

□ Procedure No.: PS/00303/2020

RESOLUTION R/00521/2020 TERMINATION OF THE PROCEDURE FOR PAYMENT  
VOLUNTEER

In sanctioning procedure PS/00303/2020, instructed by the Spanish Agency for  
Data Protection to VODAFONE ESPAÑA, S.A.U., given the complaint filed  
by A.A.A., and based on the following,

BACKGROUND

FIRST: On September 29, 2020, the Director of the Spanish Agency  
of 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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Procedure No.: PS/00303/2020

935-200320

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: D.A.A.A. (hereinafter, the claimant) dated September 18,  
2019 filed a claim with the Spanish Data Protection Agency. The  
claim is directed against Vodafone Spain, S.A.U. with NIF A80907397 (in  
later, the claimed one).

The claimant states that he received an email from the respondent in which  
indicate that the purchase of a mobile terminal that includes  
permanence, purchase that does not recognize, being a client of another operator.

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According to the claimant, the events took place on August 21, 2019.

And attach the following documentation:

□

Orange invoice, the current operator with which you have contracted the service of telephony.

On July 4, 2020, this Agency received another letter from the claimant stating that, on July 3, 2020, he received a coercive mail claiming a debt of XXX euros.

SECOND: In view of the facts denounced in the claim and the documents provided by the claimant / of the facts and documents of which he has had knowledge of this Agency, the Subdirector General for Data Inspection 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:

On November 6, 2019, the claim was transferred to the

respondent party requesting information on the claimed facts.

On December 19, 2019, the respondent states:

There are four contracts: three of them are not concluded since the portability, and the one dated 08/21/2019 (line \*\*\*TELEPHONE.1) is the one claimed for non-payment of invoices.

1. Contract dated 06/26/2019: Mobile Rate + Fiber Vodafone bit (portability from Orange: \*\*\*PHONE.2)

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2.- Contract dated 07/03/2019 Vodafone Fibra 100Mb (portability from Telefónica \*\*\*PHONE.3)

3.- Contract dated 08/21/2019 Voice plus data \*\*\*PHONE.1 Device delivered Samsung A10 Black

4.- Contract dated 09/24/2019 Vodafone One limited line (100mb fiber) (portability from Orange \*\*\*PHONE.3)

Contracts are electronic and Vodafone does not provide evidence that accredits the contracting the \*\*\*TELEPHONE.1 line, which is why they demand payment of debt.

In addition, as a result of the transfer of the claim, they send a letter to the claimant informing you that your data has not been communicated to solvency files assets and credit, but requesting the payment of the amount owed.

On June 1, 2019, it is agreed to open the present proceedings of investigation in connection with the claim filed by the claimant. Is notified

dated June 10, 2020

☐ Required from VODAFONE documents for carrying out the contracting of the number \*\*\*PHONE.1 and its corresponding signature, dated July 29 of 2020 is received at this Agency, with registration number 026866/2020, letter of allegations stating that the contracting was carried out online for what that does not have a signature. That examined the contract where all the personal data of the claimant, this has the appearance of loyal, truthful and lawful for Vodafone.

And attach the following document:

o Contract corresponding to the number \*\*\*TELEPHONE.1

☐ Examining the contract, it is verified that the personal data of the claimant, their bank details, and the email "\*\*\*\*EMAIL.1", which according to states the claimant belongs to his daughter, but the claimed one does not contribute evidence or any indication of the origin of the contract (session IP) nor confirmation or electronic signature of the contract (SMS confirmation or email with one-time key, confirmation call, etc.). By

Therefore, the origin of the claimant's data cannot be established, nor the acceptance of their treatment.

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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 according to the provisions of articles 47 and 48 of the LOPDGDD,

The Director of the Spanish Agency for Data Protection is competent to initiate

and to solve this procedure.

II

Article 58 of the RGPD, "Powers of Attorney", says:

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

corrections listed below:

(...)

b) sanction any person responsible or in charge of the treatment with a warning

when the treatment operations have violated the provisions of this

Regulation;

(...)

d) order the person in charge or in charge of the treatment that the operations of

treatment comply with the provisions of this Regulation, where appropriate,

in a certain way and within a specified period.

(...)

i) impose an administrative fine in accordance with article 83, in addition to or instead of the

measures mentioned in this section, depending on the circumstances of the case

particular

(...)"

III

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

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transparency". The provision provides:

"1. The personal data will be:

a) Treated in a lawful, loyal and transparent manner in relation to the

interested party (<<legality, loyalty and transparency>>);"

Article 6 of the RGPD, "Legality of the treatment", details 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 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 infraction for which the claimed entity is held responsible is

typified in article 83 of the RGPD that, 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 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:

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"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 particular 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."

IV

The documentation in the file offers evidence that the claimed, violated article 6.1 of the RGPD, since it carried out the treatment of the personal data of the claimant without having any legitimacy to do so. The personal data of the claimant were incorporated into the information systems of the company, without having proven that it had legitimately contracted, had your consent for the collection and subsequent processing of your data. personal data, or there is any other cause that makes the treatment lawful effected.

Based on the foregoing, in the case analyzed, it remains in

questioned the diligence used by the respondent to identify the

person who contracted on behalf of the claimant.

Well, it follows that the claimant received an email from the claimed in the

which indicate that you have successfully purchased a mobile terminal that you do not recognize.

In this regard, we must point out that contracting is electronic and the

claimed does not provide evidence that proves the contracting of the line \*\*\*TELÉFONO.1.

On the other hand, as a result of the transfer of the claim, they send a letter to the

claimant informing him that his data have not been communicated to files of

capital solvency and credit, but requesting the payment of the amount owed.

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Precisely, required to the requested documents of realization of the

contracting the number \*\*\*TELÉFONO.1 and its corresponding signature, states that the

contracting was done online so it does not have a signature.

Although the company states that the contract where all the data appears

claimant, he has the appearance of loyal, truthful and lawful to

Vodafone.

It is important to highlight that, by examining the contract, it is verified that there are

the personal data of the claimant, his bank details, and the mail "\*\*\*\*EMAIL.1",

which, according to the claimant, belongs to his daughter, but the claimed daughter does not contribute

evidence or any indication of the origin of the contract (session IP) or

confirmation or electronic signature of the contract (SMS confirmation or e-mail

email with one-time key, confirmation call, etc.). For that reason, not



The origin of the claimant's data cannot be established, nor the acceptance of the treatment of these.

However, and this is essential, the defendant does not prove the legitimacy to the processing of the claimant's data.

In short, the respondent has not provided a document or evidence one that shows that the entity, in such a situation, would have deployed the minimum diligence required to verify that your interlocutor was indeed the one claimed to hold

Respect for the principle of legality that is in the essence of the fundamental right of protection of personal data requires that it be accredited that the responsible for the treatment displayed the essential diligence to prove that extreme. Failure to act in this way -and this Agency, who is responsible for ensuring for compliance with the regulations governing the right to data protection of personal character - the result would be to empty the content of the principle of legality.

v

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.”

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“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.

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

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

d) The possibility that the conduct of the affected party could have led to the commission of the infringement.

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 transcribed precepts, and without prejudice to what results from the instruction of the procedure, in order to set the amount of the sanction of fine to be imposed in the present case, the party claimed is considered responsible for an infringement typified in article 83.5.a) of the RGPD, in an initial assessment, concurrent the following factors.

As aggravating the following:

-

The intentionality or negligence in the infringement (article 83.2 b).

Basic personal identifiers are affected (name, data

-

bank accounts, the line identifier) (article 83.2 g).

This is why it is considered appropriate to adjust the sanction to be imposed on the person claimed and set it at the amount of €60,000 for the infringement of article 6.1 of the RGPD.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

1.

START SANCTION PROCEDURE against Vodafone Spain, S.A.U.,  
with NIF A80907397, for the alleged violation of article 6.1. GDPR  
typified in article 83.5.a) of the aforementioned RGPD.

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2. APPOINT D.B.B.B. as instructor. and as secretary to Ms. C.C.C.,

indicating that any of them may be challenged, where appropriate,  
in accordance with the provisions of articles 23 and 24 of Law 40/2015, of 1  
October, of the Legal Regime of the Public Sector (LRJSP).

3.

INCORPORATE to the disciplinary file, for evidentiary purposes, the  
claim filed by the claimant and its attached documentation, the  
information requirements that the General Subdirectorate of Inspection of  
Data sent to the claimed entity in the preliminary investigation phase and  
their respective acknowledgments of receipt.

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 60,000 euros  
(sixty 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 to  
to formulate the allegations and present the evidence that it considers  
convenient. In your statement of allegations you must provide your NIF and the  
procedure number that appears in the heading 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 established at 48,000 euros, resolving the procedure with the imposition of this sanction.

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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 48,000 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 36,000 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, 48,000 euros or 36,000 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.

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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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: On October 21, 2020, the claimant has proceeded to pay the

SECOND

sanction in the amount of 36,000 euros making use of the two planned reductions in the Startup Agreement transcribed above, which implies the recognition of the

responsibility.

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

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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 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 Administrative Procedure Common to Public Administrations (hereinafter, LPACAP), under the rubric "Termination in sanctioning procedures" provides the following:

"1. Started a sanctioning procedure, if the offender acknowledges his responsibility, the procedure may be resolved with the imposition of the appropriate sanction.

2. When the sanction is solely pecuniary in nature or it is possible to impose a pecuniary sanction and another of a non-pecuniary nature, but 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,

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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 with each other.

The aforementioned reductions must be determined in the notification of initiation

of the procedure and its effectiveness will be conditioned to the withdrawal or resignation of

any administrative action or recourse against the sanction.

The reduction percentage provided for in this section may be increased

regulations.

In accordance with the above, the Director of the Spanish Agency for the Protection of

Data RESOLVES:

FIRST: TO DECLARE the termination of procedure PS/00303/2020,

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

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

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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