

□ File No.: PS/00279/2021

## RESOLUTION OF TERMINATION OF THE PROCEDURE FOR PAYMENT

### VOLUNTARY

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

### BACKGROUND

FIRST: On September 1, 2021, the Director of the Spanish Agency  
of Data Protection agreed to initiate a sanctioning procedure against ORANGE  
ESPAGNE, S.A.U. (hereinafter, the claimed party), through the Agreement that is  
transcribe:

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File No.: PS/00279/2021

### AGREEMENT TO START A SANCTION PROCEDURE

Of the actions carried out by the Spanish Data Protection Agency and in  
based on the following

### FACTS

FIRST: Ms. A.A.A. (hereinafter, the complaining party) dated 03/05/2021  
filed a claim with the Spanish Data Protection Agency. The  
claim is directed against ORANGE ESPAGNE, S.A.U. with NIF A82009812 (in  
hereafter, the party claimed). The reasons on which the claim is based are: that between  
on 01/03/2021 and 03/03/2021 has received a total of 30 calls from various numbers in  
their mobile phone, in which they identified themselves as Jazztel workers; that  
he has also received text messages in which Jazztel appears as the sender;  
that he has never been a client of said company; that has requested the deletion of  
your phone number from their database; that on 01/11/2021 wrote to Orange

Espagne, S.A.U. (as responsible for data processing of the company Jazztel, at email: [orangeproteccion.datos@orange.com](mailto:orangeproteccion.datos@orange.com)) asking them to delete their telephone number of its databases and that on 02/05/2021 received mail [www.aepd.es](http://www.aepd.es)

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2/13

confirming by the company the deletion and opposition of your data, but that

Although the company has confirmed the deletion, it has subsequently returned to receive calls and text messages.

SECOND: In accordance with article 65.4 of Organic Law 3/2018, of 5

December, of Protection of Personal Data and guarantee of digital rights (in

hereinafter LOPDGDD), said claim was transferred to the claimed party, to

to proceed with its analysis and inform this Agency within a month of the

actions carried out to adapt to the requirements set forth in the regulations of Data Protection.

On 05/07/2021, this Agency received a response letter in which

indicated that the numbering is included as a contact telephone number for a third party

person and that was facilitated by this; Likewise, it states that you can contact the

Jazztel customer service requesting the disassociation of your

"Numbering of the contract to which the claimed debt is associated, from

where the request will be processed"; that the communications received are not of a

commercial, but "they are recovery communications sent to the numbering of

contact that appears in the contract to which the debt is associated"; that in the contract

of which the third party and owner of the debt is the owner, the details of the claimant appear.

THIRD: On 05/17/2021 by the Director of the Spanish Agency for

Data Protection, it was agreed to admit for processing the claim presented by the claimant.

## FOUNDATIONS OF LAW

I

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.

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3/13

II

The facts denounced are specified in the treatment without legitimation of the details of the claimant by ORANGE, materialized in numerous calls and text messages sent to your mobile phone in debt claim without you any relationship.

Article 5, Principles related to treatment, of the RGPD establishes in its section 1 that:

"one. The personal data will be:

a) processed in a lawful, loyal and transparent manner in relation to the interested party

("legality, loyalty and transparency");

b) collected for specific, explicit and legitimate purposes, and will not be processed

subsequently in a manner incompatible with those purposes; according to

article 89, paragraph 1, further processing of personal data for purposes  
archive in the public interest, scientific and historical research purposes or  
statistics shall not be considered incompatible with the initial purposes ("limitation  
of the purpose»);

c) adequate, relevant and limited to what is necessary in relation to the purposes  
for which they are processed ("data minimization");

d) accurate and, if necessary, updated; all measures will be taken  
reasonable for the personal data to be erased or rectified without delay  
that are inaccurate with respect to the purposes for which they are processed  
("accuracy");

e) maintained in a way that allows the identification of the interested parties  
for no longer than is necessary for the purposes of data processing  
personal; Personal data may be kept for longer periods  
long as long as they are treated exclusively for archival purposes in the interest  
public, scientific or historical research purposes or statistical purposes,  
in accordance with article 89, paragraph 1, without prejudice to the application of the  
appropriate technical and organizational measures imposed by this

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4/13

Regulation in order to protect the rights and freedoms of the interested party  
("Limitation of retention period");

f) treated in such a way as to ensure adequate security of the  
personal data, including protection against unauthorized processing or

against its loss, destruction or accidental damage, through the application of appropriate technical or organizational measures ("integrity and confidentiality")".

For its part, article 6, Legality of the treatment, of the RGPD establishes that:

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

a) the interested party gave their consent for the processing of their data personal for one or more specific purposes;

(...)"

Article 4 of the RGPD, Definitions, in its sections 3 and 11, states that:

"2) «processing»: any operation or set of operations carried out about personal data or sets of personal data, either by procedures automated or not, such as the collection, registration, organization, structuring, conservation, adaptation or modification, extraction, consultation, use, communication by transmission, broadcast or any other form of enabling of access, collation or interconnection, limitation, suppression or destruction"

"11) «consent of the interested party»: any manifestation of free will, specific, informed and unequivocal by which the interested party accepts, either through a statement or a clear affirmative action, the processing of personal data that concern him".

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5/13

Also article 6, Treatment based on the consent of the affected party,

of the new Organic Law 3/2018, of December 5, on Data Protection

Personal and guarantee of digital rights (hereinafter LOPDGDD), indicates that:

"one. In accordance with the provisions of article 4.11 of the Regulation (EU) 2016/679, consent of the affected party is understood to be any manifestation of will free, specific, informed and unequivocal by which he accepts, either through a declaration or a clear affirmative action, the treatment of personal data that concern.

2. When the data processing is intended to be based on consent of the affected party for a plurality of purposes, it will be necessary to state specific and unequivocal that said consent is granted for all of them.

3. The execution of the contract may not be subject to the affected party consenting to the processing of personal data for purposes unrelated to the maintenance, development or control of the contractual relationship".

III

The infraction that is attributed to the claimed one is typified in the article 83.5 a) of the RGPD, which considers that the infringement of "the basic principles for processing, including the conditions for consent under the articles 5, 6, 7 and 9" is punishable, in accordance with section 5 of the aforementioned Article 83 of the aforementioned Regulation, "with administrative fines of €20,000,000 as maximum or, in the case of a company, an amount equivalent to 4% as maximum of the overall annual total turnover of the previous financial year, opting for the highest amount.

The LOPDGDD in its article 71, Violations, states that: "They constitute infractions the acts and behaviors referred to in sections 4, 5 and 6 of the Article 83 of Regulation (EU) 2016/679, as well as those that are contrary to the

present organic law”.

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6/13

And in its article 72, it considers for prescription purposes, which are: "Infringements considered very serious:

1. Based on the provisions of article 83.5 of the Regulation (EU)

2016/679 are considered very serious and the infractions that

suppose a substantial violation of the articles mentioned in that 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.

(...)

IV

In the present case, from the documentation in the file, evidence that the claimant violated article 6 of the RGPD, since I treat the data of the claimant without the concurrence of any of the conditions set forth in the essential rule for the treatment to be lawful.

It is accredited that after exercising the right of deletion of the data by the claimant, who was attended by the claimed, sent him to his mobile phone number without your consent and without proof that there was a contractual relationship that legitimized the treatment, numerous calls and

SMS, which implies a violation of the principle of legality.

v

In order to establish the administrative fine to be imposed,  
observe the provisions contained in articles 83.1 and 83.2 of the RGPD, which  
point out:

"one. Each control authority will guarantee that the imposition of fines  
administrative actions under this article for violations of this

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7/13

Regulation indicated in sections 4, 5 and 6 are in each individual case  
effective, proportionate and dissuasive.

2. 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 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, 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.”

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8/13

In relation to letter k) of article 83.2 of the RGPD, the LOPDGDD, in its

Article 76, “Sanctions and corrective measures”, establishes that:

“two. In accordance with the provisions of article 83.2.k) of the 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
  - 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."
- data.

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 impose in the present case for the infringement typified in article 83.5 of the RGPD of which ORANGE is held responsible for, in an initial assessment, estimates concurrent the following factors:

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

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Only one person has been affected by the offending conduct.

The damage and harm caused to the claimant by being considered a debtor of a debt that was not due.

There is no evidence that the entity had acted maliciously, although negligent behavior is observed.

The link between the activity of the offender and the performance of treatment of personal data number of people affected.

The entity claimed is one of the largest companies in the country within its activity sector.

Based on these factors, it is deemed appropriate to impose on the respondent a penalty of 50,000 euros.

Therefore, based on the foregoing,

By the Director of the Spanish Data Protection Agency,

HE REMEMBERS:

FIRST: INITIATE PUNISHMENT PROCEDURE against ORANGE ESPAGNE, S.A.U., with NIF A82009812, for the alleged infringement of article 6.1.a) of the RGPD, sanctioned in accordance with the provisions of article 83.5.a) of the aforementioned RGPD.

SECOND: APPOINT R.R.R. and Secretary to S.S.S., indicating that any of them may be challenged, where appropriate, in accordance with the provisions of the

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Articles 23 and 24 of Law 40/2015, of October 1, on the Legal Regime of the Sector Public (LRJSP).

THIRD: INCORPORATE to the disciplinary file, for evidentiary purposes, the complaint filed by the complainant and her documentation, the documents obtained and generated by the Inspection Services during the investigation phase prior, all documents that make up the file.

FOURTH: THAT for the purposes provided in art. 64.2 b) of Law 39/2015, of 1 October, of the Common Administrative Procedure of the Public Administrations (LPACAP), and art. 127 letter b) of the RLOPD, the sanction that could correspond for the described infraction would be 50,000 euros (fifty thousand euros), without prejudice to what result of the instruction.

FIFTH: NOTIFY this agreement to ORANGE ESPAGNE, S.A.U., with NIF A82009812, granting him a hearing period of ten business days to formulate the allegations and present the evidence it deems appropriate. In his writing of allegations you must provide your NIF and the procedure number that appears in the header of this document

Likewise, in accordance with articles 64.2.f) and 85 of the LPACAP, informs that, if it does not make allegations within the term of this initial agreement, the The same may be considered a resolution proposal.

You are also informed that, in accordance with the provisions of article 85.1 LPACAP, may acknowledge its responsibility within the term granted for the formulation of allegations to this initial agreement which will entail a reduction of 20% of the sanction to be imposed in the present procedure, equivalent in this case to 10,000 euros. With the application of this reduction, the sanction would be established at 40,000 euros, resolving the procedure with the imposition of this sanction.

Similarly, you may, at any time prior to the resolution of the present procedure, carry out the voluntary payment of the proposed sanction, in accordance with the provisions of article 85.2 LPACAP, which will mean a reduction of 20% of the amount of the same, equivalent in this case to 10,000

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11/13

euros. With the application of this reduction, the penalty would be established at 40,000 euros and its payment will imply the termination of the procedure.

The reduction for the voluntary payment of the sanction is cumulative to the one

It is appropriate to apply for the acknowledgment of responsibility, provided that this

acknowledgment of responsibility is revealed within the period

granted to formulate arguments at the opening of the procedure. The pay

volunteer of the amount referred to in the preceding paragraph may be made at any

time prior to resolution. In this case, if it were appropriate to apply both

reductions, the amount of the penalty would be established at 30,000 euros.

In any case, the effectiveness of any of the two reductions mentioned

will be conditioned to the withdrawal or renunciation of any action or resource in via

administrative against the sanction.

In the event that you choose to proceed with the voluntary payment of any of the

amounts indicated above (40,000 euros or 30,000 euros), in accordance with the

provided for in article 85.2 referred to, we indicate that you must make it effective by

your deposit in the restricted 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 the date of the start-up agreement or, where applicable, 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.

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12/13

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SECOND: On September 29, 2021, the claimed party has proceeded to payment of the penalty in the amount of 30,000 euros making use of the two reductions provided for in the Start Agreement transcribed above, which implies the acknowledgment of 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

I

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:

"one. 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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13/13

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/00279/2021, of in accordance with the provisions of article 85 of the LPACAP.

SECOND: NOTIFY this resolution to ORANGE ESPAGNE, 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 AEPD, P.O. the Deputy Director General for Data Inspection, Olga

Pérez Sanjuan, Resolution 4/10/2021

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