Procedure No.: PS/00251/2019

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: D.A.A.A. (hereinafter, the claimant) dated July 24, 2018

filed a claim with the Spanish Data Protection Agency. The

claim is directed against TELEFONICA DE ESPAÑA, S.A.U. with NIF A82018474

(hereinafter, the claimed one). The grounds on which the claim is based are that the

claimed has made various charges to your bank account, corresponding to the

consumptions made by a line of which he is not the owner.

On July 3, 2018, this circumstance was communicated to the respondent, and on the 5th

of the same month and year, they reply by letter stating "we have analyzed your case

in detail and we have not observed any incidence in our processes…we are sorry

inform you that the amount is correct…". In addition, in bank receipts, access

to the other person's name and phone number.

Thus, he has been able to return some of the receipts, but dated July 13,

2018, they are reloaded after reporting the error.

Along with your letter, the following documentation has been provided: copy of receipts

erroneous charged to your bank account (dated 03/01/18, 04/03/18, 05/02/18,

06/01/18, 07/02/18 and two of 07/13/18), response from the respondent stating that the

amount is correct and that it is the client himself who has to request from his entity

bank the return of receipts that have been loaded incorrectly.

SECOND: In view of the facts set forth in the claim and the documents

provided by the claimant, the General Subdirectorate for Data Inspection proceeded

to carry out actions for its clarification, under the powers of

investigation granted to the control authorities in article 57.1 of the Regulation

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

On 10/9/2018 the Data Inspection of the AEPD directs a request

informative to the claimed.

The claim dated 11/2/2018, states that the claimant is the owner of the Contract

of Movistar Fusión service that includes a fixed telephone line and the four lines of

mobile telecommunications contained therein.

It adds that upon receipt of the claim from the owner of the bank account regarding charges for

invoices that are not their own and after making appropriate checks, directs the

claimant to his bank so that he can regress the aforementioned bank charge,

in accordance with the legislation on payment services.

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

Data Protection agreed to initiate a sanctioning procedure against the claimed, for the

alleged infringement of article 5.1d) of the RGPD typified in article 83.5 a) of the

quoted GDPR.

FOURTH: Notification of the start agreement, by means of a letter dated August 1,

2019, the respondent makes allegations in which she requests the filing of the

process.

The defendant states, in the first place, "that the receipts

mentioned, with the exception of the last ones, refer to dates and periods of

billing prior to the application of the RGPD".

Regarding the facts that give rise to the sanctioning file, it states:

"That the association of the bank account to another client of the same entity

bank has been outside the will of my client.

Likewise, it is of interest to clarify that both clients are domiciled in the

payment of the services provided in the account of the same bank.

What is interesting to highlight is that the receipts referred to in the

claim have not been finally paid by the claimant".

It affirms that, "the services provided to the clients that appear in the receipts

mentioned are domiciled in accounts of the same bank, from which

results in the absence of infringement of the principle of accuracy contained in article

5.1.d) mentioned.

The respondent concludes from the foregoing that the facts that are the subject of the

procedure, as well as the absence of responsibility, exclude the commission of the

infraction contained in article 72.1a) of the LOPDGDD".

On the other hand, it points out the absence of the criteria for the imposition of

fines.

FIFTH: On September 9, 2019, the respondent was notified of the opening of the period

of evidence, taking into account the previous investigation actions,

E/05384/2018, as well as the documents provided by the respondent.

SIXTH: On October 4, 2019, a resolution proposal was formulated in the

following terms:

"That by the Director of the Spanish Data Protection Agency,

sanction TELEFONICA DE ESPAÑA, S.A.U., with NIF A82018474, for a

infringement of article 5.1.d) of the RGPD, typified in Article 83.5 of the RGPD, a

fine of €30,000.00 (thirty thousand euros).

The proposal was notified to the respondent by electronic means, the date being

of acceptance of the notice on October 7, 2019.

SEVENTH: On October 21 of this year they have entry in the electronic headquarters

of the AEPD the allegations of the claimed to the resolution proposal, in which

it is practically reiterated in the same allegations made to the Home agreement.

Of the actions carried out in this proceeding, there have been

accredited the following:

PROVEN FACTS

1.- The claimant's bank account is associated with another client of the entity

denounced, which results in the billing being charged to the account of the

claimant. As a result, the invoiced data is transferred to the holder of the

claims the claimant.

2.- The respondent in her reply to the claimant, states that they have

analyzed his case in detail and have not observed any incidence in his processes.

Consequently, they inform him that the amount is correct and it is the client himself who

You must ask your bank to return the receipts that have been

incorrectly loaded.

FOUNDATIONS OF LAW

Yo

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

control authority, and as established in arts. 47 and 48.1 of the LOPDPGDD, the

Director of the Spanish Data Protection Agency is competent to resolve

this procedure.

II

In the first place, it must be stated that in relation to what is alleged by the

entity claimed on, "that the aforementioned receipts, except for the last ones,

refer to dates and billing periods prior to the application of the RGPD", and

therefore, it states that the RGPD should not be applied to it, but the old LOPD, given

that it is more favorable.

In this sense, it can be seen that the respondent does not argue her statement. Already

these effects, it is evident that with the previous regulations, serious infractions

(article 45 LOPD) would be sanctioned with a fine of 40,001 to 300,001 euros, and for the

current RGPD, the present case is sanctioned with a fine of 30,000 euros. For the

Therefore, it is clear that the most favorable rule is being applied to it.

On the other hand, the sanctioning procedure begins with the signing of the

initial agreement by the Director of the AEPD, which dates from July 22, 2019, has been

to comply with what is established in the third transitory provision of the LOPDGDD:

"Transitional regime of procedures:

1. The procedures already initiated at the entry into force of this organic law shall be

shall be governed by the above regulations, unless this organic law contains provisions

more favorable for the interested party.

Likewise, article 63.2 of the LOPDGDD establishes that: “The procedures

processed by the Spanish Agency for Data Protection will be governed by the provisions

in Regulation (EU) 2016/679, in this organic law, by the provisions

regulations issued in its development and, as long as they do not contradict them, with a

subsidiary, by the general rules on administrative procedures.” Of

here, that the RGPD is fully applicable to the present case, since the present

The sanctioning procedure began with the signing of the initiation agreement by the Director

of the AEPD, which was on July 22, 2019.

III

The defendant in this proceeding is accused of committing a

violation of article 5.1 d) of the RGPD, which provides that:

The personal data will be:

(…)

d) “accurate and, if necessary, updated; all measures will be taken

reasonable to eliminate or rectify without delay the personal data that

are inaccurate with respect to the purposes for which they are processed (<<exactness>>)”.

The infringement is typified in article 83 of the RGPD, under the heading "Conditions

for the imposition of administrative fines” establishes:

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

with section 2, with administrative fines of a maximum of 20,000,000 Eur 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

“Violations

Digital Rights (LOPDGDD) in its article 72.1a) indicates:

considered very serious”:

"1. Based on the provisions of article 83.5 of Regulation (EU) 2016/679,

considered very serious and will prescribe after three years the infractions that suppose

a substantial violation of the articles mentioned therein and, in particular, the

following:

a) The processing of personal data violating the principles and guarantees

established in article 5 of Regulation (EU) 2016/679”.

The obligation established in article ut supra requires that the data

data collected in any file are accurate and respond, in all

moment, to the current situation of those affected, being those responsible for the

files who are responsible for compliance with this obligation.

IV

In the present case, the documentation provided to the file reveals

that the personal data was processed by the claimed party, without taking into account the

principle of data accuracy, since the claimant's bank account was

associated with another client of the respondent entity, which gave rise to the charge of the

Billing will be made to the claimant's account.

Well, the defendant entity acknowledges this error, stating that it has been

outside his will.

In conclusion, it is accredited, through the documentation that integrates the

file, that the defendant violated the principle of data accuracy.

It must be brought up here that on July 3, 2018 the claimant

communicates this circumstance to the person claimed and they reply that the amount is correct and

In addition, they are uploaded again on July 13, 2018, despite having warned of the

mistake.

The treatment of the claimant's personal data, associated with that of another client

of the company lasted from March 1, 2018 -date of the first invoice-

until July 13, 2018.

The defendant has incurred in the serious infringement described by having carried out the

treatment of a personal data of the claimed for the issuance and charge of invoices of

a third person in the bank account, who had communicated to the operator to

payment of own bills.

v

In order to determine the administrative fine to be imposed, the

observe the provisions of articles 83.1 and 83.2 of the RGPD, precepts that

point out:

"Each control authority will guarantee that the imposition of fines

administrative actions under this article for violations of this

Regulation indicated in sections 4, 9 and 6 are in each individual case

effective, proportionate and dissuasive."

"Administrative fines will be imposed, depending on the circumstances of

each individual case, in addition to or as a substitute for the measures contemplated in the

Article 58, paragraph 2, letters a) to h) and j). When deciding to impose a fine

administration and its amount in each individual case will be duly taken into account:

a) the nature, seriousness and duration of the offence, taking into account the

nature, scope or purpose of the processing operation in question

as well as the number of stakeholders affected and the level of damage and

damages they have suffered;

b) intentionality or negligence in the infringement;

c) any measure taken by the controller or processor

to alleviate the damages suffered by the interested parties;

d) the degree of responsibility of the person in charge or of the person in charge of the

treatment, taking into account the technical or organizational measures that have

applied under articles 25 and 32;

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

treatment;

f) the degree of cooperation with the supervisory authority in order to put

remedying the breach and mitigating the possible adverse effects of the breach;

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

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

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

case, to what extent;

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

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

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

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

certificates approved in accordance with article 42, and

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

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

or indirectly, through infringement."

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

"Sanctions and corrective measures", provides:

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

may also be taken into account:

a) The continuing nature of the offence.

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

personal information.

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

d) The possibility that the conduct of the affected party could have induced the

commission of the offence.

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

infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

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

h) Submission by the person in charge or person in charge, on a voluntary basis, to

alternative conflict resolution mechanisms, in those cases in which

there are controversies between them and any interested party."

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

- The merely local scope of the treatment carried out by the entity claimed.

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

- There is no evidence that the defendant had acted maliciously, although the performance reveals a lack of diligence.

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

The entity claimed is considered a large company.

At the same time, the absence of benefits on the part of the claimed, given that the receipts to which the claim refers have not been finally paid by the claimant.

Taking into consideration the totality of the circumstances that concur, it is agrees to sanction the claimed party for an infringement of article 5.1.d) of the RGPD, typified in article 83.5 of the RGPD, with a fine of 30,000 euros.

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

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE TELEFONICA DE ESPAÑA, S.A.U., with NIF A82018474, for an infringement of Article 5.1.d) of the RGPD, typified in Article 83.5 of the RGPD, a fine of €30,000.00 (thirty thousand euros).

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

THIRD: Warn the sanctioned party that he must make the imposed sanction effective once

Once this resolution is enforceable, in accordance with the provisions of the

art. 98.1.b) of Law 39/2015, of October 1, on Administrative Procedure

Common Public Administrations (hereinafter LPACAP), within the payment term

voluntary established in art. 68 of the General Collection Regulations, approved

by Royal Decree 939/2005, of July 29, in relation to art. 62 of Law 58/2003,

of December 17, through its entry, indicating the NIF of the sanctioned and the number

of procedure that appears in the heading of this document, in the account

restricted number ES00 0000 0000 0000 0000, opened on behalf of the Spanish Agency

of Data Protection at Banco CAIXABANK, S.A. Otherwise, it

will proceed to its collection in executive period.

Received the notification and once executed, if the date of execution is

between the 1st and 15th of each month, both inclusive, the term to make the payment

voluntary will be until the 20th day of the following month or immediately after, and if

between the 16th and last day of each month, both inclusive, the payment term

It will be until the 5th of the second following month or immediately after.

In accordance with the provisions of article 50 of the LOPDPGDD, this

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

Against this resolution, which puts an end to the administrative procedure in accordance with art. 48.6 of the

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

Interested parties may optionally file an appeal for reconsideration before the

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

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

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

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

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

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

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

aforementioned Law.

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

may provisionally suspend the firm resolution in administrative proceedings if the

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

If this is the case, the interested party must formally communicate this fact by

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

Electronic Register of the Agency [https://sedeagpd.gob.es/sede-electronica-

web/], or through any of the other registers provided for in art. 16.4 of the

aforementioned Law 39/2015, of October 1. You must also transfer to the Agency the

documentation proving the effective filing of the contentious appeal-

administrative. If the Agency was not aware of the filing of the appeal

contentious-administrative within a period of two months from the day following the

notification of this resolution would end the precautionary suspension.

Sea Spain Marti

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