938-0419

Procedure No.: PS/00064/2019

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: On September 19, 2018, it has an entry in the Spanish Agency of Data Protection (AEPD) a letter from Ms. A.A.A. (hereinafter, the claimant) in which it states that VODAFONE ESPAÑA, S.A.U. with NIF A80907397 (in what successively, Vodafone or claimed), entity that has charged a service of Netflix that had not been hired by the claimant and the company verified that the service or TV channel was used in the home of another person, since it seems that had hacked into her spouse's bank account and phone number through Vodafone in order to register through an email in said service.

Thus, Vodafone tells them that they have the Netflix service contracted from February 20, 2018, being the first month free and that they have been paying for four months of that service without having contracted it. vodafone se refuses to refund the amount collected so far, that only the one for the month of July they wouldn't charge it. That both Netflix and Vodafone proceeded to cancel the service and payment to third parties.

The claimant provides a copy of the following documentation:

1. Request for arbitration before the Consumer Arbitration Board of the Region of Murcia, dated August 8, 2018, against Vodafone and Netflix.

2. Complaint filed with the General Police Directorate, dated March 8,

3. CD with the recordings of your mobile phone kept with Vodafone and

August 2018.

Netflix.

4. Invoices where you can see the charge of 13.99 euros from Netflix.

SECOND: In view of the facts denounced in the claim and the

documents provided by the claimant and of which she has had knowledge

Agency, the Subdirectorate General for Data Inspection proceeded to carry out

preliminary investigative actions to clarify the facts in

matter, by virtue of the investigative powers granted to the authorities of

control in article 57.1 of Regulation (EU) 2016/679 (General Regulation of

Data Protection, hereinafter RGPD), and in accordance with the provisions of the

Title VII, Chapter I, Second Section, of Organic Law 3/2018, of December 5,

Protection of Personal Data and guarantee of digital rights (hereinafter

LOPDGDD).

The first information requirement was sent electronically on October 16

of 2018 and is recorded as received by Vodafone on the 17th day of the same month and year, as

accredits the document called "Confirmation of the Receipt of the Notification"

of the Citizen Folder.

Vodafone did not respond to the request, so the AEPD reiterated it in order to

to analyze the claim made by the claimant and communicate the decision

to adopt in this regard.

This second informative requirement was sent electronically on 27

November 2018 and is recorded as received by Vodafone on December 4 of the same year at

at 11:40:35, as evidenced by the document called "Confirmation of the

Receipt of the Notification" of the Citizen Folder. Vodafone also did not respond

to the second requirement notified by this Agency.

Through Diligence dated March 14, 2019, it is incorporated into the file

administrative information that regarding the claimed entity appears in the

Mercantile Registry on its subscribed and paid-up capital - amounts to

483,391,632.20 euros- and on the date of commencement of operations -05/27/1994-.

THIRD: On March 22, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against VODAFONE

ESPAÑA, S.A.U., with NIF A80907397, for the alleged infringement of article 6.1. of

RGPD typified in article 83.5.a) of the aforementioned RGPD and qualified as an infringement

very serious in article 72.1.b) of the LOPDGDD.

FOURTH: Once the initial agreement had been notified, Vodofone presented a brief of allegations in

which, in summary, states in the first place that after the notification of the Agreement of

At the beginning, it was found that the allegations that were prepared in response to the

request for information E/7475/2018 due to some type of error that they do not know

were filed with this Agency.

Thus, it proceeded to resolve the claim, which was notified to

the claimant, by means of an attached letter dated December 18, 2018, which

was delivered to your home on February 14, 2019, as stated on the delivery note

of the accompanying Post Office.

In said letter, the claimant was informed that a proceeding had been

manage the cancellation of the Netflix service and to make a payment in your favor for an amount of

67.71 euros for the fees paid for said service. Attach a copy of the note

payment made.

The service appears in their systems as registered on February 20

2018 and as discharged on June 23, 2018, in accordance with the screens

which provide.

They add that the registration in the Netflix service by a third party has not been

responsibility of Vodafone or fruit that information of the spouse has been hacked

of the claimant, through Vodafone.

On the other hand, they point out that for a client to sign up for one of the

Netflix packages the customer must perform a proactive activity on his part and a

registration with prior authentication. Therefore, the process of signing up for the Netflix service

contains the sufficient and standard security measures in the market, so

Vodafone cannot be held responsible for how its customers safeguard their terminals.

Finally, it states that the dismissal of this case is agreed upon.

file and file of the proceedings, and that subsidiarily, the amount of said

The sanction must be moderate, imposing its minimum amount.

FIFTH: On April 15, 2019, the instructor of the procedure agreed to the

opening of a period of practice tests, considering incorporated the

previous investigative actions, E/07475/2018, as well as the documents

provided by the claimant.

SIXTH: Subsequently, on May 20 of this year, Vodafone was issued and notified

the Resolution Proposal, for alleged infringement of article 6 of the RGPD, typified

in article 83.5 of the RGPD, proposing a fine of €40,000.

Vodafone, on June 3, 2019, presented arguments to the Proposal for

Resolution, reiterating the arguments presented throughout the procedure and,

that is to say: that the registration on Netflix by a third party has not been the responsibility of Vodafone

or as a result of the information of the claimant's spouse being hacked, through

of Vodafone: the necessary information and access to the claimant's mobile both

requirements necessary to sign up for the Netflix service, it has clearly been

obtained by a third party without the intervention or responsibility of Vodafone, the registration only

It can be done by the interested party through the platform enabled for this purpose and

using a Vodafone mobile. It is a fundamental requirement that the start of the registration process

is done through a mobile line number registered with Vodafone and have the

terminal where said SIM card is located with that number in hand to

Continue with the registration process.

On the other hand, it points out that for a client to sign up for one of the

Netflix packages the customer must perform a proactive activity on his part and a

registration with prior authentication. Therefore, the process of signing up for the Netflix service

contains the sufficient and standard security measures in the market, so

Vodafone cannot be held responsible for how its customers safeguard their terminals.

It adds that the claimant denounced these facts before the Arbitration Board of

Consumption in Murcia and this, after analyzing the facts, proceeded to file the

proceedings. A copy of the award is attached.

Finally, it states that the dismissal of this case is agreed upon.

record and file of the proceedings.

PROVEN FACTS

1.- The claimed, has gone to charge a Netflix service that had not been

contracted by the claimant and the company verified that the service or TV channel

was used in the home of another person, because apparently they had hacked the

bank account and phone number of your spouse through Vodafone in order to

to register through an email in said service.

2.- It is known that the Netflix service has been contracted since February 20,

2018, being the first free month and that they have been paying four months of that

service without having contracted it. The defendant refuses to return the amount collected

Until now, only the one for the month of July would not be charged. How much Netflix

such as Vodafone proceeded to cancel the service and the payment to third parties.

3.- This Agency sent two informative requirements to the respondent. The

first of them, was sent electronically on October 16, 2018 and received by the

claimed on the 17th of the same month and year, as evidenced by the document

called “Confirmation of Receipt of Notification” of the Folder

Citizen.

Vodafone did not respond to the request, so the AEPD reiterated it in order to

to analyze the claim made by the claimant and communicate the decision

to adopt in this regard.

This second informative requirement was sent electronically on 27

November 2018 and is recorded as received by Vodafone on December 4 of the same year at

at 11:40:35, as evidenced by the document called "Confirmation of the

Receipt of the Notification” of the Citizen Folder. Vodafone also did not respond

to the second requirement notified by this Agency.

4.- On December 18, 2018, the defendant proceeded to the resolution

of the claim. In said letter, the claimant was informed that a procedure had been

to manage the cancellation of the Netflix service and to make a payment in your favor for an amount

of 67.71 euros for the fees paid for said service.

FOUNDATIONS OF LAW

Yo

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

control authority, and as established in art. 47 of the Organic Law 3/2018, of

December 5, Protection of Personal Data and guarantee of rights

(hereinafter LOPDGDD), the Director of the Spanish Agency for

Data Protection is competent to resolve this procedure.

II

The defendant is imputed the commission of an infraction for violation of the

Article 6 of the RGPD, “Legality of the treatment”, which indicates in its section 1 the

assumptions in which the processing of third party data is considered lawful:

"1. The treatment will only be lawful if at least one of the following is met

conditions:

5/10

a) the interested party gave their consent for the processing of their data

personal for one or more specific purposes;

b) the treatment is necessary for the execution of a contract in which the

interested party is a party or for the application at the request of the latter of measures

pre-contractual;

(…)”

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

"5. Violations of the following provisions will be sanctioned, in accordance

with section 2, with administrative fines of a maximum of EUR 20,000,000 or,

in the case of a company, an amount equivalent to a maximum of 4% of the

global total annual turnover of the previous financial year, opting for

the largest amount:

1 The basic principles for the treatment, including the conditions for the

consent under articles 5,6,7 and 9.”

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

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

(…)

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

III

The documentation in the file offers evidence that Vodafone, violated article 6.1 of the RGPD, since in the first place it did not answer to the requirements of this Agency, as recognized by the respondent in his writ of allegations, although he did inform the claimant that he was proceeding to manage the dismissal of the Netflix service and to make a payment in your favor for the fees paid by said service.

Secondly, it should be noted that he processed the personal data of the claimant. Entity that charged a Netflix service that had not been contracted by the affected party.

like the one presented here, has considered that when the owner of the data denies

contracting corresponds the burden of proof to who affirms its existence

the person responsible for the processing of third-party data must collect and keep the

documentation necessary to prove the consent of the holder. We quote, for

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

However, and this is essential, Vodafone has not proven that the holder of

the personal data object of treatment will give the consent to the celebration

of a contract with the respondent entity.

In relation to the alleged that the registration in the Netflix service by a third party does not

It has not been the responsibility of Vodafone nor has the information been hacked from the

spouse of the claimant, through Vodafone, and that for a customer to register

in one of the Netflix packages the client must carry out a proactive activity by

your part and a registration with prior authentication. Therefore, the registration process in the

Netflix service contains sufficient and standard security measures in the

market, so Vodafone cannot be held responsible for how its customers

guard their terminals. It should be noted that these assertions are irrelevant.

from the point of view of the assessment that this Agency is responsible for making.

The reason is that Vodafone has fulfilled the inexcusable obligation that

imposes the data protection regulations to prove that you collected and obtained the

consent of the owner of the data for its treatment.

The respondent has not proven that the affected party had granted her

consent, nor has it provided any document or evidence that

evidence, and did not display the minimum diligence required to verify that indeed

his interlocutor was who he claimed to be.

Respect for the principle of legality, before the principle of consent, which is in

the essence of the fundamental right to protection of personal data, requires

that it is accredited that the owner of the data consented or, at least, that the

responsible for the treatment displayed the essential diligence to prove that

extreme. Failure to act in this way -and this Agency, who is responsible for ensuring

for compliance with the regulations governing the right to data protection of

personal character - the result would be to empty the content of the principle of legality.

Regarding the allegation that the claimant denounced these facts before the

Consumer Arbitration Board in Murcia and this, after analyzing the facts, proceeded to

dossier file.

To this we have to add that, in the foundations of the Arbitration Award,

states that the dispute raised should not be resolved through arbitration by

give two reasons for exclusion:

-

-

Payments to third parties (Netflix)

Filing of a complaint with the General Directorate of Police (attested

8924/2018).

In this regard, it is interesting to note that the filing of the file by the Board

Arbitration does not affect this procedure, since this Agency is responsible for ensuring

for compliance with the regulations governing the right to data protection of

personal nature, and Vodafone has not proven that the owner of the personal data

object of treatment gave his consent.

IV

In accordance with the provisions of the RGPD in its art. 83.1 and 83.2, when deciding the

imposition of an administrative fine and its amount in each individual case will be

taking into account the aggravating and mitigating factors listed in the article

indicated, as well as any other that may be applicable to the circumstances of the case.

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

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

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

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the treatment, taking into account the technical or organizational measures that have applied under articles 25 and 32;

e) any previous infraction committed by the person in charge or the person in charge of the treatment;

f) the degree of cooperation with the supervisory authority in order to put remedying the breach and mitigating the possible adverse effects of the breach;

g) the categories of personal data affected by the infringement;

h) the way in which the supervisory authority became aware of the infringement,

in particular if the person in charge or the person in charge notified the infringement and, in such

case, to what extent;

i) when the measures indicated in article 58, paragraph 2, have been

previously ordered against the person in charge or the person in charge in question

in relation to the same matter, compliance with said measures;

j) adherence to codes of conduct under article 40 or mechanisms

certificates approved in accordance with article 42, and

k) any other aggravating or mitigating factor applicable to the circumstances of the

case, such as financial benefits realized or losses avoided, direct

or indirectly, through infringement."

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

"Sanctions and corrective measures", provides:

"two. In accordance with the provisions of article 83.2.k) of Regulation (EU) 2016/679

may also be taken into account:

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of data processing

personal.

c) The profits obtained as a result of committing the offence.

d) The possibility that the conduct of the affected party could have led to the commission of

the infringement.

e) The existence of a merger by absorption process subsequent to the commission of the

infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when not mandatory, a data protection officer.

h) Submission by the person in charge or person in charge, on a voluntary basis, to alternative conflict resolution mechanisms, in those cases in which there are controversies between them and any interested party."

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

1 The merely local scope of the data processing carried out by the claimed party.

2 The purpose of the treatment was reasonable in the hypothesis that the claimed was legitimized for the treatment carried out.

3 Only one person has been affected by the offending conduct.

4 The damage caused to the affected party by the processing of their data is not very significant.

5 The duration of the treatment carried out by the respondent has not translated into a serious harm or damage.

6 There is no evidence that the defendant had acted maliciously or with a relevant negligence.

7 The respondent did not adopt any measure to correct the effects of the infringement or responded to the two requirements addressed to it by the AEPD Inspection.

8 There is an obvious link between the processing of personal data and the activity carried out by the claimant.

At the same time, it is valued as a mitigating factor that the defendant addressed the affected before initiating the present procedure and proceeded to manage the cancellation of the service of

Netflix and to make a payment in your favor corresponding to the fees paid by said service, being discharged on February 20, 2018 and discharged on June 23 of the same year (more than 4 months).

v

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

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE VODAFONE ESPAÑA, S.A.U., with NIF A80907397, for a violation of Article 6 of the RGPD, typified in Article 83.5 of the RGPD, a fine €40,000.00 (euros).

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

THIRD: Warn the sanctioned party that he must make the imposed sanction effective once Once this resolution is enforceable, in accordance with the provisions of the art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure Common Public Administrations (hereinafter LPACAP), within the payment term voluntary established in art. 68 of the General Collection Regulations, approved by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003, of December 17, through its entry, indicating the NIF of the sanctioned and the number of procedure that appears in the heading of this document, in the account restricted number ES00 0000 0000 0000 0000 0000, opened on behalf of the Agency Spanish Data Protection at Banco CAIXABANK, S.A. Otherwise, it will be collected during 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 LOPDPGDD, 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

LOPDPGDD, 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