

Procedure No.: PS/00087/2019

RESOLUTION R/00296/2019 TERMINATION OF THE PROCEDURE BY
VOLUNTARY PAYMENT

In sanctioning procedure PS/00087/2019, instructed by the Agency

Spanish Data Protection Officer to VODAFONE ESPAÑA, S.A.U., given the complaint
presented by A.A.A., and based on the following,

BACKGROUND

FIRST: On May 27, 2019, the Director of the Spanish Agency for

Data Protection agreed to initiate a sanctioning procedure against VODAFONE

SPAIN, S.A.U. (hereinafter, the claimed party), through the Agreement that is transcribed:

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935-160419

AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Agency for the Protection of

Data and based on the following

FACTS

FIRST: Mrs. A.A.A. (hereinafter, the claimant) filed a claim with the

Spanish Data Protection Agency (AEPD) against VODAFONE SPAIN,

S.A.U., with NIF A80907397 (hereinafter, the claimed one) dated 10/19/2019.

The claim is based on the treatment that the respondent has made of their
personal data without your consent since, despite not being a client of the
company, has charged your bank account with three receipts.

The claimant states that several years ago she ceased to be a client of the
claimed and that on 09/14/2018 the operator charged a receipt to his bank account
for the amount of 17 euros. Given this fact, he contacted her through the account of

Your spouse's Twitter and requested the invoice justifying the amount charged, invoice received via email on 09/24/2018. He adds that, after several efforts to cancel the service that she had not contracted, they informed her that the cancellation requested had been processed. However, later they passed to the collection in your bank account two more receipts: on 10/11/2018, for an amount of 17.00 euros, and the 10/19/2018, for an amount of 1.65 euros.

Attach the following documents to your claim:

- Screenshots of a mobile terminal in which the contacts are reflected maintained electronically with the address @vodafone_es between 09/14/2018 and on 10/04/2018. A total of twenty messages are provided, the text of which manifest the complaints and claims made by the claimant; its coincidence with the facts that are the subject of this claim and that the

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claimed, indeed, activated in the name of the claimant the registration of a telephone line. We transcribe some of the messages received by the claimed from the @vodafone_es account in response to their complaints:

☐ Dated 09/17/2018: "Hello..., we have reviewed your case and verified that one of the lines you had is ***TELEPHONE.1, by mistake system has been activated again, (...) but in order to activate the cancellation absolute of the line in the system, we have to send you an SMS for you to confirm the withdrawal, (...) so we need you to provide us with a mobile phone number..."

□ Dated 10/02/2018: "Hello...we have just sent you the SMS so that you can
you can process the cancellation of the service."

□ Dated 10/04/2018: "Hello..., we verified that the cancellation of
the line correctly. Currently pending completion
deactivation that will be processed within a maximum period of 48 hours..."

(The underlining is from the AEPD)

- A "Direct Debit" receipt with the BANK logo
SANTANDER dated 09/14/2018. In the receipt it appears as "entity
payer" "VODAFONE"; as "Holder" the name, two surnames and the NIF of
the claimant; an amount of 17 euros and the invoice number "YI18-010736192".

- A "Direct Debit" receipt with the BANK logo
SANTANDER dated 10/11/2018. In the receipt it appears as "entity
payer" "VODAFONE"; as "Holder" the name, two surnames and the NIF of
the claimant; an amount of 17 euros and the invoice number "YI18-012567242".

- A "Direct Debit" receipt with the BANK logo
SANTANDER dated 10/19/2018. In the receipt it appears as "entity
payer" "VODAFONE"; as "Holder" the name, two surnames and the NIF of
the claimant; an amount of 1.65 euros and the invoice number "YI18-013054446"

SECOND: In view of the facts set forth in the claim, the AEPD made
actions aimed at its clarification.

On 04/02/2019, the response of the respondent to
our request for information, with which a copy of the
claim, all within the framework of file E/09386/2018. From the answer of
claimed, we highlight the following manifestations:

- On the origin of the facts claimed, states that the process under the
which VODAFONE charged the claimant, without her knowledge or consent,

the service of a mobile line “we confirm that it was due to an incident technique in our systems and, the customer has been informed of the decision to refund the total amount charged for this service, as well as verified the cancellation of this service that was effective on October 4, 2018”

- Regarding the causes that have caused these events, he explains that "... due solely and exclusively to an error in our internal systems. I don't know It is at no time an identity theft or fraud”.

- It states that we are facing an isolated event that they have “managed to mitigate imminent manner when Ms. [claimant] directly contacted my represented through social networks and, on the same day, October 4, 2018 as evidenced in document 2, said line was withdrawn”.

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The respondent provided a copy of the following documents:

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☐ As document 1, a letter dated 03/28/2019 addressed to the claimant. In it, he acknowledges receipt of the claim, of which he had transferred to the AEPD in the framework of file E/9386/2018; informs the claimant that it has verified in its systems the cancellation effective mobile phone service and has proceeded to pay the dues paid incorrectly “since the date of discharge of said service until its deactivation. In addition, he apologizes for the inconvenience it may have caused.

☐ As document 2 various screenshots in which, associated

to the personal data of the claimant, it is incorporated, among others, this relevant information:

- In the first of the images, in the "Notices" section, it appears "customer migrated Spirit 07/27/2016" The "Added Date" box is blank;

linked to the "team" ***PHONE.1 the "F. Facility",

on 06/18/2015, and of the "F. Uninstallation", on 10/04/2018.

This image is accompanied by annotations that, it seems,

would have been made by the Department of the company that provided the images

to the legal service, with the following caption: "At this time there are no

has nothing active. What you are billed for is August and September of the

line ***TELEFONO.1 registered on 05/18/2015 and deregistered on

4/10/2018. They do not have consumption, only the monthly fee.

- The second screen provided is accompanied by this annotation:

"Previously you were not being billed because you had a discount of 100%".

It does not provide a copy of the invoices that were collected from the claimant.

THIRD:

The facts object of the claim are subject to the

provisions of Regulation (EU) 2016/679, of the European Parliament and of the Council,

of 04/27/2016, regarding the Protection of Natural Persons with regard to the

Treatment of Personal Data and the Free Circulation of these Data (hereinafter,

RGPD) which is effective from 05/25/2018. It is taken into consideration

for this reason, the claimed party went to collect from the claimant, without being a client, her various

invoices, the first of them in the month of September 2018.

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 articles 47, 64.2 and 68.1 of the LOPDGDD, the Director of the Spanish Data Protection Agency is competent to initiate this procedure.

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II

Article 58 of the RGPD, "Powers", establishes in point 2:

“2 Each supervisory authority shall have all of the following powers

corrections listed below:

(...)

“i) impose an administrative fine in accordance with article 83, in addition to or in

instead of the measures mentioned in this paragraph, depending on the circumstances

of each particular case;

The RGPD deals in its article 5 with the principles that must govern the

treatment of personal data and mentions among them that of "lawfulness, loyalty and

transparency” The precept provides:

"1. The personal data will be:

a) Treated in a lawful, loyal and transparent manner with the interested party;”

Article 6 of the RGPD, “Legality of the treatment”, mentions in its section 1 the

assumptions in which the processing of third party data is considered lawful:

"1. The treatment will only be lawful if it meets at least one of the following

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 infraction for which the defendant is held responsible is typified

in article 83.5 of the RGPD that establishes:

“Infractions 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.”

On the other hand, the LOPDGDD, in its article 72.1.b), qualifies as a very

serious “The processing of personal data without the concurrence of any of the conditions

of legality of the treatment established in article 6 of Regulation (EU) 2016/679.”

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III

The documentation in the file shows that the defendant violated

article 6.1 of the RGPD.

On the one hand, it is proven that the respondent processed the personal data of the claimant -bank details, name, surnames and NIF- associated with the registration of a line mobile telephone (number ***TELEFONO.1). Works in the file the copy of the three debts that the respondent charged to the claimant's bank account, which correspond to three different invoices, dated 09/14/2018, 10/11/2018 and 10/19/2018.

On the other hand, the claimed party lacked legitimacy to process the data claimant's personal Although the claimant had been a client of the company ceased to be so years ago and had no contractual relationship with her when the events that concern us happened. This is confirmed, among other extremes, by the messages that the claimant received from @vodafone_es. On the dated 09/17/2018 you are informed that they have reviewed your case and verified that "...one of the lines that you had that it is the ***TELEFONO.1, due to a system error it has been activated again, (...) but to be able to activate the absolute deregistration of the line in the system, we have to send you an SMS so that you confirm the withdrawal, (...)" (The underlining is from the AEPD).

They also confirm the absence of legitimacy for the treatment -because evidence that there was no contract between the two- the response of the respondent to the request for information from the AEPD in which, among other things, it says that "The causes that have motivated the incident are due ... to an error in our systems internal. This is not...identity theft or fraud." And to the question formulates the AEPD on the measures it has adopted to avoid in the future similar incidents, responds: "We consider that the registration process of a service contains sufficient security measures so that the situation exposed by the Ms. [claimant] does not occur".

According to the evidence currently available procedural, and without prejudice to what results from the investigation of the procedure, it is estimated

that the conduct of the claimed could violate article 6.1 of the RGPD and may be constituting the infringement typified in article 83.5.a) of the aforementioned Regulation 2016/679.

Very enlightening in this sense is Recital 40 of the RGPD that says:

“(40) For the processing to be lawful, the personal data must be processed with the consent of the interested party or on some other legitimate basis established in accordance with Law, either in these Regulations or by virtue of another Law of the Union or of the Member States referred to in this Regulation, including the need to comply with the legal obligation applicable to the person responsible for the treatment or the need to execute a contract in which the interested party is a party or in order to take measures at the request of the interested party prior to the conclusion of a contract.”

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IV

In the determination of the administrative fine that corresponds to impose, to 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”, establishes:

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"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 treatments of personal data.
- 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 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 data.
- 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."

Without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction of a fine that would be appropriate to impose on the one claimed by the alleged infringement of the RGPD attributed to it, in an initial assessment, it is estimated that the following factors concur:

As aggravating factors:

- The large volume of business of the defendant, a circumstance that affects the seriousness of the infringement committed (implicit in article 83.2.a, RGPD). Thus, the total turnover for the 2017/2018 financial year of the claimed party (not of the business group to which it belongs) was 4,978 million euros.

- That the facts object of the claim are attributable to a lack of diligence of the claimed one that we qualify as serious (article 83.2.b, RGPD). It is also exponent of the lack of diligence of the entity that, after the date in which he informed the claimant that the disputed line had been withdrawn (on 10/04/2018), he charged his bank account with two more invoices (dated 10/11/2018 and 10/19/2018)

- The close link between the activity of the claimed party and the processing of personal data (article 83.2.k, RGPD in relation to 76.2.b, of the LOPDGDD)

As mitigating factors:

- The measures that the defendant adopted to alleviate the damages suffered by the claimant (article 83.2.c). In this regard, it must be remembered that days before the claim in question was filed with this Agency (which occurs on 10/19/2018) the respondent had addressed the complaints and claims that the affected party had formulated. Proof of this is the messages sent to the claimant in response to their complaints, among others, the one dated 10/04/2018 in the

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which informs you that the disputed line has been terminated.

-The degree of cooperation with the supervisory authority in order to remedy the
the infraction and mitigate its possible adverse effects (article 83.2.f) The claimed,
within the framework of E/9386/2019, provided information to this Agency on the facts
occurred, he sent the claimant an explanatory letter in which he apologized
and proceeded to return the amounts unduly charged to your account
banking.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

1.

START SANCTION PROCEDURE against VODAFONE ESPAÑA, S.A.U.,
with NIF A80907397, for the alleged violation of article 6.1 of the RGPD
typified in article 83.5.a) of the aforementioned Regulation (EU) 2016/679.

2. APPOINT R.R.R. as instructor. and, as secretary, to S.S.S., indicating
that any of them may be challenged, as the case may be, in accordance with
established in articles 23 and 24 of Law 40/2015, of October 1, of
Legal Regime of the Public Sector (LRJSP).

3.

INCORPORATE to the disciplinary file, for purposes of evidence, the claim
filed by the claimant and its attached documentation and documents

obtained and generated by the Subdirector General for Data Inspection during the performances performed.

4. THAT, for the purposes provided in art. 64.2 b) of Law 39/2015, of 1 October, of the Common Administrative Procedure of the Administrations Public, the sanction that could correspond would be 35,000 euros (thirty five thousand euros), without prejudice to what results from the instruction.

5. NOTIFY this agreement to VODAFONE ESPAÑA, S.A.U., with NIF A80907397, granting a hearing period of ten business days for formulate the allegations and present the evidence that it deems appropriate.

In your brief of allegations you must provide your NIF and the number of procedure at the top of this document.

If within the stipulated period it does not make allegations to this initial agreement, the same may be considered a resolution proposal, as established in article 64.2.f) of Law 39/2015, of October 1, of the Common Administrative Procedure of Public Administrations (hereinafter, LPACAP).

In accordance with the provisions of article 85 of the LPACAP, in the event that the sanction to be imposed was a fine, it may recognize its responsibility within the term granted for the formulation of allegations to this initial agreement; it which will entail a reduction of 20% of the sanction to be imposed in the present procedure. With the application of this reduction, the sanction would be

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established at 28,000 euros, resolving the procedure with the imposition of this

sanction.

Similarly, you may, at any time prior to the resolution of this procedure, carry out the voluntary payment of the proposed sanction, which will mean a reduction of 20% of its amount. With the application of this reduction, the sanction would be established at 28,000 euros and its payment will imply the termination of the process.

The reduction for the voluntary payment of the penalty is cumulative with the corresponding apply for the acknowledgment of responsibility, provided that this acknowledgment of the responsibility is revealed within the period granted to formulate arguments at the opening of the procedure. The voluntary payment of the referred amount in the previous paragraph may be done at any time prior to the resolution. In this case, if it were appropriate to apply both reductions, the amount of the penalty would be set at 21,000 euros.

In any case, the effectiveness of any of the two reductions mentioned will be conditioned to the abandonment or renunciation of any action or resource in via administrative against the sanction.

In case you chose to proceed to the voluntary payment of any of the amounts indicated above (28,000 euros or 21,000 euros), you must make it effective by depositing it in account number ES00 0000 0000 0000 0000 0000 open to name of the Spanish Data Protection Agency at CAIXABANK Bank, S.A., indicating in the concept the reference number of the procedure that appears in the heading of this document and the reason for the reduction of the amount to which welcomes

Likewise, you must send proof of payment to the General Subdirectorate of Inspection to proceed with the procedure in accordance with the quantity entered.

The procedure will have a maximum duration of nine months from the date of the start-up agreement or, where appropriate, of the draft start-up agreement.

Once this period has elapsed, it will expire and, consequently, the file of performances; in accordance with the provisions of article 64 of the LOPDGDD.

Finally, it is pointed out that in accordance with the provisions of article 112.1 of the LPACAP,

There is no administrative appeal against this act.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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SECOND: On June 20, 2019, the respondent has proceeded to pay the sanction in the amount of 21,000 euros making use of the two planned reductions in the Startup Agreement transcribed above, which implies the recognition of the responsibility.

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THIRD: The payment made, within the period granted to formulate allegations to the opening of the procedure, entails the waiver of any action or resource in via administrative action against the sanction and acknowledgment of responsibility in relation to the facts referred to in the Initiation Agreement.

FOUNDATIONS OF LAW

Yo

By virtue of the powers that article 58.2 of the RGPD recognizes to each authority of control, and as established in art. 47 of the Organic Law 3/2018, of 5

December, of Protection of Personal Data and guarantee of digital rights (in hereinafter LOPDGDD), the Director of the Spanish Agency for Data Protection is competent to sanction the infractions that are committed against said Regulation; infractions of article 48 of Law 9/2014, of May 9, General Telecommunications (hereinafter LGT), in accordance with the provisions of the article 84.3 of the LGT, and the infractions typified in articles 38.3 c), d) and i) and 38.4 d), g) and h) of Law 34/2002, of July 11, on services of the society of the information and electronic commerce (hereinafter LSSI), as provided in article 43.1 of said Law.

II

Article 85 of Law 39/2015, of October 1, on the Procedure Common Administrative of Public Administrations (hereinafter, LPACAP), under the heading "Termination in sanctioning procedures" provides the

Next:

"1. A sanctioning procedure has been initiated, if the offender acknowledges his responsibility, the procedure may be resolved with the imposition of the sanction to proceed.

2. When the sanction is solely pecuniary in nature or fits impose a pecuniary sanction and another of a non-pecuniary nature but it has been justified the inadmissibility of the second, the voluntary payment by the alleged perpetrator, in any time prior to the resolution, will imply the termination of the procedure, except in relation to the replacement of the altered situation or the determination of the compensation for damages caused by the commission of the infringement.

3. In both cases, when the sanction is solely pecuniary in nature, the competent body to resolve the procedure will apply reductions of, at least 20% of the amount of the proposed sanction, these being cumulative

each. The aforementioned reductions must be determined in the notification of initiation of the procedure and its effectiveness will be conditioned to the withdrawal or Waiver of any administrative action or recourse against the sanction.

The reduction percentage provided for in this section may be increased regulations."

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According to what was stated,

the Director of the Spanish Data Protection Agency RESOLVES:

FIRST: DECLARE

in accordance with the provisions of article 85 of the LPACAP.

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

the termination of procedure PS/00087/2019, of

In accordance with the provisions of article 50 of the LOPDGDD, 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 as prescribed by

the art. 114.1.c) of Law 39/2015, of October 1, on Administrative Procedure

Common of the Public Administrations, the interested parties may file an appeal

contentious-administrative 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.

Sea Spain Marti

Director of the Spanish Data Protection Agency

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