of definition of who is responsible and in charge of the treatment

between the parties, and may also transmit confusing information to the client or

potential client about who is responsible for the treatment.

The truth is that VDF is the data controller, since, although the bases

of data are not owned by VDF, the company controls them by supplying instructions

to carry out the treatments as if they were their own within the framework of a contract in which

that the collaborator acts and processes personal data on behalf of and on behalf of VDF.

Special mention must be made regarding the emails exchanged

by VDF and its collaborators and that have been provided with this documentation. In

an email dated July 30, 2019 VDF indicates to CASMAR, when

use their own databases, that “On the other hand, in the event that they carry out

calls using their own databases, not provided by Vodafone, must

make sure:

- That they have the prior and express approval of Vodafone to carry out such

calls.

- That they have the data in a legal way, informing and obtaining the

consent of the holders to be able to carry out commercial actions on behalf of

Vodafone. We remind you that the use of databases for the purpose of

collection on behalf of Vodafone that do not meet this requirement.

- Filter your databases with public Robinson lists, for example the managed one

by ADigital, prior to the start of the campaign.

- Do not use means of communication that have not been consented to by the

recipients of the campaign", (page 54 of the documentation provided).

This shows that they carry out commercial actions on behalf of VDF. The

collaborator does not hold any interest of his own regarding the result of the operation,

except for the economic compensation that you will receive for such service.

That, before making the calls, they have to verify that they have the approval

of VDF. The databases, then, are elaborated by the collaborators

specifically for VDF, since they must have their prior approval and go through

various filters. At that time the collaborators are already in charge of the treatment.

In the same email they indicate that "In both scenarios-VDF databases and

collaborator's databases-, it is essential that the collaborator:

- Provide a simple means for any recipient of the campaign to

communicate your wish not to continue receiving calls or commercial messages

on behalf of Vodafone.

- Transfer to Vodafone immediately the data of those recipients who

have communicated that they do not wish to receive further commercial communications and

make sure you don't contact them again in future broadcasts."

This VDF mandate, whatever databases are used by the

collaborators (own of the collaborators and elaborated for VDF), highlights

I state again that the collaborator is in charge of the treatment from the

beginning. That, although VDF indicates them in the new contract model that they are

responsible for the treatment and that "the COLLABORATOR must appear before

such potential customers on your own behalf, as data controller

the same", the truth is that it commands them that the right of opposition can be exercised

before the collaborator in front of VDF. This circumstance shows that they are

processing personal data on behalf of and on behalf of VDF.

Previous R)

Regarding the reiteration of the allegations presented, it must be

point out that they have already been answered in the Motion for a Resolution and that they appear in

FD II of this Resolution.

However, it must be insisted that the 15 files included in the second shipment

notified in November 2020 do not correspond to fifteen files

additional, but it is due to the material correction of incomplete documentation by

thus consider it the examining body, in order to correct deficiencies and avoid in all

moment violate the right to defense for the sake of the principle of transparency that

must preside over all administrative action.

Regarding the lack of evidence and imputation of infractions for mere

assumptions, it should be noted that the documentation in the file

unquestionably infers the facts now sanctioned. not only through the

On-site inspection carried out in September 2019 at the VDF headquarters

and that this is stated in the Inspection Act, but rather of the documentation attached to the aforementioned

Act and in the documentation provided by the claimants and that is complete in the

proceedings.

The lack of motivation, alleged in a generic way, in the answer to the

allegations by the investigating body cannot be admitted since the motivation

has been reasoned and sufficient for each of the allegations presented and

in accordance with the provisions of article 35.1 of Law 39/2015. what has not been

distorted by VDF have been the facts now analyzed after presenting this AEPD

Sufficient evidence to substantiate the alleged facts.

As far as classifying all the “collaborators” (sic) as in charge of the

treatment when, according to the VDF, they are not, one must insist on the provisions of the

definition of "Responsible for the treatment" and reports of this AEPD and the Committee

European Data Protection and that are detailed and developed in the FD of this

Resolution.

Regarding the allegation that the hiring by VDF of its managers of the

treatment is in accordance with the provisions of art. 28 of the RGPD, it must be rejected

plan, since in the FD of this Resolution (and in the Proposal for

Resolution) explains and details in detail the reasons why VDF has

violated the aforementioned article 28.

VDF also alleges that the infringement of article 44 of the RGPD (Transfer

International Data without the due guarantees required by the RGPD) does not appear in the Start Agreement when the AEPD already had all the documentation from the research phase. This allegation must be rejected since the agreement of beginning is in accordance with the provisions of article 64 of Law 39/2015 of October 1, of the PACAP, where section 2.b) in fine expressly indicates "... without prejudice to whatever results from the instruction. Said article is complemented by the provisions of the article 89.3 of said rule when it states that "In the resolution proposal, They will establish in a reasoned way the facts that are considered proven and their exact legal qualification, the infraction that, in its case, those constitute will be determined, the person or persons responsible and the proposed sanction, the assessment of the tests carried out, especially those that constitute the foundations basis of the decision, as well as the provisional measures that, if applicable, would have adopted…".

VDF also alleges that the specific conditions under which the make claims related to non-compliance with the LSSICE. the allegation must be rejected since the accreditation that the electronic communication has been requested or expressly authorized has not been verified by VDF in any time even throughout this procedure, as indicated in article 21.1 of said norm.

Regarding the allegation of lack of proof of non-compliance with article 48.1.b) of the LGT, it should be noted that it has been accredited and thus works in the documentation of the file regarding the tests carried out on behalf of and

on behalf of VDF, commercial calls were made to lines that appeared in the

advertising exclusion listings (Robinson), contrary to the provisions of article 23

of the LOPDGDD.

Finally, and grouping the last three previous allegations (9,10 and 11), it must be

mean that each and every one of the infractions imputed in the present

procedure have been sufficiently reasoned and motivated, as well as that in all

At this time, the proportionality of the sanction has been justified, having also been

VDF warned in the Resolution Proposal that if files had been initiated

independent, the sanction would be higher.

It also alleges arbitrary action by the AEPD in processing the

penalty procedure. In this regard, it should be noted that, first of all, it does not specify

the arbitrary action that it alleges and, secondly, the sanctioning procedure

has been processed in the legally required manner in accordance with the applicable regulations in each

infraction imputed and in accordance with the provisions of the fourth Additional Provision of the

LOPDGDD. Consequently, the claim must be rejected.

1R)

a)

<Regarding the lack of implementation of effective measures, VDF alleges that

has gradually implemented a centralized “routing system” of actions

advertising that guarantees the rights of those affected>.

The alleged is not proven, and if so, the facts to which the

this procedure refers to are prior to the alleged implementation of

said system, so its analysis is not appropriate for the purposes of infractions now

sanctioned, notwithstanding that in the future it will be assessed in the case of

that its implementation is accredited and is in accordance with the provisions of the RGPD, LGT and

LSSICE.

In addition, it must be stated that the alleged new system implemented "routing" progressively and culminating in its supposed implementation in February of 2020, there is no evidence that it has been effective since they continue to date receiving claims for the same reasons to this AEPD. And, the older abundance, additional or complementary claims continue to be received from the now claimants for the same facts without any record of action by VDF, as the person responsible for the processing of imputed data, to mitigate or minimize the effects of the violation of their fundamental right to the protection of data, enshrined in the C.E. in its article 18.4, and developed in the RGPD and LOPDGDD, as well as in the LGT and LSSICE, even having knowledge through the this procedure sees their identities and facts that are the object of the claim.

In this sense, and for merely informative purposes, there are new claims complementary to those already made of the following claimants:

Ñ.Ñ.Ñ., E/10495/2019, dated 09/16/2020, NRE: e2000002161.

O.O.O., E/07697/2018 and E/05544/2019, dated 06/11/2020, NRE: 019495/2020.

P.P.P., E/01633/2019, dated 09/30/2020, NRE: e2000003876.

Q.Q.Q., E/07183/2019, E/04493/2019, dated 09/26/2020, NRE: e2000003364.

R.R.R., E/08276/2019, dated 10/28/2020, NRE: e2000007996.

S.S.S., E/08043/2019, dated 10/13/2020, NRE: e2000005754.

T.T.T., E/08276/2019, dated 10/28/2020, NRE: e2000007996.

U.U.U., E/07106/2019, dated 11/17/2020, NRE: e2000010906.

b) < VDF alleges lack of identification of calling numbers and

recipients>.

In this sense, it is insisted that the files in which the action is not accredited

improper commercial have been withdrawn from valuation for several reasons already indicated

previously. It should be clarified once again, that it is stated in the documentation of the

file calls to numbers not included in the exclusion systems

advertising, but that in the response to the request of this AEPD has been

manifested by VDF the inclusion in the advertising exclusion systems and/or

in their systems of exclusion of the receiving line, which is why they appear in the

exhibit.

This type of statement by VDF has given rise, in the files

concrete in which such an affirmation has been made, to a favorable resolution by

part of this AEPD, so now it is not appropriate to argue otherwise at the risk of what

more interested in each moment. VDF adds that the CASMAR entity (making it

extendable to the rest of the intervening entities) is responsible for the databases

of the receiving numbers and without VDF having intervened even though it was the

responsible for the treatment. This allegation must be rejected outright on the basis of

the very definition of “responsible for the treatment” of article 4.7 of the RGPD, and

because the VDF itself affirms its non-intervention in the treatment when it is the

responsible for this.

c)

<VDF alleges that it has a specific procedure to facilitate the

exercise and attention to the right of opposition in advertising campaigns

managed directly by VDF (SMS and email) being able to unsubscribe>

In this regard, it must be insisted that article 21.1 of the LSSICE requires “request or

express authorization" to carry out the advertising action, without prejudice to compliance

of other requirements, and such request or express authorization is not accredited by VDF

that as responsible for the treatment is the one obliged to prove it.

VDF lists a series of file references in which it states that the

affected did not exercise any right. In this regard, and analyzed the references

indicated means that once the check has been made, or if they are in

the Robinson list, refer to the lack of express authorization, the affected party certifies

have exercised their rights, or VDF did not respond to the request for information

carried out since the Inspection of this Agency (E/07056/2019 and E/08284/2019)

being forced to do so.

VDF adds that it is those in charge who must carry out the appropriate consultations with

advertising exclusion lists. In this regard, it must be stressed again that the

responsible for the treatment, in this case VDF, is obliged, by virtue of the

provided in article 28 of the RGPD, to contract with those entities in charge with

sufficient technical and organizational capacity to carry out the assignment and VDF to be

able to monitor all the treatment ordered so that the treatments object

custom conform strictly to the RGPD and LOPDGDD.

d)

<VDF alleges that in the Fourth Proven Fact, reference is made to a

sanction file of reference PS/00290/2015, when said file is foreign

to VFD>.

In this sense, the spelling error should be pointed out and corrected, which said

file refers to reference PS/00290/2018 as stated in the Agreement

of Start, and of which VDF has full knowledge from the beginning of this

process.

and)

VDF alleges that it is accused of a general lack of collaboration with the

AEPD. In this sense, the allegation in section c) above has already been answered,

because VDF has not responded to several requests for information in the process of

prior investigation issued by this AEPD, giving rise to its lack of response to the

initiation of inspection activities.

<VDF alleges it is inadmissible to impute lack of action and communication with

F)

collaborators>.

In this regard, it should be noted that during the prior inspection process in 2019,

It was proven that VDF did not comply with the duty to inform those in charge of

the deficiencies that VDF should have detected in the treatments object of order or

nor did it impose the appropriate corrective measures, to which it was obliged in

quality of responsible for the treatment, to avoid in the future the repetition of the

deficiencies in the treatments, either because he was unaware of them, or because he simply

did not require its correction and adjustment of measures in accordance with the RGPD.

In this sense, there is an email sent in July 2019 to

some of the managers, not all of them, nor the sub-managers, in which

informs them of the obligation to cross their files with the exclusion lists

advertisement in which no corrective measures were imposed, when on that date VDF

was already aware of the claims made by the claimants before this

AEPD.

Likewise, there is another subsequent informative letter, in November 2020, with more information on the fulfillment of its obligations in which it explains to the managers, and not sub-managers, the new routing system that is being implementing, with a completion date of February 2020, to carry out actions marketing, but continues without demanding and imposing corrective measures adequate to avoid in the future the repetition of the deficiencies even when, insists, on that date VDF was already aware of the claims made by the claimants before this AEPD and the inspection had even already been carried out in person by the Inspection of this AEPD.

In this regard, it must be insisted that, regarding the first email from July 2019, the information was partial and with a general character not to all those in charge, and that these in turn inform the sub-managers, if it was not an email specifically to certain managers who, even so, there is no evidence that the obligations of which it reported or imposed corrective measures, since claims continued.

Regarding the second informative letter of November 2020, it should be emphasized in which is much later than the investigations carried out within the present proceedings. Consequently, the effectiveness of the aforementioned email was no more beyond that an informal communication without obligation and distribution partial since it did not impose corrective measures.

The emails that VDF sends to some of its treatment managers

reminding you of your Data Protection obligations are insufficient in

the framework of proactive responsibility. It is clearly noticeable the

insufficiency of the “measures” adopted due to the undoubted fact that the

problem examined in this sanctioning procedure continues to occur without

continuity solution.

But it is that, in addition, the abandonment of their obligations is shown by the simple

comparison of the measures that VDF would have adopted if data processors

had failed to comply with any of the terms that constitute the hard core of the

object of the contract (marketing campaigns). VDF would not have limited itself to sending

reminder emails that they have to execute the contract, but there would be

imposed penalties or even proceeded to terminate the contract. The same

diligence is the one that has to be applied with respect to proactive responsibility and

Data Protection.

Consequently, it is appropriate to reject the allegation by having proven the lack

of due diligence by the person in charge (VDF) in the follow-up and monitoring of the

custom data processing.

g)

On the condition of person in charge or in charge of the intervening entities

in the treatments carried out in the name and on behalf of VDF, it has already been

answered in the Resolution Proposal. However, the answer is reiterated and

expands on the Legal Basis of this resolution.

2R)

legal and have been withdrawn for this reason>.

<VDF alleges, among others, the existence of files open to persons

It should be noted that this allegation has already been answered, so it is insisted on

that the scope of application of LGT and LSSICE includes legal persons. The

fact that files have been withdrawn (29 in total, of the initial 191) has already

been the object of a contestation in the sense that the withdrawal is due to uncertainty in

the data, and not for the alleged reason of corresponding to legal persons and always

for the sake of transparency that must preside over all administrative action.

<Regarding the existence of numbers or receiving lines that are not

were on the Robinson list>, it has already been answered that the VDF itself in its

written responses to the requests for information affirmed the contrary and

accepted their inclusion, informing this AEPD that henceforth they were included in the

internal VDF list of exclusions.

Regarding the files outside VDF, it has already been answered that it only affected

two and have already been withdrawn from valuation in this proceeding, finding

among the 29 omitted in the Annex.

The fact of withdrawing 15% of appraisal files does not imply a decrease

of guilt in the imputed facts, since a violation of the RGPD is imputed (together

to those of the LGT and LSSICE) typified in article 83.4 in which it is established as a limit

maximum administrative sanction the amount of 10,000,000 (or 2% of the billing

annual). In addition, it has already been indicated that having initiated proceedings

independent sanctioning parties, the amount would have been greater than that now sanctioned,

even if the repealed LOPD had been applied. It must not be forgotten that the legislator

The European Union has modified the amount of the sanctions and it is now the applicable regulation.

The amount of the sanction is motivated and adjusted to law within the

discretionary criteria followed by the doctrine of this AEPD without in any

moment can be described as arbitrary. In this sense, it should be added that the

Sanctions of the RGPD are different from those of the repealed LOPD, turning out to be of the

order of fifteen times higher by mandate of the European legislature, so it is not

They are affordable amounts. In addition, article 83.4 RGPD now imputed, allows

impose amounts up to 2% of the total annual global business volume that, in this

case, it is of the order of 1,600 million, so the maximum amount established

legally in the RGPD could be 32 million euros, and double in the case of the

83.5 GDPR, when the amount now imposed is 4 and 2 million euros, respectively,

that is, the fifth (or tenth part in the violation of art 44 of the RGPD) part on the

applicable maximum. Consequently, the amount of the administrative penalty imposed

(art 58.2.i RGPD) is proportional to the imputed facts.

Regarding the alleged files, the following is meant:

Regarding E/04471/2018, the line is found in the advertising excursion system

as recorded in the file and accredited by the claimant with the registration number

of entry (NRE): 199267/2018.

Regarding files E/07183/2019 and E/07940/2019, there are defendants

codes (first column of the annex) RDC and RD, respectively, and accredited by the

documentation in the file.

<Regarding the alleged different legal personality of the VDF ESPAÑA entities,

VDF ONO, LOWI and VDF Servicios>, it should be noted that in the Inspection they witness

before VDF it was stated that the aforementioned entities are part of the VDF Group in Spain

and that in relation to marketing actions are governed by the same

procedure and that said Group was represented by Vodafone España SAU, since it was

responsible for the treatment decisions of the rest.

And this is stated in the Inspection Act:

<<The entities that form part of the Vodafone Group in Spain are VODAFONE

ESPAÑA S.A.U., (hereinafter VDF) VODAFONE ONO, S.A.U (hereinafter VDFONO)

hereafter) and VODAFONE ENABLER ESPAÑA, S.L (hereinafter LOWI), in what

referring to direct marketing actions, specifically the management of

recruitment campaigns, in general, are governed by the same process, (with

small relative differences, for example, to teleshopping providers (TVTA in what

successive). •

Regarding the process of unification of the information systems between VDF and

VDFONO, the process regarding the "individuals" segment is finished, while

that the process regarding the “companies” segment is currently on hold

until having the opportune verifications of its correct operation in the segment

"individuals". LOWI Customer Management Systems (CRM hereinafter)

remain independent>>).

In this regard, it must be insisted on what has already been said that the decision by VDF to

to continue working with the entities in charge of the treatment that

they already provided the service in ONO before the merger with VDF (as of 01/10/2018),

certifies that the person responsible for the treatment operations analyzed in the

This procedure carried out by ONO since the aforementioned date is VDF. For such

reason, the infractions analyzed in this procedure are imputed

entirely to VDF as it is the entity that decides the ends and means, without prejudice to

that Lowi's customer management information systems continue to be

Independent.

<Regarding the content of the Annex attached to the Proposed Resolution>, it is

means that the claimant of initials J.J.J. reference E/01489/2019 corresponds to it.

Regarding the claimant of initials L.L.L. references E/07671/2018 correspond to it

and subsequent research reference E/04688/2019, as well as references

E/08243/2018 and E/07690/2018. Regarding the claimant with the acronym M.M.M.,

correspond to reference E/01633/2019. And regarding the claimant of acronyms N.N.N.

references E/10149/2018 and that of subsequent investigative actions

E/07960/2019, as well as file references E/07775/2019 and

E/07960/2019. However, this allegation does not affect the merits of the case, being limited

to make some corrections when the important thing would have been to enter the file

and resolve the issues raised in the claim, which are none other than the

violation of the fundamental right to data protection of the claimants and

correct, now yes, the organizational and technical deficiencies that cause the

claims, or where appropriate, minimize their impact.

<As for the allegation of duplication of "procedures" (sic)>, which should refer to

"files" (section 5), the following must be indicated, the same as in the previous

paragraph, which is now corrected, and that the reference file must appear

E/09407/2018.

However, having detected the aforementioned material errors in the Annex, and now

correct, it should be noted that they do not affect quantitatively or on the merits of the

matter raised in this procedure nor do they cause any defenselessness because the

claimants are the same and are at the heart of this proceeding,

Therefore, after its correction in accordance with article 109.2 of Law 39/2015, of PACAP, the

claim must be rejected.

In section 6 of the same allegation, the lack of documentation of the

reference files E/07608/2018, E/07190/2019 and E/07188/2018 (the latter

has not been found affected by the procedure, so the statement must be wrong.

provided reference). Regarding the first two, claimants with initials FJJN and

FRPM respectively, it should be noted that there is no evidence that the information provided

by this Agency has been incomplete after the correction carried out by the Instruction

with the second shipment of documentation in November 2020. Consequently, the

claim must be rejected.

Finally, in section 6 of the second allegation, it is added that <the AEPD has not

issued to all claimants notice of agreement to initiate this

procedure, so once again the behavior of the AEPD has been arbitrary>.

In this regard, this Agency does not record the referenced facts, so the

allegation must be rejected, and regarding the arbitrariness to point out that the Proposal

Resolution has been reasoned and adjusted both in form and substance to the

legally established regulations, so there is no arbitrary conduct or

unfounded by the AEPD.

3R)

VDF alleges, <that in DF III of the Resolution Proposal there is no answer with

sufficient motivation for the allegations presented, which undermines the right to

defense of the alleging entity>.

In this regard, it should be added that the response by the examining body to the

allegations made by VDF after the agreement to initiate this proceeding,

were answered in their entirety and sufficiently reasoned. we bring back to

this point the reasoning already set out in this resolution on what really

constitutes a lack of motivation and that it can produce helplessness, and that it does not occur

in the case examined.

However, add that regarding the allegation made by VDF that <"AEPD

does not seem to take into account that they are third-party entities and that the controls have

to respect the current regulations on commercial and labor matters. control level

intended by the AEPD (continuous, permanent and audited) not only does it not have

legal support, but would mean an interference in the activity of the collaborators

that can hardly be executed without violating said regulations (i.e. possible

evidence of illegal transfer of workers from these companies to the companies

main). Especially considering that the criterion of the AEPD to assess whether a

control is adequate or not, it is only that of its result and, in its opinion, it only enjoys

of such a condition if it is absolutely infallible">, it should be noted that there is no

no transgression in the activities of the collaborators because it does not affect

its commercial activity, but only in what affects the treatment of personal data

staff.

The data controller is the one that has the capacity to determine the purposes and

the means of treatment and in such a fight a contract of person in charge of the treatment is signed.

treatment. Indicate the means of treatment, how the treatment has to be carried out

itself through the corresponding instructions and how it is verified that it is

executing in the entrusted way does not imply neither more nor less than delimiting

elements of the contracting that is being carried out between the two

entities.

In no case would there be that illegal transfer of workers that they allege. First,
because none of the circumstances legally provided for
this according to art. 43 of Royal Legislative Decree 2/2015, of October 23,
approving the consolidated text of the Workers' Statute Law (to
from now on, ET); Thus, neither the object of the service contracts between the companies
is limited to a mere provision of the workers of the ceding company to
the transferee company, nor the transferor company lacks an activity or a
own and stable organization, or does not have the necessary means for the
development of its activity, or does not exercise the functions inherent to its condition of
entrepreneur: here we find two different legal entities that have their
own organizational structure, where there is no possible confusion between the two.
And, second, because the data controller does not send instructions or mandate
to the employees of the person in charge, but to the person in charge himself, who will act as
consider the power of management over its own employees (art. 20.3 of the ET).
Without prejudice to expanding the answer to the following sections of the allegation in
the following Foundations of Law and those already answered during the
sanctioning procedure and that has already been included above in this
resolution, we now proceed to answer succinctly:
Regarding the erroneous inclusion of files, it has already been answered, not without insisting
now that the withdrawal of 29 files has not been motivated by the "inclusion
erroneous files", but for the sake of transparency, and only in two cases and that
through the hearing facilitated to VDF by the instruction to the documentation of the

file has been corrected,

Regarding the confusing and messy presentation of the initiation agreement, it should be noted that the

The complainant has not requested any practical evidence in order to clarify, in his opinion,

deficiencies that prevent him from exercising his right to defense, something that if he has done the

instructing body in order to avoid it. It should be added that the documentation sent to

VDF in March 2020 is duly arranged in order of entry date

in this AEPD.

Regarding the prior filtering of the VDF database, it should be noted, as has been

accredited (In-Person Inspection of September 2020), that in none of the chaos

this filtering has been satisfactory. Not even in the Databases owned by VDF, every time

that delivered to those in charge these were not filtered with the exclusion lists

exercised before them, nor in the databases coming from those in charge

that were not filtered with the VDF exclusion lists. In both cases, there was

a total lack of communication between those involved in the treatment (VDF and

those in charge and vice versa) as a result of poor organizational means and

techniques established in the communication protocols between the entities, which

they simply did not exist, and that their correct implementation was the responsibility of VDF

as the person in charge of the treatments carried out between the entities

interveners. All this has given rise to the violation of the guarantees and rights of

those affected in a systematic way and without the person in charge (VDF) detecting it and in its

case, correct. In addition, it is materially impossible for those in charge to continue

the instructions of the person in charge (VDF) simply because these instructions or

they were confused, or they were scarce or they did not exist, which cannot be accepted

entity such as VDF, which is one of the leading telecommunications operators in the

country with millions of subscribers and, at least it is assumed, with sufficient experience and linked to the processing of personal data. In short, VDF does not intervened, imperatively having to intervene, in forcing those in charge in all time to respect the guarantees and rights imposed by the RGPD.

It should be added that, with respect to the LGT, the right of opposition must be interpreted according to the RGPD and LOPDGDD, while according to the LSSICE it is necessary prior authorization for electronic communications. In both cases, neither It is established by the person in charge (VDF) the appropriate protocols of communication between the different intervening entities in order to guarantee the rights of those affected, despite being legally obliged to do so.

Regarding that VDF will implement the rejection of contracts that do not meet the protocol established by VDF, it should be noted that, first of all, that protocol must exist containing detailed instructions and mandates that clearly avoid any diversion of actions; and secondly, and in what now affects, it is not enough to reject contracts that violate this type of established protocols, but what must be avoided is reaching that situation previously violating the guarantees and rights of those affected.

Regarding the new "routing" system supposedly implemented by VDF of progressively and with a completion date in February 2020, I already told you in this Resolution that is neither accredited nor are there indications that it is, since the The claimants themselves in the files of this procedure have presented with After that date, new complementary claims to the initial one and The AEPD continues to receive claims for the same events and to date, in

specifically a year later. All this denotes that either the new system has not been

implemented, or in its case, is highly inefficient, so it should be reconsidered

its structure and operation. Violation of the rights of the interested parties

keep producing.

VDF alleges that no corrective measures have been implemented because the facts are

"sporadic and exceptional" (sic). Just remember the more than forty

disciplinary proceedings initiated in the last two years against VDF by this AEPD and

the high percentage of material and human resources that this AEPD is using

to safeguard or restore the fundamental right to data protection and

guarantees of those affected as a result of the numerous claims that

are reiterated before this AEPD against VDF. Consequently, qualifying as "sporadic and

exceptional" the facts now analyzed cannot be admitted.

As for the fact that the AEPD has not accredited the infractions committed, this

procedure deals with it and thus they are duly documented, and not by

mere assumptions as it alleges, but by objective facts that are accredited

from the documentation provided by the claimants as well as from the investigations

carried out by this AEPD, and that VDF has not been able to distort.

4R)

About the Treatment Manager as indicated in article 24 of the RGPD, it is

a broad concept, which seeks to provide effective and complete protection to

interested.

This has been determined by the jurisprudence of the CJEU. For example, the STJUE in the case

Google-Spain of May 13, 2014, C-131/12, considers in a broad sense the

responsible for the treatment to guarantee "an effective and complete protection of the

interested”.

In the same way, such effective and complete protection must be deployed in the event

that the data processing is carried out by the data controller through a

in charge of the treatment, because if not, it would be violating the letter and the purpose of the

GDPR. It would be producing a "flight" from the right to data protection.

Thus, in the Report of the Legal Office of the AEPD of July 20, 2006, it is inferred

that “the important thing to delimit the concepts of responsible and in charge of

treatment does not turn out to be the cause that motivates the treatment of these, but the sphere

direction, control or organization that the person in charge may exercise over the

processing of personal data in its possession by virtue of

that cause and that would be entirely closed to the person in charge of the treatment”; in

In our case, the control, direction and organization of the treatment corresponds to VDF.

When those in charge use their own databases, the control, direction and

ordering of VDF, in whose name and representation they call potential clients. The

manager does not decide on the purpose of its databases, but it is VDF who

it tells them what they can and should use them for.

The art. 33.2 of the LOPDGDD indicates that they are considered responsible and not in charge

those who “in their own name and without proof that they act on behalf of another

build relationships with those affected”; which, interpreted in the opposite sense,

assumes that it is a person in charge who, on behalf of the person in charge, establishes relations with

the affected. This is regardless of whether it is necessary to access data for this.

on behalf of third parties.

The person in charge, to be one, does not hold any interest of his own regarding the result of the

treatment object of order, without prejudice to the economic compensation received
for the service provided and what happens in the case examined. The
Managers have no interest of their own, act on behalf of and on behalf of the
responsible, fulfilling its orders and for its purposes, and this is what
determines that they are in charge from the beginning. The use of own databases or
outsiders does not change such a perception.
In this sense, Report 0064/2020 of the Legal Office of the AEDP (dated
12/18/2020) establishes that “Likewise, another criterion to consider is whether the entity
involved in the treatment does not pursue any purpose of its own in relation to the
treatment, but is simply paid for the services rendered, since in
In this case, it would act, in principle, as a person in charge rather than as a person in charge.
(section 60)” - Guidelines 07/2020 of the European Committee for Data Protection
(CEPD) on the concepts of data controller and manager in the RGPD
(pending at this time for final adoption after having completed the process
of public consultation) of September 2, 2020-.
Regarding the non-application of the aforementioned STS 1562/2020, we must mean that if
turns out to be applicable to the present case since what it shows is that
For the purposes of data protection regulations, an entity is in charge of
treatment, even if it works with its own databases. The situation is the same
that in which we now find ourselves, with the difference that VDF in identical
circumstance has understood that its collaborators are not in charge of treatment
but responsible for the treatment.

It is crystal clear that you are responsible for the treatment when you decide
about the means and purposes of the treatment. VDF alleges to the contrary that "it cannot be
responsible for the treatment of practically all the personal data object of
analysis in this proceeding, as it is not the entity that provides the bases
of data in question, does not provide the means to collaborators to carry out the
treatment of the data, nor does it decide, or set in any way, the parameters
identifiers of the recipients of the commercial action, being carried out in
completely independently, and at its best discretion, by the
collaborators". However, you are determining the means of treatment when
chooses that collaborators use their own databases, specially elaborated
for VDF, and allows them a certain margin of action regarding the parameters
identifiers of the recipients of the commercial action.
Ratifying the foregoing, Report 0064/2020 of the Legal Office of the AEDP (of
dated 12/18/2020) states that "In any case, it must be carefully analyzed and in
depth the legal relationship established between the parties in order to identify
who determines the ends and the means, for which the repeatedly cited
CEPD guidelines give different criteria that can be used to set these
positions, starting from the fact that the word "determine" implies actually exercising a
influence on the ends and means, for which it is not an obstacle that the service is defined
in a specific way by the person in charge, provided that the person in charge is
present a detailed description and can make the final decision on how the
that the treatment is carried out and to be able to request changes if necessary, without
that the person in charge can later introduce modifications in the elements
essential to the treatment without the approval of the person in charge (section 28) or that
allow the manager a certain margin of maneuver to make some decisions

in relation to the treatment (section 35) being able to leave to the person in charge the taking of

decisions about non-essential means (paragraph 39), so that the person in charge does not

must treat the data in another way than in accordance with the instructions

of the person in charge, without prejudice to the fact that said instructions may leave a certain degree

discretion on how best to serve the interests of the controller by allowing the

responsible for choosing the most appropriate technical and organizational measures (section 78)".

It is clear that VDF, having examined the specific case of this proceeding

sanctioning, is the one who "really exerts an influence on the ends and the means";

the simple assertion of VDF that its collaborators are not in charge of the

treatment does not undermine the reality of the facts. It is VDF "who can take the

final decision on the way in which the treatment is carried out and can request

changes".

In relation to the means of treatment, the data controller will establish

means of treatment to a greater or lesser extent depending on its strategy

commercial. The fact that the processor Vodafone grants certain

room for maneuver or that your instructions leave you a certain margin of discretion,

prevents it from being considered in charge of the treatment.

For all these reasons, VDF collaborators are legally in charge of processing

because VDF determines the means (the collaborators' own databases)

although VDF provides them with instructions allowing them a certain margin for such purposes

of autonomy in terms of choosing the parameters to make these calls.

Determine what the means of treatment are, what it includes with what, how and the

when the treatment has to be carried out, includes any decision-making action

of the controller, regardless of the extent of it.

VDF adds that "In addition to the above, as the AEPD is well aware, the

Position of advertising service providers is subject to regulation

specific in article 46.2 of the RLOPD regarding the processing of data in

advertising campaigns, regulations that remain in force as long as they do not contradict or

conflicts with the provisions of the RGPD, establishing, in its section 2 b), that:

“In the event that an entity hires or entrusts third parties with the performance of a

certain advertising campaign of its products or services, entrusting the

treatment of certain data, the following rules will apply: b) When the

parameters were determined solely by the contracted entity or entities,

These entities will be responsible for the treatment.

Well, the sole repeal provision of the LOPDGDD establishes in its section

third that "Furthermore, many provisions equal to or less than

rank contradict, oppose, or are incompatible with the provisions of the

Regulation (EU) 2016/679 and in this organic law”.

Although it does not expressly repeal the RLOPD, it will be understood to be tacitly repealed.

in all those questions that contradict, oppose, or are incompatible

with the provisions of the RGPD and the LOPDGDD. The precept of the aforementioned RLOPD is

surpassed by the RGPD and the LOPDGDD, according to the conceptualization of what it is to be

responsible and in charge of the treatment.

In any case, we are not in a factual situation in which the parameters

are determined solely by the contracted entities; rather the contrary, it is

VDF who, as data controller, is setting the parameters.

In summary, in the case examined, the collaborators hired to carry out

direct marketing actions, are in charge of VDF treatment when carrying out

direct marketing actions in the name and on behalf of the latter. They act under

VDF brand exclusively. It is VDF who determines the ends and means of the

treatment, being significant that the databases that the person in charge of the

treatment makes available to VDF are made specifically for these

latter (it is the medium that VDF chooses). And, we cannot forget, even if it is by title

merely illustrative, that the new routing system, which they point out that they have

implemented, integrates all data processors in such a network of

routing.

5R)

Going back to the genesis of the concept of data processor and following the

Opinion 1/2010, of 16/2, of the GT29, "The concept of data processor does not

contained in Convention 108. The role of the data processor was recognized

for the first time in the Commission's first proposal – although this did not introduce

the concept—in order to “avoid situations in which processing by third parties

on behalf of the person responsible for processing the file has the effect of reducing the

level of protection enjoyed by the data subject'. The concept of manager

treatment is only included explicitly and autonomously in the modified proposal of

the Commission and after a proposal from the European Parliament when, before

take on its current formulation in the Council's Common Position. Like the

definition of the data controller, the definition of the data processor

encompasses a wide variety of actors who can play that role ("person

physical or legal entity, public authority, service or any other body"). Existence

of a data processor depends on a decision made by the data processor.

data controller, who can decide that the data is processed within its

organization, for example by personnel authorized to process data under their

direct authority (see, inversely, article 2.f)), or delegate all or a

part of the processing activities in an external organization, that is — as

stated in the explanatory memorandum of the Commission's amended proposal—,

into 'a legally distinct person acting on his own account'.

Therefore, in order to act as data processor, two conditions must be met.

basic conditions: on the one hand, to be a legal entity independent of the

responsible for the treatment and, on the other hand, carry out the processing of personal data by

account of it".

Regarding the allegation made, VDF answers itself when it states that

"In reality, the aforementioned regulations establish the obligation on the part of the person responsible for

carry out suitability checks during the selection of those suppliers to

those who intend to provide personal data and, likewise, the minimum conditions under

which they must treat said personal data, and said

conditions in the corresponding contract that will contemplate all the aspects

required in article 28 RGPD … ", which in the present case has not been done.

Article 28.1 of the RGPD states: "1. When you are going to perform a treatment for

account of a controller, the latter will only choose a processor who

offers sufficient guarantees to apply technical and organizational measures

appropriate, so that the treatment is in accordance with the requirements of the

this Regulation and guarantee the protection of the rights of the interested party." I know

notes that it refers to the technical and organizational measures that must be

guarantee in all treatment object of order. That is, since before the order

of the treatment itself, such as the appropriate choice of who will act

as manager, until the end of the service as stated in the article itself

28.3.g).

And article 28.3.h continues): “will make available to the person in charge all the

information necessary to demonstrate compliance with the obligations

established in this article, as well as to allow and contribute to the realization

of audits, including inspections, by the controller or another auditor

authorized by said person in charge.

Regarding the performance of audits as an ideal means for the person in charge

of the treatment continuously supervise the person in charge of the treatment, the

Guidelines 07/2020 of the European Committee for Data Protection (CEPD) on the

concepts of data controller and manager in the RGPD of 2 of

September 2020 establish that -the translation is ours- “97. The obligation to

use only data processors "who provide guarantees

sufficient" contained in article 28, section 1, of the RGPD is an obligation

keep going. It does not end at the moment when the controller and the person in charge of the

treatment enter into a contract or other legal act. Instead, the controller must

appropriate intervals, verify processor warranties, including through

audits and inspections when appropriate".

In the same way that the person responsible for the treatment audits those treatments that

performed directly and by your hand, you must audit the treatments that other

they do for their assignment.

In the present case, VDF has not complied with either of the transcribed sections,

especially, when being able and having the legal obligation to do so (with audits

and inspections), VDF has not required the treatment manager to comply with

its obligations, non-compliance that must be attributed solely to VDF as responsible

of the treatment.

6R)

Regarding the breach of article 44 of the RGPD.

Of the evidence contained in the documentation of the file and this is reflected in

the TWENTIETH Proven Fact, specifically the treatment manager contract

signed between VDF and Casmar on 05/01/2019, in which VDF, as responsible

of the treatment subscribes with Casmar that to carry out the treatment object of

order is made from a third country (Peru) without complying with the due guarantees that

required by the RGPD, by consenting - with full knowledge by the signatory parties since

which is stated in the contract - that Casmar will carry it out through the entity

sub-processor (A-Nexo) in the name and on behalf of VDF (according to the signed contract of

dated 05/01/2019 between VDF and Casmar and the subsequent contract signed between Casmar and A-

link dated 06/27/2019). In said contract it is stated textually: “location of the

treatment: Peru” (sic). Consequently, the person responsible for this Transfer

International (TI) without due guarantees agreed between VDF and Casmar through

the sub-commissioned entity based in Peru -A-nexo-, is none other than VDF when acting in

quality of person in charge of the treatment object of order in the mentioned conditions

therefore, VDF is obliged to impose and establish the due guarantees so that

That IT can be carried out in accordance with the requirements established in the RGPD.

7R)

Regarding the breach of article 21.1 of the LSSICE.

Article 21 of the LSSICE: "Prohibition of commercial communications made to

via email or equivalent electronic means of communication.

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

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.

It is already clear from the beginning of the procedure that the marketing actions in

name and on behalf of VDF would be done using random numbers (and

electronic addresses) to "potential clients" in whose address or area the

of installed VDF services. It has also been alleged that such numbering

(used for sending SMS) were previously crossed with the lists of

advertising exclusion, which at no time appears to have been carried out and without prejudice to

which is explained later.

Now VDF alleges that the SMS sent were made to clients taking advantage of the

exception of article 21.2 of the LSSICE.

Well, it could be that way in some chaos outside of this procedure, but at present

In this case, the opposite has been proven, that is, that the recipients were not clients of

VDF and had even exercised their right to object, so the

application of the aforementioned section of article 21 (21.2) of the LSSI. the files

related to non-compliance with the LSSICE are indicated with the code "C" in the

column of the Annex to the Motion for a Resolution and which is now also attached.

Consequently, the claim must be rejected.

8R)

Regarding the LGT, VDF alleges alleged non-compliance.

The Preamble of the LOPDGDD states the following:

“Title IV contains «Provisions applicable to specific treatments»,

incorporating a series of assumptions that in no case should be considered

exhaustive of all lawful processing. Among them, it is worth noting, first of all,

Firstly, those with respect to which the legislator establishes a presumption "iuris

tantum” of prevalence of the legitimate interest of the person in charge when they are carried out

with a series of requirements, which does not exclude the legality of this type of treatment

when the conditions set forth in the text are not strictly met, although in

In this case, the person in charge must carry out the legally required weighting,

not presume the prevalence of their legitimate interest. … “

Article 23.4 of said regulation (LOPDGDD) states:

"4. Those who intend to carry out direct marketing communications must

previously consult the advertising exclusion systems that could affect your

action, excluding from the treatment the data of those affected who would have

expressed their opposition or refusal to it. For these purposes, to consider

Once the previous obligation has been fulfilled, it will be enough to consult the exclusion systems

included in the list published by the competent control authority.

It will not be necessary to carry out the query referred to in the previous paragraph when the

affected had provided, in accordance with the provisions of this organic law, his

consent to receive the communication to whoever intends to make it.”

It is already indicated in this Resolution (FD V) and that it is not appropriate to reiterate, the reasons

whereby the application of the LGT prevails in Spanish law, as a rule

special, compared to the RGPD and LOPDGDD as general regulations.

In the present case, since the authorization provided in the second

paragraph of the aforementioned section 4 of article 23, because there is no evidence of the consent of the

claimants, has been sufficiently accredited throughout the procedure that

both VDF, in its capacity as data controller, and those responsible for

acted on behalf of and on behalf of VDF did not suppress those receiving lines

that were previously included in the advertising exclusion systems of

your marketing actions. This is reflected in the column of the Annex of the

Resolution Proposal and that is now also attached with the code “R”.

Consequently, VDF has violated the aforementioned article 48.1.b) in relation to the 23rd of

the LOPDGDD so the allegation must be rejected.

9R)

sanctioning

VDF alleges a clear position of defenselessness during this proceeding

Regarding the principle of interdiction of arbitrariness, it should be noted that there is no

any action by this AEPD of diversion of legal actions, but that all the

The procedure followed has been adjusted to the legal regulations both in form and in the

motivations of its administrative acts, tests and other legal guarantees and

constitutional requirements.

There is no doubt that this sanctioning procedure is complex and voluminous,

but even so, all the required legal guarantees have been complied with. Even in the

rectification of material errors as indicated in art. 109 of the LPACAP, in

special in the complementary shipment is rectification -that not of inclusion of new

files-, giving audience to the interested party as indicated in the aforementioned rule and art.

105 of the C.E. To which we must add that, while the suspension of deadlines is in force

In accordance with the state of alarm decreed in Spain, the investigating body considered

As an urgent procedure, the sending of the file (it was carried out in March 2020) in order to avoid

defenseless and that during the time the terms were suspended, the accused had

of the time needed to analyze the documentation (about ten thousand sheets), which in

normal conditions without suspension of terms would have had a maximum of 15 days

deadline for the study and preparation of the defense line.

Regarding the imputation of infringement of article 44 of the RGPD (Transfer

International of personal data without the guarantees required in the RGPD) in the

Resolution Proposal, mention has already been made in this Resolution.

Lastly, it must be signified that VDF has not requested any test practice

during the sanctioning procedure in support of some line of defense that

considered timely in the face of the imputed infractions. The only test performed

has been requested by the investigating body in order to avoid defenselessness to the claimed, has

proceeded to correct material errors after analyzing the more than ten thousand sheets

of which the file consists and has provided VDF with an Annex with the summary

structured of the facts precisely so that he had the possibility of dealing with it

automatically and for the sake of transparency and thus avoid any impediment that

could cause a reduction of their rights, giving the mandatory hearing and

deadline for allegations, as VDF has done. Consequently, it proceeds

reject the allegation as there is no evidence of arbitrariness in the actions of the AEPD or

violation of the principle of defense, but it is known that during the development of the

In this sanctioning procedure, all the legal guarantees have been observed.

established.

v

Article 2.4 GDPR. Relationship with Directive 2000/31/EC of the European Parliament and

of the Council of June 8, 2000 on certain legal aspects of the

information society services, in particular electronic commerce in the

internal market (hereinafter Directive 2000/31/EC).

"4. This Regulation shall be without prejudice to the application of Directive

2000/31/EC, in particular its rules relating to the liability of providers

of intermediary services established in its articles 12 to 15".

In this regard, LSSICE incorporates the aforementioned Directive into the Spanish legal system 2000/31/CE.

Article 95 GDPR. Relationship with Directive 2002/58/EC of the European Parliament and of the Council of July 12, 2002 regarding the processing of personal data and the privacy protection in the electronic communications sector successive Directive 2002/58/CE).

"This Regulation will not impose additional obligations on natural persons or legal in terms of treatment in the framework of the provision of services of electronic communications in public communication networks of the Union in areas in which they are subject to specific obligations with the same objective established in Directive 2002/58/CE of the European Parliament and of the Council of July 12, 2002".

In this regard, the LGT incorporates the aforementioned Directive into the Spanish legal system 2002/58/CE.

In relation to the aforementioned articles of the RGPD mentioned above (art 2.4 and 95) and the mentioned LGT and LSSICE, the Legal Report of this AEPD of reference 0173/2018, already known by the respondent who alleges it in her writing.

In the same sense, Opinion 5/2019 pronounces on the interaction between the Directive on privacy and electronic communications and the Regulation general data protection, in particular with regard to competition, functions and powers of the data protection authorities Adopted on 12 March 2019, in paragraphs 66 to 70 and 86 in conclusions, and which are reproduced at continuation:

<66. In the event that national legislation confers on the data protection authority data competence for the application of the Directive on privacy and

electronic communications, the legislation must also determine the functions and

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

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powers of the data protection authority in relation to the application of the

Directive. The data protection authority cannot automatically trust

the functions and powers provided for in the RGPD to adopt measures to make

comply with national regulations on privacy and communications

electronic, since these functions and powers of the RGPD are linked to the

GDPR application. National legislation may assign functions and powers

inspired by the RGPD, but can also grant other functions and powers to the

data protection authority for the application of national rules on the

privacy and electronic communications in accordance with article 15 bis of

Directive.

67. The discretionary power only exists within the requirements and limits established

in higher standards. Article 8(3) of the Charter requires that compliance

of the regulations on the protection of personal data is subject to the control of a

independent authority.

68. When the processing of personal data activates the material scope of application

both GDPR and the Privacy and Communications Directive

electronic information, data protection authorities are competent to control

the subsets of the treatment that are governed by the national norms of

transposition of the Directive only if national law gives them this

competition. However, the competence of data protection authorities

under the GDPR in any case remains non-exhaustive as regards

processing operations that are not subject to special rules

contained in the directive. This line of demarcation cannot be modified by the

national legislation transposing the Directive (for example, by extending the

material scope beyond what is required by the Directive and granting

exclusive powers for said provision to the national authority of

regulation).

69. The data protection authorities are competent to enforce the

GDPR. The mere fact that a subset of the treatment is included in the

The scope of the Directive does not limit the competence of the authorities of

data protection under the GDPR.

70. When exclusive jurisdiction has been granted to a body other than the

data protection authority, national procedural law determines what must be

occur when the interested parties file complaints with the data protection authority.

data, in relation, for example, to the processing of personal data in the form of

traffic or location data, unsolicited electronic communications or

collection of personal data through cookies, without also reporting an infringement

(potential) GDPR.

86. When the processing of personal data activates the material scope of application

both GDPR and the Privacy and Communications Directive

electronic information, data protection authorities are competent to control

data processing operations governed by national standards of

electronic privacy only if the national legislation confers this

competence, and such control must take place within the powers of supervision

assigned to the authority by national law transposing the Directive.>>

Consequently, in relation to the specific matter regulated by the LGT and the LSSICE, these laws must prevail by reason of matter against the RGPD and LOPDGDD, notwithstanding that the former may need to be complemented by the legal figures that develop the latter.

Without prejudice to the subsequent development of the facts now analyzed from the perspective of the aforementioned special laws (LGT and LSSICE), the definitions of the legal concepts that the RGPD indicates in article 4:

Article 4 GDPR. Definitions

For the purposes of this Regulation, the following shall be understood as:

1) "personal data": any information about an identified natural person or identifiable ("the interested party"); An identifiable natural person shall be deemed to be any person whose identity can be determined, directly or indirectly, in particular by an identifier, such as a name, an identification number, location, an online identifier or one or more elements of the identity physical, physiological, genetic, psychic, economic, cultural or social of said person;

2) “processing”: any operation or set of operations carried out on personal data or sets of personal data, whether by procedures automated or not, such as the collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, broadcast or any other form of enabling of access, collation or interconnection, limitation, suppression or destruction;

6) “file”: any structured set of personal data, accessible in accordance with

to certain criteria, whether centralized, decentralized or distributed

functional or geographical;

7) “responsible for the treatment” or “responsible”: the natural or legal person,

public authority, service or other body which, alone or jointly with others, determines the

purposes and means of treatment; whether the law of the Union or of the Member States

determines the purposes and means of the treatment, the person in charge of the treatment or the

Specific criteria for their appointment may be established by Union Law.

or of the Member States;

8) “processor” or “processor”: the natural or legal person,

public authority, service or other body that processes personal data on behalf of the

data controller;

10) "third party": natural or legal person, public authority, service or body

other than the interested party, the data controller, the data processor

and of the persons authorized to process the personal data under the direct authority

of the person in charge or the person in charge;

11) “consent of the interested party”:

any manifestation of free will,

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

a statement or a clear affirmative action, the processing of personal data that

concern you.

18) "company": natural or legal person engaged in an economic activity,

regardless of their legal form, including companies or associations that

regularly carry out an economic activity;

25) 'information society service' means any service in accordance with the

definition of article 1, paragraph 1, letter b), of Directive (EU) 2015/1535 of the

European Parliament and of the Council. (Directive (EU) 2015/1535 of the Parliament

European and Council, of September 9, 2015, which establishes a

information procedure regarding technical regulations and rules

relating to information society services (OJ L 241 of 17.9.2015, p.

1)).

SAW

Article 24 Responsibility of the data controller

<<1. Taking into account the nature, scope, context and purposes of the

treatment as well as the risks of varying probability and severity for the rights

and freedoms of natural persons, the data controller will apply measures

appropriate technical and organizational measures in order to guarantee and be able to demonstrate that the

processing is in accordance with this Regulation. These measures will be reviewed and

will update when necessary.

2. When they are provided in relation to treatment activities, between

the measures mentioned in paragraph 1 shall include the application, by the

responsible for the treatment, of the appropriate data protection policies...>>.

Report 0064/2020 of the Legal Office of the AEPD has emphatically expressed

that “The RGPD has meant a paradigm shift when addressing the regulation of the

right to the protection of personal data, which is based on the

principle of "accountability" or "proactive responsibility" as pointed out

repeatedly by the AEPD (Report 17/2019, among many others) and is included in the

Statement of reasons for Organic Law 3/2018, of December 5, on the Protection of

Personal data and guarantee of digital rights (LOPDGDD)".

The aforementioned report goes on to say that "…the criteria on how to attribute the different

roles remain the same (paragraph 11), reiterates that these are concepts

functional, which are intended to assign responsibilities according to roles

of the parties (section 12), which implies that in most cases

The circumstances of the specific case must be taken into account (case by case), taking into account

their actual activities rather than the formal designation of an actor as

"responsible" or "in charge" (for example, in a contract), as well as concepts

autonomous, whose interpretation must be carried out under the European regulations

on protection of personal data (section 13), and taking into account (section

24) that the need for a factual assessment also means that the role of a

controller is not derived from the nature of an entity that is

processing data but of their concrete activities in a specific context…".

The concepts of controller and processor are not formal, but

functional and must attend to the specific case. The denomination by VDF of

"responsible for the treatment" to its collaborators, does not automatically confer

such condition.

The data controller is from the moment it decides the purposes and

means of treatment, not losing such condition the fact of leaving a certain margin of

action to the person in charge of the treatment or for not having access to the databases of the

duty manager.

This is unquestionably expressed in Guidelines 07/2020 of the European Committee for

Data Protection (CEPD) on the concepts of data controller and

manager in the RGPD -the translation is ours-, "A data controller is

who determines the purposes and means of the treatment, that is, the why and the

how of the treatment. The data controller must decide on both

purposes and means. However, some more practical aspects of

implementation ("non-essential means") can be left to the person in charge

of the treatment. It is not necessary that the controller actually has access to the

data that is being processed to qualify as responsible".

In the present case, it is stated that VDF is the data controller

now analyzed since, as defined in article 4.7 of the RGPD, it is the entity that

determines the purpose and means of the treatments carried out in actions of

direct marketing of the three entities (VDF, ONO, LOWI). So in your

The condition of data controller is obliged to comply with the provisions of

the transcribed article 24 of the RGPD and, especially, in terms of effective and continuous control

of "appropriate technical and organizational measures in order to guarantee and be able to demonstrate

that the treatment is in accordance with this Regulation" among which

find those provided in article 28 of the RGPD in relation to those in charge

of the treatments acting in the name and on behalf of VDF.

In this sense, and in relation to the allegation made by VDF in its written

allegations to the initial agreement that those responsible for the treatments that

the various entities carry out on behalf of and in the name of VDF and, therefore, those that

have their own files, they do not act as managers but as

responsible for these treatments, it should be noted that in the Guidelines 07/2020

of the European Committee for Data Protection (CEPD) on the concepts of

responsible for the treatment and in charge in the RGPD -the translation is ours-,"42.

It is not necessary for the data controller to actually have access to the data.

data being processed. Anyone who outsources a processing activity and, by

do so, has a determining influence on the purpose and (essential) means of the

treatment (for example, adjusting the parameters of a service in such a way that

influence whose personal data will be processed), should be considered as

responsible even though he will never have real access to the data". Let us remember that VDF

determines to whom calls can be made, since calls cannot be made to

who are already customers of the company, in addition to filtering regarding lists of

advertising exclusion or what corresponds with respect to the exercise of opposition.

Likewise, following the legal report of the AEPD dated 11/20/2019, with

internal reference 0007/2019 and STS 1562/2020 (for all of them), we must point out that

analyzes the legal figure of data processor from the perspective of the GDPR

that regulates it exclusively.

<<Article 28 Person in charge of the treatment

1. When a treatment is going to be carried out on behalf of a person in charge of the

treatment, this will only choose a person in charge who offers sufficient guarantees

to apply appropriate technical and organizational measures, so that the

treatment is in accordance with the requirements of this Regulation and guarantees the

protection of the rights of the interested party.

2. The person in charge of treatment will not resort to another person in charge without prior authorization

in writing, specific or general, of the person in charge. In the latter case, the manager

will inform the person in charge of any change foreseen in the incorporation or

replacement of other processors, thus giving the controller the opportunity to oppose

to these changes.

3. The treatment by the person in charge will be governed by a contract or other legal act with

under the law of the Union or of the Member States, binding the person in charge

with respect to the person in charge and establish the object, duration, nature and

purpose of the treatment, the type of personal data and categories of interested parties, and the

obligations and rights of the controller. Said contract or legal act shall stipulate, in

particular, that the person in charge:

a) will process personal data only following documented instructions of the

responsible, including with respect to transfers of personal data to a

third country or an international organization, unless required to do so under

of the Law of the Union or of the Member States that applies to the person in charge; in

In such a case, the person in charge will inform the person in charge of that legal requirement prior to the

treatment, unless such Law prohibits it for important reasons of interest

public;

b) will guarantee that the persons authorized to process personal data have

committed to respecting confidentiality or are subject to an obligation of

confidentiality of a statutory nature;

c) take all necessary measures in accordance with article 32;

d) will respect the conditions indicated in sections 2 and 4 to resort to another

treatment manager;

e) will assist the person in charge, taking into account the nature of the treatment, through

appropriate technical and organizational measures, whenever possible, so that this

can comply with its obligation to respond to requests that are intended to

the exercise of the rights of the interested parties established in chapter III;

f) will help the person in charge to guarantee the fulfillment of the obligations

established in articles 32 to 36, taking into account the nature of the treatment

and the information available to the person in charge;

g) at the choice of the person in charge, will delete or return all personal data once

Once the provision of treatment services ends, and will delete the copies

existing unless the retention of personal data is required under

of the Law of the Union or of the Member States;

h) will make available to the person in charge all the information necessary to demonstrate

compliance with the obligations established in this article, as well as

to enable and assist in the performance of audits, including inspections, by

part of the person in charge or of another auditor authorized by said person in charge.

In relation to the provisions of letter h) of the first paragraph, the person in charge will inform

immediately to the controller if, in his opinion, an instruction violates this

Regulation or other provisions on data protection of the Union or of

the member states.

4. When a person in charge of the treatment resorts to another person in charge to carry out

certain treatment activities on behalf of the person in charge, will be imposed on

this other manager, by contract or other legal act established in accordance with the

Law of the Union or of the Member States, the same obligations of

data protection than those stipulated in the contract or other legal act between the

responsible and the person in charge referred to in section 3, in particular the provision

of sufficient guarantees of application of appropriate technical and organizational measures

so that the treatment is in accordance with the provisions of this

Regulation. If that other processor breaches its data protection obligations,

the initial processor will remain fully accountable to the controller

treatment with regard to the fulfillment of the obligations of the other

duty manager.

5. The treatment manager's adherence to a code of conduct approved by

under article 40 or to an approved certification mechanism under article

42 may be used as an element to demonstrate the existence of guarantees

enough referred to in sections 1 and 4 of this article.

6. Without prejudice to the fact that the person in charge and the person in charge of the treatment celebrate a

individual contract, the contract or other legal act referred to in sections 3 and 4

of this article may be based, totally or partially, on the clauses

standard contracts referred to in sections 7 and 8 of this article, inclusive

when they form part of a certification granted to the person in charge or in charge of

in accordance with articles 42 and 43.

7. The Commission may establish standard contractual clauses for the matters to which it is

referred to in sections 3 and 4 of this article, in accordance with the procedure of

examination referred to in article 93, paragraph 2.

8. A supervisory authority may adopt standard contractual clauses for the

matters referred to in sections 3 and 4 of this article, in accordance with the

coherence mechanism referred to in article 63.>>

9. The contract or other legal act referred to in sections 3 and 4 shall be recorded by

written, including in electronic format.

10. Without prejudice to the provisions of articles 82, 83 and 84, if a person in charge of the

treatment infringes this Regulation by determining the purposes and means of the

treatment, will be considered responsible for the treatment with respect to said

treatment.>>

The definition of "processor" includes a wide range of actors,

whether natural or legal persons, public authorities, agencies or other bodies.

The existence of a data processor depends on a decision made by the data processor.

responsible for the treatment, which may decide to carry out certain

treatment operations or contract all or part of the treatment with a

duty manager.

The essence of the function of "processor" is that the personal data

are processed in the name and on behalf of the data controller. In practice,

it is the person in charge who determines the purpose and the means, at least the essential ones,

while the person in charge of the treatment has a function of providing services to the

Treatment Managers. In other words, "acting in the name and on behalf of

data controller" means that the data controller is at the

servicing the interest of the controller in carrying out a task

specific and, therefore, follows the instructions established by the person in charge of the

processing, at least as regards the purpose and essential means of processing.

ordered treatment.

Article 28, section 1, of the RGPD establishes that “When a

processing on behalf of a controller, the latter will choose only one

manager that offers sufficient guarantees to apply technical measures and

appropriate organizational structures, so that the treatment is in accordance with the requirements of this Regulation and guarantee the protection of the rights of the interested".

The obligation provided for in article 28.1 of the RGPD -to select a person in charge of the treatment that offers sufficient guarantees to guarantee the application of the Regulation and the rights and freedoms of the interested party - it is not exhausted in the action prior selection and hiring of treatment manager. This forces the responsible for the treatment to evaluate at all times during the execution of the contract if the guarantees (technical or organizational) offered by the person in charge of the treatment are enough.

Guidelines 07/2020 of the European Committee for Data Protection (CEPD) on the concepts of controller and manager in the RGPD -the translation is our- have, without a doubt, that, -,“97. The obligation to use only those in charge of treatment "that provide sufficient guarantees" contained in Article 28(1) GDPR is a continuing obligation. does not end in moment in which the person in charge and the person in charge of the treatment conclude a contract or other legal act. Instead, the controller should, at appropriate intervals, verify the processor assurances, including through audits and inspections when correspond

”.

And this because the data controller is the one who has the obligation to guarantee the application of data protection regulations and the protection of the rights of interested parties, as well as being able to prove it (articles 5.2, 24, 28 and 32 of the GDPR). The control of compliance with the law extends throughout the treatment from start to finish. The data controller must act, in any case, diligently, consciously, committed and actively.

This mandate of the legislator is independent of whether the treatment is carried out

directly the person in charge of the treatment or that it is carried out using a

treatment manager. Where the Law does not distinguish, we cannot distinguish ourselves.

In addition, the treatment carried out materially by a treatment manager for

account of the person in charge of the treatment belongs to the sphere of action of this

last, in the same way as if he did it directly himself. The person in charge of

treatment, in the case examined, is an extension of the person responsible for the

treatment.

The data controller has the obligation to integrate and deploy the protection

of data within everything that makes up your organization, in all its areas. I know

must bear in mind that ultimately the determining purpose is to

guarantee the protection of the interested party.

Interpret it in the opposite direction - the obligations that article 28 of the RGPD imposes

to the data controller are limited to verifying the capabilities of the data controller

initio and to sign the treatment manager contract - would not only contravene the

current legislation constituting a clearly fraudulent action, but rather

would violate the spirit and purpose of the GDPR.

In light of the principle of proactive responsibility (art 5.2 RGPD), the person in charge of the

treatment must be able to demonstrate that it has taken into account all the elements

provided for in the GDPR.

The data controller must take into account whether the data processor

provides adequate documentation that demonstrates said compliance, policies of
privacy protection, file management policies, privacy policies
information security, external audit reports, certifications,
management of the exercises of rights … etc.
The data controller must also take into account the knowledge
specialized technicians of the person in charge of the treatment, the reliability and its resources.
Only if the data controller can demonstrate (principle of liability
proactive of art 5.2 of the RGPD) that the person in charge of the treatment is adequate during
the entire processing phase (at all times) to carry out the order
entrusted may enter into a binding agreement that meets the requirements of the
article 28 of the RGPD, without prejudice to the fact that the data controller must follow
complying with the principle of accountability and periodically check the
compliance of the person in charge and the measures in use. Before outsourcing a treatment
and in order to avoid possible violations of the rights and freedoms of those affected, the
controller must enter into a contract, other legal act or agreement
binding with the other entity that establishes clear and precise obligations in terms of
of data protection.
The person in charge of the treatment can only carry out treatments on the instructions
documentation of the controller, unless required to do so by law
of the Union or of a Member State, which is not the case. The person in charge of the treatment
It also has the obligation to collaborate with the person in charge in guaranteeing the rights
of the interested parties and comply with the obligations of the data controller.
in accordance with the provisions of the aforementioned article 28 of the RGPD (and related).
Therefore, it is insisted that the data controller must establish
clear modalities for said assistance and give precise instructions to the person in charge of the
treatment on how to comply with them properly and document it prior to

through a contract or in another (binding) agreement and check in all

moment of the development of the contract its fulfillment in the form established in the

same.

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

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However, despite the obligations of the person in charge, article 28 of the RGPD

seems to suggest that the responsibility of the processor remains

limited compared to the responsibility of the data controller. In

other words, although data controllers can, in principle, be

responsible for the damages derived from any infraction related to the

processing of personal data (including those that have been committed by the

data processor) or breach of contract or other (binding) agreement

those in charge may be held liable when they have acted

margin of the mandate granted by the data controller, or have not complied

their own contractual obligations or in accordance with the RGPD. In these cases, the

in charge of the treatment can be considered totally or partially responsible for

the “part” of the processing operation in which you participate. He will only be in charge

fully responsible when it is entirely responsible for the damages

caused in terms of the rights and freedoms of the interested parties affected; all

this, without avoiding the responsibility in which the data controller has

incurred in order to avoid them.

a

S.A.U.

part of Vodafone Spain,

In the present case, despite the repeated designation as "third party" entities

by

the entities

<<collaborators/agents/distributors>>, it should be noted that the correct qualification

legal under the RGPD these entities must be classified as <<in charge of

treatment>>, since, according to the definition, they act fully in

name and on behalf of the person in charge (VDF) for all purposes regarding

Data Protection. Consequently, from now on, these entities will be

called in charge of the treatment with assumption of the responsibilities that

This term entails within the RGPD both for the person in charge and for the

in charge of the treatment operations. Just bring up the

content of the aforementioned STS 1562/2020 (for all), which states the following:

« In this sense, and the Judgment of the Supreme Court of June 5, 2004, which

confirms, in appeal for Doctrine Unification, that of this AN of October 16,

2003, echoing what was argued by this Chamber, refers to the differentiation of two

responsible depending on whether the decision-making power is directed to the file or to the

data treatment. Thus, the person responsible for the file is the one who decides the creation of the file.

file and its application, and also its purpose, content and use, that is, who has

capacity to decide on all the data recorded in said file. The

responsible for the treatment, however, is the subject to which the

decisions on the specific activities of a certain data processing,

that is, on a specific application. It would be all those assumptions in

which the power of decision must be differentiated from the material realization of the

activity that integrates the treatment. With this, as also argued by the STS of 26

of April 2005 (cassation for unification of doctrine 217/2004), the legislator

Spanish aims to adapt to the requirements of Directive 95/46/EC, which has as its

objective is to provide a legal response to the phenomenon, which is becoming more and more frequent, of

called outsourcing of computer services, where multiple

operators, many of them insolvent, created with the aim of seeking

impunity or irresponsibility of those who follow him in the following links of the

string. Currently, the new Regulation (EU) 2016/679 of the Parliament

European and Council of April 27, 2016, on the protection of people

physical with regard to the processing of personal data (by which the

Directive 95/46/CE, and of direct application as of May 25, 2018) distinguishes

also between the figures of the person in charge and the person in charge of the treatment. The

The first is defined in section 7) of Article 4 as "natural or legal person (...)

that determines the purposes and means of the treatment". And the person in charge of treatment in the

section 8) of the same article 4 as one that "processes personal data on behalf of

of the data controller".

This in relation to Articles 24 and 28 of the same European Regulation of

Data Protection. Responsible and in charge of data processing that, without place

Undoubtedly, they are also responsible for breaches of data protection

of data, in such new regulatory framework, in accordance with the provisions of article

82.2 of the repeated Regulation (EU) 2016/679, according to which: Any person responsible for

participates in the treatment operation will be liable for the damages

caused in the event that said operation does not comply with the provisions of this

Regulation. A manager will only be liable for damages

caused by the treatment when you have not complied with the obligations of the

this Regulation addressed specifically to those in charge or has acted

margin or against the legal instructions of the person in charge. It detaches from

all of the above that the concurrence, in the present case, of a person in charge of the

ZZZZ treatment at all exempts entity XXXX from liability now

appellant, and this despite the forcefulness of the clauses that appear in the

contract and annex to it signed by both companies (proven facts 9 and 10)

insofar as the personal data processed were for the purpose of carrying out a

advertising campaign regarding car and motorcycle insurance that was marketed by the

(XXXX), ultimately for the benefit of said XXXX, being such plaintiff entity the one that, in

Ultimately, it determines the purposes and means of repeated data processing, therefore

that it cannot be exonerated from liability.>>

The STS continues, in relation to the possible exoneration of alleged responsibility

As for what is signed in the "processing manager" contract, the following:

« The sanctioned conduct of obstruction or impediment by XXXX of the exercise

by its client of the right to oppose the processing of their data, is manifested in

that said company did not adopt any kind of measure or precaution to avoid the

sending advertising to your customer's email addresses by

those companies entrusted with carrying out the advertising campaigns.

The adoption of the necessary measures or precautions to ensure the effectiveness of the

right to oppose the processing of your data by XXXX, such as

responsible for the file, subsist even if the advertising campaigns are not carried out

from the data of their own files, but with databases of other

companies contracted by XXXX, and in this case it was proven that the appellant

did not communicate to the companies with which it contracted the performance of services of

advertising the complainant's opposition to receiving publicity from the Mutual, nor in short

took any provision to ensure the exclusion of his client from the shipments

advertisers contracted with third parties."

Consequently, it must be concluded that in all the treatments analyzed in the

antecedents in its various modalities, the person responsible for the treatment is

Vodafone Spain, S.A.U. (VDF) and acting as managers those other

Entities acting in the name and on behalf of VDF and for its benefit.

Of the documentation that works in the file to which mention is made in the

this resolution based on the information collected by the Inspection of this

AEPD and VDF's own acts and manifestations, non-compliance by

VDF as responsible for the treatments entrusted to the effective control and

continued in the time of the measures provided in the above transcribed art 28 of the

GDPR. In this regard, add that the obligation set forth in article 28.3.h) RGPD,

using at the beginning the imperative term "will" referring to the person in charge of the

treatment, generates the obligation to "demand" the controller "compliance with the

obligations established in this article, as well as to allow and contribute to

the performance of audits, including inspections, by the controller or another

auditor authorized by said person in charge."

Thus, it is stated that those in charge of the treatment (and successive sub-processors) that

acting in the name and on behalf of VDF do not offer sufficient guarantees to

apply the appropriate technical and organizational measures to the treatment commissioned by

VDF. And the tasks are not duly documented by VDF either.

entrusted to the successive managers who carry out the treatments in

name and on behalf of the person in charge (VDF). Furthermore, they are listed as approved by

VDF treatments that violate the scope of application of the RGPD by allowing

treatment in third countries without adequate legal guarantees.

There is also no prior written authorization from VDF with knowledge of the

technical and organizational measures of the successive entities subcontracted from other

managers, since VDF is only informed once the sub-manager is already

is chosen and for the sole purpose of assigning an access code to the

VDF customer management applications. VDF, as data controller,

unknown in advance to whom and under what conditions a

manager/sub-manager to act on their behalf and name and under their

specific specifications -which do not exist- and accept without hesitation this conduct of

continuously and repeatedly since, at least April 2018, even having

aware of this anomaly.

Nothing appears in the relationship between VDF and managers and successive sub-managers

with respect to the requirements listed in article 28.3 above, which, in summary, are

they specify in previously defining by the person in charge of the treatment (VDF) the object,

duration, nature, purpose, types of data, categories, obligations and rights of

interested parties, and mandatory powers of continuous control … etc. only in

on specific occasions, it is cited having informally communicated one or another of the guidelines

specific actions without this implying any effective control of VDF with the

treatments entrusted (and in turn sub-entrusted) on your behalf and in your

Name.

Therefore, non-compliance with data protection regulations must be

fully imputed to the person in charge of the treatment (VDF) for not acting in a

clear, active and effective in stipulating and enforcing the appropriate specifications for

properly carry out in time the treatment entrusted on your behalf.

There is also no evidence that VDF has carried out continuous monitoring throughout the cycle

of execution of the treatments commissioned and in turn sub-commissioned by other

entities on your behalf despite numerous known and

ongoing investigations carried out by the AEPD and of which VDF had

knowledge, and especially regarding the repeated conduct already sanctioned

previously in PS/00290/2018.

Consequently, as cited, VDF has seriously infringed -repeatedly and

systemic- the obligations imposed as the data controller

carried out on your behalf of the provisions of 28 of the RGPD, in relation to the

responsibilities required of all data controllers by article 24 of the RGPD,

especially with regard to the principles and proactive responsibility declared

in articles 5.1.f) and 5.2) of the RGPD.

On the other hand, article 44 of the RGPD, states the following:

<<Article 44 General principle of transfers

Only transfers of personal data that are subject to treatment will be made

or will be after their transfer to a third country or international organization if,

Subject to the other provisions of this Regulation, the person in charge and the

in charge of the treatment meet the conditions established in this

chapter, including those relating to onward transfers of personal data

from the third country or international organization to another third country or other organization

international. All the provisions of this chapter shall apply in order to

ensure that the level of protection of natural persons guaranteed by this

Regulation is not undermined>>.

In the present case, accredited the International Transfer of data to a third country

(Peru) without the appropriate measures required in the RGPD, there is no evidence that VDF as

responsible for the treatment has fulfilled the conditions established in the

Chapter V of the GDPR (Already justified in the response to claim 6R) on page

65 of this Resolution).

7th

Secondly, it should be noted that from the GDPR perspective there are

various legal concepts that directly complement those incorporated in the

LGT and LSSICE.

In this sense, regarding the LGT in terms of the right to oppose (right of

opposition) to receive unwanted calls for commercial communication purposes and to be

informed of this, the concept of opposition will be applied in accordance with the RGPD. I know

must add that, according to the LOPDGDD, Title IV, where "Dispositions

applicable to specific treatments", incorporates a series of assumptions that in no way

case should be considered exhaustive of all lawful processing. inside them

it is necessary to appreciate, in the first place, those with respect to which the legislator establishes a

presumption "iuris tantum" of prevalence of the legitimate interest of the controller when

carried out with a series of requirements. Along with these assumptions are collected

others, such as advertising exclusion files in which the legality of the treatment

comes from the existence of a public interest, in the terms established in the

article 6.1.e) of the RGPD, which requires, in accordance with the provisions of article 8.2,

is contemplated in a norm with the force of law that so provides, that, in

In this case, it is article 23 of the LOPDGDD itself, which regulates the "systems of

advertising exclusion.

This is what article 21 of the RGPD provides:

<< Right of opposition

1. The interested party will have the right to object at any time, for reasons

related to your particular situation, to which personal data concerning you

are subject to processing based on the provisions of Article 6, paragraph 1,

letters e) or f), including profiling on the basis of these provisions.

The controller will stop processing the personal data, unless

prove compelling legitimate reasons for the treatment that prevail over the

interests, rights and freedoms of the interested party, or for the formulation, the

exercise or defense of claims.

2. When the processing of personal data is for marketing purposes

directly, the interested party shall have the right to object at any time to the processing of

the personal data that concerns you, including the elaboration of profiles in the

insofar as it is related to said marketing.

3. When the interested party opposes the treatment for direct marketing purposes,

personal data will no longer be processed for these purposes.

4. At the latest at the time of the first communication with the data subject, the

right indicated in sections 1 and 2 will be explicitly mentioned to the interested party

and will be presented clearly and apart from any other information.

5. In the context of the use of information society services, and not

Notwithstanding the provisions of Directive 2002/58/EC, the interested party may exercise their

right to oppose by automated means that apply specifications

techniques.

6. When personal data is processed for the purpose of scientific research or

historical or statistical purposes in accordance with article 89, paragraph 1, the

The interested party shall have the right, for reasons related to his particular situation, to

oppose the processing of personal data that concerns you, unless it is

necessary for the fulfillment of a mission carried out for reasons of interest

public>>.

The foregoing, notwithstanding that the sanctioning regime is the one regulated in the

LGT.

Regarding the LSSICE, the need for express authorization by the recipients of

commercial communications by electronic means is specifically collected

in article 21.1 of the LSSICE, which states:

<<Article 21. Prohibition of commercial communications made through

email or equivalent electronic means of communication.

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

recipients thereof>>,

Without prejudice to the fact that for the formal purposes of obtaining authorization, the applicable is the provisions of article 4.11, in relation to article 19 of the LSSICE, which has:

<< 1. Commercial communications and promotional offers will also be governed by this Law, by its own regulations and those in force in commercial matters and advertising.

2. In any case, the Organic Law 15/1999, of December 13, of Protection of Personal Data, and its development regulations, especially, Regarding the collection of personal data, the information to the interested parties and the creation and maintenance of personal data files>>.

However, regarding the right of opposition, article 21.2 of the LSSICE establishes the obligation to offer the recipient the possibility of opposing the processing of your data for promotional purposes through a simple procedure and free, both at the time of data collection and in each of the commercial communications addressed to you.

<<Article 21.2. Prohibition of commercial communications made through email or equivalent electronic means of communication.

(…)

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 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.

In this sense, this modality of exercising the right of opposition constitutes a

specific obligation in the field of commercial communications made through

through electronic means. Pursuant to article 95 of the RGPD, it will not be possible to

impose additional obligations that have the same objective, as it would be, in this

case, the duty to consult the advertising exclusion systems provided for in article

23.4 of the LOPDGDD, which, for this reason, is not applicable.

In any case, the infraction is regulated in the sanctioning regime of the LSSICE.

Regarding the rights exercised by those affected to avoid being recipients of

direct marketing actions.

Recital 70 of the RGPD.

<<If personal data is processed for direct marketing purposes, the

The interested party must have the right to oppose said treatment, including the

profiling to the extent related to such marketing

directly, whether in respect of initial or subsequent treatment, and this in any

time and at no cost. Said right must be explicitly communicated to the

interested and present yourself clearly and apart from any other information>>.

Likewise, the aforementioned legal concepts indicated by the RGPD (among them the

provided in art 21 RGPD transcribed above) and directly applicable to the LGT,

also incorporated in the LOPDGDD as set forth below:

Art 23 LOPDGDD.

Article 23. Advertising exclusion systems.

<<1. The processing of personal data that is intended to avoid sending

of commercial communications to those who have expressed their refusal or

opposition to receiving them. To this end, information systems may be created, general

or sectoral, in which only the essential data will be included to identify the

the affected. These systems may also include preference services,

through which those affected limit the reception of commercial communications

those from certain companies.

2. The entities responsible for the advertising exclusion systems will notify

the competent control authority, its creation, its general or sectoral nature, as well

as the way in which those affected can join them and, where appropriate,

assert your preferences. The competent control authority will make public in its

electronic headquarters a list of the systems of this nature that were

communicated, incorporating the information mentioned in the previous paragraph. to such

effect, the competent control authority to which the creation has been communicated

of the system will make it known to the remaining control authorities for their

post for all of them.

3. When an affected person expresses to a person in charge his desire that his data not

are treated for the sending of commercial communications, it must inform you

of the existing advertising exclusion systems, being able to refer to the

information published by the competent control authority.

4. Those who intend to carry out direct marketing communications must

previously consult the advertising exclusion systems that could affect your

action, excluding from the treatment the data of those affected who would have

expressed their opposition or refusal to it. For these purposes, to consider

Once the previous obligation has been fulfilled, it will be enough to consult the exclusion systems

included in the list published by the competent control authority.

It will not be necessary to carry out the query referred to in the previous paragraph when the

affected had provided, in accordance with the provisions of this organic law, his

consent to receive the communication to whoever intends to make it.>>

viii

In the event that there is an infringement of the provisions of the RGPD, between the

corrective powers available to the Spanish Data Protection Agency,

as a control authority, article 58.2 of said Regulation contemplates the

following:

“2 Each supervisory authority shall have all of the following corrective powers

listed below:

(…)

b) sanction any person responsible or in charge of the treatment with a warning

when the treatment operations have violated the provisions of this

Regulation;"

(...)

d) order the person in charge or in charge of the treatment that the operations of

treatment comply with the provisions of this Regulation, where appropriate,

in a certain way and within a specified period;

(…)

i) impose an administrative fine under article 83, in addition to or instead of

the measures mentioned in this section, according to the circumstances of each

particular case;".

According to the provisions of article 83.2 of the RGPD, the measure provided for in letter d)

above is compatible with the sanction consisting of an administrative fine.

IX

Therefore, VDF, as the controller of the processing carried out on behalf of and

on your behalf and in accordance with the evidence available in the

At this time, it is considered that the exposed facts could fail to comply with the

established in article 28, with the scope expressed in the Foundations of

Previous rights, which, if confirmed, could lead to the commission of a

infringement typified in article 83.4.a) of the RGPD, which under the heading "Conditions

for the imposition of administrative fines" provides the following:

Article 83.4.a) of the RGPD,

"4. Violations of the following provisions will be sanctioned, in accordance with the

paragraph 2, with administrative fines of a maximum of EUR 10,000,000 or,

in the case of a company, an amount equivalent to a maximum of 2% of the

global total annual turnover of the previous financial year, opting for

the largest amount:

a) the obligations of the person in charge and of the person in charge pursuant to articles 8, 11, 25 a

39, 42 and 43".

Considered serious for prescription purposes in article 73 of the LOPDGDD.

Article 83.5.c) of the RGPD,

"5. Violations of the following provisions will be sanctioned, in accordance with the

paragraph 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:

c) transfers of personal data to a recipient in a third country or a

international organization under articles 44 to 49".

In the present case, the execution by VDF as

responsible for the treatment of an international transfer of data to a third country

(Peru) by consenting that Casmar carry out for A-Nexo the actions of

marketing in the name and on behalf of VDF, according to the signed contract dated

05/01/2019 between VDF and Casmar and the subsequent contract signed between Casmar and A-nexo

dated 06/27/2019; Infraction considered very serious for purposes of prescription in the

art 72.l) of the LOPDGDD.

Article 71 of the LOPDGDD. Violations.

X

The acts and behaviors referred to in sections 4, 5 constitute infractions.

and 6 of article 83 of Regulation (EU) 2016/679, as well as those that result

contrary to this organic law.

Article 72.1.l) Infractions considered very serious.

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

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:

l) The international transfer of personal data to a recipient who is

located in a third country or an international organization, when there are no

the guarantees, requirements or exceptions established in articles 44 to 49 of the

Regulation (EU) 2016/679.>>

Article 73 LOPDGDD. Offenses considered serious.

<<According to the provisions of article 83.4 of Regulation (EU) 2016/679,

considered serious and will prescribe after two years the infractions that suppose a

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

following:

j) Hiring by the data controller of a data processor

that does not offer sufficient guarantees to apply the technical and

appropriate organizational structures in accordance with the provisions of Chapter IV of the Regulation

(EU) 2016/679.

k) Entrust the processing of data to a third party without the prior formalization of a

contract or other written legal act with the content required by article 28.3 of the

Regulation (EU) 2016/679.

p) The processing of personal data without carrying out a prior assessment of the

elements mentioned in article 28 of this organic law.

In the present case, VDF is accused of violating article 28 of the RGPD,

punishable in accordance with article 83.4.a) of the RGPD, infraction typified in Article

73 of the LOPDGDD, sections j), k), p), and classified as serious for the purposes of

prescription.

In order to determine the administrative fine to be imposed, the

provisions of articles 83.1 and 83.2 of the RGPD, precepts that indicate:

"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, 9 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 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

such as the number of interested parties affected and the level of damages that

have suffered;

b) intentionality or negligence in the infringement;

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 they have applied under

of articles 25 and 32;

h) the way in which the supervisory authority became aware of the infringement, in

particular whether the person in charge or the person in charge notified the infringement and, if so, in what

measure;

i) when the measures indicated in article 58, section 2, have been ordered

previously against the person in charge or the person in charge in question in relation to the

same matter, compliance with said measures (...);

k) any other aggravating or mitigating factor applicable to the circumstances of the case,

such as financial benefits obtained or losses avoided, directly or

indirectly, through infringement.

For its part, in relation to article 83.2.k) RGPD, article 76 “Sanctions and measures

corrections” of the LOPDGDD provides:

"1. The penalties provided for in sections 4, 5 and 6 of article 83 of the Regulation

(EU) 2016/679 will be applied taking into account the graduation criteria

established in section 2 of the aforementioned article.

2. 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 treatment of

personal information.

c) The profits obtained as a result of committing the offence.

(…)

In accordance with the transcribed precepts, and derived from the instruction of the

procedure for the purpose of setting the amount of the penalty for infraction of article 28 of the

RGPD to VDF as responsible for the aforementioned infringement typified in article 83.4.a)

of the RGPD, it is appropriate to graduate the fine that should be imposed as follows:

Violation due to non-compliance with the provisions of article 28 in relation to article 24 of the RGPD, typified in article 83.4.a) and classified as serious for the purposes of prescription in article 73, sections j), k), p) of the LOPDGDD:

In the present case, the following graduation criteria are considered concurrent:

. The nature, seriousness and duration of the offence, taking into account the nature, scope or purpose of the processing operations in question; refering to nature and severity it is clear that the treatments under analysis respond to a manifest situation of imbalance to the detriment of the rights of the interested parties.

. The intentionality or negligence appreciated in the commission of the infraction; in the In this case, there is evidence of gross negligence in VDF's conduct, since after repeated claims and knowing the facts now analyzed continues without apply the appropriate corrective measures.

. The continuing nature of the offense. In the case examined, it is accredited an infraction and of long duration, from the second quarter of 2018 to date.

. The high link between the activity of the offender and the performance of treatment of personal information. It is known that VDF is an entity with more than fifteen million of customers whose personal data is systematically processed in the exercise of its attributions as one of the main telecommunications operators.

. The profits obtained as a result of the commission of the infraction. It is It is obvious that the treatments of the marketing actions now analyzed respond to profit.

. The condition of large company of the responsible entity and its volume of business (according to the audited annual accounts report corresponding to the period from March 2018 to March 2019, more than 1,600 million euros in turnover and with more than 4,000 employees).

. High volume of data and processing that constitutes the object of the file.

It consists of the documentation provided by VDF that the treatments of the actions

of marketing exceed two hundred million.

. High number of affected. There are at least 162 claimants.

. The imputed entity (VDF) does not have adequate procedures in place for

performance in the hiring and effective monitoring of those in charge of treatment

so that the infraction is not the consequence of a punctual anomaly in the

operation of said procedures but a persistent and continuing defect of the

personal data management system designed by the controller in terms of

the treatments delegated to those in charge of these.

Considering the exposed factors, the initial valuation that reaches the amount of the

The fine for the infringement charged by article 28 of the RGPD is €4,000,000 (four

million euros) and for the infringement imputed by article 44 of the RGPD, typified in the

article 83.5.c) of the RGPD is €2,000,000 (two million euros).

eleventh

Both in the initial agreement and in the resolution proposal, it was warned of the

Next:

“If the infraction is confirmed, it could also be agreed to impose the person responsible

(Vodafone España, S.A.U.) the adoption of appropriate measures to adjust its

action to the regulations mentioned in this act, in accordance with the provisions of

the aforementioned article 58.2.d) of the RGPD, according to which each control authority may

“order the person responsible or in charge of the treatment that the operations of

treatment comply with the provisions of this Regulation, where appropriate,

in a certain way and within a specified period…".

In such a case, in the resolution that is adopted, this Agency may require the entity

responsible so that, within the period determined, it adapts to the regulations of

protection of personal data the treatment operations that you delegate to the

managers and all with the scope expressed in the Foundations of Law of the

this agreement and without prejudice to what results from the instruction.

It is warned that not meeting the requirements of this organization may be

considered as a serious administrative infraction by "not cooperating with the Authority

of control" before the requirements made, being able to be valued such conduct to

the time of opening an administrative sanctioning procedure with a fine

pecuniary".

In the present case, VDF is ordered in the operative part of this

Resolution, by virtue of the corrective powers indicated in article 58.2.d) of the

RGPD, order VDF that within six months from the notification of

this Resolution, certify before this AEPD that it has adjusted to the provisions of the

RGPD and LOPDGDD all the treatment operations analyzed in this

procedure referred to in articles 17, 21, 24, 28 and 44 to 49 of the RGPD and 12, 15, 18,

23, 40 to 43 of the LOPDGDD.

XII

Article 21 of the LSSICE. Prohibition of commercial communications made to

via email or equivalent electronic means of communication.

<<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. Throughout

In this case, the provider must offer the recipient the possibility of opposing the

processing of your data for promotional purposes through a simple procedure

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.>>

In the present case, it is clear that the processing carried out to send

electronic communications (SMS, email) through the different channels used

do not have the express authorization of the recipients. Communications made to

via SMS were carried out without offering the recipient the effective and

proven to oppose the treatment. This possibility was not implemented until

November 2018 through a link to an exclusive website for this purpose, without

that it became effective every time the opposition exercises were not attended.

In addition, it is recorded that commercial communications have been made in the name and by

VDF account by electronic means to recipients who had not authorized them

expressly and that they had no business relationship with VDF.

From the evidence obtained, it is observed that the VDF procedure for the

carrying out direct marketing actions through communications

electronic commercials to potential clients, does not guarantee compliance with the

article 21 of the LSSICE, when directing the actions of sending SMS to numbers and

randomly generated addresses, which prevents verifying the existence of

prior and express authorization or, failing that, the existence of a commercial relationship

previous similar services.

Article 38 of the LSSICE. Violations.

XIII

"1. Violations of the precepts of this Law will be classified as very serious,

serious and mild.

2. The following are very serious infractions: a) (Without content) b) Failure to comply with the

obligation to suspend the transmission, data hosting, network access or

provision of any other equivalent intermediation service, when a body

competent administrative authority orders it, by virtue of the provisions of article 11. c)

(Repealed) d) (Repealed)

3. They are serious offenses:

c) The mass sending of commercial communications by email or other means

of equivalent electronic communication, or its persistent or systematic sending to a

same recipient of the service when in said shipments the requirements are not met

established in article 21.

d) The significant breach of the obligation of the service provider

established in section 1 of article 22, in relation to the procedures for

revoke the consent given by the recipients.

Article 39 of the LSSICE. sanctions

fourteenth

<<Sanctions. 1. For the commission of the offenses listed in the previous article,

The following sanctions will be imposed:

a) For the commission of very serious infractions, a fine of 150,001 to 600,000 euros.

The repetition within three years of two or more very serious infractions,

sanctioned with a firm character, may give rise, depending on its circumstances, to the

sanction of prohibition of action in Spain, for a maximum period of two

years.

b) For the commission of serious infractions, a fine of 30,001 to 150,000 euros. >>

Article 40 of the LSSICE. Graduation of the amount of sanctions.

“The amount of the fines that are imposed will be graduated according to the following

criteria:

a) The existence of intentionality.

b) Period of time during which the infraction has been committed.

c) Recidivism due to commission of infractions of the same nature, when this is the case.

has been declared by firm resolution.

d) The nature and amount of the damage caused.

e) The benefits obtained by the infraction.

f) Billing volume affected by the infraction committed.

g) Adherence to a code of conduct or an advertising self-regulation system

applicable with respect to the offense committed, which complies with the provisions of article

18 or in the eighth final provision and that has been favorably informed by the

competent body or bodies".

In the present case, the aggravating factors from a) to f) are assessed against the VDF entity.

indicated in the transcribed above art 40 of the LSSICE.

Article 45 of the LSSICE. Prescription.

fifteenth

"Very serious offenses will prescribe after three years, serious after two years and

mild ones at six months; The sanctions imposed for very serious offenses will prescribe

after three years, those imposed for serious offenses after two years and those imposed for

minor offenses per year.

In the present case, there is no prescription for serious offenses committed

by VFD.

XVI

The exposed facts could suppose by Vodafone Spain, S.A.U. the commission of

infringement of article 21 of the LSSICE.

These infringements are classified as serious in article 38.3.c) and d) of the aforementioned

Law, each one being able to be sanctioned with a fine of €30,001 to €150,000,

in accordance with article 39 of the aforementioned LSSICE.

seventeenth

After the evidence obtained in the phase of preliminary investigations and instruction, it was

considers that it is appropriate to graduate the sanction to be imposed in accordance with the following criteria established by art. 40 of the LSSI:

- The existence of intentionality, an expression that must be interpreted as equivalent to degree of guilt according to the Judgment of the National High Court of 11/12/2007 relapse in Appeal no. 351/2006, corresponding to the entity denounced the determination of a system for obtaining informed consent that is in accordance with the mandate of the LSSICE (section a).

- Period of time during which the infraction has been committed, as it is the claim of May 2018, (section b).

- Recidivism due to the commission of infractions of the same nature, when this is the case. has been declared by a firm resolution having been accredited the recidivism of the same behavior that was sanctioned in the reference procedure PS/00290/2018 (section c).

- The nature and amount of the damages caused, in relation to the volume of users affected by the infringement, more than 12 million commercial actions of marketing, (section d) and more than 200 million commercial actions.

- The profits obtained by the infraction, in relation to the volume of users to whom that affects the infraction (paragraph e).

- Billing volume affected by the infraction committed, since it exceeds one thousand six hundred million euros in the accounting period from March 31, 2018 to March 31, 2019 (section f).

In accordance with these criteria, it is deemed appropriate to impose on Vodafone Spain, S.A.U. for violation of article 21 of the LSSI a penalty of €150,000 (one hundred fifty thousand euros).

Article 48.1.b) of the LGT

eighteenth

<<Article 48. Right to the protection of personal data and privacy in relation with unsolicited communications, with traffic and location data and with subscriber guides.

1. Regarding the protection of personal data and privacy in relation to the unsolicited communications end users of communications services electronic will have the following rights:

b) To oppose receiving unwanted calls for commercial communication purposes that are carried out through systems other than those established in the previous letter and be informed of this right>>.

In the present case, it is proven that commercial actions have been carried out by account and on behalf of VDF through calls to recipients (end users) who had expressed their opposition, either to the calling entity, or prior inclusion in the Robinson exclusion list of Adigital and/or internal listings of exclusion of each of the entities involved in the entrusted treatment by VDF in its own name.

From the evidence obtained, indicated in the background, it is observed that the VDF procedure for carrying out direct marketing actions to through telephone calls does not guarantee compliance with the right of opposition of the end users with whom it contacts not to receive commercial calls, nor in the case of:

1.

campaigns managed directly by VDF, nor in,

1.

campaigns managed by managers and sub-managers, either

using VDF's own database that does not verify that they are used

complying with your instructions, either by using the databases of

those in charge of the treatment contracted on behalf and name of VDF. VFD

does not know how the treatment is carried out by those in charge and their

sub-managers. It does not know the contracts between them, and therefore does not have information

about the origin of the data nor who assumes, in this subcontracting, the obligatory

consultation of files of exclusion of advertising actions.

It is also stated that VDF does not communicate an exercise of the right of opposition that

has satisfied at the request of an affected party or after the resolution of a claim in the

AEPD to those in charge and that these in turn subcontract the material realization of

the calls. This situation has the consequence of reducing to mere formalism the

exercise of the right of opposition provided for in the aforementioned precepts, and makes

opposition procedure ineffective because nothing prevents them from being carried out again

commercial calls to those affected who are in the cases described.

19th

Article 77.37 LGT. Serious offenses.

<<The following are considered serious infractions:

37. The serious violation of the rights of consumers and end users,

as established in Title III of the Law and its implementing regulations.

In the present case, the facts analyzed are considered a serious infraction given the great

volume of marketing actions carried out and complaints received in

this AEPD as a consequence of the rights violated to the interested parties, as well

as for the excessive and continuous duration of the marketing actions

carried out in the name and on behalf of VDF.

Article 83. Prescription

<<1. The infractions regulated in this Law will prescribe, the very serious ones, three

years; the serious ones, after two years, and the mild ones, after one year.

The statute of limitations for infractions will begin to run from the day on which

that they had been committed. The initiation will interrupt the prescription, knowingly

of the interested party, of the sanctioning procedure. The statute of limitations will return to

run if the sanctioning file was paralyzed for more than a month due to

cause not attributable to the alleged perpetrator.

In the event of continued infringement, the initial date of the computation will be that in

that the infringing activity ceases to be carried out or that of the last act with which the infraction

is consumed. However, it will be understood that the infraction persists as long as the

equipment, devices or installations object of the file are not

disposition of the Administration or there is irrefutable proof of its impossibility to

use.

2. The sanctions imposed for very serious offenses will prescribe after three years; the

imposed for serious offenses, after two years, and those imposed for minor offenses, after one year. The

The limitation period for sanctions will start to run from the day

following the one in which the resolution imposing the

sanction. The prescription will be interrupted by the initiation, with the interested party's knowledge, of the

execution procedure, returning to run the term if it is paralyzed

for more than a month for reasons not attributable to the offender.>>

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

XX

93/97

Article 79.1, c) LGT. Sanctions.

1. For the commission of the infractions typified in the previous articles,

The following sanctions will be imposed:

c) For the commission of serious infractions, the offender will be fined an amount of

up to two million euros.>>

21st

The exposed facts suppose the commission by VDF of an infraction of the

Article 48.1.b) of the LGT Law, included in its Title III, which states of the right: (...) b)

To oppose receiving unwanted calls for commercial communication purposes that

are carried out through systems other than those established in the previous letter and to be

informed of this right.

Although the aforementioned article does not explicitly configure such right, it is necessary to go to

the data protection regulations already indicated in the previous Foundations in the

that regulates the right of opposition: article 21 of the RGPD, and article 23 of the

LOPDGDD.

This Infraction is typified as "serious", in article 77.37) of said

norm, which it considers as such: “37. The serious violation of the rights of

consumers and end users, as established in Title III of the Law and its

development regulations”. being able to be sanctioned with a fine of up to €2,000,000,

in accordance with article 79.1.c) of the aforementioned LGT.

In accordance with the precepts indicated, in order to set the amount of the penalty to

impose in the present case, it is considered appropriate to graduate the sanction to be imposed

in accordance with the following criteria established in article 80.1) and 2) of the LGT:

<<1. The amount of the sanction imposed, within the indicated limits,

will graduate taking into account, in addition to the provisions of article 131.3 of the Law

30/1992, of November 26, on the Legal Regime of public administrations and

of the Common Administrative Procedure (must be understood as referring to art 29 of the law

40/2015, of October 1, of RJSP), the following:

a) The seriousness of the infractions previously committed by the subject to whom

sanctions. b) The social repercussion of the offences.

c) The benefit that has been reported to the offender by the fact that is the subject of the infraction.

d) The damage caused and its repair.

e) Voluntary compliance with the precautionary measures that, if applicable, are imposed

in the penalty procedure.

f) The refusal or obstruction to access to the facilities or to provide the information or

required documentation.

g) The cessation of the infringing activity, before or during the processing of the

sanction file.

2. For fixing the sanction, the economic situation will also be taken into account

of the offender, derived from his assets, his income, his possible charges

family and other personal circumstances that prove they affect you. The

offender will be obliged, where appropriate, to pay the fees that would have been due

satisfy in the event of having made the notification referred to in article

6 or having enjoyed title for the use of the public domain

radio>>.

In the specific case, the following aggravating circumstances are indicated to quantify the sanction

fine:

a) The seriousness of the infractions previously committed by the subject to whom

sanctions. It is stated that the entity has been sanctioned with a fine or warning since

January 2018 to February 2020 on more than 50 occasions.

b) The social repercussion of the offences. The fact that there are 162 claims in

the term of just under two years according to the AEPD and the large number of

marketing actions through telephone calls (about two hundred million

of marketing actions) allows the strong repercussion

of the treatments now analyzed.

c) The benefit that has been reported to the offender by the fact that is the subject of the infraction. All

commercial actions are aimed at increasing profits

reported that can be estimated in the increase of clients between the years 2018 and

2020:

In mobile telephony, the number of mobile telephony contract customers

□

amounted to 11.4 million at the end of the quarter.

In fixed broadband, the Customer base grew again to reach 3.2

□

millions.

□

In fiber, it increased by 60,000 to close the year with 2.9 million.

In Vodafone TV, the number of Clients grew by 36,000 and exceeded the closing

□

of the last quarter the 1.3 million.

d) The damage caused and its repair. The damage caused to the

privacy of those affected, that even having exercised their right of exclusion to

marketing actions, were contacted again for the same purpose,

sometimes repeatedly and insistently.

f) The refusal or obstruction to access to the facilities or to provide the information or

required documentation. It is known that VDF has not met the latest requirements

of information issued by this AEPD. (E/07056/2019 and E/08284/2019).

g) There is also no record of the cessation of the infringing activity, before or during the

processing of the investigation file and even after the inspection

face-to-face at the VDF premises in September 2019, since there are

subsequent claims before this AEPD for the same facts.

In relation to the economic situation of the offender, it is known that VDF is one of the

largest telecommunications operators with annual billing of more than 1,600

million euros and more than 4,000 employees.

After the evidence obtained in the preliminary investigation phase, it is considered that

it is appropriate to graduate the sanction to be imposed in the amount of €2,000,000 (two million

euros).

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 VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for an infringement of Article 28 of the RGPD in relation to article 24 of the RGPD, typified in accordance with Article 83.4.a) of the RGPD with an administrative penalty of four million euros (€4,000,000).

IMPOSE VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for infraction of the article 44 of the RGPD typified in accordance with article 83.5.c) of the RGPD, with sanction administrative amount of two million euros (€2,000,000).

IMPOSE VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for infraction of the article 21 of the LSSICE, typified as serious in article 38.3.d) and c) of said rule with a penalty of one hundred and fifty thousand euros (€150,000)

IMPOSE VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for infraction of the article 48.1.b) of the LGT, in relation to article 21 of the RGPD and article 23 of the LOPDGDD, typified as serious in article 77.37 of the LGT with sanction of amount two million euros (€2,000,000).

ORDER VODAFONE ESPAÑA, S.A.U., with NIF A80907397, so that, in the period of six months from the notification of this Resolution, certify before this AEPD that has adjusted to the provisions of the RGPD and LOPDGDD all the treatment operations analyzed in this procedure referring to the articles 17, 21, 24, 28 and 44 to 49 of the RGPD and 12, 15, 18, 23, 40 to 43 of the LOPDGDD.

SECOND: NOTIFY this resolution to VODAFONE ESPAÑA, S.A.U., with NIF A80907397, with address at Avda. de América 115, 28042 Madrid.

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

between the 1st and 15th of each month, both inclusive, the term to make the payment

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

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

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

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 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 month from

counting 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,

may provisionally suspend the firm resolution in administrative proceedings if the

The interested party expresses his intention to file a contentious-administrative appeal.

If this is the case, the interested party must formally communicate this fact by

writing addressed to the Spanish Agency for Data Protection, presenting it through

Electronic Register of the Agency [https://sedeagpd.gob.es/sede-electronica-

web/], or through any of the other registers provided for in art. 16.4 of the

aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the

documentation proving the effective filing of the contentious appeal-

administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative within a period of two months from the day following the

notification of this resolution would end the precautionary suspension.

Sea Spain Marti

Director of the Spanish Data Protection Agency

ANNEX (Ordered by date of entry of the claim in the AEPD)

Column legend:

:

R/D/C:

C/ Jorge Juan, 6

28001 – Madrid

Sequential order number

Róbinson/Rights/Express Consent

www.aepd.es

sedeagpd.gob.es

97/97

PF/PC:

Physical Person/Juridical Person

LGT/PD/LSSI:

broken law

F.Robin.credited:

Accredited date inclusion in advertising exclusion lists

LINE:

Transmitter/Receiver

F. CALL LINE: Date of the advertising action

REFER. AEPD:

Reference code of the claim in the AEPD

CLAIMANT:

Name of the claimant (the number indicates the times claimed)

CLAIM TEXT: Text of the claim filed by the claimant

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28001 – Madrid

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