

Procedure No.: PS/00207/2019

938-0419

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: Ms. A.A.A. (hereinafter, the claimant) dated February 18, 2019

filed a claim with the Spanish Data Protection Agency. The

claim is directed against VODAFONE ESPAÑA, S.A.U. with NIF A80907397 (in

hereinafter, the claimed party), an entity of which it is not a client and has not been; and in this sense

the claimed included the personal data of the claimant in the solvency file

Asnef and Badexcug for a debt derived from a contracting of services that she

has not done.

The claimant provides a copy of the complaint filed with the Commissioner

Provincial of Soria dated ***DATE.1.

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

documents provided by the claimant, the Subdirector General for Inspection of

Data 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 research actions carried out, it is confirmed

that the data controller is the claimed party.

In addition, the following extremes are noted:

This Agency transferred the claim to the person claimed by electronic and the date of acceptance by the former is recorded as March 15, 2019, but did not respond to the request of this body.

For this reason, this claim was admitted for processing by fraudulent contracting, without the entity responding to the Spanish Agency for Data Protection.

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THIRD: On July 2, 2019, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimed entity, by virtue of the powers established in article 58.2 of the RGPD and in articles 47, 64.2 and 68.1 of Organic Law 3/2018, of December 5, on Data Protection Personal and Guarantee of Digital Rights (LOPDGDD), for the infringement of the article 6.1 of the RGPD typified in article 83.5.a) of the RGPD.

FOURTH: Once the initiation agreement has been notified, the entity claimed, by means of a letter of dated July 16 of this year, made, in summary, the following allegations:

“Vodafone, first of all, wants to state that after receiving the request of information E/2742/2019, Vodafone analyzed the claimant's claim and proceeded to its resolution immediately, proceeding to cancel the services registered in their name and eliminating the debt from their systems, despite not have responded to the aforementioned request for information within the term

conferred for it.

The hiring made in the name of the claimant had an appearance of correct hiring. In this sense, my client has two recordings, both made on the date ***DATE.2. In both recordings it is collected clearly the consent given on behalf of the claimant. A CD is attached with the copy of the recordings.

Given the non-payment of the services, effectively, my client included the data of the claimant in solvency files on the following dates: Experian file registration and discharged on March 11, 2018 and August 20, 2018. Asnef file, date of discharge 8 March 2018 and goes down on August 20, 2018.

In this sense, it is relevant to highlight the repeal of article 130 of Law 30/1992, of November 26, on the Legal Regime of Public Administrations and the Common Administrative Procedure. Its substitution by article 28.1 of the Law 40/2015 of October 1, on the Legal Regime of the Public Sector eliminates the mention of the "simple non-observance" making the rule "nullum poena sine culpa" prevail.

The foregoing comes only to highlight the lack of room for the responsibility without fault, principle that governs or must govern in the administrative field sanctioning, because to the extent that it is a manifestation of "ius puniendi" of the State, It is inadmissible in our legal system a liability regime no fault

In this sense, it indicates Judgment of the Constitutional Court number 219/1988, and this for being inadmissible a system of strict liability or without fault as it also comes to point out Judgment 246/1991. I cannot be penalized represented for infraction of article 6.1. of the LOPD, without reference to the subjective element of the type, not proving fraud, guilt, or negligence.

Additionally, taking into account the special nature of penalizing law

that determines the impossibility of imposing sanctions without taking into account the will of the acting subject or the factors that may have determined the breach of a legal obligation, this part maintains the inadmissibility of the imposition of sanctions some.

Thus, the Supreme Court indicates in the Judgment of December 21, 1998 (RJ1998/10226) (Appeal 9074/1991), January 27, 1996 (RJ 1996\926)

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(Appeal 640/1992) and January 20, 1997 (RJ 1997\257) (Appeal of Appeal 2689/1992)". The Supreme Court also points out in a Judgment of 20 July 1990, Arch. 6163,

Well, as can be seen, in the behavior described there is no intentionality, neither by way of intent, nor by way of guilt. Therefore, do not If there is any guilt, it is totally inadmissible to impose a sanction any to my client, as long as one of the essential requirements of the Sanctioning Administrative Law.

For all these reasons, neither represented understands that what is appropriate is for the AEPD to agree on the dismissal of this file and the file of the proceedings since the facts have occurred without any intention on the part of my client and It seems that due to some kind of error. Subsidiarily and in the event that Despite the explanations provided above, the Agency understood that my represented is deserving of a sanction for the commission of an infringement of art.

6.1. of the RGPD, the amount of said sanction must be moderate, imposing in its

minimum amount, taking into account the following circumstances set out in art.

83.2 of the GDPR:

It is requested, therefore, to agree: The dismissal of the file, with the consequent record of proceedings. Subsidiarily with respect to what is intended in number 1, impose a sanction on my client, having taken into account the AEPD for the determination of its amount, the alluded mitigating factors”.

FIFTH: On July 22, 2019, the test practice period began,

remembering: 1. Consider reproduced for evidentiary purposes the complaint filed by the claimant and her documentation, the documents obtained and generated that are part of file E/02742/2019 and 2. Consider reproduced for purposes evidence, the allegations to the initiation agreement of PS/00207/2019, presented by the reported entity.

SIXTH: On September 6, 2019, the respondent was notified of the proposed resolution formulated in the following terms: <<That by the Director of the Agency Spanish Data Protection Commission, VODAFONE ESPAÑA, S.A.U. with NIF A80907397, for an infringement of Article 6 of the RGPD, typified in Article 83.5 of the RGPD, a fine of €60,000.00 (sixty thousand euros)>>.

SEVENTH: On September 23, 2019, this Agency entered a letter of the representation of the claimed, in which they carried out the appropriate arguments to the proposed resolution.

In this brief of allegations, the dismissal of this case is requested.

file and the file of the actions or subsidiarily that a sanction for an infringement of art. 6.1 of the RGPD, noting that the amount must be moderated, imposing its minimum amount, stating "that it has proven that the two recordings in which consent was granted, on behalf of the claimant, both for contracting services and for portability. These

recordings were made on date ***DATE.2, where it is made, on the first

of them, the recapitulation of the contracting carried out (telephone lines, Ono fiber and

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Television), and in the second, the portability request for two lines

(***PHONE.1 and ***PHONE.2) from Jazztel to Vodafone Spain. In both

recordings, the consent given on behalf of the claimant is clearly recorded.

These recordings are provided.

Subsequently, as a result of contracting the services, in your

belief that the services had actually been contracted for by the

claimant, proceeded to issue the corresponding invoices for the services rendered,

which had consumption and before the non-payment of said bills, proceeded to include the

details of the claimant in solvency files.

It is not until the request for information is received from the Agency

when my client receives the claim in relation to the hiring and acts

with all diligence and speed possible, canceling the debt and deregistering the

service".

PROVEN FACTS

1º On February 18, 2019, the claimant states that she is not a client nor has she

been of the claimed, and that has been registered in the file of patrimonial solvency and

Credit Asnef, for fraudulent contracting.

2º The claimant provides a copy of the complaint filed with the Commissioner

Provincial of Soria dated ***DATE.1.

3º This Agency transferred this claim to the person claimed by electronic means and there is a date of acceptance by it on 03/15/2019 but it has not answered the request of this body.

4º On July 16, 2019, the respondent states that after receiving the information request E/2742/2019, proceeded to terminate the services provided registration in the name of the claimant, eliminating the debt from their systems and from the solvency files, despite not having answered the aforementioned request within the period conferred for it.

5th The sale was formalized over the phone. In the two recordings in consent was granted, both for contracting the services and for portability, it is verified that the manager indicates the date and asks for the name and surnames of the contracting party, as well as their DNI/NIF, their address, to which the interlocutor responds with the data of the claimant, and in the second, the portability request of two lines (**TELÉFONO.1 and **TELÉFONO.2) from Jazztel to Vodafone Spain.

FOUNDATIONS OF LAW

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By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, and as established in arts. 47 and 48.1 of the LOPDPGDD, the Director of

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The Spanish Agency for Data Protection is competent to resolve this process.

II

The defendant is imputed the commission of an infraction for violation of Article 6 of the RGPD, "Legality of the treatment", which indicates in its section 1 the cases in which the processing of third party data is considered lawful:

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

- a) the interested party gave their consent for the processing of their data personal for one or more specific purposes;
 - b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of the latter of measures pre-contractual;
- (...)"

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

"5. Violations of the following provisions will be sanctioned, in accordance with section 2, with administrative fines of a maximum of EUR 20,000,000 or, in the case of a company, an amount equivalent to a maximum of 4% of the global total annual turnover of the previous financial year, opting for the largest amount:

- a The basic principles for the treatment, including the conditions for the consent under articles 5,6,7 and 9."

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

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

(...)

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

III

In the case at hand, the data processing carried out by the claimed was carried out using reasonable diligence. In this sense, it has to take into account that in the systems of the respondent there are data related to

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the claimant, both for contracting and for portability and are associated with the claimant's DNI. The sale was formalized over the phone. Fruit of said registration, some invoices were issued that were canceled immediately in the same moment in which the respondent became aware of the situation.

Likewise, the respondent provides a copy of the two telephone recordings to through which consent was granted, on behalf of the claimant, both for contracting services, as well as for portability. these recordings were carried out on date ***DATE.2, where, in the first of them, the summary of the contracting carried out (telephone lines, Ono fiber and Television) and in the second, the portability request for two lines from Jazztel to Vodafone, in which the following information is provided: the name and surnames of the contracting party, as well as as your DNI/NIF, to which the interlocutor responds with the data of the claimant and reports on various aspects of contracting.

Therefore, the degree of culpability existing in the present must be analyzed.

case. The jurisprudence has been requiring those entities that assume in their

becoming, a constant processing of data from customers and third parties, which in the management of

the same, prove compliance with an adequate level of diligence, due to the

increasing casuistry in terms of fraud in the use of data

personal. In this sense, it is manifested, among others, the judgment of the High Court

National Law of April 29, 2010, establishing that "The question that arises

in the present case, in view of the approach of the claim, it is not so much to elucidate

if the appellant processed the personal data of the complainant without her

consent, such as whether or not you used reasonable diligence in trying to

identify the person with whom the financing contract was signed" or as

included in the ruling of the National High Court of March 10, 2015 when pointing out

that: "therefore, no reproach can be made to the actions of Telefónica Móviles

Spain S.A. in this sanctioning area, because as has already been stated, he acted with the

due diligence, treating the data of the complainant from the appearance of

legitimacy of the contracting of the line in question that was granted by the recording

telephone (...)

In short, it is not possible to assess culpability in the actions of the entity

appellant, so it cannot be charged or sanctioned ex article 130 LRJPAC

for violation of the principle of consent nor, and in correlation, of the

principle of data quality since the prior request for payment was made in the

address that according to the aforementioned telephone recording corresponded to the owner of the line"

According to these criteria, it can be understood that the respondent used a

reasonable diligence, since it took the necessary measures to identify the

person who made the contract.

Considering the aforementioned precepts and others of general application,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: FILE sanctioning procedure PS/00207/2019, instructed to

VODAFONE ESPAÑA, S.A.U. with NIF A80907397, for having proven that he used

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reasonable diligence, since it adopted the necessary measures to identify the

person who made the contract.

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

THIRD: In accordance with the provisions of article 50 of the LOPDPGDD, 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

LOPDPGDD, and in accordance with the provisions of article 123 of the LPACAP, the

Interested parties may optionally file an appeal for reconsideration before the

Director of the Spanish Agency for Data Protection within a month from

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

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

National Court, in accordance with the provisions of article 25 and section 5 of

the fourth additional provision of Law 29/1998, of July 13, regulating the

Contentious-administrative jurisdiction, within a period of two months from the

day following the notification of this act, as provided in article 46.1 of the

aforementioned Law.

Finally, it is pointed out that in accordance with the provisions of art. 90.3 a) of the LPACAP,

may provisionally suspend the firm resolution in administrative proceedings if the

The interested party expresses his intention to file a contentious-administrative appeal.

If this is the case, the interested party must formally communicate this fact by writing addressed to the Spanish Agency for Data Protection, presenting it through Electronic Register of the Agency [<https://sedeagpd.gob.es/sede-electronica-web/>], or through any of the other registers provided for in art. 16.4 of the aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the documentation proving the effective filing of the contentious appeal-administrative. If the Agency was not aware of the filing of the appeal contentious-administrative within a period of two months from the day following the notification of this resolution would end the precautionary suspension.

Sea Spain Marti

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