

□ Procedure No.: PS/00014/2020

RESOLUTION OF PUNISHMENT PROCEDURE

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

based on the following

BACKGROUND

FIRST: A.A.A. (hereinafter, the claimant) dated October 14, 2019

filed a claim with the Spanish Data Protection Agency. The

claim is directed against TELEFONICA MOVILES ESPAÑA, S.A.U.

The reasons on which the claim is based are the portability of the telephone line

***TELÉFONO.1 of which he is the owner, to the company TELEFÓNICA MÓVILES ESPAÑA, S.A.U. without your consent.

The telephone service until that day was provided by YOIGO, who according to the

claimant transfers his personal data without his authorization to the company TELEFÓNICA

MOBILE SPAIN, S.A.U. and it executes the action by changing the ownership of the

line producing the loss of said line.

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

documents provided by the claimant / of the facts and documents of which he has

had knowledge of this Agency, the Subdirector General for Data Inspection

proceeded to carry out preliminary investigation actions for the

clarification of the facts in question, by virtue of the investigative powers

granted to the control authorities in article 57.1 of the Regulation (EU)

2016/679 (General Data Protection Regulation, hereinafter RGPD), and

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

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

digital rights (hereinafter LOPDGDD).

As a result of the investigative actions carried out, it is verified

the following facts:

Within file E/10113/2018, the claim is transferred to

TELEFÓNICA MÓVILES ESPAÑA, S.A.U. and XFERA MÓVILES, S.A. (YOIGO) with

notification date of December 17, 2018 and December 27, 2018

respectively, requesting to submit a report on the causes that have motivated the

incident that gave rise to the claim, and on the measures adopted to avoid

similar incidents to occur.

TELEFÓNICA MÓVILES ESPAÑA, S.A.U. (hereinafter the claimed) presents

statement of allegations stating that the number ***TELÉFONO.1 was imported to

the one claimed from YOIGO on 11/05/2018 at 02:00 a.m.

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It points out that in cases of line portability, the agent must transfer the

call to the mobile portability verifying entity prior to the

insertion of the portability request that triggers the Technical Specification

approved by the National Markets and Competition Commission (hereinafter

CNMC) for the change of operator, but due to a specific failure of the agent that

processed the discharge in the service, the insertion of portability was carried out prior to

verification by a third party contrary to what is dictated in the standard.

The respondent provides the registration request recordings for portability and the

Verbal consent verification call by third party.

The respondent adds that the applicant for discharge requested that the

verification call after the request and that once the

verification, three SMS were sent to the owner of the line in order to inform and offer the possibility of canceling said operation.

The mobile portability operation implemented in said operator contemplates in the general portability procedure, the sending of a series of informative SMS to the telephone number that is going to be ported in which the different steps through which the request made passes, but does not provide accreditation of shipments made to this line.

The respondent also alleges that she had no record of any claim until September 18, 2019; date on which the Arbitration Board of

***LOCATION.1 submits to this Company a claim filed in relation to this process at the end of November 2018, practically a year after the claimed events took place. The arbitration hearing has held on October 10, 2019 and the claim is pending

Receive notification of the arbitration award that is issued in order to comply with its contents.

The requested operator concludes its allegations by stating that in the Currently the ownership of the line belongs to the applicant for portability, not to the claimant.

And, among others, attach the following documents.

- Recording of the telephone conversation of the discharge dated October 31, 2018
- Call recording verification of verbal consent of the portability dated November 1, 2018.
- Copy of the summons to the arbitration hearing
-

Transfer of claim

THIRD: On February 4, 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 6 of the RGPD, typified in article 83.5 of the GDPR.

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FOURTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations on February 24, 2020, in which, in summary, it stated that despite having made the insertion of the portability request on October 31, 2018, this does not take place effectively until November 5, 2019, having had the claimant a period of six (6) days to contact the reclaimed.

However, the claimant does not present any claim, nor request for cancellation of the portability process, not recording any incident reported by the claimant before said operator in relation to this request until the 18th of September 2019, that is, almost a year after the events took place denounced, object of the present claim and in the course of that time the line was working correctly at all times and without any type of incidence. additionally, the claimed party has the recording of the consent of the claimant to carry her line dated November 2, 2018.

FIFTH: On March 3, 2020, the instructor of the procedure agreed to the opening of a period of practice tests, considering incorporated the previous investigation actions, E/02655/2019.

SIXTH: On March 4, 2020, a resolution proposal was formulated, proposing that TELEFONICA MOVILES ESPAÑA, S.A.U. with NIF A78923125, for an infringement of article 6 of the RGD, typified in article 83.5 of the RGD, a fine of €75,000 (seventy-five thousand euros)

SEVENTH: On June 8, 2020, the respondent sends a letter expressing the following manifestations

"We reiterate that we are facing a specific human error that does not would affect the general procedure established by TME for these cases.

Likewise, we inform the AEPD that despite the fact that the portability process had begun, later contacted the CLAIMANT to request your consent.

As regards the presumed absence of consent for the contracting, regulated in article 6.1 of Regulation (EU) 2016/679 General of Data Protection (hereinafter, "RGD"), we must say that the aforementioned precept of the RGD does not require that the consent be presented in writing or with formalities certain, but it does require that the consent of those affected be "unequivocal",

In this case, it corresponds to my client to prove that there is the consent of the CLAIMANT. For such purposes, we refer to the recording of date November 2, 2018 that is already in the possession of the AEPD as evidence conclusive of the granting of said consent.

For all of the above and taking into account that our agent had committed the punctual human error of starting the portability process prior to the verification, from TME we consider that the CLAIMANT would have lent his

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consent to carry out the portability of your line unequivocally days before of the effective portability of the line.

Based on the foregoing, we insist that there has been no violation of article 6.1 of the RGPD for the treatment of data in terms of data protection.”

PROVEN FACTS

FIRST: The portability of the telephone line has been carried out

***TELEPHONE.1 of which the claimant is the owner, without his consent.

The telephone service until that day was provided by YOIGO, who is the one

According to the claimant, she transfers her personal data without her authorization to the company claimed and this executes the action changing the ownership of the line producing the loss of that line.

SECOND: The respondent entity alleges that although the portability request was performed on October 31, 2018, it does not take place effectively until the day November 5, 2019, so the claimant has had six (6) days to contact in contact with the claimant.

However, the claimant does not present any claim, nor request for cancellation of the portability process, until September 18, 2019, almost a year later, and during all this time the line was working at all times correctly and without any incident.

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each control authority, and according to the provisions of articles 47 and 48 of the LOPDGDD, The Director of the Spanish Agency for Data Protection is competent to initiate and to solve this procedure.

II

Article 4.11 of the RGPD defines the "consent of the interested party" as any manifestation of free, specific, informed and unequivocal will by which the The interested party accepts, either by means of a declaration or a clear affirmative action, the processing of personal data concerning you.

For its part, article 6.1 of the RGPD establishes that "The treatment will only be lawful if at least one of the following conditions is met:

a) the interested party gave their consent for the processing of their personal data for one or more specific purposes;

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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;

c) the treatment is necessary for the fulfillment of an applicable legal obligation to the data controller;

d) the treatment is necessary to protect the vital interests of the interested party or another Physical person;

e) the treatment is necessary for the fulfillment of a mission carried out in

public interest or in the exercise of public powers vested in the person responsible for the treatment;

f) the treatment is necessary for the satisfaction of legitimate interests pursued by the person in charge of the treatment or by a third party, provided that on said interests do not override the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested is a child.”

III

In the present case, the portability of the telephone line is denounced.

***TELEPHONE.1 of which the claimant is the owner, to the claimed operator because this occurs without your consent.

Said operator recognizes a human error in the protocol followed to carry out carry out the portability of the line object of this claim, since the agent must transfer the call to the mobile portability verification entity prior to inserting the port request that triggers the Specification Technique approved by the National Commission of Markets and Competition (in forward CNMC) for the change of operator, but due to a punctual failure of the agent that processed the discharge in the service, the insertion of portability was carried out with prior to verification by a third party contrary to what is dictated in the rule.

From the locutions provided to this Agency by the respondent, it can be deduced that in the registration recording of the portability maintained between the holder of the call and the agent of the claimed, it is verified that the identification data of the interlocutor with the agent of the operator do not coincide with those of the claimant and line holder.

It should be noted at this point that although the respondent is aware that the

data of the high-portability applicant, are different from those of the owner of the line and claimant, it is heard in the recording of the third-party verification that this

The verifier asks the agent of the claimed operator, if the applicant corresponds with the name and surnames of the claimant that the verifier provides and to what said agent answers "YES".

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From this fact, it follows that the defendant allows the verification continue despite knowing that the data of the portability applicant does not coincide with the data of the owner of the line provided by the verifier.

Thus, in accordance with the available evidence, things are considers that the claimed operator has used the data of the claimant, to carry out carry out the portability of the telephone line ***TELÉFONO.1 of which he is the owner, without his consent for the hiring, nor any other cause that legitimizes the treatment of your data.

The one claimed in response to the transfer of this claim provides recordings from which it can be deduced that the portability of a line was carried out with the knowledge that the interveners, that is, the requestor of the portability and the owner of the line, they had different names and surnames, which triggered a portability not requested by the owner of the line, that is, the claimant, and the loss of the corresponding telephone line, thereby contravening what is established in Circular 1/2009 of the National Commission for Markets and Competition in its Annex I, section "Processing of mobile portability requests" point 4, which indicates that the

The verifier will request the client to provide or confirm the personal data of the holder and data relating to the line and operators.

Therefore, it is considered that the known facts are constitutive of a infraction, attributable to the defendant, for an alleged violation of article 6 of the RGPD, indicated in the foundation II.

IV

Article 72.1.b) of the LOPDGDD states that "according to what is established

Article 83.5 of Regulation (EU) 2016/679 are considered very serious and

Infractions that suppose a substantial violation will prescribe after three years.

of the articles mentioned therein and, in particular, the following:

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

v

Article 58.2 of the RGPD provides the following: "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 accordance with

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 case

particular;

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SAW

This infraction can be sanctioned with a fine of €20,000,000 maximum or, in the case of a company, an amount equivalent to a maximum of 4% of the volume of total annual global business of the previous financial year, opting for the one with the highest amount, in accordance with article 83.5 of the RGPD.

Likewise, it is considered appropriate to graduate the sanction to be imposed in accordance with the following criteria established by article 83.2 of the RGPD:

As aggravating the following:

☐ In the present case we are dealing with unintentional, but significant, negligent action.

you identified (article 83.2 b)

☐ Basic personal identifiers are affected (name, a number identification, the line identifier), according to article 83.2 g)

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

FIRST: IMPOSE TELEFONICA MOVILES ESPAÑA, S.A.U. with NIF A78923125, for an infringement of article 6 of the RGPD, typified in Article 83.5 of the RGPD, a fine of €75,000 (seventy-five thousand euros).

SECOND: NOTIFY this resolution to TELEFONICA MOVILES 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 Department of Data Protection in the banking entity CAIXABANK, S.A.. In case Otherwise, it will be collected in the executive period.

Received the notification and once executed, if the date of execution is is between the 1st and 15th of each month, both inclusive, the term to carry out the voluntary payment will be until the 20th day of the following month or immediately after, and if is between the 16th and last day of each month, both inclusive, the term of the payment will be until the 5th of the second following month or immediately after.

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

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

Against this resolution, which puts an end to the administrative procedure in accordance with art.

48.6 of the LOPDGDD, and in accordance with the provisions of article 123 of the

LPACAP, the interested parties may optionally file an appeal for reconsideration

before the Director of the Spanish Agency for Data Protection within a period of

month from the day following the notification of this resolution or directly

contentious-administrative appeal before the Contentious-Administrative Chamber of the

National Court, in accordance with the provisions of article 25 and section 5 of the fourth additional provision of Law 29/1998, of July 13, regulating the Contentious-administrative jurisdiction, within a period of two months from the day following the notification of this act, as provided in article 46.1 of the aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP, the firm resolution may be provisionally suspended in administrative proceedings if the interested party expresses his intention to file a contentious appeal-administrative. If this is the case, the interested party must formally communicate this made by writing to the Spanish Agency for Data Protection, introducing him to the agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other records provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. Also must transfer to the Agency the documentation that proves the effective filing of the contentious-administrative appeal. If the Agency were not aware of the filing of the contentious-administrative appeal within two months from the day following the notification of this resolution, it would end the precautionary suspension.

Electronic Registration of
through the
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