

□ Procedure No.: PS/00351/2019

938-051119

RESOLUTION OF PUNISHMENT PROCEDURE

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

BACKGROUND

FIRST: The Spanish Agency for Data Protection proceeded to open the
legal guardianship, TD/00127/2019, upon learning of the following facts:

On July 27, 2018, D. A.A.A. (hereinafter, the claimant) exercised
the rights of access and deletion before the entity Telefónica Móviles España, S.A.U.
with NIF A78923125 (hereinafter, the claimed party). Specifically, it requested
data protection (rights of access and deletion).

SECOND: The Director of the Spanish Agency for Data Protection, issued on the 4th of
June 2019, legal protection resolution TD/00127/2019, proceeding to estimate the
claim made by D. A.A.A. and urge the claimed party so that, within the term
of the ten business days following the notification of this resolution, send to the
claimant certification stating that he has fulfilled the right of access
exercised by it or is denied with reasons, indicating the reasons why it is not
proceed to respond to your request.

Said agreement was notified to the respondent party on June 10, 2019.

THIRD: On June 20, 2019, this Agency received a letter from the claimant in the
which states that once the terms granted to the claimed party have elapsed,
failed to comply with said resolution.

Despite having upheld the resolution regarding the right of access that
was not attended, the claimed party continues without attending it.

The appellant requested the right of access and deletion and only the right to deletion therefore calls for this Agency to act accordingly.

FOURTH: The appeal for reconsideration was transferred to the respondent so that he could provide the allegations that it deems appropriate and, on August 1, 2019, in said allegations states that it has complied with the requested right and considers that only requested the deletion of the data.

After the term granted for compliance with the aforementioned has elapsed Resolution, compliance is not recorded in this Agency.

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FIFTH: On November 19, 2019, the Director of the Spanish Agency for Data Protection agreed to initiate a sanctioning procedure against the claimant, with in accordance with the provisions of articles 63 and 64 of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations (hereinafter, LPACAP), for the alleged violation of Article 58.2 of the RGPD, typified in the Article 83.5 of the RGPD.

SIXTH: Having been notified of the aforementioned initiation agreement, the respondent submitted a written allegations in which, in summary, it stated the referral to the claimant of certification with information on the reason why it was not possible to attend access to your data, basing it on the request and management of the deletion of the same, and that in attention to the circumstances of the case, the file of the process.

SEVENTH: On January 10, 2020, the instructor of the procedure agreed to the

opening of a period of practice tests, considering incorporated the previous investigation actions, TD/00127/2019, as well as the documents provided by the claimant.

EIGHTH: On February 5, 2020, it was issued and notified on the 10th of the same month and year to the party claimed the Resolution Proposal, for alleged infringement of the Article 58.2 of the RGPD, typified in Article 83.5 of the RGPD, a fine of 30,000 euros.

The party complained against presented arguments to the Resolution Proposal in the which, in short, states the same facts and arguments set forth in the allegations to the initiation agreement.

It adds that it can only be seen that this part did adequately comply with the resolution of the protection of rights TD/00127/2019, to the extent that it was answered to the claimant denying the request.

Consequently, the respondent requests that the circumstances that have concurred in the facts object of the procedure, which resolve the file of the procedure or reduce the amount of the sanction established in the motion for a resolution

PROVEN FACTS

UNIQUE: The entity Telefónica Móviles España, S.A.U., has not sent the claimant certification in which full access to your data is provided, despite the resolution of legal guardianship TD/00127/2019 issued by the Director of the Spanish Agency for Data Protection.

Consequently, due to non-compliance with said resolution, and as notified the entity claimed, such facts can be understood as the commission of the infringement typified in article 83.5 e) of the RGPD, which will be sanctioned in accordance with article 58.2 of the RGPD.

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FOUNDATIONS OF LAW

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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.

The defendant is imputed the commission of an infraction for violation of the article 58.2 of the RGPD, which states that

II

“2 Each supervisory authority shall have all of the following powers corrections listed below:

(...)

c) order the person in charge or in charge of the treatment to attend to the requests to exercise the rights of the interested party under this Regulation.”

The infraction for which the entity responsible for IBERDROLA, S.A., is typified in article 83 of the RGPD which, under the heading “General conditions for the imposition of administrative fines”, states: “5. Violations of the following provisions will be sanctioned, in accordance with section 2, with administrative fines of a maximum of 20,000,000 Euros 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:

e) non-compliance with a resolution or a temporary or definitive limitation of the treatment or the suspension of the data flows by the authority of control under Article 58(2) or failing to provide access in breach of article 58, section 1.”

The Organic Law 3/2018, on the Protection of Personal Data and Guarantee of the Digital Rights (LOPDGDD) in its article 72.1 m), 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:

(...)

m) Failure to comply with the resolutions issued by the protection authority data controller in exercise of the powers conferred by article 58.2 of Regulation (EU) 2016/679.”

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III

In the case at hand, the Director of the Spanish Agency for the Protection of Data, issued on June 4, 2019, legal guardianship resolution TD/00127/2019,

proceeding to estimate the claim made by D. A.A.A. and urge the party claimed so that, within ten business days following notification of the present resolution, send the claimant a certification stating that he has attended the right of access exercised by it or is denied for reasons indicating the reasons why it is not appropriate to attend to your request.

Thus, it is clear that the defendant did not comply with the guardianship resolution of law TD/00127/2019, in which the respondent was urged to attend said right.

IV

In order to determine the administrative fine to be imposed, the provisions of articles 83.1 and 83.2 of the RGPD, precepts that indicate:

“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;

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- 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:

2016/679 may also be taken into account:

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

a) The continuing nature of the offence.

b) The link between the activity of the offender and the performance of treatments of personal data.

commission of the offence.

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 data.

e) The existence of a merger by absorption process after the commission of the infringement, which cannot be attributed to the absorbing entity.

f) Affectation of the rights of minors.

g) Have, when it is not mandatory, a delegate for the protection of

h) The submission by the person in charge or person in charge, with voluntary, to alternative conflict resolution mechanisms, in those

assumptions in which there are controversies between those and any interested party."

In accordance with the provisions of the RGPD in its art. 83.2, when deciding to impose an administrative fine and its amount in each individual case shall be taken into account aggravating and mitigating factors that are listed in the aforementioned article, as well as any other that may be applicable to the circumstances of the case.

The claimed entity is considered a large company.

On the other hand, the following have been taken into consideration, as mitigating factors:

- Consequently, the following have been taken into account as aggravating circumstances:

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- It has not obtained direct benefits (83.2 k) RGPD and 76.2.c) LOPDGDD).

It is appropriate to adjust the sanction to be imposed on TELEFONICA MÓVILES ESPAÑA, S.A.U., and set it at the amount of €30,000 for the infringement of article 58.2 of the RGPD. Therefore, in accordance with the applicable legislation and having assessed the criteria for graduation of the sanctions whose existence has been proven, the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: IMPOSE TELEFONICA MÓVILES ESPAÑA, S.A.U. with NIF A78923125, for an infringement of article 58.2 of the RGPD, typified in article 83.5 e) of the RGPD, a fine of €30,000.00 (thirty thousand euros).

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SECOND: NOTIFY this resolution to TELEFONICA MÓVILES ESPAÑA, S.A.U. with NIF A78923125.

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

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

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

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

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

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

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

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

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

Spanish Data Protection at Banco CAIXABANK, S.A. Otherwise,

it will be collected during the executive period.

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

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

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

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

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

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

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

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

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

Interested parties may optionally file an appeal for reconsideration before the

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

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

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

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

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

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

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

aforementioned Law.

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

may provisionally suspend the firm resolution in administrative proceedings if the

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

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

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

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

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

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

documentation proving the effective filing of the contentious appeal-
administrative. If the Agency was not aware of the filing of the appeal
contentious-administrative within a period of two months from the day following the
notification of this resolution would end the precautionary suspension.

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Sea Spain Marti

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