 Procedure No.: PS/00142/2021

RESOLUTION OF PUNISHMENT PROCEDURE

In sanctioning procedure PS/0142/2021, instructed by the Spanish Agency for Data Protection, to the entity, VODAFONE ESPAÑA, S.A.U., with CIF.: A80907397 (hereinafter, "the entity claimed"), by virtue of a complaint filed by A.A.A., (hereinafter, "the claimant"), for alleged violation of Regulation (EU) 2016/679, of the European Parliament and of the Council, of 04/27/16, regarding the Protection of Natural Persons with regard to the Processing of Personal Data and the Free Circulation of these Data (RGPD); Organic Law 3/2018, of December 5, on Pro-Protection of Personal Data and guarantee of digital rights, (LOPDGDD) and by the Law 34/2002, of July 11, on Services of the Information Society and Commerce Electronic (LSSI), and based on the following:

BACKGROUND

FIRST: On 11/18/20, you have entered this Agency, filed a complaint by the claimant in which he indicated, among others, the following:

“On 08/24/2020 I received a commercial communication by email in my di-***EMAIL.1, without prior request or express authorization.

zed, and without the existence of a prior contractual relationship. Even though there should never be received that email, on 08/28/2020 I exercised my right to object before Vodafone, who replied to my request, but in spite of that, he has continued to send me his SPAM on 10/19/2020, 11/05/2020, 11/09/2020, and 11/16/2020”.

The following documentation is attached to the written claim:

1.- Email sent on 08/24/20, from the VODAFONE address info@vodafone-españa.com to the email address of the claimant with the subject: "Save on your company's communications", including in it a

advertising message.

2.- Two emails sent, dated 08/28/20, from the recipient's address.

crying out, to the email addresses: derechoprotecciondatos@vodafone.es; DPO-

SPAIN@VODAFONE.COM and info@xn--vodafone-espaa-2nb.com; with the subject: "De-

right of opposition before Vodafone Spain S.A.U". where the following was stated:

"After receiving this commercial communication about the services of Vodafone Es-

diaper S.A.U. in my email account ***EMAIL.1, without my having requested it.

neither authorized nor authorized, by means of this document with a recognized electronic signature exercised

I hereby grant my right to object, in accordance with the provisions of article 21 of the Re-

General Data Protection Regulation, and consequently, I request the opposition

to the processing of my personal data for marketing purposes, including the ele-

elaboration of profiles about me, both by you and by any other with

the one they hire I remind you that it is the doctrine of the Supreme Court that "when a

entity responsible for the processing of personal data, before which the right is exercised.

right to object to the processing of personal data for advertising activities,

contracts with another the advertising of its products and services, it is obliged to adopt

precautions and reasonable measures to guarantee the effectiveness of the right of opposition

tion; and one of these measures may consist of the communication of the excluded data

two of advertising treatment to the company with which the provision of services is contracted.

advertising cios".

3.- Email sent, dated 08/29/20, from the address: d erechospro-

tecciondatos@vodafone.es, to the email address of the claimant, with the Subject:

(Re): Right of opposition before Vodafone Spain S.A.U." where it was indicated:

"Dear Mr. According to your letter in which, according to the provisions of the Organic Law

ca 15/1999 of December 13 on the Protection of Personal Data, exercises its

Right to object to possible transfers of your data to companies of the Vodafone Group.

ne, we hereby inform you that this company proceeds to take notice immediately

day of your request. Annex the opposition to the treatment of data for commercial purposes is exercised.

In this sense, we inform you that we have ordered the exclusion of your data

of the sending of commercial information from this entity and of the promotions

of this entity based on the processing of your browsing data".

4.- Copy of four emails sent with dates, 10/19/20; 11/05/20;

11/09/20 and 11/16/20, from the VODAFONE address, info@vodafone-españa.com

to the e-mail address of the claimant, with the Subject: "Save on the co-

communications of your company", including in them the advertising message indicated

do above in point 1.

SECOND: Dated 01/26/21, in view of the facts set forth in the claim

and of the documents provided by the claimant, this Agency directed a request

information to the claimed party, in accordance with the provisions of article 65.4

of the LOPDGDD Law.

THIRD: On 04/01/21, by the Director of the Spanish Agency for

Data Protection, an agreement was issued to admit the processing of the complaint filed

by the claimant, in accordance with article 65 of the LPDGDD, as there was no re-

received any response to the request for information sent from this Agency.

cia to the claimed party.

FOURTH: On 04/06/21, the Director of the Spanish Agency for the Protection of

Data agreed to initiate sanctioning proceedings against the claimed party, by virtue of the

established powers, by the following:

- For violation of article 21 of the RGPD, by failing to comply with its obligation

in the management of the right of opposition exercised by the claimant, with a penalty

initial payment of 50,000 euros, (fifty thousand euros).

- For violation of article 21 of the LSSI, for sending co-

without the express consent of the addressee, with an initial penalty

cial of 20,000 euros, (twenty thousand euros).

FIFTH: Notification of the agreement to initiate the sanctioning procedure to the entity

called, this one by writing dated 04/26/21, formulated, among others, the following

allegations:

“ a).- Regarding the imputation of article 21 of the LSSI: The Initial Agreement imputes to Vo-

dafone an alleged infringement typified in article 21 of the LSSI:

The Agency qualifies, therefore, as a slight violation of the rights of the interested parties

users and end users the fact of making 4 communications not consented by the re-

crying on 10/19/20; 11/05/20; 11/09/20 and 11/16/20, after having exercised their right

opposition vote before Vodafone on August 24, 2020, having received

positive reply on August 29, 2020.

To this effect, it considers that article 21 of the LSSI has been violated. I. For the proper evaluation

facts, it is convenient to make certain clarifications and complement the

many described. In the first place, it should be noted that the commercial campaign that

trafficking does not belong to Vodafone nor has it been authorized by it, for the following reasons:

you:

a) Use of a domain name using the name of Vodafone without its consent.

sentiment: The domain used to send the emails info@voda-

fone-españa.com, does not belong to my client, but is owned by the entity

dad Cablanol, S.L. This entity has created said domain to send advertising to

databases for which it acts as data controller and promoting

their own offers using the trade name of Vodafone and its services

without prior authorization. All emails that the claimant attaches to their

claim before the Agency that constitutes File E/00285/2021, have

a footnote at the end of these in which the following is indicated: "NOTICE OF CONFI-

DENTIALITY. The information included in this email, as well as the possible files

attached thereto, are CONFIDENTIAL. Being for the exclusive use of its destination.

tary. If you receive this email and you are not the intended recipient, notify us of this fact and delete it.

mine this message from your system. The copying, dissemination or disclosure of

its content to third parties without the proper authorization of Cablanol S.L. Otherwise

will violate current legislation. DATA PROTECTION. Your personal data, in-

Your email is included in a file owned by Cablanol S.L whose purpose

is to maintain contact with you, who may exercise your rights of access,

rectification, cancellation or opposition by post to C/ Oviedo nº4, 1º 1ª,

28100 Alcobendas. Attaching in any case irrefutable proof of your identity."

Image number 1 extracted from the copies of the emails provided to the

E/00285/2021 of the Agency.

b) Use of design, format and corporate image outside of Vodafone. Likewise, it

must attend to the formatting aspects that are used in the communications made

given that the corporate image used by Cablanol, S.L. when it refers to

Vodafone is not authorized by my representative nor does it employ the use of official logos

of Vodafone simply makes improper use of a red color that does not correspond to

with the official Vodafone color code and the name of my representative without

attend to the font of the letter that does not correspond to the official brand

as can be seen in the image that is copied below. Image no.

number 2 extracted from the copies of the emails provided to E/00285/2021.

-c) Content of the offers does not correspond to that offered by Vodafone. Another ace-

aspect to highlight to demonstrate the non-attribution of responsibility for said co-

communication to Vodafone is the content of the offer of services that is made in the

itself, as well as its contact information. If we do a simple search for the

contact phone number provided in email communications

emails sent to the claimant, on 900 264 036, it can be verified that the same

belongs to the entity Cablanol, S.L.: Image number 3 extracted from Google.

Vodafone does not authorize entities that provide promotional services

and Vodafone products to carry out commercial campaigns with public content.

advertising that does not exclusively use creations of design and image created and self-

created by the Vodafone brand team, contact details other than the official

Vodafone customer service, nor of course content that does not refer to

the products or services offered by Vodafone.

On the other hand, when analyzing the promoted products and services, they also do not

co correspond to those offered by Vodafone in the period in which the

facts, August, October and November 2020. Firstly, these offers include

It says that "This month only get the new iPhone 12 for free when you hire your switchboard"

(see image number 2). This offer is not found in the promotional catalogue.

tions and offers made by Vodafone during the indicated period.

As Document number 1, the private promotions document addressed to

to the sales channel for the promotion of Vodafone services. Also the following

offers shown in image number 4 are not part of the catalog of

Vodafone solutions, because as can be seen in Document no.

number 1 on pages 26 and 30, Vodafone does not offer the terminals iPad Air 64GB, iPhone-

ne 12, nor Samsung Note 20 offered by Cablanol, S.L. in the advertising you have created

for the sale of own products making improper use of the image and certain

Vodafone services for the sale and promotion of the same for their own benefit

and to the detriment of the image and name of Vodafone. 7 Image number 4 extracted from the

copies of the emails provided to E/00285/2021 of the Agency.

For all of the above, it can be concluded that these shipments have not been made or authorized

two by Vodafone, and my client should not be attributed a breach of the article

Article 21 of the LSSI. This is so since it has been sufficiently proven that, (i) the

origin of the database used to send these emails is

responsibility of a third entity that indicates it in the e-mails themselves; (ii) nor

the design, use of color or format are Vodafone's own or official, since a

entity such as Vodafone that invests great efforts on a global level in its image

corporate does not authorize or consent to an indiscriminate and improper use of its name or

image associated with commercial offers that may mislead your ad.

with the consequent damage to the brand and breach of its property rights.

intellectual piety; (iii) the content of the communications does not correspond to the

official Vodafone customer service communication channels or offers

carried out during the period of sending them (nor at present). Everyone

These facts together with the evidence that is attached to the allegations, may

show the lack of responsibility of Vodafone in sending said communications.

business communications via email.

b).- Regarding the existing relationship between Vodafone and Cablanol, S.L.:

After the investigations carried out to clarify the events that occurred in the

present sanctioning procedure, we have verified that the entity Cablanol, S.L.

is an entity subcontracted by the entity Vesaleads, S.L. (entity belonging to

Grupo Solivesa for the commercialization of Vodafone services in the mi-

companies) with which Vodafone has signed an agency contract for the commercialization

Specialization of services to microenterprise clients. In this contract between Vodafone and

Vesaleads, S.L., which is attached as Document number 2, Vodafone entrusts

Vesaleads the promotion and marketing of Vodafone services on behalf of and for

Vodafone account, through you or through sub-agents, being prohibited from acting

at the agent's own expense by reselling them, as indicated

in Exponen V of the aforementioned contract: “V. That, due to the foregoing, the scope of this

deal is the promotion and marketing in the microenterprise segment of the Services

services that will be provided (i) in the name and on behalf of VODAFONE-ES when it

is the provider of the same and (ii), through a subagency relationship also

object of this contract, in the name and on behalf of VODAFONE-ONO when

this is the provider of the Services.

The AGENT may not act on his own account in relation to the aforementioned Services

through the resale of these, this activity being expressly excluded from the

bit of this contractual relationship and any other that may be maintained.

The activity of the AGENT may not extend to the marketing and distribution

distribution of the products associated with the Services in their prepaid modality, as well as

to other products marketed by VODAFONE.” Said promotion and marketing

tion is carried out through contact through commercial calls in which

the services authorized by Vodafone are offered to the interested parties, and the

use of the trademark and other intellectual property rights of Vodafone authorized

expressly by Vodafone.

In this sense, clause 9.5 of the contract textually indicates the following: “9.5. The

AGENT may not use or possess trademarks, domain names or other IPRs

likely to be confused with the IPRs that VODAFONE exploits in the marketing of

your electronic communications services.

The AGENT will only use VODAFONE's DPI when promoting the commercialization

provision of services in the name and on behalf of VODAFONE, for the development of the

activity object of this contract.” Likewise, in accordance with the provision contract

of services signed between Vesaleads, S.L. (Vodafone agent) and Cablanol, S.L., (sub-

bagente) in it the obligations acquired by Vesaleads, S.L. Y

the obligations of Cablanol, S.L. for the marketing of services

in its seventh clause in which it expressly indicates the following: "The SUBAGENT

undertakes to carry out the activity of promotion and commercial distribution of the al-

Vodafone in accordance with the instructions and action programs determined

by the latter, ensuring the proper marketing of its products and

services, the quality of the service and the veracity of the information provided to the

Customers."

Said contract is attached as Doc 3. For all of the above, it is verified that Cablanol,
SL has not complied with the obligations imposed by contract for the promotion and
marketing of Vodafone services. But he has made the sending of di-
such communications at your own risk, assuming your responsibility in
regarding the treatment of the data of the users impacted by the electronic mails.
cos (as reported in them) and promoting their own services for their benefit.
office for which the image and name of Vodafone are used, forming a
joint commercial offer that has not been authorized by Vodafone as there is no
collaboration agreement for the joint promotion of products and services.
In conclusion, it would not be appropriate or correct to attribute the events to Vodafone
described in the sanctioning procedure, nor the ownership of the content, the format
mato and the domain itself from which said advertising is sent that does not
belong in no case to Vodafone nor has it been carried out by virtue of the relationship
existing contract. Furthermore, we must add that at the time Vodafone
became aware of this practice by the sub-agent, the cessation of such practice was requested.
activity to it. In this sense, the SAN dated 02/26/2021 pronounces:
< We proceed to analyze the question regarding the existence of culpability
ity, invoked its absence by the plaintiff. It is said by recurring society that
so that the responsibility provided for by the legal system can be attributed
for the commission of an administrative infraction, a double title of imputation is required.
tion: (i) the objective imputation, that is, that it can be attributed from the point of view
of the material accusation, and (ii) the subjective imputation, that is, the voluntary attribution

tive. It is not enough, therefore, with the pure value of the result or with the objective injury

of a protected legal interest, the devaluation of the action by the commission is also required.

intentional or negligent action of the conduct. The simple non-observance can be understood as referring

adherence to a norm, but the objective non-observance of the norm does not in itself justify the

imposition of the sanction. This being the case, it is known that liability can be incurred

liability for the infringement we are examining either intentionally or doubly

losa or culpable (art. 28 of Law 40/2015, of October 1, on the Legal Regime of the

Public sector-). And it is now appropriate to recall that, as the Supreme Court points out in

the Judgment of January 23, 10, 1998, "...although the guilt of the conduct

must also be tested, must be considered in order to assume the

corresponding charge that ordinarily the volitional and cognitive elements ne-

necessary to appreciate it are part of the typical behavior tested, and that its

exclusion requires that the absence of such elements be proven, or in its aspect

regulations, that the diligence that was required by those who claim their ineligibility has been used

existence; is not enough, in short, to exculpate a behavior typical-

mind unlawful the invocation of the absence of guilt".>

Subsidiarily, and in the event that the Agency understands that there has been an infringement

and a sanction must be imposed on Vodafone, the following must be taken into account

aggravating and mitigating circumstances. In the event that the Agency understands

ra that there has been an infraction and that the imposition of a sanction is also appropriate

to Vodafone, it must be modulated downwards according to the circumstances that

will be set forth in this Second Allegation.

In its Start Agreement, the Agency refers to the graduation criteria of the

sanction contained in article 40 of the LSSI and makes certain value judgments

that are not shared by Vodafone. The Initiation Agreement affirms that "The existence of intentionality, an expression that must be interpreted as equivalent to a degree of culpability. bility in accordance with the AN Ruling of 11/12/07 relapse in Appeal no. 351/2006, corresponding to the denounced entity the determination of a system of obtaining informed consent that is appropriate to the LSSI".

After the exposition of the facts of the first allegation, you must reconsider this Agency the application of this provision when verifying the non-intentionality of the communications by Vodafone, since it has not participated in the definition of this, neither in the contribution of the databases nor, even, in the content of the offers. tas that are made to those affected.

Secondly, now by reference to the section “Term of time during which you have been committing the infraction, since the entity stated that it had agreed to manage correctly establish the claimant's right to object, but three months later sent them non-consensual commercial communications again, (section b).” sayings communications have not been sent by Vodafone, but they have also not returned to be sent and no further complaints have been received in this regard, so the impact of such a campaign cannot be graduated on a large scale.

c).- About the alleged infringement of article 21 of the RGPD:

The facts imputed are not constitutive of the infraction foreseen in article 21 of the GDPR. As evidenced by the claimant, Vodafone responded in a timely manner to the request for the right to oppose receiving commercial communications in your account of e-mail. Thus, as evidenced in file E/00285/2021, which is requested to adhere to this initial agreement, Vodafone gave a written reply

from your official account for the attention of the exercise of the rights of the interested parties.

two, rightsprotecciondatos@vodafone.es to the right of opposition exercised as

only five days after receiving such request, appearing as Robinson in

their systems. Vodafone should not be blamed for the lack of exercise of the right of opposition

tion of the claimant when it has not been proven that Vodafone has carried out the

sending commercial communications after the processing of such exercise.

cio, because as has been indicated in the first allegation, such communications are not

owned by Vodafone and have been fraudulently taken for the sale of products

cough of a third entity. Proof of this is that the claimant has not denounced the

receipt of commercial communications from Vodafone and the response itself

tion to such exercise of rights through the official channel of Vodafone for the processing of

these applications, which provides a written record that the trademark has been applied.

user Robinson in the Vodafone systems, not being able to be contacted for the

sending any commercial communication.

Subsidiarily, and in the event that the Agency understands that there has been an infringement

and a sanction must be imposed on Vodafone, the following must be taken into account

aggravating and mitigating circumstances In the event that the Agency understands

ra that there has been an infraction and that the imposition of a sanction for infraction is in order

of article 21 of the RGPD, it must be modulated according to the circumstances

which will be presented in this Allegation.

The Commencement Agreement partially refers to some of the graduation criteria

contained in article 83.2 of the RGPD and 76.2 of the LOPDGDD, and for reasons of clarity

The reasons why this party disagrees and en-

tends that the sanction – if imposed – should be modulated downwards.

I. The duration of the infraction, taking into account the scope or purpose of the operation.

treatment of the data, as well as the damages caused to the interested party, since

the entity stated that it had proceeded to correctly manage the right of opposition

claimant, 12 on 08/28/20 and three months later, re-sent you up to four

other advertising emails, (section a). Without prejudice to the fact that it cannot

Considering that Vodafone is responsible for the events, this aggravating circumstance should not

be applied taking into account precisely the short duration of the events

that occurred in the three months following the exercise of the right, not having

Neither the Agency nor Vodafone have confirmed that it has occurred again.

II. The negligence in the infringement, when verifying the lack of due diligence of the entity

demanded in the fulfillment of its obligations with respect to the management of

the personal data of the users, (section b). As stated in the allegations

above, the database used is not the responsibility of Vodafone, nor is it

the commercial offer itself that is communicated to those affected that, in any case, has

damaged the image of my client by not complying with the proper use of her corporeal image.

and commercial offers that, in any case, are not authorized to the entity.

dad.

I REQUEST THE SPANISH DATA PROTECTION AGENCY to have

presented this document and all the documents that accompany it and, by virtue thereof, have

consider the statements contained therein to have been made and, after the appropriate procedures,

agree: 1) The dismissal of the file with the consequent filing of the proceedings

tions, for not having committed any of the imputed infractions. 2) Subsidy-

erly, that in the event of imposing any sanction, it is imposed in a minimum amount,

light of the extenuating circumstances indicated in this document.

SIXTH: On 08/04/21, the testing practice period began, agreeing

in the same: a).- consider reproduced for evidentiary purposes the complaint filed

by the complainant and her documentation, the documents obtained and generated that

are part of file E/00285/2021 and b).- consider reproduced for evidentiary purposes.

torials, the allegations to the initial agreement of PS/00142/2021, presented.

SEVENTH: On 08/31/21, the requested entity is notified of the proposal

of resolution, in which, it is proposed that, by the Director of the Agency

Spanish Data Protection Agency is sanctioned against the claimed entity, for the

following offenses:

- For violation of article 21 of the RGPD, by failing to comply with its obligation

in the management of the right of opposition exercised by the claimant, with a penalty

tion of 50,000 euros (fifty thousand euros).

- For violation of article 21 of the LSSI, for sending co-

without the express consent of the recipient, with a sanction of

20,000 euros (twenty thousand euros).

EIGHTH: Notification of the proposed resolution to the respondent party, the latter, dated

09/20/21, submits brief of allegations, indicating, among others, the following:

“PREVIOUS.- Background: the Resolution Proposal and summary of the allegations:

The Agency understands that my client would have violated the right of opposition exercised

made by the claimant, in relation to article 21 of the RGPD, and would have sent co-

commercial communications without the express consent of the recipient, infringing

Article 11 of the LSSI.

In view of the foregoing, and without prejudice to the fact that Vodafone relies entirely on

the arguments presented on April 26, 2021 (the "Brief of Arguments

of April 26"), my client understands that:

1) On the arguments made by the Agency regarding the existing relationship

between VODAFONE and Cablanol, S.L. and the imputation of the infringement of article 21

LSSI:

• The relationship between the parties was existing, as indicated by the Agency, however, it was

Cablanol, S.L. who acted outside of that relationship, becoming, following the established

ed by article 28.10 of the RGPD, in responsible for the treatment.

2) On the arguments provided by the Agency to sanction my client

for the infringement of article 21 of the RGPD:

• Cablanol, S.L. yes, he was notified of the right of opposition exercised by the interested party.

Therefore, by acting as the independent data controller of my re-

submitted, was obliged to implement, with due diligence, the necessary measures

caesarean sections to process the right of opposition.

• The email address that was used to send the communications.

commercial operations by Cablanol, S.L. cannot be considered as personal data.

personal, having a business nature and general ownership and not specific in a

person – as will be detailed later –, not applying the RGPD.

FIRST.- The relationship between the parties was existing, as indicated by the Agency, not ob-

Tante, Cablanol, S.L. acted outside the scope of the contracted relationship, becoming,

as indicated in article 28.10 of the RGPD in the person responsible for the treatment.

The existing contractual relationship between the parties involved in this process, as

As my client has evidenced before the Agency, it would be the following: Cablanol,

SL is an entity subcontracted by the company Vesaleads, S.L. (entity belongs to

Grupo Solivesa), with which Vodafone signed a contract for the commercialization

tion of services that this operator performs in the microenterprise segment.

Given this situation, the Agency understands that Cablanol, S.L. acted as manager of

treatment with respect to my client. It is at this point that we hold

our respectful disagreement, since, as was proven in the Statement of Allegation-

On April 26, the entity Cablanol, S.L. acted outside and external to Vodafo-

ne, breaching, de facto, the contract signed between the parties.

Notwithstanding the foregoing, in the Resolution Proposal the Agency considers that

"It is not up to this Agency to assess compliance or non-compliance with the agreements

two adopted. According to the Agency:

Vodafone considers it relevant to emphasize the fact that a va-

ment on the fulfillment of the service contract, but on the fact that Ca-

blanol, S.L. should have applied its duties as data controller, by becoming

tacitly, independently and externally responsible for the contracted relationship with

Vodafone, through the realization of the facts in previous alleged writings, totally

oblivious to the tasks that he had to assume as treatment manager. Is by

Both the negligence on the part of Cablanol, S.L. in their treatment outside the services

contracted on behalf of Vodafone, the event generating an illegitimate treatment, and not

the fulfillment of the service contract contracted by my client.

In this sense, what, from our point of view, the Agency has not assessed in this

case is that when Cablanol, S.L. breached the contract between the parties, this entity

immediately became responsible for the treatment, following the provisions

in article 28.10 of the RGPD; “If a data processor violates this

Regulation when determining the purposes and means of treatment, will be considered responsible

sable of processing with respect to such processing.”

Likewise, as indicated by the Agency in its resolution proposal, the person in charge

of the treatment, defined in point 7 of article 4 of the RGPD, is "the natural person or

body, authority, service or other body that, alone or jointly with others, determines the

purposes and means of treatment.

In this case, Vodafone at no time indicated to Cablanol, S.L. to send the

offers that he sent, nor did he provide any database to which he could send the communications.

cations. On the contrary, Cablanol, S.L. used a design, format and corporate image

goes outside of Vodafone, made use of a domain name using the name

from Vodafone without your consent and the content of the offers does not correspond

with the one offered by Vodafone.

Therefore, the ends and means were determined by Cablanol, S.L., not by my re-

presented. Proof that Cablanol, S.L. acted on his own is that, as

indicated in the Brief of Allegations of April 26, when analyzing the products and services

promoted by Cablanol, S.L., they do not correspond to those offered

by Vodafone in the period in which the events occurred.

Therefore, the promotion that it carried out harmed the image of Vodafone, offering

non-existent products that could later be demanded by potential customers, affecting

do to the reputation of my client.

For all of the above, Cablanol, S.L., by acting as it did, breached the contract between

the parties, determining in their own way and unilaterally the purposes and means of the treaty.

treatment and, therefore, becoming the data controller as provided

to in articles 4 and 28.10 of the RGPD.

In the event that the Agency maintains the interpretation provided in its proposal for resolution, it would be voiding the content of the provisions of article 28.10 of the RGPD since, no matter what obligation the data processor breaches, even if determines the purposes and means of the treatment, as in the case analyzed, it will be always the responsibility of the person responsible for not having acted with due diligence.

SECOND.- Cablanol, S.L. was notified, therefore, by acting as responsible for the independent treatment of my client, it is the obligation of the entity implementing Take the necessary measures to process the right of opposition.

The Agency establishes that my client violated article 21 of the RGPD for not transacting correctly mitigating the right of opposition of the interested party. Given this statement, We show our respectful disagreement, since, in the first place, following with what is established in the first statement of these allegations, Cablanol, S.L., acted as data controller, being its obligation to process this right cho, as indicated in article 12.1 of the RGPD; “the data controller will take the appropriate measures to provide the interested party with all the information indicated in articles 13 and 14, as well as any communication under articles 15 to 22”.

Likewise, secondly, the Agency indicates in its resolution that it should be done be notified to Cablanol, S.L., so that it does not send more commercial communications them to the interested party. According to the Agency: “This action was not only not necessary because

Cablanol, S.L. acted as data controller, but rather that this entity already

had been informed, since the interested party, when filing his claim, did so, by

same time, before Vodafone y Cablanol, S.L., as evidenced in Annex 1

of the transfer of claim and request for information in relation to the file

E/00285/2021, which this Agency sent us.

We have to remember that the email address info@vodafone-españa.com, as

as indicated in the Brief of Allegations of April 26, it is used for sending

of the emails that originated this claim and does not belong to my representative.

sitting, but is owned by the entity Cablanol, S.L.

Therefore, Cablanol, S.L. I should have processed, as my client did,

the right to object, not only because it acted as data controller

dependent on Vodafone, but because it had been notified of the claim.

THIRD.- The email address that was used to send the

commercial communications by Cablanol, S.L. cannot be considered

as personal data, therefore not applying the RGPD.

The email address that was used to send communications

commercial by Cablanol, S.L. would be ***EMAIL.1. This email address

email, the only data that is used by Cablanol, S.L for sending communications

tions cannot be considered as personal data. For this we are founded

in the provisions of Report 0437/2010 of this Agency: “The email address

tronic is formed by a set of freely chosen signs or words generally

mind by its owner, with the only limitation that said address does not coincide with the

corresponding to another person. This combination may have meaning in itself
or lack of it, and may even, in principle, coincide with the name of another
person other than the owner. From the foregoing it follows that we can refer to
to two essential assumptions of e-mail address, according to the degree of
identification that it makes with the owner of the email account: […].
A second assumption would be the one in which, in principle, the email address
co does not seem to show data related to the person who owns the account (by reference
refer, for example, the email account code to an abstract name or to
a simple alphanumeric combination without any meaning).
At the same time, it is interesting to point out that the European Commission1, on its website
official website reports that an email address that meets the format
“info@empresa.com”, should not be considered as personal data.
This email address format, which is not considered personal data,
personal by the European Commission has an identical structure to that of the mail
electronic object of study in this procedure; ***EMAIL.1.
Therefore, not being able to consider the email address of this alleged
as personal data, this claim would be outside the scope of application.
tion of the RGPD and, therefore, of the competence of the Agency. Official page of the Co.
European mission where the following matter is analyzed https://ec.europa.eu/info/law/law-
topic/data-protection/reform/what-personal-data_en
FOURTH.- Subsidiarily, in the event that it is understood that there has been in-
fraction, there are several factors that lead to the conclusion that the performance
of Vodafone has not been negligent and, consequently, cannot be imposed on the same
any sanction Subsidiarily, in the event that the Agency en-
would tend that there has been an infringement of articles 21 of the RGPD and 21 of the LSSI (which

that we deny), the imposition of any sanction is not appropriate for having acted in a

diligent (not guilty).

My client could not act negligently when Cablanol, S.L. acted in a way

independent of Vodafone guidelines, becoming responsible for the treatment

I lie. Furthermore, the performance of Cablanol, S.L. put my family at risk

presented, acting autonomously and without authorization. All these factors

prove that Vodafone had no control over Cablanol, S.L. and that, for

therefore, he could not have acted negligently.

Likewise, to indicate again that, when my client became aware of the incom-

contractual fulfillment of Cablanol, S.L., terminated the contract that linked them,

revealing once again the pernicious effect that this relationship had generated in Vodafone.

ne. For all these reasons, we maintain the inadmissibility of the imposition of any sanction.

By virtue of all of the above, I REQUEST THE SPANISH PROTECTION AGENCY

DATA PROCESSING that has presented this writing and all the documents that

accompany it and, by virtue of it, considers the statements contained therein to have been made.

das and, after the appropriate procedures, agree: The dismissal of the file with the

consequent filing of the proceedings, for not having committed any of the in-

imputed fractions. Subsidiarily, that in the event of imposing any sanction,

impose a minimum amount, in light of the mitigating circumstances indicated in the

this writing”.

Of the actions carried out in this procedure, of the information and do-

documentation presented by the parties, the following have been accredited:

PROVEN FACTS

1.- In the documentation provided by the claimant, in his letter dated 11/14/20,

The following data are verified to be taken into account in this procedure:

- On 08/24/20 the claimant receives an advertising email with the

following features:

or From: VODAFONE <info@vodafone-españa.com>

o To: DATA PROTECTION DELEGATE, ***EMAIL.1

o Subject: IMPROVE YOUR BUSINESS COMMUNICATIONS.

o The advertising message included in the email had the following text:

□

“ UPDATE YOUR COMPANY'S COMMUNICATIONS WITH

VODAFONE”.

: Come to VODAFONE Now your lines and switchboard

with great discounts. 900264036. Only this month Take the

new iPhone 11 FREE when hiring your switchboard Now from

only €131/month get: a switchboard + 2 communication channels

tion + unlimited calls to landlines and mobiles (national) + Adsl or

fiber* + terminals + maintenance included + *according to coverage.

And this month only, take one of these gift products to the con-

treat your switchboard Samsung Galaxy S20 iPad Pro 64GB iPhone

11 Samsung Note 10 You can't miss an opportunity like

is!

- On 08/28/20, the claimant sends several emails with the following

following features:

or From: A.A.A. ***EMAIL.2

o To: derechoprotecciondatos@vodafone.es

DPO-SPAIN@VODAFONE.COM and

info@xn--vodafone-espaa-2nb.com

o Subject: Right of opposition before Vodafone España S.A.U.

o Text: “After receiving this commercial communication about the services

Vodafone Spain S.A.U. in my email account

***EMAIL.1, without my request or authorization, through the

This document with a recognized electronic signature, I exercise my right of

opposition, in accordance with the provisions of article 21 of the Regulations

General Data Protection Document, and consequently, I request

opposition to the processing of my personal data for marketing purposes

dotecnia, including the elaboration of profiles on my person, both

for you as for any other with whom you contract. I remind you

that it is doctrine of the Supreme Court that “when an entity responds

responsible for the processing of personal data, before which the right is exercised

Right to object to the processing of personal data for activities

advertising, contract with another the advertising of its products and services

cios, is obliged to adopt precautions and reasonable measures to

guarantee the effectiveness of the right of opposition; and one of those me-

measures may consist of the communication of the data excluded from

advertising to the company with which you contract the provision of

advertising services".

- On 08/29/20, from the email address <<VODAFONE>> (de-

rechosprotecciondatos@vodafone.es), respond to the claimant indicating

with the following message:

o "Dear Mr. According to your letter in which, as provided in

Organic Law 15/1999 of December 13 on Data Protection of

personal character, exercises his right of opposition to possible assignments

of your data to companies of the Vodafone Group, hereby informs you

We believe that this society proceeds to take immediate account of its

petition. Annex the opposition to the treatment of data for commercial purposes is exercised.

In this sense, we inform you that we have ordered the exclusion

sion of your data from the sending of commercial information from this

entity and the commercial promotions of this entity based on

the processing of your browsing data".

-

On 10/19/20; 11/05/20; 11/09/20 and 11/16/20, the claimant again receives

emails with advertising messages that refer to a

promotion of VODAFONE (mobile line, switchboard, 2 communication channels)

calls, unlimited calls…), from the address: <<info@vodafone-españa.-

com

>>. Advertising messages contain the following information:

o "UPDATE YOUR COMPANY'S COMMUNICATIONS WITH VODA-

FONE: Come to VODAFONE Now your lines and switchboard with great

discounts. 900264036 We analyze your situation and look for the option

that benefits you the most, and in less than 24 hours we will send you the estimate.

Market Stall. Only this month Get the new iPhone 12 FREE when signing up

your switchboard REQUEST INFORMATION-Now from only €131/month

take with you: 1 mobile line + a switchboard + 2 communication channels + calls

Unlimited calls to landlines and mobiles (national) + Adsl or fiber* + terminal

them + maintenance included *according to coverage. And only this month take

C/ Jorge Juan, 6

28001 – Madrid

www.aepd.es

sedeagpd.gob.es

15/26

one of these gift products when hiring your Samsung switchboard

Galaxy S20 iPad Air 64GB iPhone 12 Samsung Note

2.- For its part, the defendant entity, VODAFONE, initially alleged that:

- The domain used to send the emails, info@vodafone-

españa.com does not belong to VODAFONE, but is owned by the entity

Cablanol, S.L. This entity has created said domain for sending advertisements.

data bases for which it acts as data controller and

promoting their own offers using the trade name of Vo-

dafone and its services without prior authorization.

-

The corporate image used by Cablanol, S.L. when it comes to Vodafo-

ne, is not authorized by Vodafone nor does it employ the use of official Vodafone logos.

dafone simply misuses a red color that does not match

It corresponds to the official Vodafone color code and the Vodafone name without

attend to the font of the letter that does not correspond to the official of the

Mark.

- The contact telephone number that is provided in the communications of the

emails sent to the claimant, 900 264 036, belongs to the

entity Cablanol, S.L.

- Cablanol, S.L. is an entity subcontracted by the entity Vesaleads, S.L.

(entity belonging to the Solivesa Group for the marketing of services

of Vodafone in the micro-enterprise segment), with which Vodafone has signed

an agency contract for the commercialization of services to micro-clients

cross-company

3º.- Of the documentation presented by the claimed entity together with its allegations-

nes, stands out, in the document entitled: “DATA PROCESSING AGREEMENT

PERSONAL DE VODAFONE”, signed on 10/01/19, between the entities, VODAFO-

NE and Vesaleads SL, for the performance of Vodafone's activity, the following:

- BACKGROUND:

-

(…)

(b) The parties have agreed that the Data Processor may process certain

All Personal Data contained in Vodafone files, in the name and by

account of this, who may act as "Responsible for treatment"

or "Data Processing Manager" as set out in the General Regulations.

General Data Protection, hereinafter RGPD with respect to said Data

Personal.

(…)

2. PROCESSING ACCORDING TO VODAFONE INSTRUCTIONS

-

or 2.1. The Treatment Manager guarantees and undertakes that in

all times:

2.1.1. It will only process the Personal Data to carry out the

activities entrusted in the Agreement, in accordance with

the purposes entrusted and as agreed in writing

by the parties and will only act in accordance with the indications

provided in writing by Vodafone. In particular, the Manager

of Treatment will not exercise control by itself, nor will it transfer

such Personal Data to a third party, unless Vodafone

expressly authorize and in writing;

2.1.1.1.will not treat, apply or use the Personal Data-

them for any purpose other than that required by

Vodafone and that is not necessary to provide the

agreed services;

2.1.1.2.will not process Personal Data for its own

purposes or include Personal Data in products or services

services offered to third parties;

2.1.1.3. you must complete a Treatment Appendix

separately for each Service

that requires the Processing of Personal Data.

(…)

6. USE OF SUB-MANAGER OF TREATMENTS

-

or 6.1. The Treatment Manager will not subcontract or outsource any

any Processing of Personal Data to any other person or entity,

including the Entities of the Group of the Treatment Manager ("Su-

Treatment Manager") unless and until:

□

□

□

6.1.1.The Treatment Manager has notified Vodafone

by formal written notification the full name and

registered office or main office of the Processing Sub-Manager

completing Annex 1.

6.1.2.The Treatment Manager has notified Vodafone

any changes that are required to be made to Annex 1 in accordance with

with this Clause 7.

6.1.3. The Treatment Manager has provided Voda-

Give the detail (including categories) of the Treatment that must be

□

□

perform the Processing Sub-Manager in relation to the Services

borrowed vices;

6.1.4. Treatment Manager has signed an agreement with

said Treatment Sub-manager who, in no case, may

be less demanding than what is contained in this Agreement;

6.1.5.Vodafone has not substantiatedly opposed

subcontracting or outsourcing within ten (10) days

business days following receipt of the written notification of the

Treatment Manager established in Clause 7.1.1, in-

including the information established in Clause 7.1.3;

For its part, in the document entitled: “COMMERCIAL DISTRIBUTION AGREEMENT

CANAL VODAFONE”, signed on 06/11/20, between the merchants, SOLIVESA MASTER

FRANCHISE SL and CABLANOL S.L. (later called “Subagent”, in the document)

ment), you can read, among others, the following:

- FIRST: PURPOSE.- 1.1.- The SUB-AGENT commits to SOLIVE-

SA MÁSTER FRANCHISE SL to develop, in exchange for the remuneration

later it is agreed and during the term of this Contract,

the activity of intermediation in customer registrations for the operator of Vodafo-

ne.

FOUNDATIONS OF LAW

I-Competition:

a).- With respect to the infraction committed to the RGPD, it is competent to resolve

this procedure the Director of the Spanish Agency for Data Protection, of

in accordance with the provisions of its art. 58.2 of the RGPD and in art. 47 of LOPDGDD.

b).- Regarding the infraction committed to the LSSI, it is competent to resolve

this procedure the Director of the Spanish Agency for Data Protection, of

in accordance with the provisions of its art. 43.1, second paragraph.

II- On the consideration that the email used should not be considered-

do personal data in this case.

The entity complained against alleges that “The email address that was used

(***EMAIL.1). for sending commercial communications by Cablanol,

SL cannot be considered as personal data, therefore not applying the

GDPR(…)”,

Article 4 of the RGPD defines "personal data" as: "all information about a

identified or identifiable natural person ("the interested party"); will be considered a legal person

identifiable physical person any person whose identity can be determined, directly or indirectly,

mind, in particular by means of an identifier, such as a name, a number,

identification number, location data, an online identifier, or one or more

elements of the physical, physiological, genetic, psychic, economic,

cultural or social of said person”;

Therefore, in principle, the email address is considered to all

effects as a personal data, since it is formed by a set of signs or

words freely chosen by the interested party with the only limitation that said di-

reaction does not coincide with that of another person, remaining, therefore, totally identified

from the rest of the people.

The respondent entity continues to allege that: “(…) the European Commission, on its website

official website reports that an email address that meets the format

“info@empresa.com”, should not be considered as personal data. This format of

email address that is not considered personal data by

of the European Commission has an identical structure to that of the email object

of study in the present procedure; ***EMAIL.1 (…)”.

However, it should be pointed out that the format referred to by the "European Commission

pea” (info@...) does not identify any person or position of the company in particular, if

not that it refers to a generic email address where, in principle,

principle, any user or employee of it has access, as could also be for-

mates such as (HR@...; Accounting@...; spare parts@...; etc.). when the address

email of a company, as in the case at hand (...@icas.es)

is used by a single employee, being able to identify directly or indirectly with

the name, with certain digits or with the position held, as in our case,

<<data protection delegate>> (dpd@...), it is considered personal data to all

the effects.

III- Regarding the existing relationship between the entities, VODAFONE and Cablanol, S.L. and the

imputation of the infraction of article 21 of the LSSI for the sending of co-

commercials without consent.

From the documentation provided in this proceeding, it appears that the entity

dad Cablanol, S.L. is an entity subcontracted by the company Vesaleads, S.L. (per-

belonging to Grupo Solivesa), with which VODAFONE signed a contract for the co-

marketing and promotion of services that this operator performs in the segment of

the micro-enterprises.

However, VODAFONE argues that: “although the relationship between the parties was

existing, was Cablanol, S.L. who acted outside of that relationship, becoming, if-

Following the provisions of article 28.10 of the RGPD, in responsible for the treatment "

and, therefore, no responsibility could fall on the operator in sending

commercial communications to the claimant.

Regarding this argument, we must indicate that points 7 and 8 of article 4

of the RGPD, define the figures of the person responsible for the processing of personal data and

of the person in charge of said treatment, in such a way that, the person in charge of the treatment

of data, (point 7), is identified as: "the natural or legal person, authority, service

office or other body that, alone or jointly with others, determines the ends and means of the treatment.

I lie".

In the present case, the entity VODAFONE is clearly identified as the responsible party.

sable of data processing and this is clear from point 2 of the contract signed on

10/01/19, between this entity and Vesaleads SL.

For its part, the person in charge of processing personal data is defined, in point

8, of the aforementioned article 4 of the RGPD, as, "the natural or legal person, authority, service

office or other body that processes personal data on behalf of the data controller

I lie".

In the present case, the company Vesaleads SL, is clearly identified as the

charged with the processing of personal data. However, as indicated in

the "proven facts", the management entrusted to the company Vesaleads SL by

of VODAFONE, was subcontracted by the entity Cablanol SL, becoming the

in charge of processing the personal data that VODAFONE could transfer-

you.

For its part, article 28.3 of the RGPD specifies the following: “the treatment by the

manager will be governed by a contract or other legal act in accordance with the Law of the Union or of the Member States, which binds 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 responsable".

Therefore, the data controller does not lose this consideration in any way. time and continues to be ultimately responsible for the correct processing of data made by the person in charge of the treatment and to guarantee that the rights rights that assist people in relation to their personal data, is fulfilled in accordance with the RGPD, as well as recognized in the document: "AGREEMENT OF VODAFONE PERSONAL DATA PROCESSING", signed on 10/01/19, en- between the entities, VODAFONE and Vesaleads SL, (Cablanol SL):

2.1. The Treatment Manager guarantees and undertakes that in all moment: 2.1.1. It will only process the Personal Data to carry out the activities entrusted in the Agreement, in accordance with the purposes entrusted amended and as agreed in writing by the parties and will only act in accordance with the instructions provided in writing by Vodafone. In particular, The Treatment Manager will not exercise control by itself, nor will it transfer said Personal Data to a third party, unless expressly authorized by Vodafone. mind and in writing: 2.1.1.1.will not treat, apply or use the Personal Data for any purpose other than that required by Vodafone and that is not necessary would be required to provide the agreed Services; 2.1.1.2.will not process the Data Personal Data for your own purposes or include Personal Data in products or services offered to third parties; 2.1.1.3.must complete a Treatment Appendix separate treatment independently for each Service that requires the Treatment of Personal Data.

Article 28.10 of the RGPD, to which the entity claimed to ensure that

the responsibility of the facts is only of the entity Cablanol SL., establishes the

following: "Notwithstanding the provisions of articles 82, 83 and 84, if a person in charge

of the treatment violates this Regulation by determining the purposes and means of the

treatment, will be considered responsible for the treatment with respect to said treatment.

I lie".

For its part, Article 82 cited, indicates, on the responsibility of the person in charge and

of the person in charge of data processing, that: “1. Any person who has suffered harm

damages and material or immaterial damages as a consequence of an infraction of the

This Regulation will have the right to receive from the person in charge or the person in charge of the

compensation for the damages suffered. 2.Any liability-

ble that 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.

glament. A manager will only be liable for damages caused

for the treatment when it has not complied with the obligations of this Regulation-

specifically addressed to those in charge or has acted outside or in

against the legal instructions of the person in charge. 3. The person in charge or in charge of the

treatment will be exempt from liability under paragraph 2 if it demonstrates

that it is not in any way responsible for the fact that caused the damages and per-

trials. 4. When more than one controller or processor, or one controller

responsible and a person in charge have participated in the same treatment operation and are,

in accordance with sections 2 and 3, responsible for any loss or damage caused
for said treatment, each person in charge or person in charge will be considered responsible
of all damages, in order to guarantee the effective compensation of the interest
sad. 5. When, in accordance with section 4, a person in charge or in charge of the
treatment has paid full compensation for the damage caused, said
responsible or in charge will have the right to claim the other responsible or en-
loaded that have participated in that same treatment operation the part of the
compensation corresponding to its part of responsibility for the damages and losses
damages caused, in accordance with the conditions set out in section 2. 6. The actions
Judicial actions in exercise of the right to compensation will be presented before the courts.
competent courts under the law of the Member State indicated in the
article 79, paragraph 2.
To determine if the distributor of the emails, (Cablanol SL) should be
considered, as indicated by the operator VODAFONE, solely responsible for the treatment
of the data and therefore solely responsible for sending the emails, de-
We must attend to what is specified in article 33.2 of the LOPDGDD, where it is established
establishes that, “those who, in
their own name and without stating that they act on behalf of another, establishes relationships
nes with those affected”.
On the other hand, applying article 28.10 of the RGPD, as the claimant entity alleges-
da, Cablanol SL., it could be considered responsible for the treatment if there were
tuado, "(...) outside or against the legal instructions of the person in charge (...)",
but as has been verified, Cablanol SL sent several emails
advertisements referring to certain offers of the operator VODAFONE,
with advertising phrases such as: "UPDATE YOUR COMPANY'S COMMUNICATIONS"
SA CON VODAFONE” or “(…) Come to VODAFONE. Now your lines and switchboard with

great discounts (...)", Therefore, it is proven that Cablanol SL sent the

of advertising emails in accordance with the guidelines entrusted

by the operator VODAFONE (see the stipulations of the signed service contract-

between the two), establishing relationships with the recipients of the emails

nicos, by mandate of the operator and promoting its services. So what-

It has been proven that the person ultimately responsible for the events that occurred is none other than the

VODAFONE radio.

Regarding the complaint made by the operator VODAFONE indicating that: "(…) Cabla-

nol, S.L. has not complied with the obligations imposed by contract for the promotion

tion and marketing of Vodafone services. But you have sent

of said communications at your own risk, assuming your responsibility.

ity regarding the treatment of the data of the users impacted by the emails

electronic devices (...)" and that "(...) the promotion that he carried out harmed the image of Vo-

dafone, offering non-existent products that could later be demanded by possible

customers, affecting Vodafone's reputation and that by acting as it did, it was incumbent

extended the contract between the parties", it should be noted that it is not the responsibility of this Agency

assess the degree of compliance with the agreements adopted in the service contract

cios carried out between the operator VODAFONE and Vesaleads, S.L. (Cablanol, SL),

because its resolution would correspond, in any case, to the judicial sphere.

Regarding the sending of advertising emails without the mandatory consent

of the interested party, it should be noted that, once it has been established that the ultimate responsible

of non-consensual commercial communications, carried out by the entity Cablanol SL. was the operator VODAFONE, article 21 of the LSSI, establishes the following:

"one. The sending of advertising or promotional communications by co-electronic mail or other equivalent means of electronic communication that previously have not been requested or expressly authorized by the recipients of are. 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 commercials referring to products or services of your own company that are similar res to those who were initially contracted with the client. In any case, the The provider must offer the recipient the possibility of objecting to the processing of your data for promotional purposes through a simple and free procedure, both at the time of data collection as in each of the communications with mercials that you direct. When the communications have been sent by mail electronically, said means must necessarily consist of the inclusion of an address e-mail or other valid electronic address where you can exercise this right, being prohibited the sending of communications that do not include said address."

The aforementioned infraction is typified as minor in art. 38.4.d) of said regulation ma, which qualifies as such, "The sending of commercial communications by electronic mail single or other equivalent means of electronic communication when in said shipments the requirements established in article 21 are not met and it does not constitute an infringement serious".

Pursuant to the provisions of article 39.1.c) of the LSSI, minor infractions may sanctioned with a fine of up to €30,000, establishing the criteria for its duration in article 40 of the same norm.

After the evidence obtained, it is considered appropriate to graduate the sanction to impos-

ner in accordance with the following aggravating criteria, established by art. 40 of the

LSSI:

-

The existence of intentionality, an expression that must be interpreted as equivalent

valent to degree of guilt according to the Judgment of the Court

National of 11/12/07, relapse in Appeal no. 351/2006, where it was established

ce that, it corresponds to the claimed entity the determination of a system

that guarantees the obtaining of the free and informed consent that is appropriate

to the mandate of the LSSI.

- Period of time during which the infraction was committed, then, after

of the first shipment made without the consent of the recipient, on 08/24/20, and

even if the entity claimed claimed to have taken the appropriate steps

so that the sending of more advertising e-mails would not occur again.

recipients on his behalf, two months later, on 10/19/20, the second co-

email on your behalf, repeating with new shipments, on 11/05/20; the

11/09/20 and 11/16/20, (section b).

Pursuant to these criteria, it is considered appropriate to impose on the defendant entity

a penalty of 20,000 euros (twenty thousand euros), for the infringement of article 21 of the

LSSI, regarding the sending of commercial communications without the consent of the des-

recipient.

III- On the imputation of the infringement of article 21 of the RGPD, regarding the lack of diligence shown in the management of the right of opposition exercised by the interested party do.

The defendant entity alleges that: "(…) Cablanol, S.L., acted as responsible for the treatment, being your obligation to process this right, as indicated in article 12.1 of the RGPD (…)". However, as stated in the previous point, this could have been considered true if Cablanol SL. would have acted on his behalf own name and without stating that he acted on behalf of VODAFONE, establishing relationships on your own with the recipients of the emails (art. 33.2 of the LOPDGDD), or even, if Cablanol SL., had acted outside or against VODAFONE's legal instructions, but as has been confirmed, Cablanol SL. sent several advertising emails referring to certain offers of the operator VODAFONE, therefore, for all purposes, the operator VO-DAFONE must be considered the controller of personal data processing carried out on your behalf by the entity Cablanol SL.

to

Well, in our case, on 08/28/20, the claimant sent several emails electronics

from VODAFONE:

rightsprotecciondatos@vodafone.es; DPO-SPAIN@VODAFONE.COM and info@xn--vodafone-espaa-2nb.com, requesting to benefit from their right to object against the sending of advertising emails with advertising of the operator.

addresses

following

the

One day after sending these emails, on 08/29/20, you receive a reply from

VODAFONE, from the address, derechoprotecciondatos@vodafone.es), indicating

that: “(…) we hereby inform you that this company proceeds to take note of

immediately of your request. Annex the opposition to the processing of data for purposes

commercial, in this sense, we inform you that we have ordered the exclusion of

your data from the commercial information sent from this entity and from the

commercial promotions of this entity based on the processing of your data

navigation".

However, two months after receiving confirmation that he would not return

to receive commercial promotions from VODAFONE, on 10/19/20; 11/05/20;

11/09/20 and 11/16/20, receive emails with promotional messages again

from the operator

Article 21 of the RGPD, establishes, on the right of opposition of the data

data of the interested party, that:

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,

exercise or defense of claims.

2. When the processing of personal data is for direct marketing

ta, the interested party will have the right to oppose at any time the treatment of the data.

personal data concerning you, including profiling to the extent

that is related to said marketing. 3. When the interested party objects

to processing for direct marketing purposes, the personal data will no longer be

processed for these purposes.

4. At the latest at the time of the first communication with the interested party, the right

The data 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

Cho to oppose by automated means that apply technical specifications.

6. When personal data is processed for the purpose of scientific or historical research,

for statistical purposes in accordance with article 89, paragraph 1, the interested party

You will have the right, for reasons related to your particular situation, to oppose the treatment

processing of personal data that concerns you, unless it is necessary for the fulfillment

fulfillment of a mission carried out for reasons of public interest.

Therefore, the known facts constitute an infraction, attributable to the

claimed, ultimately responsible for data processing, for violation of the

Article 21 of the RGPD, by failing to comply with its obligation in the management of the right of opposition

Of the interested.

Article 72.1.k) of the LOPDGDD considers it very serious, for prescription purposes,

“The impediment or the obstruction or the repeated non-attention of the exercise of the

rights established in articles 15 to 22 of Regulation (EU) 2016/679.”.

This infraction can be sanctioned with a maximum fine of €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

of greater amount, in accordance with article 83.5.b) of the RGPD.

In accordance with the precepts indicated, and without prejudice to what results from the

instruction of the procedure, in order to set the amount of the sanction to be imposed in

the present case, it is considered appropriate to graduate the sanction to be imposed in accordance

with the following aggravating criteria established in article 83.2 of the RGPD:

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-

The duration of the infringement, since two months after confirming

the entity complained to the interested party that he would not receive any more emails

advertising tronics, he received up to four more emails in the following months.

following, (section a).

The negligence in the infringement, when verifying a clear lack of due diligence

of the entity claimed in the management of the right of opposition of the claimant,

then, after having assured that he had carried out the opportune steps

so that no new advertising emails would be sent to him again, the claim

again received new advertising e-mails referring to

reference to promotions of the claimed entity, (section b).

For its part, article 76.2 of the LOPDGDD establishes that, in accordance with the

provided for in article 83.2.k) of the RGPD, it will be taken into account, as factors

aggravating circumstances of the sanction, the following:

- The continuing nature of the infringement, therefore, although the entity claimed affirms

have correctly managed the right to oppose the personal data

claimant's personal data in August 2020, two months later he resubmitted

commercial communications to the claimant, (section a).

-

The link between the activity of the offender and the performance of treatment of

personal data, considering the number of customers and users that the entity

ty VODAFONE currently owns (section b).

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

Regarding the infraction committed by violating the provisions of article 21 of the

RGPD, allows you to set an initial penalty of 50,000 euros, (fifty thousand euros).

In view of the foregoing, the following is issued:

:

RESOLVE

FIRST: IMPOSE, on the entity, VODAFONE ESPAÑA, S.A.U., with CIF.:

A80907397, a fine of 50,000 euros, (fifty thousand euros), for the infringement of the

article 21 of the RGPD, by not correctly managing the right of

opposition exercised by the claimant.

SECOND: IMPOSE, on the entity, VODAFONE ESPAÑA, S.A.U., a fine of

20,000 euros, (twenty thousand euros), for the infringement of article 21 of the LSSI,

for their responsibility in sending advertising emails without the

mandatory consent of the recipient.

THIRD: NOTIFY this resolution to the entity, VODAFONE ESPAÑA

SAU. and to the claimant about the outcome of the claim.

Warn the sanctioned party that the sanction imposed must be made effective once it is

enforce this resolution, in accordance with the provisions of article 98.1.b)

of Law 39/2015, of October 1, of the Common Administrative Procedure of the Ad-

Public Administrations (LPACAP), within the voluntary payment period indicated in article

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, me-

upon deposit in the restricted account Nº ES00 0000 0000 0000 0000 0000, opened

on behalf of the Spanish Agency for Data Protection at CAIXABANK Bank,

S.A. or 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

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 82 of Law 62/2003, of December 30,

bre, of fiscal, administrative and social order measures, this Resolution is

will make public, once it has been notified to the interested parties. The publication is made

will be in accordance with the provisions of Instruction 1/2004, of December 22, of the Agency

Spanish Data Protection on the publication of its Resolutions.

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

established in articles 112 and 123 of the LPACAP, the interested parties may interpose

have, optionally, an appeal for reconsideration before the Director of the Spanish Agency

of Data Protection within a period of one month from the day following the notification

fication of this resolution, or, directly contentious-administrative appeal before the

Contentious-administrative Chamber of the National High Court, in accordance with the provisions

placed in article 25 and in section 5 of the fourth additional provision of the Law

29/1998, of 07/13, regulating the Contentious-administrative Jurisdiction, in the

two months from the day following the notification of this act, according to

the provisions of article 46.1 of the aforementioned legal text.

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 interested party

do states its intention to file a contentious-administrative appeal. Of being

In this case, the interested party must formally communicate this fact in writing

addressed to the Spanish Agency for Data Protection, presenting it through the Re-

Electronic Registry of the Agency [https://sedeagpd.gob.es/sede-electronicaweb/], or to

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

that proves the effective filing of the contentious-administrative appeal. If the

Agency was not aware of the filing of the contentious-administrative appeal

tive within two months from the day following the notification of this

resolution, would end the precautionary suspension.

Sea Spain Marti

Director of the AEPD, P.O. the Deputy Director General of Data Inspection, Olga Pé-

rez Sanjuán, Resolution 10/4/2021

C/ Jorge Juan, 6

28001 – Madrid

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